DISTRICT COURT OF QUEENSLAND

CITATION:	*Durkin v Ambrose Haulage Pty Ltd* [2020] QDC 97
PARTIES:	**DENIS DURKIN** (plaintiff) v **AMBROSE HAULAGE PTY LTD** ACN 132 496 532 (defendant)
FILE NO/S:	BD 1659 of 2019
DIVISION:	
PROCEEDING:	Trial
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	29 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	22 April 2020; 23 April 2020; 24 April 2020
JUDGE:	Jarro DCJ
ORDER:	**Judgment for the defendant**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – GENERALLY – where the plaintiff claims damages for injuries suffered in the course of employment with the defendant – where both liability and quantum are in dispute TORTS – NEGLIGENCE – BREACH OF DUTY – where the plaintiff was employed by the defendant as a long distance fuel truck driver – where the plaintiff developed shoulder injuries – where it is the plaintiff's case that the injuries were a consequence of driving a truck with deteriorated shock absorbers and suspension – whether the risk of injury was foreseeable and not insignificant – where the defendant's case is that the shock absorbers and suspension was not deteriorated – where the plaintiff raised concerns about the truck's suspension to the defendant – where the defendant purchased and installed new springs – whether the defendant's conduct amounts to a breach of duty TORTS – NEGLIGENCE – CAUSATION – where the plaintiff had an underlying degeneration in his shoulders – whether the actions in breach of duty caused the injuries DAMAGES – MEASURE AND REMOTENESS OF DAMAGES FOR ACTION IN TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES - where the parties are in dispute as to the

injuries sustained by the plaintiff – where the plaintiff has a pre-existing constitutional degeneration in the neck and shoulders – whether the measure of damages should be reduced in light of the plaintiff's pre-existing condition.

Workers' Compensation and Rehabilitation Act 2003, s 305, s 305A, s 305B, s 305C, s 305D, s 305E

Workers' Compensation and Rehabilitation Regulation 2014, Sch 9

Clarricoats v JJ Richards & Sons Pty Ltd [2017] QSC 214, cited

Finn v The Roman Catholic Trust Corporation for the Diocese of Townsville [1997] 1 Qd R 29, cited

Lusk v Sapwell [2012] 1 Qd R 507, cited

Malec v JC Hutton Pty Ltd (1990) 169 CLR 638, applied

Rudd v Starbucks Coffee Company (Australia) Pty Ltd [2015] QDC 232, cited

Stitz v Manpower Services & Anor [2011] QSC 268, cited

COUNSEL: P Rashleigh for the plaintiff

A Mellick for the defendant

SOLICITORS: Shine Lawyers (Toowoomba) for the plaintiff

Hede, Byrne & Hall Lawyers for the defendant

[1] **JARRO DCJ:** The plaintiff, Mr Denis Durkin, seeks to recover damages from his former employer, Ambrose Haulage, said to have been caused to his shoulders as a consequence of driving a long distance fuel truck, over a period of time, with deteriorated suspension/shock absorbers.

[2] Liability and quantum are in dispute.

[3] The defendant, Ambrose Haulage, operates a fuel and grain haulage business from Goondiwindi. It employed Mr Durkin from 2014. This was the same year when Ambrose Haulage bought a brand new Kenworth 409 Truck ("the Kenworth") which Mr Durkin predominately drove on highways generally in southern Queensland.

Case as Pleaded

[4] On the morning of trial and following an opposed application, Mr Durkin was given leave to amend the statement of claim. The amended statement of claim pleaded the following relevant factual matters:

> "5. Over a period of time from approximately ~~the beginning of~~ May 2017 and the end of March 2018 ~~1 July 2017 until on or about 31 March 2018~~:-

(a) The Defendant required the Plaintiff to drive long haul fuel transport trips.

(b) The jobs involved driving the Kenworth, carrying loads of approximately 65 to 85 tonnes of fuel over long distances, such as round trips from Goondiwindi to Brisbane ~~Sydney~~.

(c) In and by approximately May 2017 ~~July 2017~~:

(i) The Kenworth had been driven approximately one million kilometres;

(ii) The springs in the Kenworth were deteriorated and the ride had become rough, causing the Plaintiff to get bounced around in the driver's seat of the Kenworth;

(iii) The Plaintiff's arms and shoulders were forcefully jarred and jolted as he held the steering wheel; and

(iv) When traversing particularly rough road surfaces, the Plaintiff's arms were forcefully slammed and pulled as he held the steering wheel.

(d) As a consequence of the facts pleaded at paragraphs 5(c)(i)-(iv) above the Plaintiff began to experience shoulder pain.

(e) From ~~In~~ approximately May 2017 until the end of March 2018 ~~October 2017~~, the Plaintiff made complaints to Mr Jim Ambrose, a representative of the Defendant regarding the condition of the shock absorbers and suspension of the Kenworth and that driving the Kenworth as set out in paragraph 5 (c) was causing pain in his shoulders on approximately 25 May 2017, 27 June 2017, in November after 17 November 2017 and in approximately February 2018.

(f) Subsequently, the Defendant purchased replacement springs for the Kenworth, but did not install the replacement springs until approximately March 2018.

(g) As a result of performing the truck driving duties over a period of time in the manner described herein, the Plaintiff suffered injury to his left and right shoulders (hereafter "the incident").

PARTICULARS OF INJURY

7. As a result of the incident, the Plaintiff suffered personal injuries, particulars of which include:-

   (a) Right shoulder – Partial Tear Supraspinatus Tendon with Tendinitis; and

   (b) Left Shoulder – Supraspinatus Tendinitis with Subacromial Bursitis."

[5] The allegations of negligence levelled against the defendant included[1]:

(a) Failing to provide safe plant and equipment by failing to provide the Kenworth with safe and proper shock absorbers and suspension.

(b) Requiring, causing and/or allowing Mr Durkin to travel in the Kenworth, with shock absorbers and suspension that were in a bad state of repair thereby exposing Mr Durkin to a foreseeable risk of injury.

(c) Failing to repair, maintain and/or replace the shock absorbers and suspension in the Kenworth, so as not to expose Mr Durkin to a foreseeable risk of injury.

(d) Causing, allowing and/or permitting the shock absorbers and suspension in the Kenworth to fall in to disrepair thereby causing Mr Durkin to suffer personal injury.

(e) Failing to respond adequately or at all to Mr Durkin's express complaints in relation to the condition of the shock absorbers and suspension, and Mr Durkin's consequent shoulder pain.

(f) Requiring, permitting and/or allowing Mr Durkin to continue driving the Kenworth, in circumstances where the defendant had actual knowledge of the condition of the shock absorbers and suspension, and Mr Durkin's consequent shoulder pain, thereby exposing Mr Durkin to a foreseeable risk of injury.

[6] Whilst the defendant accepted that Mr Durkin was required to drive long haul trips and that the jobs involved driving the Kenworth carrying loads of approximately 65 to 68 tonnes of fuel over long distances such as road trips from Goondiwindi to Brisbane, it pleaded the following relevant factual matters:

(a) Mr Durkin was an experienced truck driver and had been driving trucks for decades prior to commencing employment with the defendant in 2014.

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1 As per amended statement of claim at [8].

(b) The Kenworth was road-train rated so as to be able to carry loads up to 90 tonnes.

(c) The loads of fuel being carried varied between pre-delivery journeys and journeys post-delivery and before reloading.

(d) As at 1 July 2017, the Kenworth had been driven 976,567 kilometres.

(e) The Kenworth was serviced approximately monthly, after it had travelled between 20,000 to 25,000 kilometres (notwithstanding the manufacturer recommended it need only be serviced after it travelled about 50,000 kilometres).

(f) The Kenworth's suspension was checked at each service.

(g) The suspension was found to be and was in proper working order.

(h) The springs in the Kenworth's suspension had not deteriorated.

(i) Airbags were fitted under the cabin of the Kenworth.

(j) The Kenworth was fitted with an ergonomically sound top of the range driver's seat.

(k) The Kenworth did not ride rough.

(l) The Kenworth did not cause Mr Durkin or any other person driving it to be bounced around.

(m) The Kenworth did not cause the arms and shoulders of Mr Durkin or any other person driving the Kenworth to be forcefully jarred and jolted when holding the steering wheel.

[7] Further, whilst Mr Durkin raised a concern with his employer about the Kenworth's suspension, the defendant pleaded that:

(a) It made enquires with Jim Ambrose and Rodney Ellis who drove the Kenworth as to the suspension, both of whom reported no difficulties with the suspension.

(b) Its mechanic Dillon Mechanical checked the Kenworth's suspension and found it to be in proper working order.

(c) A new suspension system was nonetheless obtained for installation in the Kenworth.

(d) The new suspension system was installed in the Kenworth by Dillon Mechanical on or about 9 March 2018, being the first reasonable opportunity for the defendant to have the installation undertaken.

[8] The defendant also relied upon Mr Durkin's bilateral constitutional degenerate rotator cuff disease to defeat the claim brought against it.

Lay Evidence

Denis Durkin

[9] Mr Durkin is now 59 years of age. He relocated to Toowoomba in January 2019 after spending a number of years in Goondiwindi. He is semi-literate and since completing Grade 7 in about 1975, his employment history largely involved truck driving with stints in the farming and oil industries.

[10] Mr Durkin commenced with the defendant in 2014 and had a good relationship with it.

[11] During the relevant period (between May 2017 and the end of March 2018), Mr Durkin was driving the Kenworth. It had two trailers attached to it. Mr Durkin was required to deliver fuel from Goondiwindi to the Lytton Refinery in Brisbane, via places such as St George, Moonie, Gatton and Brisbane. After a short overnight stay, Mr Durkin would then return with a full load of fuel to Goondiwindi and farms along the way, via Toowoomba and Millmerran.

[12] He described parts of journey along the highways as *"rough"* where he would encounter *"potholes, melon holes in the road, rough culverts ... gravel roads and washouts"*.[2] When driving over these areas, the Kenworth's suspension would *"bottom out"*. The terrain would affect the Kenworth *"quite severely"* and *"pound down on the front end of the truck…through the steering"*. He said *"it pulled my arms all the time"* and caused his arms *"to be ripped"*.[3] Every time he hit a bump on the road or a rough section, Mr Durkin said *"the front end of the truck would pound back and rip back through my arms".*[4]

[13] Over a period of time, Mr Durkin noticed that his shoulders *"just got worse and worse".*[5] He said he first experienced pain in about May 2017. That was when he told his employer, Mr Jim Ambrose of Ambrose Haulage, that his pain was because of the spring suspension in the truck.[6] Mr Ambrose told Mr Durkin that he would get the mechanic Mr Darren Dillon of Dillon Mechanical *"to have a look at it".*[7] Mr Durkin said that he raised the issue with Mr Ambrose several times after May 2017, which he described as *"an ongoing conversation"* until the suspension was replaced in March 2018. For example, Mr Durkin told Mr Ambrose that he had sought treatment from a physiotherapist in October/November 2017 *"to deal with my arms being ripped by the suspension of the truck"*.[8]

[14] Once the Kenworth's suspension was replaced in March 2018, it provided a *"much better ride"* for Mr Durkin.[9]

[15] In cross examination:

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2 T1-26 and T1-30.
3 See for example T1-26.
4 T1-30, line 45.
5 T1-30, line 27.
6 T1-30, line 43.
7 T1-32, line 2.
8 T1-33, line 5.
9 T1-31, line 4. In cross examination Mr Durkin said *"there was a 100 per cent difference in the suspension"*: T1-64, line 16.

(a) Mr Durkin said that Mr Ambrose may have told him that he had driven the Kenworth and *"couldn't find a problem"*.[10]

(b) Mr Durkin accepted that there was communication between him and his fellow co-worker Mr Rodney Ellis, which Mr Durkin conceded would have enabled Mr Ellis to make an assessment of the Kenworth, and more particularly pre and post suspension change. He said that Mr Ellis may have told him that he did not encounter a problem with the suspension and there was *"nothing wrong with it"*.[11]

(c) Mr Durkin said that he had several conversations with the mechanic Mr Dillon regarding the Kenworth's suspension. He said that he *"used to complain to [Mr Dillon] about the front end of the truck at all times"*.[12]

(d) Shortly prior to the relevant period, Mr Durkin attended for chiropractic treatment in August 2016 for *"a tight neck, shoulders and low back"*.[13]

(e) The Kenworth had an eight bag air suspension system, it was fitted with parabolic springs on the steering wheels, there were airbags under the front of the cabin of the Kenworth, its two trailers were fitted with airbag suspension and the Kenworth was fitted with a $5,000 Aisuru seat.[14]

[16] Whilst other matters were raised in cross examination, I do not consider it necessary to canvass such matters as they are ultimately unremarkable in light of my findings.[15] All in all, my impression of Mr Durkin was that he was not deliberately dishonest, untruthful or prone to embellishment, however there were some aspects of his evidence which were not persuasive and, as a consequence, I am not prepared to act solely on his evidence unless otherwise corroborated by independent evidence. Inevitably that makes it very difficult for Mr Durkin to be successful in his claim for personal injuries against his former employer.

Employer, Mr Jim Ambrose

[17] Together with his brother, Mr Jamie Ambrose began Ambrose Haulage in 2008. His brother has left the business and since 2012, Mr Ambrose has been the sole director.

[18] In 2014, Ambrose Haulage employed Mr Durkin as a truck driver. That was the same year, the business bought the Kenworth brand new, at a cost of $300,000, which was a significant outlay for the business. The Kenworth was eventually traded in in January 2019.

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10 T1-84, line 10.
11 T1-83, line 46.
12 T1-83,
13 T1-79, line 35.
14 See T1-80 to T1-81.
15 For example the onset of shoulder pain based on Mr Durkin's reports to various medical practitioners, physiotherapists and WorkCover representatives.

[19] At the time of ordering the Kenworth, Mr Ambrose said:

> *"because I drive the trucks myself and I've been in the industry a long time, so when I ordered the truck, I ordered it with an aftermarket seat, the ISRI Big Boy seat, which is the top-of-the-range seat. I ordered it with parabolic springs in the front, which is the smoothest suspension you can get in a Kenworth truck, and it's on eight-bag air – air suspension on the drive".*[16]

[20] Mr Ambrose had *"a choice on how you spec up your truck from new".* He said he chose:

> *"parabolic springs because they provide a smoother ride. They're softer, they're lighter and they provide a smoother option. And eight-bag air – air glide suspension in – sorry. Kenworth eight-bag suspension in the rear of the truck is – it's just their common suspension. That's – so that's how they – you spec a truck up for this application. Our application is only 65 tonne. It's a 90-rated tonne truck. We carted 65 or 68 tonne. So that's all we required for that application."*[17]

[21] According to Mr Ambrose, the Kenworth was *"a beautiful truck to drive"* and *"the smoothest truck in our fleet"*.[18]

[22] He said Mr Durkin predominantly drove the Kenworth and described him as *"a very reliable employee"*.[19]

[23] Repairs to the Kenworth were performed by Mr Darren Dillon, who has been servicing and repairing Ambrose Haulage since 2010. He described Mr Dillon as a very thorough mechanic who would let him know if there were any issues arising from the fleet. He acted on Mr Dillon's advice and recommendations.[20]

[24] Mr Ambrose gave evidence that Mr Durkin raised the issue of the suspension with him in October 2017. He recalled Mr Durkin explaining to him that the *"springs [were] buggered and 'I've hurt my shoulders. I've got shoulder pain and the springs are buggered' ".*[21] Mr Ambrose explained that Mr Durkin's complaints were as frequent as approximately once a month and by March 2018, Mr Ambrose told Mr Durkin to consult a doctor.

[25] When Mr Durkin first raised the issue of the suspension:

(a) the Kenworth had travelled about 800,000 kms.

(b) Mr Ambrose drove the Kenworth and assessed the suspension. He said the *"suspension was worn, yes, but it was definitely still roadworthy and it didn't provide a rough ride"*.[22]

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16 T2-35, lines 33 – 38.
17 T2-36, lines 34 – 41.
18 T2-36, line 46.
19 T2-38, line 15.
20 See for example T2-38, lines 8 – 13 and T2-41, line 25.
21 T2-38, line 38.
22 T2-38, line 45.

(c) Mr Ambrose spoke to Mr Ellis and Mr Dillon about the Kenworth's suspension. He took the view that it did not need to be done.

[26] Mr Ambrose said that it was normal for suspensions in his trucks to be replaced approximately 1,000,000 to 1,500,000 kilometres, depending upon the vehicle. He said that the Kenworth was serviced every 25,000 to 30,000 kilometres (despite the manufacturer recommending every 50,000 kilometres). In his view, he had his trucks serviced more regularly because *"it's good preventative maintenance practice"*.[23]

[27] He said the roads which Mr Durkin drove on were *"terrible"* and *"extremely rough"*[24] but *"you get to learn [the roads] and you know where the bumps are and you slow down, and if you drive to conditions and you do drive steady, it limits the rough ride"*. [25]

[28] Mr Ambrose said: *"If the suspension was completely buggered and you hit a very big bump, you would get an up-and-down movement in the cab"*.[26] He earlier explained: *"and that's pretty much – that's the effect it has. So you hit a big bump, go up and down in the seat, and you move on to the next one. But it's not – it's not a violent thrashing around the cab, it's just a … and away you go"*.[27]

[29] Mr Ambrose noted that the parts for the suspension were ordered in December 2017. The work to the Kenworth's suspension was performed in March 2018. He described the period between December 2017 and March 2018 as *"the busiest time of year"*[28] for his business.

[30] Notably Mr Ambrose drove the Kenworth after its suspension was replaced and described it as *"not a lot of difference"*.[29] When asked to expand upon that, he said that the Kenworth rode very well and you *"could tell the difference, but the truck still rode very well"*. It *"felt tighter and just probably a few less rattles"*.[30]

[31] The following matters were identified in cross-examination:

(a) Mr Ambrose accepted that he had given an earlier version to a loss adjustor that he could not remember when Mr Durkin first told him about the Kenworth's suspension and pain to his shoulders.

(b) He rejected that Mr Durkin first raised the matter in May 2017. His explanation was because that was *"11 months before the change"*. He thought it was *"quite close to six months"*.[31]

(c) Mr Durkin made regular complaints about the Kenworth's suspension.

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23 T2-40, line 47.
24 T2-39, line 4.
25 T2-39, line 10.
26 T2-44, line 24.
27 T2-40, line 33.
28 T2-43, line 2.
29 T2-43, line 26.
30 T2-45, line 1.
31 T2-51, line 40.

(d) The suspension replacement was performed in March 2018 *"probably because it was a slow period and slow weekend"*.[32]

(e) Mr Ambrose admitted to allowing Mr Durkin to continue driving the truck in circumstances where Mr Durkin kept complaining to him about how it was affecting his arms and shoulders.

Dillon Mechanical

[32] Mr Dillon has been a diesel mechanic since 2008. His customers include Ambrose Haulage. He has been servicing all of their fleet since about 2010.

[33] Mr Dillon gave evidence that he was aware of the purchase of the new Kenworth and explained that the upgrades to the Kenworth included a driver's seat and shock absorbers. He explained the process of performing a relevant service and essentially it was a situation where what needed to be done was permitted to be done by Ambrose Haulage. He was authorised to place orders for mechanical parts by Ambrose Haulage.

[34] He indicated that Mr Ambrose told him that the Kenworth's suspension needed to be examined. Mr Durkin also raised the Kenworth's suspension to him in about June 2017. Mr Dillon's view was that the suspension system did not need to be replaced when Mr Durkin complained to him about the system.[33]

[35] Mr Dillon performed full services on the Kenworth around 12 January 2017, 25 February 2017, 8 April 2017, 13 May 2017, 19 May 2017, 1 July 2017, 21 September 2017, 5 November 2017, 23 November 2017, 23 February 2018 and 6 April 2018.[34] There was no evidence that Mr Dillon did not, during those services, properly check the Kenworth's suspension or made an assessment of the suspension system which was inappropriate. Mr Dillon had not formed a view there was any problem with the suspension during regular services.[35]

[36] When Mr Dillon changed the suspension, he observed *"very minimal sag"*. He identified a difference between the old and new suspension to be somewhere between *"a quarter to half an inch"*.[36] In his view, the suspension was *"not in a dangerous state"* and the springs *"could have kept going"*.[37] If he owned the Kenworth, he would not have replaced the suspension.

Co-Worker Rodney Ellis

[37] Mr Ellis' evidence was that he worked for Ambrose Haulage until about March 2018.

[38] He shared the driving of the Kenworth with Mr Durkin, some four to six weeks after his commencement. He said the *"truck never got turned off"*.[38] He had a good relationship with both Ambrose Haulage and Mr Durkin.

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32 T2-63, line 22.
33 T2-75, lines 36 – 38.
34 Exhibit 1, ppA 322, 324, 326, 329, 330, 332, 337, 344, 355 and 358.
35 T2-72, line 12.
36 T2-79, line 9.
37 T2-76, line 38.
38 T2-84, line 35.

[39] Mr Ellis recalled Mr Durkin raised the issue of the suspension with him, however he considered the truck drove well. He said:

> *"Denis did raise that about the suspension to me. I believe – yeah. It never really worried me, the truck. I thought it rode quite well. I never had a problem with it."*[39]

[40] He thought Mr Durkin first raised the issue a few months before the suspension was replaced. He never had a problem with it. In his view, *"it was a damn good truck to drive"*.[40] He noted that there was an extra comfort seat to the cost of about $4,000 which *"made life a lot nicer to it"*.[41] He remembered the suspension was changed, but did not recall when it was changed. He drove the Kenworth after the new suspension was installed and observed *"no big difference at all"*.[42] In his view, his employer managed the maintenance *"quite well"*.[43]

Factual Findings

[41] Having regard to the evidence given by the various lay witnesses, at this juncture, I make the following factual findings:

(a) In 2014, Mr Durkin commenced employment with Ambrose Haulage and predominately drove the Kenworth until April 2018.

(b) The relationship between Mr Durkin and his employer was an amicable one.

(c) The Kenworth was purchased brand new in 2014 and fitted with an ergonomically customised seat. Airbags were fitted under the cabin of the Kenworth.

(d) Parts to the roads Mr Durkin travelled, as a long haul driver in the Kenworth, were rough.

(e) The Kenworth was serviced approximately every 20,000 to 25,000 kilometres despite the manufacturer recommending services at intervals of 50,000 kilometres.

(f) The Kenworth was regularly serviced by Dillon Mechanical who performed full services on the Kenworth around 12 January 2017, 25 February 2017, 8 April 2017, 13 May 2017, 19 May 2017, 1 July 2017, 21 September 2017, 5 November 2017, 23 November 2017, 23 February 2018 and 6 April 2018. On those occasions, Mr Dillon, among other things, properly checked the Kenworth's suspension and made an appropriate assessment regarding whether the suspension required repairing.

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39 T2-84, lines 42 – 44.
40 T2-85, line 3.
41 T2-85, line 9.
42 T2-85, line 31.
43 T2-85, line 40.

(g) In about October 2017, Mr Durkin raised with his employer Mr Jim Ambrose a concern about the Kenworth's suspension as it caused Mr Durkin to experience pain in his arms and shoulders.

(h) Neither Mr Ambrose nor Mr Ellis had concerns about the Kenworth's suspension in October 2017 or at all.

(i) The Kenworth was inspected by Mr Dillon after Mr Durkin's concerns became known. Mr Dillon had no concerns about the Kenworth's suspension in October 2017 and subsequent services when the suspension was checked.

(j) Mechanical parts to replace the suspension were ordered and received by Dillon Mechanical in December 2017.

(k) Between October 2017 and March 2018:

(i) Mr Durkin continued to drive the Kenworth despite regularly raising to his employer complaints of bilateral arm and shoulder pain.

(ii) The Kenworth was serviced on multiple occasions by Dillon Mechanical.

(l) When the suspension was replaced in March 2018, Mr Dillon found minimal difference between the old suspension and the new suspension. He would not have replaced them if he owned the vehicle.

[42] Two Orthopaedic Surgeons were called to give evidence. Their respective expert opinions will be highlighted below where appropriate. However it is convenient at this juncture to note that both experts agreed that there was a significant component of age and activity related degeneration which affected Mr Durkin's shoulders.

Employer's Liability

[43] Liability must be determined having regard to Part 8 of Chapter 5 of the *Workers' Compensation and Rehabilitation Act* 2003 (WCRA), namely sections 305 to 305E.

[44] By reason of s 305B of the WCRA, the defendant has accepted rightly that its duty of care owed to Mr Durkin was a duty to take precautions against a risk of injury to Mr Durkin that was foreseeable, not insignificant and, in the circumstances a reasonable person in the position of the defendant would have taken the precautions.

Breach of Duty of Care

[45] Regarding the determination of whether there has been a breach of duty, sections 305B and 305C of the WCRA are as follows:

"**305B General principles**

(1) A person does not breach a duty to take precautions against a risk of injury to a worker unless—

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and

(b) the risk was not insignificant; and

(c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.

(2) In deciding whether a reasonable person would have taken precautions against a risk of injury, the court is to consider the following (among other relevant things)—

(a) the probability that the injury would occur if care were not taken;

(b) the likely seriousness of the injury;

(c) the burden of taking precautions to avoid the risk of injury.

305C Other principles

In a proceeding relating to liability for a breach of duty—

(a) the burden of taking precautions to avoid a risk of injury includes the burden of taking precautions to avoid similar risks of injury for which the person may be responsible; and

(b) the fact that a risk of injury could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of injury does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk."

[46] The enquiry as to whether a duty of care has been breached is prospective and not confined to the circumstances of Mr Durkin's accident.[44] The analysis must be undertaken from the viewpoint of the defendant, in the circumstances that were known, or ought to have been known, to the defendant at the time of the alleged injury.[45]

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44 See *Lusk v Sapwell* [2012] 1 Qd R 507 per Muir JA (Margaret Wilson AJA and A Lyons J agreeing) at [18] and [22].

45 Ibid.

[47] The risk must be defined taking into account the particular harm that materialised, and the circumstances in which that harm occurred. However, it is not confined to the precise set of circumstances in which Mr Durkin was injured. Rather, what must be reasonably foreseeable is "the nature of the particular harm that ensued, or, more relevantly, the nature of the circumstances in which that harm was incurred".[46] An employer is not required to guard against all risks of injury.[47]

[48] Although not explicitly articulated by Mr Durkin, I consider the risk is defined as a risk that an employee might sustain an injury to their shoulders from driving long distances in a truck with deteriorated springs/suspension.

[49] By mid-2017, the Kenworth had travelled over 800,000 kilometres in circumstances where it had to traverse roads, which according to the evidence of Mr Durkin, Mr Ambrose and Mr Ellis, could be characterised as, in parts, lacking maintenance with the presence of many potholes and undulations that, at times, caused a rough ride. It is accepted that Mr Durkin raised concerns about the Kenworth's springs/suspension and how it was impacting upon his arms and shoulders.[48]

[50] Mr Ambrose stated in his evidence:

> "What was your view about the suspension in the Kenworth? - - -
> The suspension – the truck had over 800,000 k's on it. The suspension was worn, yes, but it was definitely still roadworthy and it didn't provide a rough ride to my – yeah. To my knowledge.
>
> Well, what sort of – well, what are the roads like? More particularly the roads Mr – firstly that Mr Durkin had to drive on those trips into Brisbane and back that you mentioned earlier? The Monday – sorry – the Sunday, Monday and the Tuesday, Wednesday trips? - - -
> The roads are terrible. They're extremely rough. The St George to Goondiwindi road is definitely the roughest and it's gotten rougher. The Mooney – from St George into Mooney is extremely rough as well and bounces a lot, but you drive to conditions.
>
> And what does that mean? - - -
> That means if you're driving the same roads over and over and over again, you get to learn them and you know where the bumps are and you slow down, and if you drive to conditions and you do drive steady, it limits the rough ride."[49]

[51] In cross-examination of Mr Ambrose, the following exchange took place:

> "MR RASHLEIGH: Can I go back to the – replacing the spring?---Yes.

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46 See *Rudd v Starbucks Coffee Company (Australia) Pty Ltd* [2015] QDC 232 at [150].

47 See *Finn v The Roman Catholic Trust Corporation for the Diocese of Townsville* [1997] 1 Qd R 29 at 41 per Williams J.

48 T2-38, lines 37 to 39.

49 T2-38, line 44 – T2-39, line 12.

> Why did you pick that day? Why did you pick the 9th of [March] – 9th and 10th of [March]?---Probably a slow period and a slow weekend and Darren [Dillon] was available to do it.
>
> See, there's no reason to pick those dates, is it? Because it wasn't off the road for a week and a-half. It was off the road for a couple of days. Correct?---Correct.
>
> That being the case, it could have been done at any time, surely, after you received the [indistinct]?---I only chose to replace the springs for Mr Durkin.
>
> I'm not suggesting otherwise. But, because – see, Mr Durkin's come to you and he's said, "Look, the truck's – driving the truck's causing me serious problems. My shoulders are buggered", to use your term; correct?---Yes.
>
> So, surely, you would, if you're going to continue on letting Mr Durkin drive the truck – surely, you've got to make sure that the truck's in tip-top condition for him to drive?---But I – sorry.
>
> But he's made a complaint about it – about banging down that's causing him problems with his shoulders. He's come to you with that problem, hasn't he?---Yes.
>
> All right. So you order the springs, but you let it go for three months before you change them?---Yes.
>
> And allow Mr Durkin to continue driving the truck in those circumstances, and he keeps complaining to you about how it's affecting his arms and shoulders, doesn't he?---Yes, but he never refused to drive it.
>
> I'm not suggesting he didn't refuse to – he refused to drive it. What I'm saying is you allowed him to drive it in circumstances where you knew that the truck was causing severe problems for Mr Durkin's shoulders; correct?---Correct."[50]

[52] It is not unsurprising then that one of the principal criticisms raised on Mr Durkin's behalf related to a failure by the employer to adequately respond to Mr Durkin's express complaints in relation to the condition of the Kenworth's suspension/shock absorbers and his consequent shoulder pain, and indeed, allowing Mr Durkin to continue to drive the Kenworth in circumstances where the employer had actual knowledge of Mr Durkin's complaints of pain and his belief that it was attributable to driving a truck with deteriorated springs/suspension over rough surfaces. It was highlighted that merely two days (9 and 10 March 2018) were required to necessitate the repairs to the Kenworth's suspension and there was no sufficient reason preventing the springs/suspension from being replaced at an earlier time shortly after the parts arrived to Mr Dillon's workshop in December 2017, given the Kenworth

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50 T2-63, line 19 to T2-64, line 3.

was serviced around 20 December 2017, 28 January 2018, 21 and 23 February 2018.[51] Whilst such criticism is understandable, it does automatically lead to a finding of breach of duty of care. The mere fact that Mr Durkin may have been injured in the course of employment is not enough. He needs to prove more than simply that his injuries occurred in the course of employment.

[53] I return to sections 305B and 305C of the WRCA. Because Mr Durkin raised concerns about the Kenworth's springs/suspension to his employer and his belief that it was causing him to experience arm and shoulder pain, I consider the risk of injury was, on balance, foreseeable and not insignificant. Indeed, the employer was on notice about Mr Durkin's complaints of arm and shoulder pain and his belief that it was linked to the Kenworth's springs/suspension. In other words, it therefore knew or ought to have known that an employee might sustain an injury to their shoulders from driving long distances in a truck with deteriorated springs/suspension. I would have concluded differently had no complaints been made to the employer. But given the test is undemanding and not so far removed from the common law test of the risk of injury being "not farfetched or fanciful", the risk of injury was, on balance, foreseeable and not insignificant.[52]

[54] However breach is shown only if a reasonable person would have taken precautions after bringing into account, among other relevant things, the probability and seriousness of the potential injury as required by s 305B(2).[53]

[55] There is no evidence apart from Mr Durkin's to support a finding that there was something defective about the Kenworth's springs/suspension which warranted its replacement or that the defendant was in breach of duty by causing Mr Durkin to be driving the Kenworth in the circumstances alleged. There is no independent evidence that the springs/suspension were deteriorated, in a state of disrepair or bad repair. Nor is there sufficient evidence that the employer ought not to have permitted Mr Durkin to drive the Kenworth in the circumstances alleged. Rather there is overwhelming evidence to the contrary and that is the evidence I prefer.

[56] Evidence was given by Mr Ambrose that after Mr Durkin made his initial complaint, he drove the Kenworth and considered it to be in a roadworthy state. Further, he approached Mr Ellis, who was spending as much time as Mr Durkin in the Kenworth, to ascertain whether he had any issues with the Kenworth's suspension and Mr Ellis advised him that he did not have an issue with it. Further, Mr Ambrose raised the issue with the mechanic, Mr Dillon, who performed a number of regular full services upon the truck between October 2017 and March 2018. At each regular service, the suspension was properly checked by Mr Dillon. When the suspension was ultimately replaced (which it seems was done solely to appease Mr Durkin), Mr Dillon did not observe any material difference between the old and the new system. Indeed Mr Dillon said that if he owned the Kenworth, he would not have replaced the suspension. It is this evidence which I prefer over the sole evidence of Mr Durkin. There was no reason to have changed the Kenworth's springs/suspension prior to October 2017,

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51 I was not persuaded by the explanation given by the employer regarding this period of time. See T2-42, line 45 to T2-43, line 6.

52 As to the undemanding nature of the test, see *Clarricoats v JJ Richards & Sons Pty Ltd* [2017] QSC 214 at [103], per McMeekin J where His Honour footnoted the discussion of the level of probability required in *Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd* [2013] 1 QD R 319 at [22] – [26] per Fraser JA (White JA and Mullins J agreeing).

53 See *Clarricoats v JJ Richards & Sons Pty Ltd* [2017] QSC 214 at [104].

March 2018 or indeed at all. The employer did not need to replace the suspension. Neither was it reasonable nor necessary for the employer to have changed the springs/suspension because no one other than Mr Durkin raised a concern about it (and his belief that it was causing him arm and shoulder pain). The Kenworth was serviced more frequently than what was recommended by the manufacturer and when the Kenworth was serviced, Mr Dillon adequately inspected the springs/suspension on each relevant occasion. The Kenworth was properly maintained, was in a roadworthy condition and could be safely driven as it was by Mr Ambrose and Mr Ellis. Short of dismissing Mr Durkin from employment or preventing him from driving at all, there was nothing the employer ought reasonably to have done in the circumstances.

[57] For me to have found that the employer breached its duty of care to take precautions against a risk of injury to Mr Durkin that was foreseeable, not insignificant and, in the circumstances a reasonable person in the position of the defendant would have taken the precautions, I would have been assisted with evidence of the forces applied to Mr Durkin while driving the Kenworth and the forces which would have been necessary to expose an employee to the risk of injury to the shoulder. I only have Mr Durkin's belief that the springs/suspension in the Kenworth were deteriorated and that caused him to get bounced around in the driver's seat ultimately producing pain in his arms and shoulders. I am not persuaded to act solely on the basis that because the employer was told of concerns, viz a viz the Kenworth's suspension and Mr Durkin's shoulder pain, and continued to allow Mr Durkin to drive the Kenworth, there should be a finding of a breach of duty of care. That may suggest an element or aspect of danger but it does not prove a breach of duty especially given the evidence of Mr Ambrose, Mr Ellis and Mr Dillon regarding the condition of the Kenworth's springs/suspension. The weight of this evidence causes me to find that there was nothing defective with the Kenworth or that there was deterioration of the springs/suspension which warranted replacement. I am not satisfied there was a breach of duty by causing Mr Durkin to drive the Kenworth in the circumstances alleged.

[58] Therefore I have reached the view that, on balance, Ambrose Haulage did not breach its duty of care to Mr Durkin.

Causation

[59] Notwithstanding my finding regarding an absence of a breach of duty of care, moving onto the issue of causation, I note section 305D of the WCRA provides:

> "**305D General principles**
>
> (1) A decision that a breach of duty caused particular injury comprises the following elements—
>
> (a) the breach of duty was a necessary condition of the occurrence of the injury (*factual causation*);
>
> (b) it is appropriate for the scope of the liability of the person in breach to extend to the injury so caused (*scope of liability*).

> (2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1)(a)—should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party in breach.
>
> (3) If it is relevant to deciding factual causation to decide what the worker who sustained an injury would have done if the person who was in breach of the duty had not been so in breach—
>
> (a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and
>
> (b) any statement made by the worker after suffering the injury about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.
>
> (4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party who was in breach of the duty."

[60] Section 305E states that the onus of proving any fact relevant to the issue of causation is on the plaintiff, on the balance of probabilities.

[61] Mr Durkin must show that "but for" the defendant's breach of duty, the injury would not have occurred.[54] I have already noted that there is no independent evidence of the forces applied to Mr Durkin when he was driving the Kenworth and, importantly, there is no independent evidence of the forces which would have been necessary to expose a person to the risk of shoulder injuries.

[62] The expert medical evidence consisted of Orthopaedic Surgeons Dr Mark Robinson and Dr Chris Blenkin.

[63] Dr Robinson has diagnosed Mr Durkin as suffering a partial tear right supraspinatus tendon with tendonitis and left supraspinatus tendonitis with subacromial bursitis. In his view, there was a significant component of age and activity related degeneration affecting both shoulders. Dr Robinson recognised that there was an increased incidence of defects of the rotator cuff, with advancing age. He noted Mr Durkin's occupational activities included driving a truck with poor suspension, climbing on to the trucks, connecting fuel nozzles and dip sticking the tankers which all contributed to inflammatory changes within the tendon and subacromial bursa. He considered that one third of Mr Durkin's presentation related to occupational exposures at Ambrose Haulage and two thirds related to a pre-existing age and activity related degenerative changes involving both shoulders. Dr Robinson assessed Mr Durkin as

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[54] See *Strong v Woolworths Limited* (2012) 246 CLR 182.

having a 4% impairment of whole person function according to AMA-5 as a consequence of Mr Durkin's occupational exposure.

[64] Usefully, Dr Robinson also referred to the natural history of Mr Durkin's underlying degenerative change and that it was a progressive condition. However his evidence did not include an opinion as to whether, once Mr Durkin became symptomatic, changing the Kenworth's suspension at an earlier point in time would have had any effect on Mr Durkin's condition. Dr Robinson readily conceded that he was not aware of any knowledge of the level of forces that would have been imposed on Mr Durkin's shoulders whilst he was driving the Kenworth and was unable to say what level of forces would have been imposed on the shoulders of a person of normal fortitude before such person would have been exposed to the risk of shoulder injury from driving a fuel tanker.

[65] Dr Blenkin was of the view that whilst Mr Durkin may have suffered an exacerbation of his underlying condition, it was the underlying condition that was causing his symptoms to continue. He considered that Mr Durkin's shoulders suffered from degenerate rotator cuff disease. He noted that in terms of causation of the shoulder problems, Mr Durkin relied on the poor state of the springs at the front of the truck causing excessive jarring to be transmitted through the steering column to his arms and shoulders. Dr Blenkin's view was that there was no organic causal relationship between such a process and the condition of Mr Durkin's shoulders, which exhibited features of constitutional degenerate rotator cuff disease. It was his view that there was no causal relationship between the nature of the activities performed by Mr Durkin and the condition of his shoulders. He stated:

> "Mr Durkin contends his shoulders became progressively more painful over the months he worked after the onset of the trouble and indeed I am sure this is correct. This, however, is an exacerbation because once a shoulder becomes painful many activities will provoke that pain.
>
> I do not see that the work activities have acted to aggravate the condition of the shoulders, which became symptomatic at about the same time. Again, this is a feature of constitutional predisposition to the development of bursitis/impingement.
>
> …
>
> It is my view Mr Durkin's shoulders would have become symptomatic in the same timeframe as they did, even if he was not working as a truck driver for Ambrose Haulage."[55]

[66] It was Dr Blenkin's opinion that Mr Durkin would have found it necessary to stop truck driving in the timeframe that he did, irrespective of the nature of that job of truck driving.[56] He said that Mr Durkin's underlying degenerate rotator cuff disease and the development of painful impingement syndrome precluded Mr Durkin from continuing to undertake his occupation. Dr Blenkin shared the view of another Orthopaedic Surgeon, Dr Anthony Wilson who recorded in part:

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55 Exhibit 8, pp C62 – C63.

56 Exhibit 8, p C63.

> "…I cannot entertain the proposed mechanism of injury has caused the rotator cuff tear, even over an extended period of time, there would be no science behind this."

[67] I agree with the contention advanced on behalf of the defendant that Dr Blenkin has provided comprehensive reasons as to why there is "no science behind this" in the opinion section of his report and the subsequent file note of a telephone conference between him and Counsel on 17 April 2020.[57] Reliance has been placed on the AMA Guide to the Evaluation of Disease and Injury Causation (The Guide). It was Dr Blenkin's view that the Guide identified non-occupational risk factors which are relevant in Mr Durkin's case including age and body mass index. It was identified by Dr Blenkin that in the relevant period, Mr Durkin was 56. When Dr Blenkin saw Mr Durkin, Mr Durkin's BMI was 31.5 (obese range). Dr Blenkin highlighted that the Guide identified occupational risk factors (sustained loading of the shoulders at 60 degrees in front, or in abduction i.e. to the sides). The work activities described by Mr Durkin did not involve those risk factors. Dr Blenkin held the view that persons at risk included a process worker working with arms under load, particularly if it was necessary to maintain an awkward posture under the load. He considered on Mr Durkin's description of his work duties, such considerations had no application. He highlighted that:

> "Because of [Mr Durkin's] age and obesity, his biological clock arrived at midnight in 2017 and his constitutionally degenerate shoulders became symptomatic. The non-occupational risk factors and the constitutionally degenerate shoulders resulted in a situation where [Mr Durkin's] shoulders were pregnant with the risk of becoming symptomatic at any time irrespective of the truck driving. The fact that both shoulders became symptomatic within a relatively short time-frame is consistent with [Mr Durkin's] biological clock having reached the point where his constitutionally degenerate shoulders became symptomatic".[58]

[68] Dr Blenkin maintained the view that Mr Durkin's complaints of pain progressing (i.e. worsening) was an inevitable consequence of his constitutionally degenerate shoulders becoming symptomatic and was going to occur irrespective of whether he continued truck driving.

[69] Mr Mellick who appeared for the defendant usefully emphasised that when Mr Durkin attended Dr Robinson on 18 December 2018, he gave a history of noticing pain in his right shoulder around July 2017 and, over a period of several months, noticing discomfort in his left shoulder. When Mr Durkin attended Dr Blenkin on 20 February 2019, Mr Durkin relayed that, in early 2017, he started to experience pain in both shoulders; the right was worse initially. The onset in the two shoulders was spontaneous and at a similar time. When Mr Durkin attended on a physiotherapist at Goondiwindi Physiotherapy Centre on 17 November 2017, he was recorded as giving a history of pain in the right shoulder with onset four weeks previously.[59] The pain diagram at that page is only marked on the outer edge of the back of the right shoulder

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57 Exhibit 10.

58 See Exhibit 10, p C69 at [11].

59 See Exhibit 1, p C7.

compared with the pain diagram in the report of Ms Ross who is the occupational therapist.[60]

[70] Mr Mellick also emphasised that in the cross-examination, Dr Robinson conceded:

(a) The likelihood of the condition in Mr Durkin's neck having progressed between the examinations by Drs Robinson and Blenkin.

(b) The condition in Mr Durkin's neck is a separate condition – it is not one for which is claimed – but it is the cause of the symptoms of which Mr Durkin complains, that is the symptoms extending from the back of the neck across the shoulders down the arms and into the middle fingers.

(c) Mr Durkin's neck symptoms and the condition in his shoulders add to the overall picture of an obese person in his late 50s with symptomatic degeneration and further, smoking could have also contributed to his condition.

(d) He does not point to any particular scientific literature in expressing an opinion concerning medical causation, but relies on the allegations made by Mr Durkin.

(e) Whilst he does not agree with everything in the Guide, he accepts the non-occupational and occupational risk factors identified relevantly by Dr Blenkin are applicable to Mr Durkin. The non-occupational risk factors include Mr Durkin's age and obesity and the occupational risk factor - sustained loading of the shoulders at 60 degrees in front or to the sides – is absent.

[71] Overall I formed the impression that appropriate concessions were made by Dr Robinson which causes me to accept the underlying reasoning of Dr Blenkin regarding the nature of Mr Durkin's injuries. In the end however, it seemed to me that in most relevant respects the opinions of the two experts did not greatly differ.

[72] While it is reasonable for Mr Durkin to have argued that the work he was exposed to, had the potential to cause injuries to his shoulders and that the inference should be drawn that his work caused his injuries, whatever be its diagnosis, it does not necessarily follow that work in breach of duty caused his injury. My view is that, at its highest, Mr Durkin has shown that there may have been an increased risk of injury given the way the defendant conducted its work, but that does not sufficiently demonstrate that the actions in breach of duty did in fact cause the injury.[61]

[73] Overall I am not satisfied the evidence, on balance, has established that any breach of duty (if in fact there was any) caused any injury to Mr Durkin.

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60 See Exhibit 6, p C40

61 *Stitz v Manpower Services & Anor* [2011] QSC 268 at [105] and [114]. Also the views of Drs Robinson and Blenkin did not greatly differ.

Damages

[74] It is necessary to assess damages in case the above findings on liability do not survive an appeal.

[75] The leading statement of relevant principle is *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 at 642 – 643 which has stated:

> "When liability has been established and a common law court has to assess damages, its approach to events that allegedly would have occurred, but cannot now occur, or that allegedly might occur, is different from its approach to events which allegedly have occurred. A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred. Hence, in respect of events which have or have not occurred, damages are assessed on an all or nothing approach. But in the case of an event which it is alleged would or would not have occurred, or might or might not yet occur, the approach of the court is different. The future may be predicted and the hypothetical may be conjectured. But questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof. If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. The probability may be very high — 99.9 per cent — or very low — 0.1 per cent. But unless the chance is so low as to be regarded as speculative — say less than 1 per cent — or so high as to be practically certain — say over 99 per cent — the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability. The adjustment may increase or decrease the amount of damages otherwise to be awarded. See Mallett v. McMonagle; Davies v. Taylor; McIntosh v. Williams. The approach is the same whether it is alleged that the event would have occurred before or might occur after the assessment of damages takes place."

[76] The WCRA and the *Workers' Compensation and Rehabilitation Regulation* 2014 apply to provide statutory modification of the assessment of Mr Durkin's damages.

[77] Mr Durkin is 59 years of age.

[78] The pleaded injuries were stated to be a partial tear supraspinatus tendon with tendinitis of the right shoulder and supraspinatus tendinitis with subcromial bursitis of the left shoulders. Dr Robinson acknowledged that Mr Durkin has a significant component of age and activity related degeneration affecting both shoulders. It was

submitted on Mr Durkin's behalf that Mr Durkin suffered an injury in the nature of an aggravation of pre-existing degeneration in the shoulders.

[79] The defendant submitted that if it be held Mr Durkin suffered injuries, the injuries were minor and have been overwhelmed by not only the significant pre-existing degeneration in his shoulders, but the causally independent condition in the neck. I tend to agree especially in light of the weight of the expert orthopaedic evidence.

[80] Mr Durkin's current symptoms include tightness of the shoulder and neck. He suffers from headaches. He said that by October 2017, his pain was there all the time. Unfortunately by April 2018, Mr Durkin was in receipt of worker's compensation benefits which lasted for about five months. Mr Durkin attempted to embark upon a massage career after he obtained a diploma in remedial massage in December 2019 and managed to work self-employed for a period of two months at a local gym in order to earn some money. Those earnings were negligible. He said that he has not been gainfully employed since essentially leaving Ambrose Haulage. Had it not been for the injuries, Mr Durkin said that he would have worked until he was 75 years of age and continued to drive trucks.

[81] Evidence was given by occupational therapist, Evelyn Ross. Her view, consistent with that of Dr Robinson, considered that Mr Durkin was unlikely to obtain and retain any work for which he is reasonably suited by education, training and experience. She was of the view that he would not be able to undertake a job such as operating a forklift.

[82] Prior to the injuries, Mr Durkin's hobbies included woodwork. He is now prevented from doing so.

[83] To date Mr Durkin has received three chiropractic treatments and 15 remedial massages. He takes approximately one packet of Aspro Clear which lasts for about a week for pain relief approximately, at a cost of $10.00 per week.

General Damages

[84] The assessment of general damages requires the relevant injury to be categorised within Schedule 9 of the *Worker's Compensation and Rehabilitation Regulation* 2014.

[85] Given the opinions of Drs Blenkin and Robinson, I consider the shoulder injuries to be minor, which in my view, aligns with Item 97 in Schedule 9 of the Regulation. That provides an ISV range of 0 to 5. I will allow 5 points for both shoulders for a short term duration, before the consequences of the pre-existing degeneration in the neck and shoulders became evident.

[86] I therefore assess award for general damages at $7,050.00.

Past Economic Loss

[87] Mr Durkin ceased work in late March 2018. He is presently unemployed and in receipt of the Newstart allowance.

[88] A financial analysis of Mr Durkin's income history was tendered by agreement.[62] On my calculations, it would seem that on average in the three years to 30 June 2018, Mr Durkin's net weekly earnings was $1,203.86. I will adopt this figure in light of the varied earnings in the years preceding those years.

[89] Allowing for the underlying conditions which in all likelihood would have arisen irrespective of Mr Durkin's employment, I will allow say no more than 12 months for past economic loss. That being the case, $1,204 by 52 weeks equals $62,608.00.

[90] There is no entitlement to interest having regard to the Workcover benefits and Centrelink benefits Mr Durkin has received.

Loss of Past Superannuation Entitlements

[91] Allowing 9.5% on the above amount equates to an award of $5,948.00.

Future Economic Loss

[92] I am not satisfied the evidence has demonstrated an entitlement for damages for future economic loss is appropriate particularly in view of the medical evidence regarding the nature of Mr Durkin's underlying conditions (pre-existing constitutional degeneration in the neck and shoulders) .

Future Expenses

[93] For the brief reasons expressed immediately above, I am not satisfied there should be an award for future expenses.

Special Damages

[94] Workcover expenses total $10,427.35.[63] No receipts for other out of pocket expenses were furnished. Therefore I will allow the amount of $10,427.35.

Fox v Wood

[95] The *Fox v Wood* component is $10,261.00.

Summary of Damages

[96] Therefore the assessment of damages is summarised as follows:

General Damages	$7,050.00
Past Economic Loss	$62,608.00
Past Loss of Superannuation	$5,948.00
Special Damages	$10,427.35
Fox v Wood	$10,261.00
Sub total	**$96,294.35**

62 Exhibit 1.
63 Exhibit 1, pp B34/39.

Less WorkCover refund	$49,818.10
TOTAL	**$46,476.25**

[97] I will hear the parties as to costs.