Supreme Court

New South Wales

Case Name:	Jackson v Pacific International Lines (Private) Limited (No.3)
Medium Neutral Citation:	[2026] NSWSC 957
Hearing Date(s):	14–17, 30–31 July; 19 September; 16 October 2025.
Date of Orders:	11 August 2026
Decision Date:	11 August 2026
Jurisdiction:	Common Law
Before:	Harrison AsJ
Decision:	1) Judgment for the plaintiff against the first defendant in an amount to be calculated by the parties. 2) Judgment for the plaintiff against the second defendant in an amount to be calculated by the parties. 3) The parties are to take steps to reach agreement on the amounts of the judgments, including judgments on the cross claims, within 14 days. 4) The parties are to forward consent orders to my Associate within 14 days, or failing that, to contact my Associate to have the matter relisted for further directions within 14 days. 5) The defendants are to pay the plaintiff’s costs unless the parties seek a different order within 14 days.
Catchwords:	NEGLIGENCE—Stevedoring—Co-tortfeasors: stevedoring firm employer and third-party shipowner—Compensation paid under Workers Compensation Act 1987 (NSW)—Failure to provide safe working conditions—Failure of stowage equipment resulting in physical and psychiatric injury—Apportionment of liability

	DAMAGES—Pre-existing psychiatric injuries—Pre-existing asymptomatic spinal condition—Non-economic loss—Economic loss—Fox v Wood
Legislation Cited:	Civil Liability Act 2002 (NSW) ss 5B, 5C, 5D, 5F, 5G, 5H, 5I, 5R, 5S, 12, 13, 16, 55, Marine Order 32 (Cargo handling equipment) 2011 div 3, sch 3 Navigation Act 2012 (Cth) Workers Compensation Act 1987 (NSW) ss 151G, 151I, 151J, 151Z(2) Work Health and Safety Act 2011 (NSW and Cth) ss 17, 19, 20, 21 274 Work Health and Safety Regulation 2017 (NSW) cll 34, 35, 36, 38, 39
Cases Cited:	Australian Securities & Investments Commission v Rich (2009) 75 ACSR 1; [2009] NSWSC 1229 Ajia v TF & RF Fordham Pty Ltd trading as Trn Group [2020] NSWDC 371 Babayi v Eden Park Fruits Pty Ltd [2023] NSWSC 473 Blatch v Archer (1774) 1 Cowp 63 at 65 (98 ER 969 at 970) Collins v Insurance Australia Ltd [2022] NSWCA 135 Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd (1991) 22 NSWLR 389 CSL Australia Pty Limited v Formosa (2009) 235 FLR 273; [2009] NSWCA 363 Davie v New Merton Mills [1959] AC 604 DC v State of New South Wales [2016] NSWCA 198 Dell v Dalton (1991) 23 NSWLR 528 at 433. Dovuro Pty Ltd v Wilkins (2003) 215 CLR 317; [2003] HCA 51 EMI (Australia) Limited v Bes [1970] 2 NSWR 238 Fox v Wood (1981) 148 CLR 438; [1981] HCA 41 Ho v Powell (2001) 51 NSWLR 572; [2001] NSWCA 168 Jackson v KAH Australia Pty Ltd t/as Bayview Boulevard Sydney [2017] NSWSC 747 Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8 Joslyn v Berryman (2003) 214 CLR 552; [2003] HCA 34 Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44;

	[2005] HCA 15 Malec v JC Hutton Pty Limited (1990) 169 CLR 638; [1990] HCA 20 Mason v Demasi [2009] NSWCA 227 Matthews v Dean (1990) 11 MVR 455; [1990] Aust Torts Reports 81-037 O'Donnell v Reichard [1975] VR 916 Origin Energy LPG Pty Ltd v BestCare Foods Ltd [2012] NSWCA 407 Perisher Blue P/L v Nair Smith [2015] NSWCA 90 Podrebersek v Australian Iron & Steel Pty Ltd (1985) 59 ALR 529; [1985] HCA 34 Powell v Success Leadership Pty Ltd [2015] NSWDC 269 Seltsam Pty Ltd v McGuiness (2000) 49 NSWLR 262; [2000] NSWCA 29 Southgate v Waterford (1990) 21 NSWLR 427 Sutherland Shire Council v Major [2015] NSWCA 243 Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2020] NSWCA 263 Than v Galletta & Ors [2019] NSWDC 9 TNT Aust Pty Ltd v Christie (2003) 65 NSWLR 1; [2003] NSWCA 47 Transport Industries Insurance Co Ltd v Longmuir [1997] 1 VR 125 Transport Workers' Union of Australia v Qantas Airways Limited [2021] FCA 873; (2021) 308 IR 873 T & X Company Pty Ltd v Chivas [2014] NSWCA 235 Uniting Church of Australia Property Trust v Miller; Miller v Lithgow City Council [2015] NSWCA 320 Value Constructions Pty Ltd v Badra [2024] NSWCA 181 Watson v Foxman (1995) 49 NSWLR 315 Watts v Rake (1960) 108 CLR 158; [1968] HCA 58 Willmot v Queensland [2024] HCA 42
Texts Cited:	Harold Luntz and Sirko Harder, Luntz Assessment of Damages for Personal Injury and Death (LexisNexis Butterworths, 5th ed, 2021)
Category:	Principal judgment
Parties:	Amie Jackson (Plaintiff) Pacific International Lines (Private) Limited (First Defendant)

Patrick Stevedores Holdings Pty Ltd (Second Defendant)

Representation:	Counsel: L King SC (Plaintiff) C J Callaway (Plaintiff) G Parker SC (First Defendant) A Schonell (First Defendant) S L Flett (Second Defendant) Solicitors: McNally Jones Staff (Plaintiff) HWL Ebsworth Lawyers (First Defendant) Hall & Wilcox (Second Defendant)
File Number(s):	2021/00238533
Publication Restriction:	Nil

JUDGMENT

Loss of past and future superannuation

Fox v Wood

Costs

Orders

1 **HER HONOUR:** The plaintiff seeks damages for personal injury while working as a stevedore.

2 The plaintiff is Amie Jackson. She is represented by L King SC together with J Callaway of counsel (there was also a Captain King, a liability expert who gave evidence for the employer). The first defendant is Pacific International Lines (Private) Limited (the shipowner) and is represented by G Parker SC together with A Schonell of counsel. The second defendant is Patrick Stevedores Holdings Pty Ltd (the employer) and is represented by S L Flett of counsel.

3 The shipowner was at all material times: a company duly incorporated in and having its registered office in Singapore; able to be sued in and by its corporate name and style; and the owner, operator, and occupier of the container ship the MV Kota Lambang (the vessel). The shipowner also employed the master and crew on board the vessel.

4 The employer was and is a company duly incorporated in and having its registered office in Port Botany, New South Wales; able to be sued in and by its corporate name and style; the owner and operator of a container terminal at Port Botany, New South Wales; and the employer of the lashing gang engaged to work on board the vessel at the material time.

5 The parties relied on a joint Court Book consisting of three volumes marked Exhibits A1, A2 and A3 (Ex A1, A2 and A3).

6 The plaintiff was employed as a stevedore by the employer at its Port Botany container terminal. The stevedoring work was subject to the mandatory "Managing Risks in Stevedoring: Code of Practice" (December 2016) (the Code), approved under s 274 of the *Work Health and Safety Act 2011* (NSW and Cth) (*WHS Act)*.

7 This judgment will proceed in the following order under corresponding headings: general background; pleading framework; the plaintiff's background; elements of the cause of action including expert evidence on stevedoring and expert medical evidence; contributory negligence; obvious risk; and, finally, damages including expert evidence on typical career progression for employees of the employer.

General Background

8 The vessel is an all-steel construction, fully cellular, Panamax container ship built in 2008 and registered in Singapore. It is an enormous ship with the capacity to carry 4,250 twenty-foot shipping containers. Containers can be either stacked on deck or stored in the hold. The containers on deck are secured by twist locks and up to six lashing bars, four of which are about 4.5-5.5 metres long and two of which are about 2.5 metres long. The vessel has 32 transverse walkways from which the containers are lashed and unlashed.

9 The vessel had portable stowage hooks (also known as "stowage racks" or "lashing racks") which, when used as a pair, could be used to store lashing bars during lashing operations. The portable stowage hooks would be hung over the handrail of a walkway in the following manner:

10 

Figure 1(CB 280) Portable Stowage Hooks of the Kind that Failed

11 The shipowner had acquired new portable stowage hooks (figure 1) on 10 August 2018, about 12 days before the plaintiff's incident. When the vessel arrived at Port Botany on 22 August 2018, the lashing racks were partially filled, presumably because lashing bars had been left there from the previous operation.

12 These portable stowage hooks have been described in several different ways by those who worked in different capacities on the ship. In this Judgment, I will describe them as "portable stowage hooks" as that best describes them.

13 On 22 August 2018, the plaintiff was injured in the course of her employment with the employer while on board of the vessel. On that day, the plaintiff commenced her shift at 9:00pm. She was paired with Mr Rocky Todorovski (Mr Todorovski) as a work buddy. Between 9:30 and 9:45pm, a pair of laden stowage hooks gave way and a number of lashing bars collapsed onto the plaintiff's lower body while she was walking along a walkway on the vessel (the incident). The plaintiff suffered serious injuries to her right leg, ankle and foot. These injuries are accepted by all parties. However, the plaintiff further alleges subsequent injuries to her left shoulder and her neck and also psychological/psychiatric injuries. The fact of these latter injuries is in dispute.

The pleading framework

14 The starting point is the pleading framework. The pleadings are lengthy. I will attempt to briefly summarise the issues in the pleadings that remain in dispute. However, unusually, most of the plaintiff's allegations have been contested.

The plaintiff's further amended statement of claim dated 3 July 2025

15 On 3 July 2025, the plaintiff filed a further amended statement of claim (FASOC) and relevantly pleaded that she was exposed to a risk of harm which was foreseeable, not insignificant and that, in the circumstances, a reasonable person in the defendants' position would have taken precautions against.

16 The shipowner and/or the master and crew (for whose acts and omissions the shipowner is vicariously liable) owed a duty of care to those persons attending and/or working on board the vessel, including the plaintiff:

> "(1) to take reasonable care to ensure that those persons were not exposed to the risk of injury due to the state or condition of the vessel or its equipment;

(2) to take reasonable care in the supply and maintenance of equipment to the vessel, to ensure that it was suitable and adequate for the purposes which was to be used and so as to not give rise to the risk of injury to those persons attending and/or working on board the vessel, including the plaintiff;

(3) to take reasonable care to remove or alternatively to mitigate any hazards on board the vessel that may cause the risk of injury to those persons attending and/or working on board the vessel, including the plaintiff;

(4) to take reasonable care to remove or alternatively to mitigate any hazards in relation to any of the vessel's equipment that may cause the risk of injury to those persons attending and/or working on board the vessel, including the plaintiff;

(5) to take reasonable care by the provision of appropriate systems of work and/or safeguards in connection with the use and stowage of equipment on board the vessel and so as to avoid the risk of injury to those attending persons attending and/or working on board the vessel, including [the] plaintiff."

17 The employer and/or its employees (for whose acts and omissions the employer is vicariously liable) owed a non-delegable duty of care to its employees, including the plaintiff:

"(1) to take reasonable care to ensure that its employees were not exposed to the risk of injury due to the state or condition of the vessel or its equipment;

(2) to take reasonable care to ensure that the equipment supplied to the vessel was suitable and adequate for the purposes for which they were to be used and so as not to give rise to the risk of injury to those persons attending and/or working on board the vessel, including the plaintiff;

(3) to ensure that unlashing operations did not commence until any hazards with the equipment on board the vessel were mitigated;

(4) to take reasonable care by the provision of a safe system of work in connection with the use and stowage of equipment on board the vessel so as to avoid the risk of injury to those attending and/or working on board the vessel, including the plaintiff."

18 The injuries, loss and damage that the plaintiff sustained while on board the vessel were caused by the negligence of the defendants, and by those for whose acts and omissions the defendants are vicariously liable, in breach of its and their aforesaid duty. The said injuries, loss and damage were occasioned by reason of the negligence of the shipowner as follows:

"(1) Failing to supply stowage hooks sufficient to carry the weight of lashing bars.

(2) Supplying stowage hooks which were not fit for the purpose.

(3) Failing to supply stowage hooks marked with safe weight limits.

(4) Failing to supply stowage hooks made from hardened steel.

(5) Failing to devise and maintain a safe system for the stowage of lashing bars.

(6) Failing to correctly complete the employer's Vessel Pre-Operations Checklist prior to commencement of unloading.

(7) Failing to install stowage hooks fitted with safety catches.

(8) Failing to ensure that the walkway was in good condition and free of obstructions.

(9) Failing to supply stowage hooks with sufficient steel reinforcement which subsequently lowered the capacity of the hooks to withstand the required load.

(10) Failing to supply walkway railings which were sufficient to withstand the weight of the stowage hooks when stacked with lashing bars.

(11) Failing to ensure that lashing bars were removed from the stowage hooks prior to the commencement of the unlashing operations.

(12) Failing to consider and inform the plaintiff and [the employer] of the safe working load for the stowage hooks.

(13) Failing to test the new hooks before installing them.

(14) Failing to properly inspect the new hooks before installing them.

(15) Failing to ensure that the stowage hooks as supplied met the specifications provided to the supplier.

(16) Failing to properly specify to the supplier or manufacturer the circumstances under which the stowage hooks would be deployed.

(17) Failing to ensure that appropriate design and construction specifications were provided to the supplier when ordering the stowage hooks so as to ensure that stowage hooks supplied were fit for purpose.

(18) Failing to inform the supplier as to the circumstances in which the stowage hooks were to be used and the weights the stowage hooks were expected to withstand when fully stacked with lashing bars.

(19) Installing the stowage hooks in circumstances where they were not fit for purpose."

19 The plaintiff further contends that the shipowner was in breach of the provisions of the Marine Order 32 (Cargo handling equipment) 2011 (Marine Order 32) made pursuant to the *Navigation Act 2012* (Cth).

20 For the purposes of ss 5C and 5D of the *Civil Liability Act 2002* (NSW) (CLA), the shipowner's negligence was a condition of the harm caused to the plaintiff and was within the scope of the shipowner's liability.

21 Furthermore, the said injuries, loss and damage were occasioned by reason of the negligence of the employer as the plaintiff's employer failed to:

"(1) supply a safe place of work.

(2) supply a safe means of access to a place of work.

(3) supply safe plant and equipment.

(4) ensure that the vessel owner/operator supplied stowage hooks of sufficient robustness to carry the weight of the lashing bars.

(5) instruct the vessel owner/operator to supply stowage hooks which were fit for the purpose.

(6) instruct the vessel owner/operator to supply stowage hooks marked with safe lifting limits.

(7) instruct the vessel owner/operator to supply stowage hooks made from hardened steel.

(8) instruct the vessel owner/operator to devise and maintain a safe system for the stowage of lashing bars.

(9) instruct the vessel owner/operator to ensure that the stowage hooks were fitted with safety catches.

(10) ensure the vessel's owner/operator supplied stowage hooks with sufficient reinforcement to permit lashing bars to be securely positioned in place.

(11) correctly complete the employer’s Vessel Pre-Operations Checklist prior to the commencement of unloading operations.

(12) properly instruct the plaintiff.

(13) properly supervise the plaintiff.

(14) carry out any proper risk assessment.

(15) ensure that the stowage hooks were not overloaded.

(16) supply walkway railings which were sufficient to withstand the weight of the stowage hooks when stacked with lashing bars.

(17) ensure that the walkway was in good condition and free of obstructions.”

22 Further, and/or in the alternative, the plaintiff contends that the employer was in breach of the provisions of the Marine Order 32.

23 Further and/or in the alternative, the plaintiff's injuries were occasioned by reason of the breach by the employer of the *WHS Act*. The plaintiff does not assert that such breaches constitute a separate cause of action but relies upon the breaches as constituting further evidence of a failure to exercise the required duty of care, particulars of which are as follows:

“(1) At all material times the employer was bound by the provisions of the *Work Health and Safety Act 2011*, as amended (the Act);

(2) At all material times [the employer] was bound by the provisions of the *Work* Health and Safety Act Regulation [2017], (the Regulation);

(3) The plaintiff asserts that if the facts and matters asserted above are proven then those facts and matters would be sufficient to constitute breaches of the Act which, whilst not providing the plaintiff with a separate cause of action, constitutes evidence of negligence;

(4) As particularised below, the plaintiff's injuries and disabilities were caused or materially contributed to by [the employer's] breaches of the relevant sections of the Act including but not limited to s 17, Management of Risk, ss 19, 20 and 21 and clauses 34, 35, 36, 38 and 39 of the Regulation and specifically the failure to eliminate risks to the health and safety of workers so far as was reasonably practicable;

(5) The employer failed to comply with s 19 of the Act in that it failed to ensure, so far as was reasonably practicable:

> (a) the provision and maintenance of a work environment without risks to health and safety;
>
> (b) the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and
>
> (c) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking;

(6) [the employer] failed to comply with s 20 of the Act in that [the employer], as an entity with management and control of the workplace, failed to ensure, so far as was reasonably practicable, that the workplace and anything arising from the workplace were without risks to the health and safety of the plaintiff;

(7) [the employer] was in breach of clause 34 of the Regulation in that [the employer] as a duty holder, failed to identify reasonably foreseeable hazards that gave rise to risks to the health and safety of the plaintiff;

(8) [the employer] was in breach of clause 35 of the Regulation in that [the employer] as a duty holder, failed to eliminate risks to the plaintiff's health and safety so far as was reasonably practicable.

(9) [the employer] was in breach of clause 36(2) of the Regulation in that [the employer] as a duty holder, failed to minimise risks to the health and safety of the plaintiff by implementing risk control measures;

(10) [the employer] was in breach of clause 36(3) of the Regulation in that [the employer] as a duty holder, failed to minimise risks, so far as is reasonably practicable, by doing one or more of the following:

(a) substituting (wholly or partly) the hazard giving rise to the risk with something that gives rise to a lesser risk;

(b) isolating the hazard from any person exposed to it;

(11) if a risk then remained, [the employer] failed to minimise the remaining risk, so far as was reasonably practicable, by implementing administrative controls;

(12) [the employer] was in breach of clause 38 of the Regulation in that [the employer] as a duty holder, failed to implement control measures and review and as necessary revise those control measures so as to maintain, so far as

was reasonably practicable, a work environment that was without risks to health or safety of the plaintiff;

(13) [the employer] was in breach of clause 39 of the Regulation in that [the employer] failed to ensure that information, training and instruction provided to the plaintiff was suitable and adequate having regard to:

(a) the nature of the work carried out by the plaintiff;

(b) the nature of the risks associated with the work at the time the information, training or instruction was provided; and

(c) the control measures implemented;

(14) [the employer] failed to comply with the requirements of AS1470 - 1986 Health & Safety at Work - Principles and Practices and Australian / New Zealand Standard AS/NZS 4804:2001 OH&S Management Systems - General Guidelines;

(15) [the employer] failed to develop and implement an effective occupational health and safety management system in accordance with the requirements of Australian and New Zealand Standard AS/NZS 4801:2001 Occupational Health and Safety Management Systems - Specification with Guidance for Use;

(16) [the employer] failed to comply with the basic intent and articulated risk management methodology as contained within the Australian/New Zealand Standard AS/NZS ISO 31000:2009 Risk Management - Principles and Guidelines and specifically the requirement of [the employer] to identify hazards and to then develop and implement appropriate risk controls to address the hazards."

Shipowner's further amended defence dated 7 July 2025

24 On 7 July 2025, the shipowner filed a further amended defence that pleads as follows.

25 The shipowner stated that the portable stowage hooks varied between older and newer versions throughout the vessel. The newer portable stowage hooks had been purchased in Singapore and installed on the vessel on about 11 August 2018, about 11 days prior to the incident. The newer portable stowage hooks had been used on prior occasions without incident. The system of using suspended portable stowage hooks was devised by the employer and represented a departure from usual international stevedoring practices and the employer's usual practice.

26 The shipowner admitted that it ordered the newer stowage hooks that were purchased in Singapore from AMOS International (S) Pte Ltd (AMOS). When ordering the stowage hooks from AMOS, the shipowner specified the dimensions of the hooks, including in terms of their length, thickness and the

width of the opening. The hooks supplied to the shipowner by AMOS did not meet the specifications it requested. The hooks supplied by AMOS contained a latent defect in that the width of the opening was wider than specified. The latent defect enabled a greater number of lashing bars to be stored within the stowage hooks. The shipowner had no reasonable means of knowing, and did not know, that the stowage hooks it received were not to specification and contained the latent defect.

27 The shipowner denied that it was responsible or vicariously responsible for: the supply of the portable stowage hooks and lashing bars to the vessel; the maintenance of portable stowage hooks; the establishment and maintenance of the system for the stowage of lashing bars on board the vessel; and the use of the stowage hooks for the stowage of the lashing bars on board the vessel and when they were not affixed to containers.

28 The shipowner claimed that the risk of harm was not foreseeable because the stowage hooks had only been purchased 12 days prior to the incident on 22 August 2018, had been used without incident before and that it did not foresee, and had no means of foreseeing, that they were at risk of failure or would be overloaded by the employer’s employees. The precautions and measures pleaded by the plaintiff were not precautions that would be taken by a reasonable person in the position of the shipowner in response to the risk of harm.

29 The shipowner denied it breached or vicariously breached any duty of care owed to the plaintiff. The shipowner asserted that the plaintiff’s employer is liable or vicariously liable to the plaintiff for the incident on 22 August 2018 and otherwise during the course of her employment. The plaintiff’s employer was solely responsible for the plaintiff's system of work and providing a safe place of work and solely responsible for providing the plaintiff with any necessary supervision and equipment including the suitability for use by the plaintiff of any lashing bars and portable stowage hooks. The risk of harm to which the plaintiff was allegedly exposed was not foreseeable and/or was insignificant and/or in circumstances a reasonable person in the shipowner's position would not have

taken precautions against the risk of harm as alleged. This submission is not borne out by the evidence, a subject to which I will return.

30 The shipowner pleaded that it exercised reasonable care: the latent defect in the newer portable stowage hooks was not discoverable by reasonable examination.

31 The shipowner denied the plaintiff’s consequential injuries to the neck and left shoulder were sustained as a consequence of the incident. It denied the plaintiff’s use of alcohol, tobacco and sedatives were a consequence of the incident.

Employer’s amended defence dated 9 July 2025

32 On 9 July 2025, in reply to the FASOC, the employer relied upon an amended defence. It accepted that it owed the plaintiff a duty of care, but denied any breach. In the alternative, it pleaded contributory negligence on the part of the plaintiff:

> “8 Further, or in the alternative, the Second Defendant says that any injury or loss or damage sustained by the Plaintiff (which is not admitted) was caused or contributed to by her own negligence, particulars of which are as follows:
>
> 8.1 Knew, or ought to have known, that there was a risk of injury when working in and around and with the stowage hooks and lashing racks;
>
> 8.2 Failed to take any or any proper care in and about the performance of her work in and about the stowage hooks and lashing racks;
>
> 8.3 Failed to take proper precautions for own safety in the performance of her work in and about the stowage hooks and lashing racks;
>
> 8.4 Failed to take any steps to avoid the consequence of any act or omission of the Second Defendant relied upon;
>
> 8.5 If the Plaintiff was exposed to dangers in the performance of her work (which is denied), failed to advise the Second Defendant of those dangers;
>
> 8.6 If the Plaintiff was exposed to dangers in the performance of her work (which is denied), failed to remove herself from such danger;
>
> 8.7 If the Plaintiff was exposed to dangers in the performance of her work (which is denied), failed to request the First and/or Second Defendant to remove any such dangers;
>
> 8.8 If the Plaintiff's work with the Second Defendant could not be safely undertaken (which is denied), elected to so do when not required so to do by the Second Defendant;
>
> 8.9 If the gear, plant and equipment which the Plaintiff was required to operate for the Second Defendant were not proper and safe (which is denied), failed to advise the Second Defendant of it;

> 8.10 If the gear, plant and equipment which the Plaintiff was required to operate for the Second Defendant were not proper and safe (which is denied), failed to request the Second Defendant to replace or adjust that gear, plant or equipment;
>
> 8.11 If the gear, plant and equipment which the Plaintiff was required to operate for the Second Defendant were not proper and safe (which is denied), failed to cease to use that gear, plant and equipment;
>
> 8.12 If the Plaintiff required further training (which is denied), failed to request it from the Second Defendant;
>
> 8.13 If the Plaintiff required further instruction in the performance of her work (which is denied), the Plaintiff failed to request it from the Second Defendant;
>
> 8.14 If the Plaintiff required further supervision (which is denied), failed to request it from the Second Defendant."

Cross claims

33 Both first and second defendants filed cross claims against each other. On 4 September 2024, the shipowner filed a cross claim seeking indemnity or alternatively, contribution. On 12 September 2024, the employer similarly filed a cross claim against the shipowner also seeking contribution and indemnity. Both defendants have filed defences against each other to those cross claims.

The plaintiff's background

34 The plaintiff was born in 1986. She is currently 39 years of age.

35 She was diagnosed with ADHD when she was about six years old and was prescribed Ritalin, which she took until she was about 17 or 18 years old. While the plaintiff was still in high school, she began to drink alcohol and smoke marijuana occasionally on the weekends.

36 In 2002, halfway through Year 10, the plaintiff left school at 16 years of age. She then completed a 4-year hairdressing apprenticeship and worked in hair salons until 2008. From 2008 to 2012, the plaintiff worked at Forestville RSL Club before commencing self-employment in mobile hairdressing on a part-time basis. None of that work as a hairdresser or gaming attendant undertaken between 2008 and 2012 involved any prolonged periods of looking upwards or extending her neck.

37 Between 2005 and 2017, she worked part-time for Fiesta Food Systems. During her employment with Fiesta Food Systems, the plaintiff occasionally used a forklift to move bins of seasoning material from where they were

stacked on the floor over to the mixing machine. The mixing machine had a hopper which was approximately 1.8 to 2 metres high, so the plaintiff would raise the forklift to that height, and her employer would then tip the required quantity of seasoning into the mixer. Driving the forklift was not something that the plaintiff did often and she did not have a forklift driver licence at that time. This work did not involve prolonged or repeated extensions of her neck.

38 From the time she commenced work for the employer on 17 November 2017 and to the time that the incident occurred on 22 August 2018, the plaintiff had not suffered any neck or arm pain, despite undertaking lashing duties on a full-time basis. These lashing duties involved lifting, bending and looking up in order to position lashing bars into twist locks.

39 In examination-in-chief, the plaintiff gave evidence that prior to the incident on 22 August 2018 she had been going to a gym for at least a year (T17.22-50).

40 Between November 2016 and April 2017, the plaintiff consulted psychologist Michelle Hopkinson six times for depression. Her GP, Dr Andrea Jesudason referred her. She has ceased seeing Michelle Hopkinson.

41 On 19 January 2017, the plaintiff was referred to psychiatrist Dr Robert Gordon (Dr Gordon). The plaintiff told Dr Gordon that she wanted to change her life, having become a moderately heavy drinker and having commenced using recreational drugs including GHB. Dr Gordon prescribed Vyvanse (after initially prescribing Ritalin and then taking the plaintiff off it), which the plaintiff continues to take. She believes that Vyvanse has assisted with management of her ADHD. From early 2017, the plaintiff ceased taking recreational drugs and substantially reduced her alcohol intake. She continues to see Dr Gordon.

42 Having decided to make a career change, she contacted her uncle who had worked as a stevedore with the employer for many years. He informed her that the employer was hiring people to work at the Port Botany container terminal. She subsequently submitted an application and was asked to attend the terminal in mid-2017. On that day, the job applicants were spoken to by members of management; informed of the drug and alcohol policy and its enforcement; and completed questionnaires and employment information forms.

43 The plaintiff was also individually interviewed by the operations manager Gus May. She was initially told that the position would be casual but that there was a likelihood that the position would become permanent. A few weeks later she was informed that she was unsuccessful but that her application would be retained for potential future opportunities. The plaintiff took steps to improve her employment prospects. In mid-October 2017, she enrolled with the Technical Publishing Company for training. On 17 November 2017, she obtained her licence to operate a forklift. On 14 November, she obtained a licence to perform “High Risk Work”.

44 Eventually, the plaintiff received a phone call from Aleisha Chiba, who worked in the employer’s HR department, who asked if she was still interested in employment with the company and informed her that the rejection email had been sent in error. The plaintiff took a four-day induction course before physically doing the work. On 17 November 2017, she commenced work with the employer as a “Grade 2 Supplementary Stevedore”, primarily as part of a lashing gang.

45 Between November 2017 and August 2018, the plaintiff averaged between 32 and 40 hours a week. The plaintiff enjoyed this work because it was outdoors and quite physical. Her intention was to remain working for the employer. During her employment, she did not have any disciplinary issues, remained drug and alcohol-free and her ADHD was under control. She was happy to take any overtime that was offered to her and considers that she was a model employee.

46 Prior to the incident, she was fit and well. She had no previous injuries to either her leg, foot or ankle. Nor had she had any previous neck injuries.

Elements of the cause of action

Duty of care and breach

47 The shipowner pleaded that it and/or the vessel’s master and crew did not owe the plaintiff a duty of care. However, this is position is at odds with decisions like *CSL Australia Pty Limited v Formosa* (2009) 235 FLR 273; [2009] NSWCA 363 (*Formosa*) where, at [69], Allsop P, Basten JA, Handley AJA stated:

> '[A shipowner is required] to exercise reasonable care to avoid exposing a stevedore coming on to his ship to risk of injury which reasonable care would see eliminated or ameliorated, whether by attending to it physically or by warning or otherwise. This is especially so if the danger or risk on board is created by a particular operation of the ship. The duty is to exercise reasonable care for the safety of those coming on board to work the ship…'.

48 It is common ground that the employer as the plaintiff's employer owes a non-delegable duty of care to the plaintiff. As to the nature of a shipowner's duty, the Court of Appeal in *Formosa* stated at [71]-[74]:

> "[71] The above duty and its discharge must of course reflect the reality of the functions being undertaken on board ship during loading and unloading. Stevedores bring a degree of expertise, experience and skill to their work on board. They do this, however, in the environment of, and with the equipment and machinery provided by, the ship. The master and officers maintain a responsibility for the ship, her safety and stability and for the care of the cargo. They retain a right to direct and control the stevedores. The stevedores are, however, not the employees of the ship or its owners*: Cameron v Nystrom* [1893] AC 308 at 312 (Lord Herschell) and *Karuppan Bhoomidas v Port of Singapore Authority* [1978] 1 WLR 189 at 193.
>
> [72] The recognition of these respective functions and roles can be seen in the discussion of the shipowner's duty of care to the stevedore *in Federal Marine Terminals Inc v Burnside Shiping Co Ltd 394 US 404* (1969) *and Scindia Steam Navigation Co Ltd v De Los Santos 451 US 156* (1981). Under these cases the duty extends at least to the exercise of ordinary (viz reasonable) care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able, by the exercise of reasonable care, to carry on its cargo operations with reasonable safety to persons and property and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the ship or ought reasonably to be known to the ship and that are not known or would not be obvious to or anticipated by him or her if he or she were reasonably competent in his or her work: *Federal Marine Terminals* at 416 and *Scindia* at 166-167.
>
> [73] In *Scindia* the Court rejected the notion that the ship must inspect or supervise the stevedores in their work. The case involved the operation and application of the *Longshoremen's and Harbour Workers' Compensation Act* (33 USCA §905(b)) but the duty of care was one at general law.
>
> [74] One of the leading United States scholars in the field, Professor Robert Force, put the position as follows in *Admiralty and Maritime Law* (Federal Judicial Centre 2004) at 108-109:
>
>> 'In *Scindia Steam Navigation Co., Ltd. v. De Los Santos* the Supreme Court articulated guidelines setting forth the duties that a vessel owes to maritime workers. In general, a vessel owner who turns part of a ship over to a stevedore may rely on the expertise of the stevedore in loading or discharging cargo from the vessel. Negligence that occurs during these operations usually is the fault of the stevedore or its employees and is not attributable to the vessel owner. Nevertheless, a vessel owner must exercise "reasonable care under the circumstances."

> Scindia described the following three duties that the vessel owner owes to a maritime worker: (1) A “vessel owes to the stevedore and his longshoremen employees the duty of exercising due care ‘under the circumstances.’ This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.” (2) “It is also accepted that the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation.” And (3) “We are of the view that absent contract provision, positive law, or custom to the contrary . . . , the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore.’
>
> The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself.”

49 Therefore, both the shipowner and the employer owed duties of care to the plaintiff along the lines described in *Formosa* and the authorities discussed therein. In the joint liability conclave report dated 27 June 2025 of the liability experts, Mr Maybury said that "[t]he usual delineation for safety tasks between the ship personnel and the stevedores is the ship is responsible for ensuring the ship and its equipment are safe and fit for operations, while the stevedoring company is responsible for the safety of its workers during cargo operations”. Mr Maybury’s statement accords with the legal authorities.

50 The question of duty and breach is also governed by ss 5B and 5C of the *CLA*, which are in the following terms:

> **5B General principles**
>
> (1) A person is not negligent in failing to take precautions against a risk of harm unless:
>
> > (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
> >
> > (b) the risk was not insignificant, and

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

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the Court is to consider the following (amongst other relevant things):

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

(d) the social utility of the activity that creates the risk of harm."

5C Other principles

In proceedings relating to liability for negligence—

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

(b) the fact that a risk of harm 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 harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

Lay evidence about the incident

<u>The plaintiff's evidence</u>

51 The plaintiff relied upon her statement to the insurance investigator dated 16 November 2018; her evidentiary statement dated 17 December 2024; and her supplementary evidentiary statement dated 3 July 2025. She also gave evidence and was cross-examined at length. I carefully observed the plaintiff giving evidence and being cross-examined. I found her to be largely truthful. I formed the view that she was intelligent, articulate, and capable. Her evidence is as follows.

52 On 22 August 2018, at 9:00pm, the plaintiff commenced her shift. She was working in a gang of 10 to 12 stevedores. This gang was the first to start unloading the vessel berthed at Port Botany terminal. Prior to starting the work, the shift manager, Bobby Woods, told them that the vessel was difficult and that they should all be very careful.

53 As part of the unloading process, the stevedores were required to remove the lashing bars used to secure the containers and place them into designated portable stowage hooks.

54 At about 9:30pm or 9:45pm, the incident occurred while the gang were unlashing “three high” lashing bars. The plaintiff was partnered with Mr Todorovski. They were working on a transverse walkway at Bay 19/21. The width of that walkway was 60cm. The containers were secured by lashing bars. The lashing bars securing the containers at that location were the largest, and known as "three high" bars, meaning that they could be used to lash together three containers. The weight of each three-high bar was approximately 23kg. Although there is evidence that the bars weighed up to 30kg, the precise weight is not significant and I accept that they were about 23kg.

55 As the plaintiff walked from one container to the next, the portable stowage hooks were hungover on the handrail adjacent to her. They gave way causing the lashing bars contained within them to fall on her right foot and leg (see figure 8 for a photograph of the collapsed hooks and lashing bars).

56 The plaintiff was wearing steel cap safety boots and other personal protective equipment. She was trapped under about 30 bars for a number of minutes. Part of the incident was witnessed by Mr Todorovski, Travis Smith and Shane Doherty. Together they removed the bars from the plaintiff’s foot one-by-one. She was given first aid and was taken ashore by crane and conveyed by ambulance to Prince of Wales Hospital.

57 The plaintiff at T73.26-38 and T74.1-13 gave evidence about the details of the incident:

> “Q: Undoing the first panel you said there were about two or three containers in the panel?
>
> A: Yes
>
> Q: Sixteen bars, lashing bars altogether. I take it that when you take them down, screw the adjustable ends in, you take one end and he takes the other end and you put them in the rack and that's what you did on the first run that night?
>
> A: Yes.

> Q: You finished the first run that night hadn't you and he had some cleaning up to do and you walked to the next unit and you were standing there watching him?
>
> A: Waiting for him...
>
> …
>
> Q: While you were standing there waiting for him, the rack that you were standing next to collapsed?
>
> A: Yes
>
> Q: You hadn't put any bars in it?
>
> A: No.
>
> …
>
> Q: You hadn't put any bars in that one because you hadn't got to that workstation yet, you had been working in the one beside it?
>
> A: Yes. The container beside it, yes."

58 The shipowner does not accept the plaintiff's account of how the incident occurred.

Ratko Todorovski

59 The plaintiff also relied on the evidentiary statement of Mr Todorovski dated 11 March 2022. Mr Todorovski is an experienced stevedore. He worked at Port Kembla between 2004 and 2012, transferred to Port Botany in 2012 where he worked there until mid-2015. He then left the employer and returned in 2017, where he has remained since. He gave evidence and was cross-examined.

60 It is common ground that Mr Todorovski was working as the plaintiff's buddy on the night of the incident and that the plaintiff was still a fairly new employee at that stage.

61 He was familiar with the vessel and the complicated lashing bar plans and three high lashing bars required to secure the containers. He described modern vessels as having lashing platforms, which means that shorter lashing bars can be used.

62 On 22 August 2018, before they commenced lashing duties, the stowage hooks were full or almost full of lashing bars. He noted that generally, the ship's crew will have cleared the portable stowage hooks, placing excess bars in dedicated, purpose-built stowage spaces on the sides of the vessel on the main deck so that the lashing gang can place the bars that they remove from

the containers into the stowage hooks. As a consequence, a number of stowage impracticalities arise including that the bars cannot be stored to the sides of the narrow walkways as this represents a trip hazard, and the bars could not be placed in the dedicated stowage area on the main deck as that was below the level they were working on.

63 He recalled that at the time of the plaintiff's incident, he was disconnecting a lashing bar and putting it vertically on the deck, so he wasn't sure what exactly she was doing, only that she was nearby. He suddenly heard a crash followed by the plaintiff screaming, and when he turned around, he saw that she had been pinned against the opposite rail of the walkway. Her legs had been pinned under lashing bars which had fallen out of the stowage rack on the adjacent rail. She was clearly in a lot of pain and was screaming for the bars to be removed. Mr Todorovski, Travis Smith and one or two others immediately began removing the bars one at a time, not wanting to cause further injury to the plaintiff.

64 When the first aider arrived, the plaintiff was given one or two green whistles for pain relief. As she was in great pain and distress, a crane was organised to lower a work cage onto the vessel, and the plaintiff was taken ashore in that way. The fact that they removed the bars from the plaintiff's legs one by one is not in dispute.

65 In cross-examination Mr Todorovski explained at T184.43-48:

> "All the senior guys are, aware of this ship, and the - its notoriously for just safety trip hazards and, various rust and various - we were giving - we were giving a heads up about the ship, and its import, that its starting tonight, just, just to be aware that, that - what we are dealing with. That was it. It was a generalised, 'the Kota is back' chat I guess, if that makes any sense,"

66 He agreed that he was told that he had a lot of inexperienced supplementary employees who had no experience working on the vessel.

67 Mr Todorovski explained that the portable stowage hooks were holding lashing bars prior to the commencement of unloading. The collapse of the rack did not occur while another bar was being loaded. The rack collapsed because the stowage hooks could not support the load that they were holding. This is another subject to which I will return.

68 Mr Todorovski could not remember how many bars he placed into the rack before it collapsed. He estimated between four and seven bars (T185.39-186.31). He could not recall whether he put them in unassisted (T187.1).

Ryan Bellingham

69 The plaintiff also relied on the evidentiary statement of Mr Ryan Bellingham (Mr Bellingham) dated 7 July 2025. Mr Bellingham was the safety facilitator who performed the checklist for the vessel when it arrived in Port Botany on 1 November 2018 after the plaintiff's incident. He gave evidence and was cross-examined.

70 In about 2003, Mr Bellingham commenced work with the employer. He performed lashing duties for a period of about seven years and for the last 14 years, he has been designated as a grade 6 team leader. In this role, he carries out the role of a safety facilitator, which involves performing inspections of vessels and completing a pre-operations checklist before stevedoring operations begin.

71 The checklist completed on that day was annexed to his statement and is signed by Mr Bellingham and the chief officer of the vessel. The final page is signed by the employer's shift manager. Mr Bellingham recorded: "Lashing bar stowage hooks in walkways have been improved and properly fixed to safety railings".

72 On 1 November 2018, Mr Bellingham was aware that the plaintiff had been injured when a portable stowage hook holding lashing bars collapsed on 22 August 2018. At the time of the inspection, he sought to ensure that the shipowner had taken steps to provide more secure portable stowage hooks in the transverse walkways. When he conducted his inspection, he observed several new stowage hooks located in the transverse walkways. These new stowage hooks had been secured to the handrails with bolts; the bottom had a heavily reinforced steel section and rested on the walkway itself.

73 Mr Bellingham explained that the practice of the employer was to keep the walkways clear because of the trip and slip hazard presented by obstacles. As Mr Bellingham explained, stevedores engaged in lashing and unlashing have most of their focus and attention overhead (removing or putting up lashing

bars, undoing the turnbuckles that secure lashing bars and stowing the lashing bars in the hooks) and do not have a lot of time to look at where they are placing their feet.

74 There were several large permanent stowage hooks that sat flush on the main deck on either side of the vessel and were used to store lashing bars. Mr Bellingham stated that those stowage hooks were different to the hooks in the transverse walkways and were designed to store surplus lashing bars out of the way.

75 At T157.5, 157.30-47, 157.49-158.2 Mr Bellingham was asked:

> “Q: Lashing work performed by Patricks is performed in accordance with the standard operating procedure of Patricks?
>
> A: That's correct.“
>
> …
>
> “Q: If you go to "TB481" under the heading "vehicles", vessel safety, do you see that? Read to yourself paragraphs 4.22, 4.23 and 4.24. Are you familiar with those?
>
> A: That's right, that's right.
>
> Q: You're familiar with those?
>
> A: I am.
>
> Q: If the vessel is not safe for work, as at from stevedoring, the shift manager or the safety facilitator won't permit stevedoring work to take place, correct?
>
> A: Majority of the time.
>
> Q. Well it's all the time isn't it?
>
> A. Are you, are you referring to this vessel when it came into port?
>
> Q: I am just referring to stevedoring operations generally.
>
> A: That's, yes correct.”
>
> …
>
> “Q: You're in no doubt if the Patrick safety facilitator and/or ships manager was of the view that stevedoring operations could not be performed safely they had the authority to prevent work from taking place?
>
> A: Yes.”

76 At T159.41-44:

> “Q: Well this particular ship was said to have a large number of lashing bars you understand that to be so?
>
> A: This particular shipping line was renowned for having more lashing gear than most other vessels.”

77 At 174.21-28 Mr Bellingham stated:

> "Q: when they put on board a boat (referring to the lashing crew) such as the Lambang which you have already identified as a difficult boat because of the nature of the ...
>
> A: Kota of vessels in general .
>
> Q: Kota vessels in general simply because there is a lot of lashing material on them?
>
> A: Yes."

Troy Dunn

78 The plaintiff also relied upon the unsigned statement of Troy Dunn (Mr Dunn) dated 15 November 2018. Mr Dunn had died by the time of the trial.

79 Mr Troy Dunn was employed as a permanent stevedore by the employer. On the day of the plaintiff's incident, Mr Dunn was working as a tele-op. He had heard about the plaintiff's incident and saw her after she had been brought ashore.

80 He was familiar with the vessel that the plaintiff was injured on, having undertaken lashing duties on it numerous times over just under a decade. Mr Dunn described the vessel as "a bit run-down" and a hard ship to do lashing on because of the number of bars required to secure each container.

81 Mr Dunn also explained that stevedores would usually store the lashing bars in stowage hooks. Previously, there had been an issue regarding the lack of sufficient stowage hooks to store the bars used on the ship, with stevedores having to push them to the sides of the walkways. This represented a trip hazard to the stevedores. The Union Safety Committee in Port Botany raised this matter with the employer and required the vessel to provide more portable stowage hooks.

82 Following the plaintiff's incident, Mr Dunn boarded the vessel and observed the portable stowage hooks that had collapsed and caused the plaintiff's injuries. The portable stowage hooks were painted, and the end had opened under the weight of the bars. He observed that the metal was of lighter weight and thinner gauge than the existing black painted stowage hooks on the vessel, which were sturdier and about three times the thickness of the new hooks. The newer hooks also did not have a safe weight limit stamped on them.

83 Following the plaintiff's incident, all work stopped for several hours while safety facilitator, Michael Upcroft, investigated. All inadequate portable stowage hooks were removed and the vessel was required to weld steel rods into the walkway deck, rising vertically up the railing, which provided an ad hoc means of storing the bars without obstructing the walkway.

84 Mr Dunn explained that during the shift after the plaintiff's incident, a second loaded portable stowage hook, failed and collapsed. The plaintiff also says that she was informed that a similar incident, involving the collapsing of a lashing bar hook occurred the day after her incident.

Marie Gibbs

85 Marie Gibbs (Ms Gibbs), the employer's 'Environmental, Compliance & Sustainability Manager', prepared a 'Factual Incident Report' (dated 7 September 2018, 15 days after the incident) and described the incident as follows:

> "**1. Incident Description**
>
> On Wednesday, 22 August 2018 at approximately 20:15 hrs the M.V. KOTA LAMBANG came alongside Patrick's Berth 7, and a vessel inspection was conducted by the duty safety Facilitator.
>
> At the pre-shift meeting the duty shift manager held a special tool box with the lashers prior to unlashing as many being supplementary employees (employed Nov-17) that had no experience working a Kota vessel. The Kota Lambang [the vessel] had arrived alongside with no cargo port and starboard on hatch covers, Sydney discharge centre hatch cover only on 21/23 deck, and 17/19 deck had Sydney discharge on port and starboard hatch covers.
>
> The shift manager and lashing team leader arranged for the lashers to work in small groups of four in order to reduce the congestion from unlashing and removing 6 bars per box. As most of the portable lashing bar racks were full of lashing bars, the shift manager instructed the lashers to use the portable stowage racks provided and to place any excess bars to one side of the walkway to remove the risk of trip hazards. The lashers boarded the vessel and began unlashing.
>
> At approximately 21:45 hrs during the course of unlashing Bay 19/21, a lasher working in a group with three other lashers, unlashing and placing the removed lashing bars into a nearby portable lashing bar rack hung over a handrail, when this rack and another portable lashing bar rack supporting the other end of the lashing bars (each forming part of the vessel equipment) collapsed. The lashing bars fell out of the portable lashing racks and rolled onto the lasher's right leg/foot pinning their leg between the lashing bars and the transverse walkway.
>
> **2. Incident Response**

The lashers working with the injured lasher quickly started removing the fallen lashing bars pinning the lasher's right leg.

The lashing team leader was alerted of the incident and contacted the Shift Manager reporting two portable lashing bar racks had given way causing lashing bars to fall onto a lasher's right leg. The shift manager directed the onsite First Aider go out to the vessel, then instructed security to call for an ambulance. On the arrival of the incoming shift First Aider the shift manager asked them to go to the vessel to assist the other First Aider.

The shift manager went out to the vessel, along with the Safety Facilitator assessed the area, with adjacent space available the decision was made to remove the injured worker from the vessel in the work cage. The crane driver transported the injured worker via the work cage from the vessel to the wharf. The injured worker was placed in the terminal's ambulance and taken to the Admin Tower, initially treated by paramedics and then transported by NSW Ambulance to the Prince of Wales Hospital.

Incident Investigation Findings

a. Two portable lashing bar racks (Type 3 – new generation) simultaneously collapsed. These lashing bar racks form part of the vessel equipment.

b. The two portable lashing bar racks (Type 3 – new generation) associated with the incident are constructed from approx. 50mm flat bar and reinforced on the internal mouth with approx. 10mm steel round bar. By comparison, earlier racks of that type which were reinforced with approx. 20mm steel round bar.

c. Vessel supplied insufficient number of empty lashing bar racks available for the number of lashing bars being removed for the Sydney discharge. The vessel arrived with many of its lashing bar racks [hooks] full due to its heavy lashing plan of 6 bars per box (i.e. 4 long lashing bars and 2 short lashing bars).

d. The current vessel safety inspection (extracted from the Code of Practice Managing Risks in Stevedoring (2016), Appendix C) for vessels who have had a prolonged absence from Patrick's terminal does not include a process for the safety facilitator to confirm if any material modifications to the vessel or equipment have been made to the area(s) to be worked by stevedores (up and below deck) and/or review of a marine surveyor's report.

e. The Port Botany Terminal Risk Register (4 - PBT_REG_04_01_v1) - 17-Feb-17, includes - "Manual handling injuries from incorrect stowage of lashing bars, incorrect method of work, being struck by lashing bar or equipment, falling debris, vessel design" - controls do not specifically address failing portable lashing bar stowage racks or hand railing failing.

Root Causes

1. The engineering design / construction of the portable lashing bar racks [portable stowage hooks] (type 3) appears to have insufficient steel reinforcement (i.e. approx. 10mm steel round bar) compared to the earlier racks [portable stowage hooks] (type 1) which are reinforced with double the thickness of steel (i.e. approx. 20mm steel round bar).

2. Vessel owner provided insufficient number of empty lashing bar racks [portable stowage hooks] for the number of lashing bars being removed for the Sydney discharge.

> 3. The current vessel safety inspection process, for vessels with a 3 to 5-year absence, does not include confirming with the vessel owner if any material modifications to the vessel or equipment have been made in the areas to be worked by stevedores, and/or the review of a marine surveyor's report."

86 The Factual Incident Report identified two important concerning causes. Firstly, the engineer design/construction of the two portable stowage hooks (Type 3 – new generation) appears to have insufficient steel. Secondly, the shipowner provided an insufficient number of empty portable stowage hooks for the number of lashing bars being removed for the Sydney discharge as the vessel arrived with many of its lashing bars full.

Expert evidence about the stowage hooks and stevedoring

87 All three parties relied upon expert liability evidence. The plaintiff relied on Mr David Dubos (Mr Dubos) and his reports dated 16 May 2022, 7 March 2025 and 23 May 2025. The shipowner relied on Captain Roger King (Captain King) and his report dated 5 February 2025. The employer relied on Mr Joel Maybury (Mr Maybury) and his reports dated 30 August 2018, 26 March 2025, 8 May 2025 and 19 May 2025. The experts produced a joint liability conclave report dated 27 June 2025 (Joint Liability Report) and also gave concurrent evidence in Court (Captain King dialled in via AVL from India). During the conclave, the experts were mostly in agreement with each other.

88 The evidence of each expert witness was objected to by each of the other parties. My rulings are set out in *Jackson v Pacific International Lines (Private) Limited (No 1)* [2025] NSWSC 922. In that Judgment, I provided a detailed summary of the three experts' skill, experience and qualifications, and made evidentiary rulings. To avoid repetition, I refer to, without repeating in great detail, that summary of their skills, experience and qualifications:

(1) The plaintiff's expert, Mr Dubos, is a safety engineer consulting in industrial management with qualifications in safety science, ergonomics and management.

(2) The shipowner's expert, Captain King, is a Master Mariner and has served in various ranks on a range of blue water vessels and is very experienced with the attempted salvage and wreck removal of containerships.

(3) The employer's expert, Mr Maybury, has worked as a stevedore and also has experience consulting as a marine and cargo surveyor. He was also the only expert to inspect the ship on 23 August 2018, after the

incident, but did not inspect the portable stowage hooks that failed as they were not made available to him.

89 As I stated earlier, ultimately the experts were largely in agreement with each other when they gave conclave evidence.

<u>The stowage hooks</u>

90 There were two general methods of storing lashing bars on the vessel: permanent racks (figure 2) and the portable stowage hooks. The portable stowage hooks were the property of the shipowner and were suspended from the top rail of the walkway railing. Permanent stowage racks were located aligned fore and aft on each side of the main deck.

91 

Figure 2: Permanent stowage racks

92 On the night of the plaintiff's incident, there were three types of portable stowage hook systems present on board the vessel. Two were of an older and different appearance to the type associated with the plaintiff's incident (figures 3 and 4). The portable stowage hooks that failed (see figure 1) came from the delivery of 30 hooks requisitioned by the shipowner on 1 August 2018 and supplied to the shipowner in Singapore, as stated, on about 10 August 2018, approximately 12 days before the plaintiff's incident occurred, and were installed on the vessel on 11 August 2018. This is common ground.

93 

Figure 3 (CB320): Older type of portable stowage hook

94 

Figure 4 (CB321): Older type of portable stowage hook

95 The shipowner ordered the new portable stowage hooks through a general supplier, AMOS (as stated above). The order included other items such as hand soap dispensers and paper towels. The supplier was not tasked with providing any input towards the design or construction of the hooks. The supplier of the portable stowage hooks is not a party to these proceedings. The mill test certificate demonstrates that the hooks the shipowner requested had

been tested "with satisfactory results" and met the requirements of the "material specification".

96 The only evidence pertaining to the order of the hooks is a document entitled 'ROB Statement cum Store Requisition' (Figure 5).

97

Check List	VESSEL	SERVICE CODE	DEPT	SUPPLY DATE	SUPPLY PORT	REPORT DATE	APPROVED BY(Name)	REQN NO
LAMGDE18011	LAMG-Kota Lambang	AA1-TORRES LOOP	DECK	9-Aug-18	SIN-SINGAPORE	1-Aug-18	CAPT LIYANAGE DEEI	11

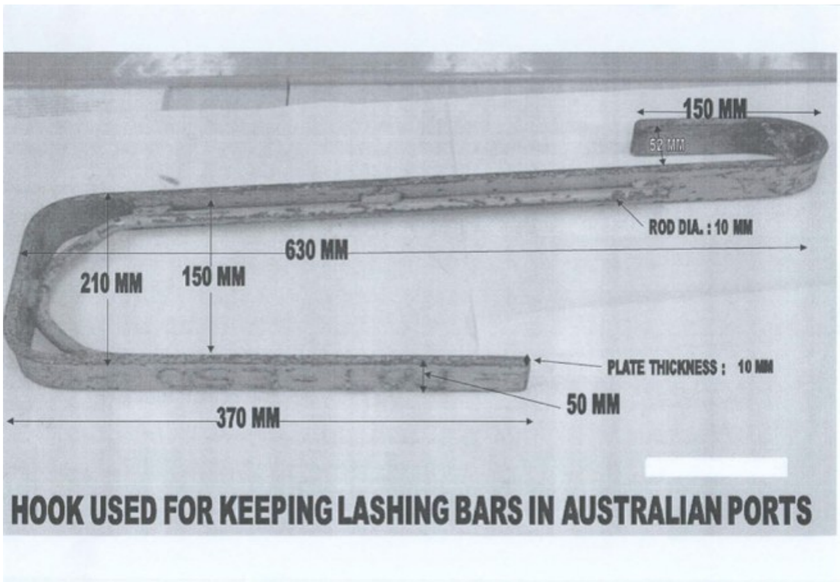
N/B Pls key in the products reqd on a one-item-one-line basis using CAPITAL letters with one spacing between each word WITHOUT commas

S/NO	ISSA CODE	PRODUCT DESCRIPTION	ROB	UOM	QTY REQUIRED	REMARKS	REQSTD BY(Rank)
							CO
1		HAND DOAP DISPENSER(500ML)	0	PCS	15	For Australian port	
2		PLASTIC PAPER TOWEL DISPENSER	0	PCS	5	For Australian port	
3		PAPER TOWEL (6'S PER CASE) FOR PLASTIC PAPER TOWEL					
4		DISPENSER	0	CSE	3	For Australian port	
5	231101	Chains for General Use	0	MTR	100	For deck catwalk safety guard chains	
6		Forged Chain Shackles G210,S210 Nominal shackle size 1/4 inch	0	PCS	50	For Connect deck catwalk safety guard chains	
7		Hook for securing lashing bars	45	PCS	30	For hanging lashing bar in Australian ports(photo attached)	
8						ROB SOME ARE WATSED DUE TO AGE	

98 Figure 5 'ROB Statement Cum Store Requisition'

99 The reference to “45” is unexplained, but ‘ROB’ stands for ‘remaining on board’ and it seems to mean that there are 45 other portable stowage hooks on board the vessel. ‘UOM’ stands for ‘unit of measure’ (‘PSC’ = ‘pieces’). The requisition to the supplier attached no documents other than the ‘photo attached’ (figure 6). As visible in figure 5, the requisition contained included scant information:

> “Hook for securing lashing bars... ROB 45… quantity 30… For hanging lashing bar in Australian ports (photo attached)… ROB SOME ARE WATSED DUE TO AGE.”



100

101 Figure 6: image accompanying the requisition for the portable stowage hooks

102 The ‘Delivery Order’ from the supplier dated 10 August 2018 includes:

> “**OFFER: CHINA**
>
> HOOK FOR SECURING LASHING BARS (PHOTO ATTACHED)
>
> **OFFER : MILD STEEL HOOK FOR SECURING LASHING BARS. 'S' shape L370/630/150 x W210/52 using W50 x THK10 plate c/w 1 coat of primer paint finish
>
> ~~DELIVERY : 4-5 DAYS & NON-RETURNABLE**”

103 The delivery order bears the “Signature and Stamp” of the Chief Officer.

104 The portable stowage hooks as supplied can be seen in figure 1 above and in figure 7 below.

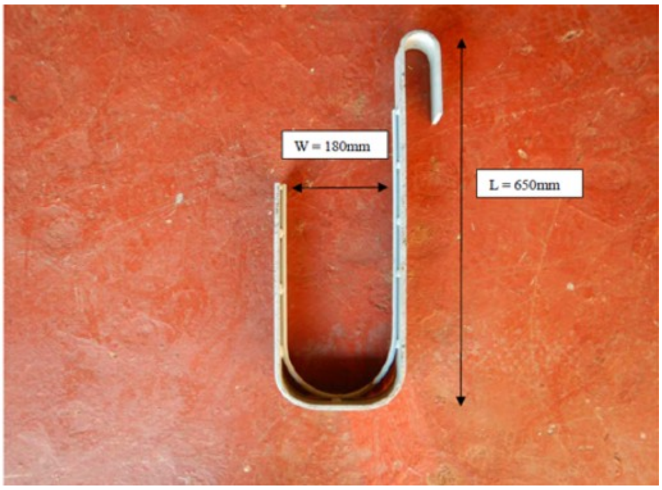
105 

Figure 7 (CB321): Portable stowage hook of the kind that failed

106 As to whether portable stowage hooks as supplied matched the description of the hooks specified in the requisition and/or the delivery order, the experts agreed that they did not match. They agreed that "the item supplied is not consistent with the dimensions in the requisition order, namely the width of the jaw" with 150mm being specified in the requisition order and the hooks supplied measuring 180mm with the result that more lashing bars could have been placed in the hook (T226.12-22).

107 The experts had similar answers to whether there were any material differences between the newly fabricated portable stowage hooks and the existing hooks.

108 The experts largely agreed that the material differences between the newer hooks supplied pursuant to the requisition order and the existing hooks

included their dimensions (the newer hooks being wider than the existing ones) and their construction (the newer portable stowage hooks were not as reinforced and seemed to be constructed with a thinner gauge steel). The use of thinner gauge steel accorded with view of Mr Dunn who observed that the metal was of lighter weight and thinner gauge that the existing hooks on the vessel, which were sturdier and about three times the thickness of the new hooks. The newer hooks also did not have a safe weight limit stamped on them.

109 They agreed that the new stowage hooks were not manufactured in accordance with the specifications in the photograph titled 'Hooks used for keeping lashing bars in Australian ports' in the requisition.

110 In terms of how, to the extent that the stowage hooks were not manufactured in accordance with the requisition order, this could have contributed to the portable stowage hooks' failure, Captain King said that the greater width of the new portable stowage hooks meant it had a greater capacity to hold more lashing bars and potentially, impacted on their ability to bear the weight actually placed on them. He also noted that determining the correct specifications is not within the skillset of the average ship's officer. Mr Dubos and Mr Maybury (with the qualification that this question would be better answered by an engineer), pointed to the insufficient reinforcement and adequate steel strength that likely meant the hooks were not fit for purpose.

111 The experts disagreed as to the differences in design or specification of the lashing hooks supplied as compared with the diagram in figure 6. Mr Maybury declined to answer on the basis that it was a question for an engineer. Captain King believed that the average ship's officer would not be trained to determine whether what was supplied was fit for purpose and that the chief officer and company at a higher level, would have made a reasonable assumption that what was ordered was supplied. Mr Dubos on the other hand thought that this difference would have been easily identifiable. During the conclave, they ultimately agreed that neither the stevedores nor the ship's officers would have been able to detect the difference between the hooks as specified and the

hooks as provided by a visual inspection alone (T256.40-48). I accept and agree with this evidence.

112 As to why the hooks did not hold the lashing bars in position, both Mr Dubos and Mr Maybury agreed that the hooks did not restrain or hold the lashing bars in position because they were not fit for purpose and inadequately constructed.

113 When giving concurrent evidence, Captain King identified the weld, where the rod bar had detached from the bottom of the U bracket (figure 7) (T213.37-45). Mr Maybury also agreed that the top rack in figure 7 appeared to depict a weld failure, while Mr Dubos agreed that the reinforcing bar had come away from the main part of the rack but was not certain that that was because of a weld failure specifically (T214.30-215.26). When Mr Maybury (the only expert who boarded the vessel after the incident) attended the vessel on 23 August 2018, he did not inspect the hooks that failed as they were not made available to him (T215.30-37). Both Mr Dubos and Captain King also confirmed that they only saw photographs of the portable stowage hooks (T216.7-14).

114 

Figure 8: the Portable Stowage Hooks Involved in the Incident

<u>The shipowner's responsibility with respect to the portable stowage hooks</u>

115 The experts agreed that the shipowner should have taken steps that were reasonably available to it prior to ordering the hooks to ensure that the manufacturer was placed in a position to produce hooks that were fit for

purpose. Both Mr Maybury and Mr Dubos highlighted the need for the shipowner to have provided detailed specifications.

116 Mr Maybury and Captain King referred to the shipowner conducting a risk assessment. When giving concurrent evidence, Mr Dubos and Mr Maybury agreed that given the shipowner requisitioned the portable stowage hooks, it was in a position to inspect what they had received to see if it matched the specifications (T262.6-14). Captain King agreed that it was in a position to do so but queried whether or not that would actually be done (T262.33-37).

117 During the hearing, counsel for the plaintiff asked the liability experts whether, if the shipowner had provided the proper specifications to the manufacturer of the portable stowage hooks, it would have been able to obtain hooks that had been fit for purpose. Captain King gave evidence that he did not know what the process involved was but ultimately agreed that if everything had gone well, a portable stowage hook that was fit for purpose would have been manufactured and supplied for use on the vessel (T208.42-209.9). Both Mr Maybury and Mr Dubos also agreed that if the proper specifications had been provided, then a fit for purpose stowage hook could have been provided (T209.22-31).

118 There was some marked difference of opinion as to whether an engineer should have been engaged by the shipowner to provide specifications about the stowage hooks to AMOS. Captain King was of the opinion that if his suggested risk assessment was conducted by both defendants prior to manufacture of the hooks, then an engineer may have been engaged to work out the required specifications, but that this would have been a secondary consideration to the question of whether hanging lashing bar hooks from the handrails on the walkways was in fact the best solution. Captain King also opined that on the information they had, it was unclear whether an engineer had been engaged to draw the original design in the requisition. Mr Dubos view was that an engineer should have been engaged and that either the staff of the shipowner or some other appropriate person or firm should then have provided detailed specifications that proffered their opinion as to what specifications should be included.

119 The liability experts provided comment as to what reasonable measures were available to the shipowner, if an engineer had been engaged to document the appropriate specification for the fabrication of the hooks, to bring those specifications to the shipowner and ensure compliance with those specifications. In particular, they commented on whether the specifications would have likely included a requirement for strength testing and/or certification before delivery to the shipowner. In terms of whether the shipowner should have informed the fabricator of the relevant specifications and whether strength testing and/or certification would have been required, Captain King said that the hooks should have been able to carry the specified "number of lashing bars of the longest and heaviest dimensions and weight". He was not convinced in the effectiveness of a strength test alone, instead suggesting "weld verification using non-destructive" means as well as the need to simply "over engineer" the hooks so they could withstand both static and dynamic loading. Mr Maybury also suggested that some form of strength testing was required prior to delivery and that these specifications should have been provided to the manufacturer in writing.

120 In relation to the question of if an expert had been engaged, what information would likely have been required from the shipowner to design a hook that was fit for purpose, the experts agreed that an engineer would have required information as to the number and weight of the lashing bars to be stored. Mr Dubos and Mr Maybury agreed that information could be gleaned from examining the existing hooks in situ and speaking directly to staff. While the experts agreed that some form of checking that the portable stowage hooks complied with the specification should have been carried out, from the evidence of the liability experts have given, it is my view that an engineer's inspection was not essential.

<u>The employer’s responsibility with respect to the portable stowage hooks</u>

121 In relation to whether it is standard practice for stevedores to undergo training on the stowage of lashing bars in portable stowage hooks, Mr Maybury assumed that stevedore training would include things like keeping a tidy working environment and how to identify and address hazards. Captain King was not aware of any specific stevedoring training for risks associated with the

portable stowage hooks. In contrast, Mr Dubos said that safety training related to regular work tasks was required and should include housekeeping, keeping walkways clear, noting trip hazards and if applicable, the safe working load for stowage bars.

122 The experts were largely in agreement that a visual inspection by the employer prior to the plaintiff commencing work would not have revealed a defect or that the portable stowage hooks were not fit for purpose. Mr Maybury said that an engineering assessment would have been required to detect the structural inadequacies of the hooks, not a visual inspection. Captain King agreed, adding that like the ship's crew, the stevedoring crew would not be able to determine whether the hooks could support the weight of the lashing bars placed in them. Mr Dubos said that a comparison of the existing and new hooks could have revealed some differences, but that this could not be reasonably expected given the number of other safety inspection matters to which the stevedores had to attend. Mr Dubos also expressed the view that after the employer's recommendation to clear the walkways, it was the shipowner in the first instance that had to provide safe equipment on its ship, and to ensure that portable stowage hooks were empty prior to the start of unlashing operations, and this accords with the opinion of Captain King.

The failure of the portable stowage hooks

123 The proximate cause of the plaintiff’s injury was the failure of the portable stowage hooks. Liability depends upon factual findings that are made as to why the portable stowage hooks failed. The parties’ submissions as to the reason for the failure of the portable stowage hooks are as follows.

<u>The plaintiff’s submissions</u>

124 The photographed hook (figure 6) bears no resemblance to the older ‘hooks’ that were in use on the vessel. The older hooks appear to be reinforced differently and to be more robust. The older hooks have an opening of 120mm as opposed to the opening of 180mm referenced in the photograph.

125 A glaring deficiency in the order is the shipowner’s failure to specify the strength of the steel to be used in the construction of the new portable stowage hooks.

126 There are two rogue documents in evidence that bear no relation to the subject hooks. They are not referred to in either the Requisition or the Delivery Order. Both are mill test certificates addressed to Chye Hin Hardware. They come from different companies. A single item is highlighted in each of the certificates. One of the certificates pre-dates the order by 4 ½ months. The other is undated. Without reference to the Requisition or the Delivery Order the certificates refer to the following:

(1) The certificate dated 26 March 2018 from FENG HSIN STEEL CO., ITD. Cert. no. 1071161-A2-1 identifies the customer as CHYE HIN HARDWARE PTE LTD; Spec. ASTM A36 MODIFIED KILLED STEEL. The highlighted product appears to be 25 x 6 metre lengths of 10mm mild steel round bars with unexplained test and analysis results.

(2) The undated certificate from H.L. STEEL INTERNATIONAL CO, LTD refers to HOT ROLLED FLAT BAR 50mm x 9mm with unexplained chemical composition and physical yield and tensile strengths.

127 There is no evidence tying the certificates to the requisition or to the supply. Their relevance or significance is unexplained. The experts have prepared the Joint Liability Report and given evidence without reference to the certificates. I agree with the submissions as to the lack of providence of the two documents. I also accept that the liability experts did not take them into account so they do not affect their reports.

128 Upon the shipowner receiving the hooks no consideration appears to have been given as to whether the hooks would be fit for purpose. They were simply installed on the vessel.

129 Unlike Mr Dubos or Captain King, Mr Maybury had the advantage of attending the vessel and examining the three types of portable stowage hooks utilised onboard. Mr Maybury's opinions in the Joint Liability Report of 27 June 2025 largely mirror that which he expressed in his independent report of 30 August 2018. Specifically, that:

> "[t]he failure of the lashing rack [the portable stowage hooks] can be attributed to the unfortunate oversight of applying insufficient steel reinforcement and subsequently lowering the capacity of the racks to withstand the required load."

130 The contemporaneous photographs of the failed portable stowage hooks also demonstrate that there was a lack of reinforcement.

131 Further, as previously stated both Mr Dubos and Mr Maybury agreed that the hooks failed because they were not fit for purpose and inadequately constructed.

132 While Mr Maybury agreed that both failed hooks appeared to be similar, he noted that the weld was intact in one of the hooks that failed (T214.49-50).

133 The two portable stowage hooks that failed were part of a delivery of 30 requisitioned stowage hooks. Apart from the two that failed, Mr Maybury said that the remaining 28 hooks did not appear to have been utilised. After the incident, these 28 portable stowage hooks were removed from the ship. In cross-examination, the following exchange took place at T221.23-38:

> "WITNESS MAYBURY: Based on my experience on board the vessel at the time, the racks that I inspected, being similar to the one involved with the incident, they were more recent than the other in appearance. They also, as you can see in the photo, there, there's no or limited markings on them, and it's suggested at the time that they were not actually in use.
>
> PARKER: Well, you don't know that one way or another, you're just assuming that aren't you?
>
> WITNESS MAYBURY: At the - like I said, at the time of my inspection, it looked like they had not been in use. As you can see—
>
> PARKER: Well they'd only been on—
>
> WITNESS MAYBURY: As you can see in my photo in the Gibson and Minto report—"

134 The shipowner did not adduce any evidence to the contrary.

135 The appearance of the hooks should have been sufficient to put the shipowner on notice that the hooks might not be suitable for use. In the Joint Liability Report, the experts were largely in agreement about the material differences between the newer hooks supplied pursuant to the requisition order and the existing hooks.

136 Mr Maybury answered to question 5 of the Joint Liability Report as follows:

> "The older hooks visually appear with thicker reinforcement, stronger construction and a large gauge steel utilised. There are material differences you can only go with based on appearances."

137 Similarly, Captain King observed in answer to question 5 of the Joint Liability Report:

> "The newly supplied racks [the portable stowage hooks] from Singapore per the requisition order appear to be wider in the jaw than the existing rack. The bracing of the newer racks uses rod rather than flat bar. Visually they are different dimensions and different construction methods."

138 Mr Dubos stated that in comparison with the existing hooks on the vessel, the newly requisitioned ones were of a "flimsy nature" (T247.39-42).

139 Pictured below on the left-hand side is the new rack, collapsed, and an example of the older rack, intact:

140 

Figure 9 Collapsed new rack alongside intact old rack

141 As with the requisition, the shipowner did not adduce any evidence in relation to the receipt and installation of the hooks. Both Mr Dubos and Mr Maybury agreed that given the shipowner requisitioned the stowage hooks, it could inspect what they have received to see if it matched the specifications (T262.6-14).

<u>The shipowner's submissions</u>

142 The small but material difference between the hooks as specified and the hooks as supplied was not readily detectable by visual inspection (T.254.6-22). It cannot reasonably be suggested that the shipowner should have measured the hooks before taking them onboard because a purchaser of goods expects to receive what they ordered, especially when the goods supplied visually match the description of the order (T256.29-256.48).

143 There is no expert evidence as to whether the provision of racks that were not to the shipowner's specification by the supplier was a causal factor in the incident. Nor is there any evidence that the racks would not have been fit for purpose if they had been supplied to the specifications the shipowner reasonably believed it was receiving.

144 Mr Maybury and Mr Dubos have each ventured that the racks appeared flimsy and must have failed for that reason. Those opinions should be given no weight. Both experts have admitted they don't have engineering qualifications and that the question of the strength of the racks and why they failed ought to be answered by an engineer. Both Mr Maybury and Captain King accepted these questions are not amenable to layman's common sense. Mr Dubos faintly and unpersuasively cavilled with that proposition (T246.48-247.50).

145 All three liability experts agreed that the suitability of the racks to bear the weight of the lashing bars can't be determined in the absence of an engineering report (T253.42-254.4). All three experts agreed they do not know what weight or what number of bars would have caused the racks to collapse (T245.30-245.44).

146 There is no admissible evidence that would enable the Court to assess whether the new racks were or were not fit for purpose. At its highest, the evidence establishes that two of the 30 new racks received on about 10 August 2018 failed. There is no admissible evidence about the suitability of the other 28 racks that did not fail. Indeed, the evidence shows those racks fulfilling their intended purpose. There is a photograph of the new lashing racks supporting a significant number of lashing bars at CB 280 and 403. Conjectural statements that the steel was not of sufficient dimension, or the hook was not reinforced correctly, or the subject hooks were not as robust as those of earlier generations should be disregarded as the speculation of unqualified persons.

147 There is no evidence that would enable the Court to form a view on whether the racks specified by the shipowner, as distinct from the racks received from the supplier, would or would not have been fit for purpose.

148 This is an important issue that should not be overlooked. The shipowner requested and, from the delivery slip, had a reasonable basis to believe it had

received racks that met the specified dimensions. Its conduct should be evaluated according to that reasonable belief. Viewed through this lens, the plaintiff bears the onus of establishing that the hooks would have failed if they were to the specification the shipowner ordered and was told it was receiving. The plaintiff has plainly failed to discharge that onus. Factual causation is not made out.

149 The most persuasive evidence regarding the cause of the incident is a defective weld found in one of the racks. When the weld failed, the load shifted entirely onto the remaining hook, which then collapsed. Photographs of the faulty weld appear in Captain King’s report (CB278); unlike other new hooks (CB276), this weld had failed. All liability experts agreed that the image at CB278 shows the defect (T213-215). The defective weld was not detectable via visual inspection. It has not even been established that an engineering assessment prior to the incident would have located the defect.

150 On 20 August 2018, the vessel arrived in Brisbane where it was unloaded by the employer's workforce. K Garland, an employee of the employer, completed the employer’s standard form Pre-Operation Inspection Checklist before the vessel was unloaded. The checklist recorded:

(1) excess lashing gear had not been correctly stowed;

(2) excess lashing gear was on walkways from previous ports;

(3) the lashing gear was in good condition; and repairs were urgently needed on most transverse walkways in particular bays 13, 15, 17, 19, 21 and 59.

151 After 20 August 2018, the vessel departed Brisbane and sailed for Port Botany.

152 On 22 August 2018 the vessel berthed at Port Botany.

153 Mr Dylan Little (Mr Little), the employer’s Safety Facilitator, performed the pre-work safety inspection and noted:

(1) the areas of the ship to be accessed by the stevedores were safe and that the arrangements on board the ship complied with the provisions of Marine Order 32 and of the Code;

(2) the "ship presents tidy" with "lashing hooks in the traverse walkway";

(3) no need for repairs was identified.

154 On arrival in Sydney, Mr Little did not note the presence of lashing gear on the walkways. It follows that this was rectified before the ship's arrival at Port Botany. After completing the inspection, Mr Little entered the ship's office and spoke to the Chief Officer, Liu Xuegang. He told the Chief Officer "he was happy with the ship's present condition" and "was happy that the lashing bars were hanging in the transverse walkway, as that would be easy for the stevedores to lash the containers.".

155 On arrival at Port Botany the stevedoring foreman noted the hooks were full or nearly full. On the balance of probabilities, all or most of the new lashing hooks purchased in Singapore were used in Brisbane and loaded with unlashed bars at that location. The new portable hooks then remained loaded for the duration of the voyage between Brisbane and Port Botany.

156 These propositions ought to be accepted for three reasons. First, the portable stowage hooks had only been purchased 10 days prior in Singapore. As a matter of logic, they could not have been loaded until the ship was unlashed at the next port, being Brisbane. Secondly, the employer's Factual Incident Report dated 7 September 2018 identified that most of the portable lashing bar hooks were already full of lashing bars before unlashing work began at Port Botany (employer factual investigation). The Factual Incident Report also recorded that a direction was given to the stevedores to "place any excess bars to one side of the walkway to remove the risk of trip hazards." There would have been no need to give that direction if other portable hooks were available onboard; the inference being they were all in use. Thirdly, Mr Ratko Todorovski, the plaintiff's co-worker, observed that "the stowage hooks which I saw were full, or close to full, with lashing bars before we commenced [unlashing]."

157 The new lashing hooks purchased on or about 10 August 2018 did not fail when loaded in Brisbane or during the voyage between Brisbane and Botany. There were no prior incidents that ought to have made the shipowner aware of the risk of failure.

158 The process of unloading containers from the vessel was controlled by the employer as the stevedoring firm that operates the container terminal.

159 The Safety Facilitator is required to bring safety issues to the attention of the ship's officers so that corrective action can be taken before unlashing begins. The stevedoring firm is entitled to refuse to unload the vessel until safety issues have been rectified (T231-233). The obligation to carry out the Pre-Operation Inspection rests with the stevedoring firm under the Code. The employer had its own checklist that was modelled on the Code.

160 The employer reserved the right to refuse to unload a vessel under its Standard Terms and Conditions (Exhibit D1-4, Term 3.2 (o)).

161 Once the vessel has been cleared as safe for unlashing, the ship is turned over to the stevedores and their work area becomes an exclusive zone (T233.20-34, T234.44). The unlashing work is then done by a highly trained workforce of expert stevedores. The stevedores need to be experts because the work can be hazardous (T234.40-235.15). The ship does not supervise or play an active role in the unlashing work.

162 Captain King said:

> "The Master and Deck Officers in charge of Port Watchkeeping have a variety of tasks and responsibilities to undertake to ensure the overall safety of the vessel. These tasks do not include the unlashing of containers. In fact, in Australia this work is preserved for the stevedores under maritime union rules as is cargo operations under section 94 of the *Navigation Act 2012*. The supervision of individual stevedores undertaking unlashing operations is not the role of the shipowner, Master or Deck Officers but one for the terminal management and operations team".

<u>The employer's submissions</u>

163 Mr Maybury as a consequence of his training, experience and his inspection of the vessel the day after the incident, is the most appropriate expert to volunteer an opinion. I agree.

164 At T199.50 Captain King agrees that "There seems to be some history in Australia of using those racks".

165 At T209.22-25, Mr Maybury gave evidence:

> "Yes, in my opinion, if there was proper specification, load bearing capacity, the information, such as a technical drawing and specifications with tolerances, and some testing done, yes a more suitable fit for purpose lashing rack could have been provided."

166 At T225.19 Mr Maybury agreed that the opening of the mouth of the hook was wider than specified and this meant that more bars could be placed in the hook.

167 In his report of 30 August 2018, Mr Maybury said that the hook provided bore no relationship to the other hooks on board as a visual appearance of the hook when compared to the other two shows that it is less robust.

168 At T225.8 Mr Maybury indicated that the finished hook was different from the diagram provided to the manufacturer. He also agreed that the quantity of bars that were required to be removed if stacked on the transverse walkway would have amounted to a tripping hazard.

169 The root cause of the plaintiff's injury was the shipowner's failure to provide stowage hooks similar to the photos that were provided and those that were supplied were not fit for purpose. That inappropriate stowage hooks installed by the shipowner became part of vessel and created an unsafe place for the plaintiff to work. The shipowner did not request the appropriate hooks be provided in accordance with the photos. Rather it was content to order and install hooks of an inferior quality.

170 In November 2017, the plaintiff was employed by the employer as a supplementary employee to work as part of a lashing team. She gave evidence that she was given induction training for four days when she commenced working for the company in November 2017.

171 The employer submitted that there is no doubt that the plaintiff received thorough training, and her activities were witnessed by a supervisor. At T74.15-42, the plaintiff was questioned in the following way:

> “Q: One of the aspects of working at Patricks with the ships and taking down the lashing bar was it had to be tidy.
>
> A: Yes
>
> Q: They emphasised, that, that you had to keep a clean workspace to avoid tripping hazards, and that's what you had in mind on that night, that's correct?
>
> A: Yes.
>
> Q: If there had been a problem and you weren't happy with the conditions, you would have reported to one of the senior fellows there and said, ‘look, this is just not safe. There are too many lashing bars in the hooks.’

A: Yes.

Q: Because it's a very safety conscious employer, isn't it?

A: Yes.

Q: They take great pains to train you in first aid, safety?

A: Yes.

Q: You're nodding, you've got to answer.

A: Yes yes.

Q: They stress that if you're not happy with what you're doing, report it to a senior person?

A: Yes.

Q: ... and they'll intervene on your behalf?

A: Yes."

172 Mr Todorovski, the plaintiff's co-worker, agreed at T183.39-46:

"Q: If you, as a senior man, regarded it as dangerous work on that boat at that particular time, you wouldn't have started would you?

A: If, if it was dangerous, no. I… there was… it was safe, it looked like a safe area to work, we use the racks, it was ...

Q: My point is if you felt unsafe you'd go to a more senior person and say "look I don't like this area, we're not working here until its fixed up"?

A: We would."

173 And at T175.15-25 Mr Bellingham said:

"Q: The people who join are called supplemental, aren't they, before they become permanent?

A: They're referred to as supplementary when they start.

Q: When you're usually put with a permanent whose got some experience?

A: You're trained by a person with experience. But once - once you're trained and considered a lasher, you will have a lashing team leader who is experienced."

174 And at T182.40-183.12, Mr Todorovski said:

"Q: Patricks are very safety conscious?

A: Yep

Q: There's a toolbox meeting before you go on board?

A: (No verbal reply)

Q: The safety facilitator pairs you up as twos?

A: (No verbal reply)

Q: And you're assigned - Her Honour?

> Q: Sorry you have to say, its being recorded, so if you nod your head its not going to be recorded.
>
> A: Okay
>
> Q: So you're agreeing with?
>
> A: Yes”

175 The shipowner raised an issue that the ship's inspection prior to the plaintiff commencing work was less than optimal. This is disputed.

176 As visible at CB445, the captain identified that the safety officer boarded the ship at 20.30 and completed his inspection by 21.00.

177 The vessel's pre-operation check list (CB502-505) reveals that an inspection was done by "D Little" before the plaintiff boarded the ship and started work. There is a suggestion that because Mr Little failed to tick 1.9 and 4.6 (CB503) that the state of transverse cross ways were not as expected. This is not the case. Mr Little identified that the ship presented tidy and the lashing hooks were present on the transverse walkway. He also identified the small void in the walkway safety railing [ship’s design] and urged the team leaders to be vigilant.

178 After completion of the inspection, Mr Little had a meeting with the first officer Liu Xuegang. The following appears in a statement of Mr Xuegang (CB178-179):

> "At 2056 hours, Mr Little came into the ships office and spoke to me. He signed the gangway log. He provided me with the vessel arrival pre operation check list and he told me he was happy with the ships present condition. However, he raised the following items –
>
> -ensure reefer containers are off power before unlashing as the lashing is at the deck level;
>
> -ship’s condition presents satisfactory;
>
> -he was happy that the lashing bars were hanging in the transverse walkways, as that would be easy for stevedores to lash the containers.
>
> -small gap in walkway safety railing on bay 27/29, it should be highlighted with some measure. I told him that I would arrange for some tiger rope to be fitted there.”

179 Mr Little had inspected the transverse walkways and found them to be satisfactory.

180 If the lashing hooks were overloaded (which they were not), then it was the responsibility of the ship's crew to remove them and store them elsewhere (see Bellingham T163.38-50).

181 Not only was the plaintiff thoroughly trained in her duties and was working with an experienced lasher, the employer had also complied with all safety requirements before the lashing crews boarded the vessel. Further, the portable stowage hook that collapsed could not have been identified on inspection. All liability experts agreed in the Joint Liability Report that a visual identification of the stowage hook would not disclose that they were not fit for purpose. I agree, and make these factual findings here with the evidence.

<u>Resolution</u>

182 Subject to the following, I prefer the opinions of Captain King and Mr Maybury where their opinions differ from that of Mr Dubos on the basis that they are more experienced as to the operation of equipment on ships.

183 As Mr Maybury actively inspected the ship the day after the incident occurred (but not the portable stowage hooks or where the incident occurred) I accepted and prefer his evidence as to his actual observation.

184 The employer’s Factual Incident Report identified two causes of the incident. The first cause was said to be the difference in manufacture: the newer hooks were of lower gauges than the older hooks. The second cause was said to be that the shipowner did not provide a sufficient supply of empty portable stowage hooks.

185 In the Joint Liability Report, Mr Maybury and Mr Dubos were of the opinion that the portable stowage hooks failed because they were inadequately specified and inadequately manufactured.

186 I accept the evidence of Mr Maybury and Mr Dubos. As noted above, there is evidence from Mr Dunn that on the day after the incident, another portable stowage hook failed.

187 I agree with Mr Maybury and Mr Dubos that the portable stowage hooks failed because they were inadequately specified and inadequately manufactured for the function they were to fulfil. Mr Dubos said in the Joint Liability Report:

> “Contributing to the failure was the lack of specification of reinforcing bar thickness and potentially lack of adequate fit for purpose specification of thickness of steel plate used, mouth opening width and safe working load.”

And Mr Maybury stated:

> “sufficient reinforcement and adequate strength steel were not provided to ensure [the portable stowage hooks were] fit for purpose”.

188 Ultimately, as will be dealt with in greater detail below, the shipowner did not take reasonable care in their requisition and fitting of the portable stowage hooks and that is why they failed.

The relevance of Marine Order 32

189 The plaintiff submitted that both shipowner and employer were in breach of the provisions of Marine Order 32. This is not said to give rise to a separate cause of action, but to inform the consideration of whether there has been a breach of the common law duty of care.

190 Section 19 of Marine Order 32 is in the following terms:

> Division 3 Safe Working Load and Certificates
>
> …
>
> 19. Determination and Marking
>
> (1) The Master may permit the use of an article of material handling equipment for loading or unloading a vessel only if:
>
> (a) a competent person, having regard to the design, strength, material of construction and proposed use of the article has determined the safe working load of the article; and
>
> (b) the safe working load is marked on the article in a way that is durable and readily visible.
>
> …

191 Section 2 of sch 3 of Marine Order 32 is in the following terms:

> Schedule 3 Testing and Examination Procedures
>
> …
>
> (2) Items other than wire and fibre ropes, nets and slings
>
> …
>
> (1) Material handling equipment for use in loading or unloading a vessel must be tested and examined:
>
> (a) before being used for the first time; and
>
> (b) after repair of any stress bearing component.
>
> …

The plaintiff’s submissions

192 As stated, the plaintiff does not assert that such breaches constitute a separate cause of action but relies upon the breaches as constituting further evidence of a failure to exercise the required duty of care namely:

(1) Under Marine Order 32, the portable stowage hooks constituted material handling equipment on board and belonging to a vessel.

(2) Division 3 "Safe Working Load and Certificates - Determination and Marking” required a competent person to determine the safe working load of the article; and the safe working load is marked on the article in a way that is durable and readily visible. Here, a competent person did not so determine in breach of Marine Order 32 and the stowage hook was not so marked in breach of Marine Order 32.

(3) Schedule 3 “Testing and examination procedures" requires that material handling equipment must be tested and examined: (1) Before being used for the first time; and (2) after repair of any stress bearing component. Here, the stowage hook was not so tested and examined in breach of the Order.

193 At the hearing, Captain King disagreed that the portable stowage hooks should have safe working load certificates because they are not classified as lifting equipment under Marine Order 32, so it is not best practice to do so (T212.14-25). The experts ultimately agreed that there was nothing in Marine Order 32 that mandated that the portable hooks contain a safe working load (T243.41-244.3).

The shipowner’s submissions

194 The shipowner submitted that Marine Order 32 provides a comprehensive structure of requirements attending to safety in cargo operations. It is significant that div 3 of Marine Order 32 provides for safe working load certificates (“SWL”) on material handling equipment which does not include portable stowage hooks.

195 As the duty of care imposed on the shipowner must not be inconsistent or in disconformity with Marine Order 32, it follows that there can be no requirement for an SWL on the portable stowage hooks (*Formosa* at [84]). To posit such a requirement, as the plaintiff’s particulars do, is not in conformity with Marine Order 32.

196 Captain King’s opinion differs from Mr Dubos in that he did not consider that lashing bars could be characterised as "Material Handling Equipment" such that it fell under Marine Order 32/2016 (Marine Order 32).

197 In his report of 26 March 2025, Mr Maybury also disagreed with Mr Dubos' interpretation of Marine Order 32 as stated in the latter’s report of 16 May 2022, and his description of the stowage hooks as "Material Handling Equipment"; and suggested that those comments could be excluded because a person or business that deals frequently with compliance with Marine Order 32 would be more familiar with that order. Mr Maybury said he largely agreed with the comments in the made by Mr Dubos in his report of 7 March 2025 except for two minor points including the interpretation of Marine Order 32.

198 In his report of 19 May 2025, Mr Maybury did not consider that the lack of a requirement that portable stowage hooks have a maximum weight warning was applicable to Marine Order 32; but did note the apparent absence of testing of the hooks prior to use.

199 Captain King at T199.46-50 stated:

> "All I can say is the Kota Lambang - on board the Kota Lambang was a practice of using hanging lashing bow racks on the handrails and the transverse walkway. I don't know how long that had been done for. There seems to be some history in Australia of using those racks."

200 Mr Maybury at T234.40-50 stated:

> “Q: ... Stevedores are a very specialist expert group -
>
> A: Correct, correct. They're the trained people on board the vessels do - engaged to discharge - unlash, discharge and load the vessel, then lash the vessel again.
>
> Q: And it's very dangerous risk-prone activity, correct?
>
> A: It can be, especially on this vessel.”

201 Captain King at T235.7-15 stated:

> "The lashing and unlashing of containers can be hazardous. That is why you have codes of practice to, to identify and mitigate risk. This vessel in particular, not having lashing bridges, which is elevated platforms in which to lash from, results in it having more lashing bars, and more under the cargo securing manual required for the vessel. That's the only difference with other container ships that's affected all the lashings were done from the deck level with more bars, so more mitigation need to be put in place to manage the risk associated with that. That-I mean that's taking a risk based approach, to, to, to know, known risks."

202 At T236.47-237.12, counsel for the shipowner asked the liability experts:

> "Q: This vessel was noted to be a more difficult vessel for lashings for stevedoring purposes particularly, because there were a very large number of bars, and the stevedores knew that they had to cope with all the additional bars on this particular vessel. That would have alerted them, would it not to the requirements to ensure that portable lashing racks were available to receive the bars? Correct, or not correct?
>
> Dubos: Certainly, yeah
>
> Q: Do you agree with that Mr Maybury?
>
> Maybury: Yes, yeah
>
> Q: Captain King
>
> King: I agree."

<u>Resolution</u>

203 So far as the Marine Order 32 is concerned, the portable stowage hooks do not fail within the definition of "Material Handling equipment". As set out by the experts, with whom I agree, they do not fall within the definition of "lifting equipment" as referred in Marine Order 32 div 3 s 19(1). The shipowner was not required to have a warning on the portable stowage hooks that the stowage hooks have a maximum weight. The plaintiff did not allege that any breach of Marine Order 32 was a separate cause of action, but rather that it was a particular in the breach of duty of care.

The shipowner's duty and breach

<u>The plaintiff's submissions</u>

204 The decision of *Formosa* does not relieve a shipowner from the duty to exercise reasonable care to avoid the risk of injury to people like the plaintiff and her colleagues; this includes the provision of fit for purpose hooks which were the ship's equipment not the employer's.

205 A consideration of what the Court said in *Formosa* at paras [71]-[73] (reproduced above) shows that what is said goes against it rather than in favour of it. It is made clear in at [71] that stevedores go upon a ship to exercise their expertise "in the environment of, and with the equipment … provided by the ship". The relevant equipment here was the faulty lashing hooks which were specified for and procured by the shipowner and put into operation by it. The shipowner must have intended that they be used.

206 At [72] the Court spoke to the same effect saying that the shipowner's duty extends to having “the ship and its equipment in such condition that an expert and experienced stevedore would be able, by the exercise of reasonable care, to carry on its cargo operations with reasonable safety to persons". That was not the case here.

207 Then at [73], all the Court says is that a shipowner in the position of the shipowner did not have an obligation to inspect and supervise the stevedores in their work. But in the absence of evidence that the hooks that failed were overloaded - which was not the case since there was no spillage onto the plaintiff's lower limb while the hooks remained intact - this proposition has no application. There is simply no evidence that anything the employer's employees did caused the two hooks to fail, and it was the failure which caused the injury.

208 There is nothing in *Formosa* or any of the American authorities and academic writing referred to that say that actual knowledge of the risk on the part of the shipowner is essential. On the contrary, at [72] it was said that any hazards on the ship "or with respect to its equipment that are known to the ship or ought reasonably be known to the ship" lie at the feet of the shipowner if not known or ought not reasonably to be known to the stevedores. The shipowner knew that it did not seek advice or testing as to the adequacy of the new lashing hooks and knew that they were of different manufacture and not as robust as the earlier ones, and at least ought to have known that they were not built to specification.

209 But the background may well be regarded as more significant: it was for the shipowner to take reasonable care to see that the new portable stowage hooks were fit for purpose. All three liability experts say that could have been done. It was not, and the employer was hardly in a position to have actual or constructive knowledge of that dangerous state of affairs. Rather what was likely to be obvious to them was that the lashing hooks were holding some lashing rods with apparent stability and security.

210 The shipowner did not engage the employer as a contractor to produce fit for purpose additional new portable stowage hooks. It cannot touch upon a case

like this in which the factual situation is that shipowner failed to do an adequate job to obtain portable stowage hooks that were fit for purpose.

211 The simple fact is that the work activities and procedures the plaintiff and her workmate were engaged in did not cause her injury. It was the unsafe condition of the portable stowage hooks which was the cause, and that was the responsibility of the shipowner.

212 It was foreseeable that if the hooks were not appropriately designed and sufficiently robust to take a full or lesser load of lashing bars there was a risk that they would collapse and expose persons such as the plaintiff to the risk of serious injury. The provisions of the *CLA* are amply satisfied.

213 The circumstances described above make it clear the plaintiff was exposed to a significant risk of harm which was foreseeable, not insignificant and, one that a reasonable person in the position of the shipowner would and should have taken precautions against. To the extent that the *CLA* is picked up, these considerations well satisfy the requirements of liability. It must have been obvious that if the stowage hooks were not strong enough to hold a load of lashing hooks that could be fitted into them their failure would likely have serious consequences to people working in their vicinity.

<u>The shipowner's submissions</u>

214 The shipowner submitted the scope of the duty owed by a ship operator to a stevedore does not extend to any of the obligations particularised in the FASOC. The plaintiff's claim fails at the duty level.

215 In *Formosa*, the NSWCA concluded at [86] that a shipowner or operator owes a duty to exercise reasonable care in the provision of a safe work environment for the stevedores who come on board to work on the ship.

216 The Court held that the standard of care and its discharge should reflect an expectation that a stevedore will exercise a high degree of care for their own safety. This was said to arise out of the relationship between ship operator and stevedore, the differing functions each performs while in port, the manner in which the ship is turned over to the stevedores during the unloading process, and the expertise, experience and skill the stevedores bring to their work.

217 Also in *Formosa* at [72]-[73], the Court referred to and approved the approach taken in the American authorities. In *Formosa*, it was said that knowledge of risk was required to enliven the duty to warn the stevedore or take corrective action in respect of defective equipment in the control of the stevedore.

218 Those principles were recently reviewed in *Value Constructions Pty Ltd v Badra* [2024] NSWCA 181 by Kirk JA who said at [60]:

> "[T]he High Court made clear in *Leighton* that such a ship owner does owe a duty to persons coming onto the site "to use reasonable care to avoid physical injury to them" (at [48]). This Court's earlier decision in *AV Jennings* and Basten JA's statement in *Sydney Water* at [71], are consistent with that understanding. The statement of Brennan and Dawson JJ in *Papatonakis*, approved and applied in *Felk*, addresses situations where the risk in question is not one that the ship owner had a general duty to take reasonable care to avoid, but rather is a risk that arises from the carrying out of the particular work that the independent contractor is retained to undertake. For such risks, cases such as *Christmas*, *Archer*, *Sydney Water* and *Pacific Steel* illustrate that, in general, the ship owner does not have a duty to employees of an independent contractor to ensure that the contractor has a safe system of work in carrying out its activities at the site (subject always to all of the circumstances, including where for example there is a need for coordination, as arose in *Stevens*)."

219 With respect to the nature, scope and content of the shipowner's duty to the plaintiff the shipowner submitted as follows.

(1) Firstly, the identification of the scope of a duty of care involves delineating what types of risk of harm are subject to the duty of care and who is the object of the duty: *Collins v Insurance Australia Ltd* [2022] NSWCA 135 at [10].

(2) Secondly, the content and discharge of the duty owed by a ship operator to a stevedore must take into account and reflect: (1) maritime traditions; (2) the unique nature of a commercial ship as a work environment; (3) the relationship between and respective functions of the ship operator and stevedoring firm; (4) the manner in which a ship is given over to the stevedore during unloading; (5) the expertise the stevedore brings to the task of unloading; and (6) an expectation on the part of the ship operator that the stevedore will exercise a high degree of skill and care for their own safety.

(3) Thirdly, consistent with *Formosa*, the duty owed by a ship operator to a stevedore is a duty to exercise reasonable care in the provision of a reasonably safe work environment for the stevedores who come on board to work the ship.

(4) Fourthly, ship operators are not required to supervise independent contractors' employees or warn them of dangers they routinely encounter due to their expertise.

(5) Fifthly, a ship operator does not owe a duty to a stevedore to supervise, inspect the system of work, the work conditions, the plant and equipment under their control, or to warn of dangers unknown to it.

220 Here, the ship was turned over to a highly skilled workforce of stevedores. The ship's crew and its officers played no active part in the unloading operation. Instead, they were attending to the difficult and complex task of keeping watch over a working commercial vessel in port. The plaintiff was employed by an independent contractor that had control over the stevedoring operation, the stevedore's system of work, and the stevedore's exclusive work area. The shipowner should not be found to have a duty to ensure that the employer maintained a safe system of work, a duty of inspection, or a duty to discover dangerous conditions it was not aware of.

221 The plaintiff bears the onus of identifying the risk of harm the shipowner ought to have taken precautions against.

222 The plaintiff has provided no basis to determine whether any particular risk of harm was prospectively foreseeable. The evidence does not support a finding that the shipowner had actual knowledge of the risk or that a reasonable person in its position ought to have foreseen the risk, however that risk might be characterised.

223 In identifying whether a risk of harm was reasonably foreseeable, the standard is that of a reasonable person in the position of the defendant: *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317; [2003] HCA 51 (*Dovuro*). In *Dovuro*, Gummow J emphasised that reasonable foreseeability must be considered from the position of the defendant, a seed manufacturer, not the position of a person trained in agricultural science; at [62]-[64]. In *Koehler v Cerebos (Australia) Ltd* 222 CLR 44; [2005] HCA 15 at [55], Callinan J similarly held that the foreseeability of a risk of psychiatric injury needed to be assessed from the perspective of a reasonable person in the position of the employer, not a psychiatrist. The need to assess reasonable foreseeability from the correct vantage point ensures defendants are held to realistic standards and not unfairly condemned by hindsight: *Uniting Church of Australia Property Trust v Miller*; *Miller v Lithgow City Council* [2015] NSWCA 320; *Perisher Blue P/L v Nair Smith* [2015] NSWCA 90.

224 Applied to the facts of this case, the test is whether, prospectively, the risk of the portable stowage hooks failing and causing injury to a stevedore was foreseeable to a reasonable ship operator standing in the shipowner's shoes.

225 Subsection 5B(1)(c) of the *CLA* provides that the failure to take precautions against a risk of harm is not negligent unless a reasonable person in the position of the defendant would have taken those precautions.

226 This inquiry is to be determined prospectively. The "correct approach" requires "standing back from known events and asking, in a prospective, objective way, what a reasonable person would have done in the circumstances": *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [53].

227 In the circumstances of this case, where the new portable stowage hooks were purchased from a reputable supplier and were not capable of being identified as deficient by visual inspection, none of the precautions pleaded by the plaintiff are capable of founding liability against the shipowner because: (a) they would not have been taken by a reasonable person in the shipowner's position; or (b) they would have made no difference to the causation and occurrence of the incident because they would not have ameliorated the risk of harm, whether by identifying or inoculating against the risk; or (c) they have simply not been proven by the plaintiff on the evidence.

228 In *Davie v New Merton Mills* [1959] AC 604 (*Davie*), the House of Lords determined that an employer's non-delegable duty in respect of plant and equipment does not extend to defects in plant and equipment that an employer obtains from a reputable vendor where those defects are the product of the manufacturer's or vendor's negligence. In that case, an employee suffered an injury to his eye as the result of a latent defect in a tool provided by the employer. It was held that the employer's nondelegable duty had been discharged by buying the tool from a reputable source in circumstances where the latent defect was not reasonably discoverable by the employer.

229 The shipowner did not owe the plaintiff a non-delegable duty but the principle and reasoning in *Davie* are apposite. The shipowner was not under a duty to inspect the portable lashing hooks but, even if it were subject to such a duty, a

reasonable inspection would not have revealed that the hooks were not fit for purpose or that one of the thirty hooks contained a hidden defect in the form of the defective weld. Like the employer in *Davie*, the shipowner was entitled to rely on its acquisition of the hooks from a reputable supplier as a defence to the claim.

230 The plaintiff has failed to prove the shipowner knew or ought to have known that the weld would fail.

<u>The plaintiff's submissions in reply</u>

231 The plaintiff does not accept that the risk of harm is not clear. The risk of harm was of physical injury to a person in the vicinity of lashing hooks which were being used for their intended purpose but were not, by reason of want of reasonable care on the part of the shipowner, fit for that purpose.

232 Any reasonable person would have actual or constructive knowledge of the risk and would foresee it. They were in use as intended. They were not carrying a load that could not be put into them. Yet they failed, and that was after they were built as specified by the shipowner and were in a condition known to the shipowner by comparison with the other hooks that had not failed over time. Here, the shipowner had actual or constructive knowledge of the foreseeable risk.

233 It does not assist the shipowner to say that it had no engineering capacity of its own and that there is no evidence that an engineering assessment (presumably an engineering test after manufacture) would have been successful in identifying any defect. It remains the case that all three experts on liability say that the task of acquiring fit for purpose lashing hooks could have been achieved, and if that meant specifying engineering testing or getting engineering advice to complete a proper specification, that was the obligation of the shipowner. If the shipowner is saying that its own failure to get engineering assistance is somehow fatal to the plaintiff's case, that proposition is untenable.

234 The shipowner was a shipowner and operator. Of necessity it needed a wide variety of equipment upon its vessel, and it was responsible for having stowage hooks as part of that body of equipment. It was not itself a stowage hook

manufacturer but it knew what lashing hooks were and what they had to do to fulfil their task safely. Thus, the shipowner was obliged to exercise reasonable care to see that they were fit for purpose. At the risk of repetition, the evidence of all three liability experts is that that could have been done. It was not done and the failure to exercise reasonable care was that of the shipowner.

Resolution

235 The shipowner contents that the plaintiff's claim fails at the duty of care level. The plaintiff's detailed allegations on the duty of care owed by the shipowner are set out earlier in this Judgment.

236 To recap Mr Dunn's evidence, after the new portable stowage hooks failed the other new stowage hooks were removed from ship.

237 The old stowage hooks had an opening of 120mm, whereas the new one had an opening of 180mm. The older hooks were better reinforced and were more robust. The shipowner did not specify the strength of the steel to be needed in the new portable stowage hooks.

238 Another deficiency in the order is the shipowner's failure to specify the strength of the steel to be used in the construction of the new portable stowage hooks in its requisition to the supplier.

239 Mr Maybury attended the ship eight days after the incident. He examined the three types of portable stowage hooks utilised onboard, but not the specific stowage hook that failed. Mr Maybury's opinion in the Joint Liability Report largely mirrors that which he expressed in his report of 30 August 2018. Specifically, that:

> "[t]he failure of the lashing rack [the portable stowage hooks] can be attributed to the unfortunate oversight of applying insufficient steel reinforcement and subsequently lowering the capacity of the racks to withstand the required load."

240 The contemporaneous photographs of the failed portable stowage hooks also demonstrate there was a lack of reinforcement.

241 The liability experts were largely in agreement that, had the shipowner provided the proper specifications to the manufacturer of the portable stowage hooks, then hooks that were fit for purpose would have been obtained. Captain

King ultimately agreed that if everything had gone well, a portable stowage hook that was fit for purpose would have been manufactured and supplied for use on the ship (T208.42-209.9). Mr Maybury and Mr Dubos also agreed that if the proper specifications had been stipulated, then fit for purpose portable stowage hooks would have been provided (T209.22-31).

242 As with the requisition, the shipowner did not adduce any evidence in relation to the receipt and installation of the hooks. Both Mr Dubos and Mr Maybury agreed that given the shipowner requisitioned the portable stowage hooks, it was in a position to inspect what they had received to see if it matched the specifications to ensure that they were fit for purpose (T262.6-14).

243 At T209.22-25 Mr Maybury opined:

> "if there was proper specification, load bearing capacity, the information, such as a technical drawing and specifications with tolerances, and some testing done, yes a more suitable fit for purpose lashing rack could have been provided."

244 To be clear, from the evidence of the liability experts, the requisition had insufficient specifications, the shipowner did not ensure that the new portable stowage hooks were comparable to the stowage hooks that it ordered to be replaced. Hence, the new portable stowage hooks were not fit for purpose. The shipowner's duty of care extends at least to the exercise of reasonable care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able, by the exercise of reasonable care, to carry on its cargo operations with reasonable safety to persons and property and to warn the stevedore of any hazards on the ship or with respect to its equipment that are known to the ship or ought reasonably to be known to the ship and that are not known or would not be obvious to or anticipated by the stevedore if they were reasonably competent in his or her work.

245 At all times, it was necessary for the shipowner to exercise reasonable care. What amounts to reasonable care is informed by maritime customs and the fact that the vessel was to be ‘handed over’ to the employer and stevedores who are trained lashers. It is true, in accordance with *Davie*, that the shipowner is not liable for damage which results from a latent defect in a product which

was obtained from a reputable supplier where that latent defect was not uncoverable by reasonable inspection. However, the facts are different here.

246 In summary, the shipowner did not provide adequate specification of the portable stowage hooks in its requisition form. The older portable stowage hooks were not only narrower (able to carry fewer lashing bars) but also more heavily reinforced. The onus and responsibility for ensuring that the newer portable stowage hooks (of the kind that failed) were appropriate to replace the older hooks was with the shipowner.

247 When the shipowner handed over the vessel to the employer with the portable stowage hooks of the kind that failed they were at least partially but most likely mostly filled. Although the employer bears responsibility for proceeding with lashing despite this fact (as will be dealt with below) the fact that the shipowner handed over the vessel in this state in circumstances where the portable stowage hooks were not fit for purpose increased the probability that they would fail as in fact they did. The employer and the stevedores were entitled to the assumption that the vessel had been handed over in a reasonably safe condition. Here, reasonableness is to be understood in the context of skilled maritime operations. In circumstances where the portable stowage hooks were presented with apparent remaining capacity, but those stowage hooks were in fact not able to bear that extra load. In my view, the shipowner was negligent in presenting the vessel in that state. While the shipowner has repeatedly submitted that a simple visual inspection of the new portable stowage racks would not have reasonably revealed any deficiencies, in that case, the stevedores cannot have reasonably been expected to discover that the portable stowage hooks could not bear their natural capacity.

248 It was the shipowner’s duty to take reasonable care that the equipment on its ship was, in the circumstances, safe. Part of this duty involves providing proper specifications when ordering new, custom equipment. The risk of harm guarded against in this instance is the risk of physical injury arising out of equipment that is not fit for purpose.

249 Within the terms of s 5B of the *CLA*, the risk that the failure adequately to requisition new equipment would result in harm was both reasonably

foreseeable and was not insignificant. A reasonable person in the shipowner's position would have taken precautions along the lines described above. I am satisfied that the failure to take those precautions caused the failure of the portable stowage hooks and therefore the plaintiff's injuries.

250 For these reasons, provision of fit-for-purpose stowage hooks fell within the nature and scope of the duty of care the shipowner owed to the plaintiff. Hence the shipowner has breached its duty of care to the plaintiff.

The employer's duty and breach

<u>The employer's submissions</u>

251 If it is suggested that the portable stowage hooks were commissioned and installed at the behest of the employer and therefore in some way a liability attaches to the employer, then this argument should be rejected entirely for the following reasons:

(1) The plaintiff in her statement of 17 December 2024 at [15] said "our shift manager, Bobby Woods, spoke to us before we started work. He said that this vessel had not been in the port for quite some time and that it was a difficult ship and that we should be careful".

(2) A safety requirement was that lashing workers perform their duties in groups of two. There is no issue that Mr Todorovski was the plaintiff's partner.

(3) The shipowner has raised an issue that the ship's inspection prior to the plaintiff commencing work was less than optimal. This is disputed.

(4) The request to the shipowner was nothing more than a safety requirement for which the employer should not be criticised.

252 In all the circumstances the provision of portable stowage hooks was appropriate. The problem in this case is that the stowage hooks provided by the shipowner were different from those that were ordered and were totally unfit for purpose. It is this breach that was responsible for the plaintiff's injuries. There is no other explanation. On any evaluation the portable stowage hook issue was solely a problem for the shipowner.

253 The shipowner created an unsafe workplace which would not have been apparent to the employer or its employees. If there is to be an attribution of liability then it must be directed against the shipowner.

The shipowner's submissions

254 The employer should have taken the following reasonable precautions:

(1) not proceeded to load already full or nearly full stowage racks and instructed its workforce, including the plaintiff and Mr Todorovski, not to place bars into loaded racks;

(2) ensured it had an adequate Pre-Operation Inspection Checklist;

(3) ensured that its Pre-Operation Inspection Checklist was completed by the Safety Facilitator; and

(4) the Safety Facilitator should not have permitted work to proceed in the absence of the above precautions.

255 Here, the employer had a much higher degree of culpability than the shipowner. The employer was an expert in stevedoring operations at the Port Botany Terminal. It was the one that directed the use of the portable storage racks. It had exclusive control of the stevedore workforce and the stevedoring operation. It was entitled to refuse to unload the vessel. It failed to use reasonable care in the stevedoring operation that occasioned the plaintiff's injuries. It owed the plaintiff a non-delegable duty to provide safe plant and equipment. The scope of the employer's duty extended to ensuring reasonable care was taken. This could not be discharged by assigning its duty to the shipowner.

256 To the extent there is any liability on the shipowner, the contribution by the employer must be substantially greater than 50%.

257 There should be a verdict for the shipowner on its cross-claim against the employer. The proportion should be in excess of 50%. The appropriate finding is 80% to the employer and 20% to the shipowner.

The plaintiff's submissions

258 In essence the plaintiff agrees with the employer's submissions.

259 The assertion by the shipowner that the employer bears significant responsibility in negligence for failing to prevent the failure of the portable stowage hooks appears to derive substantially from reliance on the proposition that an employer has a non-delegable duty of care which requires seeing to it that reasonable care is taken. *Willmot v Queensland* [2024] HCA 42 (*Willmot*) at [49] is inapplicable to the present case. *Willmot* was a historical sexual

abuse case involving the conscious acts of an individual or individuals. It was not an industrial incident case remotely like the present. Moreover, the High Court's plurality reasons at [49] does not purport to be anything more than a summary reference to previous authority whilst confining itself to the narrow dispute in the instant case.

<u>The issue of Mr Little's 'Vessel Arrival Pre-Operations Checklist'</u>

260 On 22 August 2018, at approximately 8:30pm, the employer's Safety Facilitator Officer, Mr Little, completed a 'Vessel Arrival Pre-Operations Checklist'. Mr Little determined that the vessel presented as "tidy" with "lashing racks in traverse walkway".

261 In respect of that checklist, Mr Little did not tick:

(1) Item 1.9, an item which required Mr Little to verify whether the "walkways are in good condition and free of obstructions, with excess lashing gear suitably stacked to remove slip and trip hazards"; and

(2) Item 4.6, an item which required Mr Little to verify whether the "walkways are clear of excess lashing, loose gear and other trip hazards".

262 In the report, Mr Little identified that the ship presented tidy and the lashing racks were present on the transverse walkway. He also identified the 'small void in the walkway safety railing (ship design)' and urged the team leaders to be vigilant.

263 After completion of the inspection, Mr Little had a meeting with the first officer Liu Xuegang, a representative of the shipowner, who made the following statement.

> "At 2056 hours, Mr Little came into the ships office and spoke to me. He signed the gangway log. He provided me with the vessel arrival pre operation checklist and he told me he was happy with the ships present condition. However, he raised the following items —
>
> i. Ensure reefer containers are off power before unlashing as the lashing is at the deck level.
>
> ii. Ships condition presents satisfactory.
>
> iii. He was happy that the lashing bars were hanging in the transverse walkways, as that would be easy for stevedores to lash the containers.
>
> iv. There was a small gap in walkway safety railing on bay 27/29, it should be highlighted with some measure. I told him that I would arrange for some tiger rope to be fitted there."

264 Mr Little had inspected the transverse walkways and found them to be satisfactory.

The first dispute: Mr Little was not called to give evidence

265 The shipowner first submitted that the employer has called no lay evidence. There is no evidence from Messrs Garland and Little, the employer's 'Safety Facilitators' who inspected the vessel at Brisbane and Sydney and authorised the work to proceed. The absence of Mr Little is significant bearing in mind the controversy as to the extent to which the portable racks were loaded before the commencement of the unlashing operation.

266 Mr Little expressly notes in his checklist "Lashing racks in transverse walkways". He does not refer to lashing bars in the walkways. The inference is that the lashing bars noted by Mr Garland when he inspected the vessel in Brisbane had been stowed in the racks. Mr Wood issued instructions to the stevedores concerning the unlashing operation and the state of the racks. Neither he nor the shift manager have been called.

267 Mr Little took photographs before the unlashing commenced but the defendant has not produced those photographs.

268 The employer submitted that the absence of Mr Little as a witness is the subject of comment and/or complaint by the shipowner. The employer refers to the documentation dealing with Mr Little's inspection of the vessel. Mr Little's inspection is also the subject of documentation by the ship's first officer. When read together, or even in isolation, the contents of these documents are a complete answer to the inspection conducted by Mr Little before the stevedores commenced work. There is no evidence relied upon by the shipowner to the contrary.

269 The employer submitted that in assessing this matter, and notably Mr Little's inspection, primary reliance ought to be placed on the contemporaneous business records tendered. As noted by Lee J in *Transport Workers' Union of Australia v Qantas Airways Limited* [2021] FCA 873; (2021) 308 IR 873 at [17], such material reflects spontaneous, unfiltered and timely records which constitute the extemporaneous and unvarnished product of the conduct of a

business. The imperative to place principal reliance on such documents is heightened in circumstances where the human memory about historical events is undermined where litigation intervenes and the process of memory is overlaid, often subconsciously, by perceptions or self-interest (*Watson v Foxman* (1995) 49 NSWLR 315 at 318-319).

270 Consistent with Lee J's assertion, the use of the documents referred to above ought be given significant weight by the Court in these proceedings, and offsets the shipowner's submissions regarding the absence of oral testimony from Mr Little. Further there is no property in a witness, and the shipowner could have ensured that Mr Little was available to give evidence by issuing a subpoena. It did not. Therefore, the evidence of Mr Little should not be the subject of comment or complaint and the shipowner's submissions on this aspect should be rejected.

271 It is my view that nothing extra could be gained by the employer calling Mr Little to give evidence. In other words, I agree with the employer’s submissions.

The second dispute: the employer did not request that the shipowner remove the bars, did not refuse to unload the ship, and did not inform its workers not to place bars into full or near full racks

272 The shipowner submitted that the Code requires excess lashing bars to be neatly stacked on the walkway or placed in the designated storage racks. The system of using portable lashing racks suspended from the safety fencing was the result of employer’s direction.

273 In response to the question of whether the excess lashing bars should have been stored in the permanent stowage areas, Mr Bellingham said, "Definitely yes" (T163.36). In response to the question of whether in so far as the portable racks were full the excess bars could have been taken and placed in the permanent stowage areas, Mr Bellingham said, "Yes in my opinion the crew should have taken them down and put them in those areas" (T163.38-42). Later, he agreed that the stevedores and/or the crew could have removed the bars (T165.25).

274 The shipowner submitted that it should not be forgotten that the immediate act that precipitated the incident was Mr Todorovski placing additional bars into already loaded racks. This submission is incorrect.

275 This was an inherently dangerous work method on account of the risk that the lashing bars fall out of the unsecured lashing racks, as Captain King had observed in the past. Blame for this system ought to be laid squarely at the feet of the employer. It could have directed its workforce to take down the bars, requested the shipowner remove the bars, refused to unload the ship, or informed its workers not to place bars into full or near full racks; it did none of those things.

276 The stevedoring operation was solely in the hands of the employer. The Safety Facilitator had the authority to direct the ship's crew to rectify any safety concerns and prevent stevedoring work taking place until the ship complied with his directions (T157.47). It follows that Patrick's Safety Facilitator permitted the stevedoring operation to take place notwithstanding that the racks were full and that no instruction had been issued to the ship's crew or to the stevedores to remove excess bars to the designated storage areas.

277 Mr Todorovski stated that it was known that the ship had a complicated lashing plan (CB176). He stated, furthermore, that the portable storage racks were full or near full with lashing bars before the work was commenced. The photograph at CB410 shows the designated and permanent racks (T180.02). Mr Todorovski stated that the only people working in the area where the plaintiff was injured were stevedores (T184.15). Mr Todorovski agreed that they could have placed the bars in the permanent stowage area (T184.20). He stated that the racks were three-quarters full from the outset (T185.14). He stated that they had taken down 4 or 5 bars and placed them in the racks when they collapsed (T185.41-46) but later conceded that it was maybe 6 or 7 (T186.30).

278 The experts agreed with Mr King that the ship’s officers do not supervise the unlashing (T195.1-5). The experts also agreed that the racks are not supplied with a safe workload certificate because they are not lifting equipment (T212.15).

279 However, the employer submitted that if the lashing hooks were overloaded (which they were not), then it was the responsibility of the ship's crew to remove them and store them elsewhere (see Mr Bellingham at T163.38-50).

280 If the portable stowage hooks were overloaded, then Mr Little, as the safety facilitator, should have asked the shipowner to remove them. However, the lashing hooks did not seem overloaded, although it did have several bars on it. Also, there were bars around the walkway.

281 It is my view that because the portable lashing bars had an insufficient number of empty portable lashing racks available for the number of lashing bars when the stevedores began, Mr Little should have informed the shipowner of that fact prior to removing of the storage racks.

282 At items C-E of the Factual Incident Report, Ms Gibbs says:

> "C [Note: understand signage not standard.] Vessel supplied insufficient number of empty lashing bar racks available for the number of lashing bars being removed for the Sydney discharge. The vessel arrived with many of its lashing bar racks full due to its heavy lashing plan of 6 bars per box (i.e. 4 long lashing bars and 2 short bars).
>
> D The current vessel safety inspection (extracted from the Code of Practice Managing Risks in Stevedoring (2016, Appendix C) for vessels who have a prolonged absence from Patrick's terminal does not include a process for the safety facilitator to confirm if any material modifications to the vessel or equipment have been made to the area(s) to be worked by stevedores (up and below deck) and/or review of a marine surveyor's report.
>
> E The Port Botany Port Terminal Risk Register 'do not specifically address failing portable lashing bar storage racks or handrailing failing.'"

The third dispute: the indication of the employer's Factual Incident report

283 The employer's Factual Incident Report dated 7 September 2018 prepared by Ms Marie Gibbs, the Environmental Compliance and Sustainability Manager, is instructive.

284 Ms Gibbs says that at the pre-shift meeting the Duty Shift Manager held a special toolbox meeting with the lashers prior to unlashing as many were supplementary employees (employed November 17) and had no experience working on a Kota vessel. She said "[a]s most of the portable lashing racks were full of lashing bars, the shift manager instructed the lashers to use the

portable racks provided and to place any excess bars to one side of the walkway to remove the risk of trip hazards."

285 The shipowner submitted that the following inferences should be drawn from the Factual Investigation Report prepared by the employer:

(1) notwithstanding the Safety Facilitator's knowledge that there was an insufficient number of empty lashing racks available, he did not instruct the ships crew to remove the bars and place them in the designated stowage area;

(2) the Shift Manager and Lashing Team Leaders likewise did not instruct the stevedores to remove the bars from the stowage racks and place them in the designated stowage racks before commencing the unlashing;

(3) the safety inspection plan did not provide a process whereby the Safety Facilitator enquired about, much less confirmed, any material modifications to the vessel or the equipment;

(4) Patrick's Risk Register (which presumably is an alternative reference to the equivalent of a "Safe Work Method Statement") did not specifically address failing portable lashing bar storage racks or handrailing failings.

286 Under the heading "Corrective Action Plan" Ms Gibbs advanced the following:

> "3 Work with shipping company and vessel to provide a suitable design for portable lashing bar racks, for example a lashing bar rack which extends down to the walkway floor and the safe working load sign posted."

287 The task was to be performed by the Engineering Department and completed by 31 December 2018.

288 The recommendations make clear that the employer did not provide the vessel with a suitable design for a portable lashing bar rack based on what appears to be the employer's "East Swanson Dock design" prior to the incident.

289 The following inferences should be drawn from the recommendations for corrective action:

(1) post-incident, the employer accepted that they should have in effect specified the design of the portable lashing racks;

(2) the shipowner would have complied with any direction and specification made by the employer for the design of the portable stowage racks; and

(3) as at September 2018, it appears the employer already had an acceptable design in the form of the "East Swanson Dock" design, but this was not made available to the shipowner.

290 The employer should have taken the following reasonable precautions:

(1) not proceeded to load already full or nearly full stowage racks and instructed its workforce, including the plaintiff and Mr Todorovski, not to place bars into loaded racks;

(2) complied with the Code by not using portable racks and instead devising a system of work that involved placing the bars on the walkway or alternatively in the designated storage racks;

(3) placed safety over speed by ensuring its system for managing removed lashing bars was in compliance with the Code;

(4) ensured its Standard Operating Procedure complied with the Code;

(5) ensured it had an adequate Pre-Operation Inspection Checklist;

(6) ensured that its Pre-Operation Inspection Checklist was completed by the Safety Facilitator;

(7) if it insisted on using portable lashing racks, prescribed them in accordance with the Swanson Dock design;

(8) provided the shipowner with a suitable design for portable lashing bar racks;

(9) carried out an inspection on board the vessel to ensure the lashing racks met Patrick's specifications prior to permitting the work; and

(10) the Safety Facilitator should not have permitted work to proceed in the absence of the above precautions.

291 The shipowner submitted that the employer had a much higher degree of culpability than the shipowner. The employer was an expert in stevedoring operations at the Port Botany Terminal. It was the one that directed the use of the portable storage racks. It had exclusive control of the stevedore workforce and the stevedoring operation. It was entitled to refuse to unload the vessel. It failed to use reasonable care in the stevedoring operation that occasioned the plaintiff’s injuries. It owed the plaintiff a non-delegable duty to provide safe plant and equipment. The scope of the employer's duty extended to ensuring reasonable care was taken. This could not be discharged by assigning its duty to the shipowner.

<u>Resolution</u>

292 *Formosa* is instructive in identifying the duties of care owed to stevedores by shipowners and employers.

293 The plaintiff's view of *Kondis v State Transport Authority* (1984) 154 CLR 672; [1984] HCA 61 (*Kondis*) is correct. *Kondis* held that the duty of an employer to an employee is never more than one of reasonable care in all the

circumstances of the case, so that if reasonable care is taken by someone else who assumes the employer's responsibilities, the employer is not liable, but is liable if the party allowed to discharge the employer's duties falls short of reasonable care. The starting point is that it must be a case in which someone other than the actual employer is discharging the employer's responsibility before the non-delegable nature of the employer's duty where someone else is doing the employer's job becomes relevant. It is obvious that if an employer allows someone else to give training and instruction or devise a system of work for its employees, or to provide safety equipment of a kind usually provided by employers, any failure to exercise reasonable care by somebody else will see the employer made liable on a non-delegable basis.

294 But here it was not part of the usual or ordinary employment obligation of the employer to requisition and provide specifications for portable stowage hooks. That was a non-employment obligation of the shipowner. The shipowner did not hand over the portable stowage hooks to employer for them to assume ownership of and put into operation on a variety of ships.

295 The employer owes a non-delegable duty of care to exercise reasonable care to the plaintiff. The employer’s duty consisted of taking reasonable care that the environment in which the plaintiff was to commence work was reasonably safe. Mr Little on behalf of the employer failed to draw the attention of the shipowner to the fact that the portable stowage hooks were full or close to full. He should have made a recommendation that the stevedores not commence work until the stowage hooks were empty or almost empty. This was one of the causes of the incident. As Mr Todorovksi said in his statement (quoted below), the clearing of such stowage hooks seemed to be common practice:

> “…the stowage racks which I saw were full, or close to full, with lashing bars before we commenced. In most cases, the ship's crew will clear the stowage racks and place the surplus bars in dedicated purpose built stowage spaces on the sides of the vessel on the main deck. This allows the lashing gang a place to put the bars which they are removing from the containers. On this night, we had only been working for 10 minutes or so and already the stowage racks that we encountered were already pretty full with lashing bars.”

296 Mr Little, on behalf of the employer, did not tick or cross two boxes on his checklist. However, his written comments sufficiently address those matters set out in items 1.9 and 4.6. However, Mr Little had a responsibility to draw the

attention of the counterpart representative of the shipowner to that fact that the portable stowage hooks were full or close to full before the stevedores commenced unlashing operations at Port Botany.

297 For this oversight, the employer bears some lesser responsibility for the overloading of the portable stowage hooks that caused the incident.

298 A safety facilitator such as Mr Little should have understood that they would very rapidly reach capacity (as in fact they did) and potentially become overladen. In terms of s 5B of the *CLA*, the risk that an overladen stowage area would cause injury was both reasonably foreseeable and not insignificant—this is precisely why something like the 'Vessel Arrival Pre-Operations Checklist' existed. A reasonable person in Mr Little's position would have taken precautions to prevent the portable stowage hooks becoming so full. I am satisfied this failure to draw the attention of the shipowner to the fact that the portable stowage hooks were full or close to full materially contributed to the failure of the stowage hooks that caused the plaintiff's injuries.

299 The employer is vicariously liable for the actions of Mr Little and otherwise had a non-delegable duty of care to the plaintiff. Hence the employer breached its duty of care to the plaintiff.

Causation and Damage

300 The question of causation of harm in actions for negligence is governed by s 5D of the *CLA*, it is in the following terms:

> 5D General principles
>
> (1) A determination that negligence caused particular harm comprises the following elements—
>
> (a) that the negligence was a necessary condition of the occurrence of the harm (factual causation), and
>
> (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability).
>
> (2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent—

(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

(b) any statement made by the person after suffering the harm 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 determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

301 In order for a plaintiff to recover damages for a negligent act, they must demonstrate that that negligent act was causative of their loss. The plaintiff alleges that the injuries arising from the incident are threefold: (1) immediate injury to her leg and foot; (2) subsequent injury to her cervical spine and left shoulder; and (3) psychiatric injury arising from these physical injuries.

302 As outlined above, the defendants do not cavil with plaintiff's assertion that the failure of the portable stowage hooks caused the plaintiff's injury to her right leg and foot. However, the allegation that the incident caused the plaintiff injuries to her cervical spine and her left shoulder and psychiatric injuries is contested.

303 Much of the material which will be covered in this section will also be relevant to the quantification of damages, but it is collectively set out here for the sake of coherence.

The plaintiff's account of her injuries and her life after the incident

304 As is detailed above, the incident occurred about 9:30pm or 9:45pm on 22 August 2018. On 22 August 2018 at 22:15pm, the plaintiff was transferred by ambulance to Prince of Wales Hospital. On 24 August 2018, she underwent an open reduction internal fixation right talus fracture operation performed by Dr Jeffery Ling, a Senior Medical Staff.

305 The operation report states:

"postero-medial approach to ankle joint between achilles tendon and FHL

neurovascular bundle identified and protected behind FHL throughout

posteromedial talus fracture identified

large fracture fragment reduced - fixation with 3x 2.2mm speed-tip screws (26, 28 and 30mm lengths) small fracture fragment with tiny sliver of articular surface excised (unsuitable for fixation"

306 On 26 August 2018, the plaintiff's discharge summary recorded:

> **"Summary of Care**
>
> Ms Amie JACKSON presented to POWH ED on 22/08/2018 after an incident at work in which she sustained a fracture of her talus bone of the right foot. She was admitted under Dr Jeffrey Ling (orthopaedic surgeon) and underwent surgical fixation of the fracture on 24/08/2018. The procedure was completed without complication, and she recovered well post-operatively.
>
> She received twice daily physiotherapy and was noted to be safely mobilising with crutches and non-weight bearing on her right leg. She was reviewed by the orthopaedics team and there was no signs of infection or neurovascular compromise around the surgical site. She was discharged on 26/08/2018 for ongoing outpatient follow up.
>
> **Discharge Plan**
>
> 1. Discharge home 27/08/2018, non-weight bearing on the right leg and mobilising with crutches.
>
> 2. For follow up in Dr Lings outpatient clinic on 06/09/2018 at 13:00 PM, for removal of cast, review of wounds, and transition to CAM boot
>
> 3. Follow up in Dr Ling's outpatient clinic on 04/10/2018 at 13:00 PM with xrays, for review of progress.
>
> 4. For presentation to POWH ED or GP if any new concerning features, such as new pain or swelling, or loss of sensation."

307 Following the surgery on 26 August 2018 until December 2018, the plaintiff's right leg was in a cast for two weeks. She then wore a moon boot for two and a half months. As she was advised not to place any weight on her right foot for the first two months, she walked with an altered gait, leaning on the left crutch. From about 13 November 2018, the plaintiff started weight-bearing in the moon boot for a month. She walked with a limp for some time after the moon boot was removed.

308 As the plaintiff lived on the third storey of an apartment building without a lift, she had to negotiate 30 steps on a frequent basis. She lived separately to her roommate, so she had to carry out all daily tasks on her own. The plaintiff believed that her reliance on the crutches altered her posture and gait, which strained her neck, left shoulder and arm.

309 The plaintiff would hold the handrail and hop up and down the stairs, one at a time, carrying the crutches in her backpack (as opposed to using the crutches to climb the stairs). She would only use the knee walker inside her unit as it

was too difficult to get it up and down the stairs. Inside her unit, she would also hop around, using her left hand to steady herself against benchtops, tables and other furniture.

310 She relied on public transport or taxis and spent significant time on her feet while outside of her unit.

311 In February 2022, the insurer for the employer sent the plaintiff to see Dr Brian Stephenson to obtain an opinion regarding her left shoulder and arm symptoms. Dr Stephenson recommended that the insurer accept liability for her neck and arm symptoms, which it later did. In September 2023, she was re-examined by Dr Stephenson.

312 The plaintiff first noticed a pins and needles sensation in her left hand about four to six weeks after Dr Ling's first operation and initially, those symptoms were not major. She mentioned the symptoms to Dr Ling who advised that they would recede eventually. In June 2020, the plaintiff reported the pins and needles to Dr Ben Dixon, and an MRI scan of her shoulder was ordered. It revealed that she had some bursitis of the shoulder joint, but no further treatment was given (the plaintiff believes that Dr Dixon told her bursitis was not a major problem). The plaintiff reports that she has continued to suffer from pins and needles, pain across the top of the left shoulder and left side of her neck since that time.

313 After the incident, the plaintiff developed symptoms of depression, tearfulness, recurring nightmares and flashbacks of the incident; and began to misuse alcohol and started taking GHB again. From about 19 August 2019, she was put off work by Dr Lim. She was referred to psychiatrist Dr Abdal Khan and saw him once on 20 September 2019; Dr Khan recommended a hospital admission for substance withdrawal management, but this was not approved by the insurance company, so she was not hospitalised. She then returned to Dr Gordon's care.

314 From 7 January 2020 to 10 February 2022, the plaintiff was admitted to Royal Prince Alfred Hospital (RPA) and intubated for two weeks, as she was suffering from withdrawal symptoms after taking GHB, methamphetamine and benzodiazepine.

315 On 16 March 2020, as a follow-up to her admission to RPA, she was then admitted to South Pacific Private Hospital for drug and alcohol rehabilitation, where she remained until 11 April 2020.

316 In early 2020, the plaintiff began seeing a different physiotherapist, Dan Gartner. In May 2020, he referred her to foot surgeon Dr Martin Sullivan in relation to her ongoing foot pain. Dr Sullivan recommended further surgery to remove some of the ankle bone and informed the plaintiff that the high doses of Gabapentin that she was taking was not advisable, although she found that it reduced the nerve pain in her ankle. On 18 August 2020, Dr Sullivan admitted the plaintiff to North Shore Private Hospital and performed the surgery to remove the ectopic bone from her ankle.

317 In June 2020, the plaintiff was assessed by consultant psychiatrist Dr Graham George at the request of the employer's workers' compensation insurer. Following this assessment, the insurer accepted liability for the plaintiff's psychological injuries and have paid the medical expenses related to this condition since that time. The plaintiff says that the first six pages of Dr George's report dated 11 June 2020 sets out an accurate medical and psychiatric history both before and after the incident.

318 In January 2021, the plaintiff had another relapse and she was admitted to Northside Private Hospital for a month for drug and alcohol treatment. She found these hospital admissions helpful in regaining control of her life.

319 In January 2021, Dr Sue Morgans, a psychiatrist that the plaintiff saw during her admission, recommended that she connect with Platinum Rehabilitation as she did not have a rehabilitation provider.

320 In March 2021, the plaintiff saw Dr Lim until she transferred to Dr Kyra Jones, feeling that she was not making any progress towards returning to work with Dr Lim. She agreed with Dr Jones, that returning to work was the best option for her as her psychological condition worsened while she was off work (leading to drug and alcohol misuse and in turn, lengthy hospital admissions).

321 On 26 May 2021, the plaintiff reported that she was experiencing pain in her neck and left shoulder and pins and needles in her hand to Dan Gartner. She

received acupuncture and massage to her neck, left shoulder and arm. She continued to see him on a monthly basis during which most of the treatment was on the neck, left shoulder and arm.

322 On 21 September 2021, the plaintiff returned to work on selected duties; she spent the first week retraining in the office and then did some lashing duties in the second week.

323 Dr Jones' certificates closely followed the requirements of the return-to-work plan. By 5 October 2021, the plaintiff was doing six-hour shifts (when a normal shift is eight hours), of which, she spent two hours doing lashing duties and administrative work for the rest.

324 During this time, the plaintiff says that continued to experience altered sensations in her left hand and in her upper left shoulder. She regularly attended the employer's onsite physiotherapist and reported the problems to him; he gave her massage and acupuncture treatment to her neck, left shoulder and arm.

325 On 7 October 2021, the plaintiff reported these problems to Dr Jones, who altered the certificate, downgrading the plaintiff's work capacity and implementing a lifting and pushing limit of no more than 5kgs. Dr Jones gave the plaintiff a referral to have an ultrasound scan of her left shoulder and an MRI on her neck. He informed the plaintiff that her duties were to be restricted until these matters had been investigated further. The plaintiff gave Dr Jones' certificate to the employer and on about 14 October 2021, she was contacted by Cara Blake from the HR office. She was informed that the employer could not accommodate the new restrictions and there was no administrative work available, so she remained off work from 7 October 2021.

326 The scans were performed on 14 October 2021, and she was reviewed on 18 October 2021 by Dr Jones, who referred her to spinal surgeon Dr Johnny Wong. A new medical certificate was issued downgrading her lifting capacity to less than 1kg and pushing limit to 2kg. On 4 November 2021, she received a steroid needle on her left shoulder which briefly alleviated the pain, but the symptoms returned shortly afterwards.

327 From about October 2021, she saw Dan Gartner on a weekly basis. His treatment assisted in relation to the plaintiff's headaches but did not do much for the pins and needles in her left hand.

328 On 11 November 2021, Dr Jones changed the plaintiff's certificate to say that she had no capacity for work.

329 On 18 November 2021, the plaintiff saw Dr Wong for the first time. He arranged for the plaintiff to undergo a nerve conduction study. On 25 November 2021, she was reviewed by Dr Wong after completing the study and was told that her symptoms were coming from the neck and that she should continue with physiotherapy. The plaintiff was anxious to return to work and wanted to avoid further surgery if possible.

330 On 26 November 2021, a new return-to-work plan was created, following a meeting between the plaintiff, Penelope from Platinum Rehab and Dr Jones. Initially, she was to return to work from 29 November 2021, doing six-hour shifts, three days a week with a 20kg lifting limit and a two-hour limit on lashing duties. Her work capacity was to be increased gradually in the following weeks. She returned as per the plan, however the lashing duties aggravated her symptoms. Nevertheless, she persisted because she wanted to return to work.

331 On 9 December 2021, Dr Jones certified that the plaintiff would be able to work full shifts (eight hours per day) three days a week with a maximum of 4 hours' lashing duties up until 23 December 2021 and from then, a maximum of 6 hours' lashing duties per shift.

332 On 13 December 2021, the plaintiff received a call from Ryan McBriarty, the employer's HR manager. He spoke to her in an aggressive manner, stating that she could not be allocated work because the plan dated 26 November 2021 anticipated that she would be able to work full shifts, unrestricted, on a trial basis from 20 December 2021, but that Dr Jones' certificate extended the plaintiff's restrictions beyond that date. She was unable to explain that the restrictions were only extended for an additional week.

333 After 9 December 2021, the plaintiff was not allocated any further restricted duties.

334 From this time, Dr Jones issued certificates that stated the plaintiff had capacity to do restricted work.

335 Despite weekly physiotherapy sessions, the neck and left arm symptoms become worse.

336 From December 2021, as the return-to-work plan fell apart, the plaintiff's mental health deteriorated, and she became more depressed, anxious and jumpy. She relapsed, taking GHB and drinking excessively. At her next review with Dr Jones on 15 March 2022, she reported these developments, and the plaintiff was issued with a new certificate putting her off all work at that time. The headaches, neck, left shoulder and arm symptoms became worse.

337 She had difficulty finding a psychologist that did Workcover and had availability, contacting between six to eight people before finding Rosalind Bolitho.

338 Dr Jones advised the plaintiff to return to Dr Wong because of her increasing symptoms, and she made an appointment with him on 24 March 2022. At this appointment, he recommended that she undergo a foraminotomy (surgery to widen part of the vertebra to enable free passage of the nerve running down her left arm). The plaintiff felt that this surgery presented the best opportunity to fix her neck problem and return to work, and that returning to the workforce would be the best way of treating her psychological conditions.

339 The workers compensation insurer only agreed to pay for the surgery after the plaintiff's solicitors filed an application in the NSW Personal Injury Commission.

340 On 1 September 2022, the employer terminated the plaintiff's employment on the basis that she was unable to perform the inherent requirements of the role for the foreseeable future.

341 On 1 December 2022, the plaintiff was admitted to Northern Beaches Hospital and underwent a left C5/6 posterior cervical foraminotomy. Following the surgery, she initially noticed a lessening of the symptoms, but she soon began experiencing neck pain and swelling. While visiting her grandmother in Tuncurry, the pain became so severe she was transported by ambulance to Manning Hospital. There, a CT scan revealed an infection at the wound site,

and she was advised to see the operating surgeon as soon as possible. On her way back to Northern Beaches Hospital, the wound discharged, and a large amount of pus was produced. On 28 December 2022, she was admitted to hospital under Dr Wong, who performed another surgery to clean the infection. She was put on oral antibiotics for five to six weeks.

342 The plaintiff continues to experience neck and left shoulder pain, and numbness in the left thumb and index finger from time to time.

343 She also continues to receive physiotherapy in relation to her right foot and ankle and neck on a fortnightly basis. She experiences neck stiffness and headaches (likely related to her neck stiffness) every two to three days and for which, she takes Panadol every four hours. These symptoms often wake her up from sleep. The discomfort in her right foot and ankle persists no matter what she is doing but has worsened in the last year and is aggravated if she walks for a long period of time or walks over uneven surfaces. During this time, she has also noticed the onset of pain in her left heel.

344 In early November 2024, the plaintiff returned to Dr Sullivan because of the worsening pain in her right ankle. He informed her that the left heel pain could be due to her favouring her right foot when walking. Dr Sullivan gave her a referral to have a steroid needle into the right ankle. The previous steroid needle that she had about one year ago only alleviated her symptoms for a day or so before the effects wore off. At the time of writing, Dr Sullivan proposed to order an up-to-date CT scan so that he may be able to advise as to further available treatment options. Dr Sullivan has previously told her that due to the type of fracture suffered in her right ankle, there was a possibility that the plaintiff would require an ankle joint fusion, which would result in a permanently stiff foot and limp. The plaintiff said that that prospect made her very depressed.

345 The workers compensation insurer approved a request from the plaintiff’s doctor to cover the cost of attending a gym. She attended North Head Fitness regularly until the beginning of this year when her ankle symptoms worsened. She did cardio, including cycling and lifting weights up to 10kgs, as recommended by her physiotherapist.

346 The neck, left arm and ankle problems disrupt her sleep to such an extent that she is lucky if she receives more than four hours of sleep. These symptoms have also negatively impacted her sex life.

347 Her current podiatrist is Andrew Scone, who she first saw shortly after the incident. He built orthotics which she must wear in both shoes, and she has gone through five sets since the incident. She finds it difficult to wear heels and some flat shoes as well.

348 The plaintiff's right ankle injury means that she cannot drive a motor vehicle for long distances. Prior to the incident, she enjoyed pool and beach swimming and could swim freestyle for up to a kilometre. Now, she can still swim, but freestyle is difficult because of her neck, shoulder and arm injuries.

349 In about early 2017, the plaintiff commenced cross-fit exercise programs (including high intensity activities like running, jumping, gymnastics and balance work) which she enjoyed immensely; but she can no longer participate. The plaintiff used to enjoy bushwalking and camping, but she has not engaged in these activities since the incident. She used to enjoy dancing before the incident but can no longer participate. Since the incident, the plaintiff has lost a lot of physical strength since the incident, and now has difficulty opening tight lids, lifting her arms above head height and washing and styling her hair. The plaintiff also has difficulty in managing everyday tasks like doing laundry, cleaning her unit, carrying shopping and washing her car.

350 The scarring on her right foot and ankle can become irritated when wearing certain types of shoes. It is also a constant reminder of the incident, which causes her sadness.

351 Since her incident, the plaintiff has suffered from significant depression and anxiety, nightmares and a lack of confidence. She is always on edge, often ruminates about the incident and has relapsed into consuming drugs and alcohol. These relapses have led to her admission to psychological or detox wards on a number of occasions.

352 The plaintiff says that she has lost her ambition and fears not having any prospects in life. She often spends most of the day in bed, does not like leaving

her home and is no longer interested in mixing with people socially. As a result, she has lost many friends. She is sad that she cannot work for the employer anymore, having considered it to be her dream job, it being active, outdoors and physical.

353 She understands that of the 40 to 50 people who were in the plaintiff's intake in November 2017, all of them have now been promoted to full-time positions with the employer and believes that but for her incident, she would also have been made permanent. I will return to this subject under the heading loss of earning capacity.

354 The plaintiff currently sees Dr Jones monthly. He provides certificates of capacity, prescriptions and organises referrals. The plaintiff continues to see Dr Gordon, but as he has moved to Mittagong, she usually sees him by telehealth. She also continues to see her psychologist Ms Bolitho regularly.

Aaron Henke's (the plaintiff's intimate parter's) account of the plaintiff's life before and after the incident

355 Aaron Henke (Mr Henke), the Chief Operating Officer, gave an evidentiary statement to the following effect. He was not requested for cross-examination.

356 He has known the plaintiff for a period in excess of 17 years.

357 On 14 June 2022, he attended at the medical examination with Dr Wendy Roberts as the plaintiff's support person. They were at Dr Roberts' rooms for about 7 or 8 hours. He was excluded from much of the examination by the doctor.

358 The doctor requested that Mr Henke complete a statement and she gave him a form entitled "For Accompanying Person". He was informed that a copy of that statement appears as an addendum to Dr Roberts' report dated 22 September.

359 Mr Henke and the plaintiff had been a "couple", and they lived together from 2020 up until late 2024. Prior to 2020, Mr Henke saw the plaintiff on a regular basis, usually once a week. Since late 2024, Mr Henke has seen the plaintiff again on a fairly regular basis, perhaps once every one or two weeks. Their decision to separate was amicable.

360 He stated that in his opinion, the plaintiff's ongoing psychological issues, depression and pain were a factor in their separation. He was aware that the plaintiff had a difficult upbringing. When he first knew her, she enjoyed socialising on the weekends and was able to hold down regular work during the week.

361 In about early 2017, he noticed a change in the plaintiff. Initially, she moderated her alcohol consumption significantly and then cut it out altogether. She ceased taking recreational drugs at this time. She said to him that she wanted to "get clean". She still went out and mixed with people, but Mr Henke observed that she usually left early from these gatherings. Mr Henke asked her about these changes, and she told him that a relative who had worked on the waterfront had said to her that there may be jobs coming up with Patricks. She said to him that this sounded interesting because it was completely different from anything she had done previously. The plaintiff told Mr Henke that she was going to get fit and was going to start eating healthy foods. She said to him that she wanted to "re-set her life". From about this time, Mr Henke observed that the plaintiff was going to the gym two or three times a week. She certainly did change her diet, and he also recalled that she ceased drinking and taking drugs.

362 When the plaintiff initially applied for the position with the employer, she told Mr Henke that she had missed out. She said that she was disappointed, but that they were going to keep her name on file. He understands that the company then contacted her later and offered her a position. He understands that she commenced work for the employer on 17 November 2017. She told him how excited she was about getting the position. She also told him that she had done some trade courses, he believes in forklift driving, prior to commencing this work. She seemed happy about getting this chance.

363 In the months after her commencement, the plaintiff told Mr Henke about how much she loved the work. It was obvious that she was excited and was enjoying the work. She said it was completely different from anything she had done previously. She used to say things like: "This is my dream job, I was made for this. I am working outdoors, doing something active" and other

comments of a similar nature. She said to Mr Henke on one occasion that she was hopeful that the position would become a permanent role for her.

364 From the time that she commenced with Patricks up until her accident in August 2018, Mr Henke saw her on a frequent basis and on no occasion did he observe her either drinking alcohol or taking drugs, or acting as if she was under the influence of drugs.

365 Following the incident, Mr Henke was aware that the plaintiff had a very lengthy convalescence and underwent a number of operations on her foot and also, later on, on her neck. Not long after the accident, the plaintiff began to show increasing signs of anxiety. She appeared depressed and despondent. She stopped socialising and would be missing from friends and family social groups. This was unlike her and out of character. Mr Henke used to drop around and see her in her apartment, and she often looked tired, stressed and unhappy. She said to him that she rarely left the apartment and that she had lost confidence.

366 The plaintiff's mental state seemed to get worse the longer her convalescence went on. She was very upset when her return-to-work program was ceased by the employer in December 2021. Shortly after that, she underwent two operations on her neck.

367 Mr Henke was aware that since her accident, the plaintiff has had a number of relapses in relation to drugs and alcohol and a number of admissions to mental health units. To his observation, her current situation is much as he described it in his statement to Dr Roberts in 2022. Before they broke up in late 2024, the plaintiff would spend days doing nothing, largely confined to the apartment. It was difficult to get her off the couch or distract her. She seemed to have lost all her confidence. Before her accident she was a very active person and the change in her has been dramatic.

Right foot and leg injury

<u>Expert orthopaedic evidence about the plaintiff's foot and leg injury</u>

368 All three parties relied upon orthopaedic evidence. The plaintiff relied on: Dr Jeff Ling, foot and ankle surgeon, and his reports dated 9 November 2018, 13 November 2018, 7 February 2019, 16 May 2019 and 7 November 2019; Dr

Martin Sullivan, foot and ankle surgeon, and his reports dated 19 May 2020, 18 August 2020, 25 August 2020, 8 September 2020, 15 September 2020, 6 October 2020, 25 July 2023, 29 October 2024, 2 December 2024 and 13 December 2024; Dr Gavin Soo, orthopaedic surgeon, and his reports dated 8 August 2019 and 5 September 2019; Dr G.J. McGroder, rehabilitation physician, and his reports dated 15 June 2021, 15 September 2022 and 14 August 2023; Dr Brian Stephenson, orthopaedic surgeon, and his reports dated 21 August 2019, 7 February 2022, 17 February 2022 and 15 September 2023; and Dr Peter Endrey-Walder, general surgeon, and his reports dated 5 July 2022, 20 September 2022 and 10 October 2024. The shipowner relied on Dr Kim Slater and his reports dated 10 May 2022 and 3 November 2024. The employer relied on Dr Robert Breit and his reports dated 16 July 2020 and 4 March 2025.

369 A joint expert report dated 27 June 2025 was prepared by Drs McGroder, Endrey-Walder, Slater and Breit (Joint Orthopaedic Report). Since there was little dispute as to the plaintiff’s right ankle injury, after providing the Joint Orthopaedic Report, the orthopaedic experts were not called to give conclave evidence.

370 The experts were largely in agreement that:

(1) The plaintiff suffered a closed right talar fracture which required internal fixation and subsequently had developed subtalar arthritis and, to a lesser extent, ankle arthritis on the right foot.

(2) As far as the left shoulder is concerned, there is no evidence of intrinsic pathology at this time, although she may have had some rotator cuff irritation in the past which is a common occurrence with the use of crutches. However, her current presentation is of referred pain from the neck into the shoulder.

(3) The right foot and ankle injury is directly related to the incident on 22 August 2018. The experts agreed prognosis of the ankle is a high probability of the need for right subtalar fusion as a consequence of the injury. They estimate a 50% probability of the need for ankle surgery as opposed to subtalar fusion in years to come, whether that be ankle replacement or ankle fusion. The prognosis is therefore guarded.

(4) The treatment received for the foot and her right ankle injury has been reasonably necessary. But for the cervical spine, while necessary, is not related to the ankle injury, but more to the nature and conditions of her employment.

(5) With respect to her right lower limb, the plaintiff has had activity related pain which has been resistant to appropriate treatment, resulting in a limitation of her ability to undertake normal activities of daily living and employment opportunities because of pain, stiffness, swelling and restricted range.

(6) These restrictions are likely to remain and if she requires an ankle fusion, may become more severe. There is a low probability of improvement in well-established conditions.

(7) The plaintiff is totally unfit for her pre-injury duties. She did attempt to resume restricted duties, but the degree of symptoms limited her capacity to the point where she was no longer able to be employed. From a purely musculoskeletal point of view, there is no reason that the patient could not perform sedentary or light duties with restrictions. The plaintiff had previously been a hairdresser but the injuries that she sustained made it impossible for her to return to work as a hairdresser, which is the other occupation for which she had experience and training.

(8) She will remain incapacitated at least at her current level. That may deteriorate with time, particularly if she has an ankle fusion as well, so the probability of her working to the age of 70 is remote.

(9) The restrictions are likely to remain and if she requires an ankle fusion, they may become more severe. There is a low probability of improvement in well-established conditions.

(10) In answer to “what restrictions and limitations have arisen in the past from the subject injuries and disabilities including upon the plaintiff’s functioning and quality of life,” the experts agree with respect to her right lower limb, the patient has had activity related pain which has been resistant to appropriate treatment, resulting in a limitation of her ability to undertake normal activities of daily living and employment opportunities because of pain, stiffness, swelling and restricted range.

(11) The experts also agree, based on Drs Wong’s and Moloney's assessment, that there's a high probability of the need for further cervical spine surgery at the C6/7 level in view of the patient's on-going complaints. The prognosis is therefore guarded.

(12) The experts agree that the cervical spine displays underlying spondylosis. Their opinion is that the symptomatology was coincidental rather than caused by the use of crutches. The use of crutches is not associated with causation or aggravation of cervical spondylosis. Setting that aside, they say that the cervical spondylosis is work related due to the nature and conditions of her employment but not related to this injury. Dr Endrey-Walder’s view is that:

> “As it relates to the cervical spine, I accept that Ms Jackson had pre-existing spondylosis at the time of the ankle injury, this likely secondary to the nature and conditions of her work. I agree that the use of crutches is not associated with causation of her spondylosis, but not that it had not contributed to its aggravation. In Ms Jackson's Evidentiary Statement (17.12.2024) she wrote, amongst other things,

> that between 22.8.2018 and December that year "my right foot was confined in a moon boot...I was reliant upon crutches to get around". She lived in a third-floor apartment (no lift), "I had to fend for myself in relation to shopping, running errands, preparing meals etc. I believe that as a result of my altered posture and gait caused by my reliance on the crutches, this placed stress and strain on my neck, left shoulder and arm" I believe that the altered biomechanics on account of the above should be considered an aggravating factor consequent upon the ankle injury."

371 On 7 November 2019, Dr Ling, the plaintiff's treating orthopedic surgeon, reviewed the plaintiff 15 months post-operation. His report recorded:

> "I note she is not working at the moment, for psychological reasons, presumably because of the sudden death of her partner. Functionally though, I note that she is able to train very intensely, including heavy weights, burpees and general cross for training. Her exercise phys report shows she is strong and functional. Clinically, she only has mild leg wasting, and she has good functional range of motion of her ankle and hindfoot. …. I would recommend an immediate graded return to work as a Lasher. She is in agreement with this. I would return her to work slowly over three months in a graded fashion…".

372 In an email to the parties dated 4 July 2025, Mr Trainor, the plaintiff's solicitor, raised the following issues and made these submissions relating to the Joint Orthopaedic Report:

(1) Dr Endrey-Walder was unable to participate in the meeting due to technical reasons beyond his control. He could hear the input from the other members, but he was unable to be heard by them.

(2) He was permitted an opportunity merely to tack on his opinion to the joint conclusions of the others. He did not have the opportunity to converse with the others during the meeting. Because of Dr Endrey-Walder's inability to participate in the conclave, he was denied the opportunity of explaining his reasoning for his view at the time the other three experts were considering the matter.

(3) The orthopaedic experts did not provide a joint report on "matters agreed or disagreed setting out their reasons for the disagreement".

(4) The material supplied to the conclave consisted in the main of medical opinions in relation to the plaintiff's ankle injury and not the neck and arm condition. It was the intention of the parties always to schedule a separate neurosurgical conclave on the spinal injury. The late primary examination with Dr Moloney, neurosurgeon, was arranged for that purpose.

373 So far as the orthopaedic surgeons' responses relate to the cervical spine, the plaintiff submitted that for the reasons outlined above, they should be disregarded: the responses are in the main unaccompanied by reasons and do

not disclose the assumptions upon which they are based and are, by agreement between the parties at least, beyond expertise.

374 In respect of the cervical spine, I accept that reports of the neurosurgeon experts should be preferred over those of the orthopaedic surgeons where their opinions differ.

The plaintiff’s submissions

375 The plaintiff's serious right lower limb condition would on any realistic view preclude her from work requiring prolonged periods on her feet, climbing or general mobility. That means that she could not return to work with the employer in her old job or anything like it and much of her employment background before her employment with the employer involved working on her feet. She has no background in clerical or sedentary work having gone to year 10 at high school without completing the School Certificate.

The shipowner’s submissions

376 The plaintiff has some restrictions for employment due to the ankle injury. The Joint Orthopaedic Report concludes, "[f]rom a purely musculoskeletal point of view, there is no reason that the patient could not perform sedentary or light duties with restrictions."

377 In terms of fitness for work, the plaintiff's ankle injury does not preclude her from undertaking clerical duties, as she did during the period December 2018 to August 2019, or from attending the gym (T65.26-28). The plaintiff accepted she could currently "get a job and work as a receptionist” (T66.5-6). She also accepted she could "potentially" do warehouse work as a dispatch clerk and could work as a salon receptionist if a job were available (T70.12-14).

378 The notion that the plaintiff's right ankle injury is totally destructive of earning capacity is unsupported by the evidence. In terms of the ankle, the shipowner submitted that the plaintiff is currently physically capable of working full-time in a sedentary role and has been able to do so since at least November 2019. Jobs the plaintiff could work have been identified by the vocational assessors. Work of that nature is suitable, available and, on the plaintiff's own evidence, capable of being performed by her. She has a significant residual earning

capacity that significantly exceeds her earnings in Financial Years 2016 and 2017.

Jones v Dunkel inference with respect to Dr Ling

379 The shipowner submitted that a *Jones v Dunkel* ((1959) 101 CLR 298; [1959] HCA 8) inference should be drawn against Dr Ling who was not called to give evidence. Since the evidence of Dr Ling is crucial on this issue, the absence of any explanation as to why there is no evidence on the topic from him leads to an inference that his evidence would not have assisted the plaintiff's case. Furthermore, the Court should not draw inferences favourable to the plaintiff on this issue because she has failed to make any attempt to prove her complaints by direct evidence: *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418.

380 A *Jones v Dunkel* inference can be used for two purposes, namely, (a) in assisting to decide whether to accept evidence that has been given which relates to a matter of which that witness could have given evidence; and (b) in assisting to decide whether to draw inferences of fact which are open on the evidence that has been given, in relation to matters of which that witness could have spoken (Winneke P in *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125 at 131, quoting from *O'Donnell v Reichard* [1975] VR 916 at 929).

381 The rule in *Jones v Dunkel* is a particular application of Lord Mansfield CJ's maxim in *Blatch v Archer* (1774) 1 Cowp 63 at 65 (98 ER 969 at 970) that: "[a]ll evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." That maxim goes to the problem that, in deciding issues of fact, the Court is concerned not just with the question "what are the probabilities on the limited material which the court has, but also whether that limited material is an appropriate basis on which to reach a reasonable decision" (*Ho v Powell* (2001) 51 NSWLR 572; [2001] NSWCA 168 at [14]-[16] per Hodgson JA, Beazley JA agreeing).

382 Where the evidence not adduced relates to a positive allegation or matter of which the party in question bears the evidentiary onus, then the rule in *Jones v*

Dunkel assists the Court in deciding whether the party bearing that onus has discharged it (*Australian Securities & Investments Commission v Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229 at [438]-[440]).

383 Dr Ling was the treating orthopaedic surgeon of the plaintiff. After Dr Ling performed the open reduction and internal fixation operation, the plaintiff was hospitalised for 10 days before being discharged home with a CAM walker and crutches. Dr Ling periodically reviewed the plaintiff and noted that the plaintiff's initial recovery was good and consistent with the expected trajectory.

384 Although Dr Ling was not called to give evidence, Dr Ling's post-operation review reports dated from 9 November 2018 to 7 November 2019 are in evidence. They speak for themselves. If the shipowner wanted to challenge Dr Ling's evidence, the shipowner could have ensured that Dr Ling was available to give evidence by issuing a subpoena.

385 In the exercise of my discretion. I do not draw a *Jones v Dunkel* inference against the plaintiff not calling Dr Ling to give evidence.

Resolution

386 The medical evidence is not controversial when it comes to the plaintiff's right lower limb. I accept this evidence.

387 The plaintiff suffered an injury to the right ankle in the nature of a displaced fracture of the posterior talus and avulsion fracture of the distal tibia.

388 After Dr Ling performed the open reduction and internal fixation operation, the plaintiff was hospitalised for 10 days before being discharged home with a CAM walker and crutches. Dr Ling periodically reviewed the plaintiff and noted that the plaintiff's initial recovery was good and consistent with the expected trajectory. On 3 December 2018, the plaintiff returned to work and continued to work on suitable duties until August 2019.

389 On 7 November 2019, Dr Ling reviewed the plaintiff 15 months post-operation. He noted in his report that due to psychological issues, the plaintiff was not working at the time. However, physically, he noted that she can train very intensely. Her exercise report showed that she was strong and functional. Clinically, she only has mild leg wasting, and she has good functional range of

motion of her ankle and hindfoot. Dr Ling noted that he would recommend an immediate graded return to work as a lasher.

390 In June 2021, he said that the right ankle had improved functionally. He recorded that the plaintiff tried to return to work. On 15 June 2021, the plaintiff told Dr McGroder that she did her share around the house.

391 The orthopaedic experts agreed that it's more probable than not that she will require a subtalar fusion and they would estimate a 50 percent probability of the need for right ankle surgery in years to come whether that be ankle replacement or ankle fusion.

392 The plaintiff is totally unfit to work as a stevedore. She attempted to resume restricted duties, but the degree of symptoms limited her capacity to the point where she was no longer able to be employed in that capacity.

393 From a purely musculoskeletal point of view, there is no reason that the patient could not perform sedentary or light duties with restrictions. The plaintiff had previously been a hairdresser but the injuries that she sustained made it impossible for her to return to work as a hairdresser, which is the other occupation for which she had experience and training.

394 She will remain incapacitated at least at her current level. That may deteriorate with time, particularly if she has a right ankle fusion as well, so the probability of her working to the age of 70 is remote.

395 The orthopaedic experts also agreed due the injury to her right lower limb, the plaintiff has had activity related pain which has been resistant to appropriate treatment, resulting in a limitation of her ability to undertake normal activities of daily living and employment opportunities because of pain, stiffness, swelling and restricted range.

396 In summary, the plaintiff has suffered significant injuries to her right lower limb because of the incident. She has undergone treatment including surgery. Although the plaintiff has recovered well all things considered, the injury still causes her disability and pain on a regular basis. She is more likely than not to require further surgery to her right lower limb (a right ankle fusion). This

procedure will likely occur in about ten years. The defendants are responsible for this.

Cervical spine and left shoulder injuries

Expert neurological evidence about the plaintiff’s alleged neck and shoulder injuries

397 Contrary to the lower-body injuries, the alleged injuries to the plaintiff's left shoulder, left arm, left hand and neck that are very much in dispute. The plaintiff and shipowner relied upon expert neurosurgical evidence. The plaintiff relied on Dr Johnny Wong, neurosurgeon, and his reports dated 18 November 2021, 25 November 2021, 24 March 2022, 29 June 2022, 1 December 2022, 28 December 2022, 9 February 2023, 19 June 2023, 10 April 2025 and 27 May 2025. The shipowner relied on Dr Peter Moloney, neurosurgeon, and his report dated 17 June 2025. The experts produced a joint neurosurgical report dated 9 July 2025 (Joint Neurosurgical Report). They also gave concurrent evidence in Court on 31 July 2025 (with Dr Moloney dialling in via AVL).

398 The neurosurgical experts were essentially in agreement with each other. Their opinions are summarised as follows.

399 Drs Wong and Moloney agreed that the plaintiff’s diagnosis in relation to her left upper limb and cervical spine complaints was “a cervical radiculopathy from left C6 and now a component of left C7 nerve roots”. At the time of the incident, the experts agreed that the plaintiff had a “pre-existing pathology of foraminal stenosis at left C5/6, C6/7” but that this was asymptomatic, meaning she did not have any pain. As a result, the plaintiff did not require treatment in the past and it did not impact her past work capacity.

400 Drs Wong and Moloney also agreed that the nature and conditions of the plaintiff’s employment contributed to the pathology and that while there was likely some stenosis from the underlying pathology, given that it was asymptomatic and then became symptomatic later, the use of the crutches aggravated her condition. This answer was different to what Dr Moloney stated in his report dated 17 June 2025, where he was of the opinion that the nature and conditions of the plaintiff’s employment contributed to the pathology, but was not of the opinion that use of crutches aggravated her condition.

401 While Dr Wong's opinion is that the incident contributed to the plaintiff's upper limb pain, the experts agreed that pain from use of the crutches was due to the associated neck posture (that is, head extended while leaning forward and climbing stairs with difficulty) and not because of the crutches themselves. The experts agreed that these were the only possible causes of the plaintiff's neck and left upper limb pain.

402 In relation to question 10 "but for the incident, would the plaintiff on the balance of probabilities, have required the spinal surgery recommended in March 2022 and performed by Dr Wong on 1 December 2022 and 28 December 2022?" As to the necessity of the spinal surgery, the experts agreed that a combination of the injury, "unusual loading strains on the neck caused by treatment" and the use of crutches led to the need for surgery in 2022. The experts also agreed that the purpose of the surgery on 1 December 2022 was to reduce the plaintiff's neck and arm pain, and that this in fact occurred, and that the operation on 28 December 2022 was unexpected and was to treat an infection.

403 The experts agreed that the plaintiff's prognosis in relation to her neck is good and that is has not impacted her daily life and work activities. In terms of future treatment, continuation of current treatment and pain medication, cortisone steroid injections when pain recurs and physiotherapy on an ongoing basis is suggested. Beyond this, it was difficult to say whether the plaintiff's symptoms would improve or would be exacerbated such that an anterior spinal fusion would be required at a later stage. The likely probability that repeat steroid injections, physiotherapy and surgery would be required are 50-60%, 80-90% and 30% respectively. The estimated cost of these treatments was $50,000.

404 In terms of the future limitations arising from the neck and upper limb conditions, the experts agreed that regardless of the evolution of the neck problem and whether different treatment is required, the plaintiff would need to "avoid employment which places a loading strain upon her neck". This means that she should not lift weights greater than 10kg and do work requiring extending her neck (like forklift work and lashing). The experts' opinion was that there would not be a significant impact on her daily life if the appropriate modifications were made. The plaintiff's future work capacity is impacted.

405 In answer to question 19 "Assuming Ms Jackson did not suffer her ankle injury, would her diagnosed neck and upper limb conditions preclude her from working as a stevedore", the experts agreed that had the plaintiff not suffered the ankle injury and subsequently required treatment for it, it is possible that her neck condition "may have remained asymptomatic and, under these circumstances, she would not have been precluded from working as a stevedore".

406 The experts agreed that roles including clerk, receptionist and information officer are feasible so long as "an adequate ergonomically planned work station was available" to the plaintiff. The experts agreed that question 21 regarding the plaintiff's ability to work as an Uber driver given her arm and neck condition was more suited to an occupational physician, but agreed, insofar as her neck was concerned, it was not out of the question for four to six hours a day. They did note that the plaintiff's ankle injury may have an impact on her ability to do this work.

407 Dr Wong's view is that the plaintiff's cervical spondylosis is not a congenital condition but usually develops and gradually worsens over time and that it can become symptomatic without provocation (T332.48-49, T333.43-48). Dr Moloney agreed (T334.9). Both experts noted that the plaintiff's condition is quite advanced for her age (T335.10-16).

408 Dr Moloney opined that while use of the crutches may have aggravated the plaintiff's neck problems, that it would have settled after ceasing to use the crutches (T335.37-42). Dr Wong agreed that it was possible the plaintiff's symptoms would dissipate after she stopped using crutches but that given the degree of stenosis, there could be ongoing inflammation in the nerve that would continue to cause pain (T336.1-14).

409 Counsel for the shipowner asked both experts whether the plaintiff's neck complaints could have been caused by her physical restraint during a hospital admission and not because of her use of the crutches, given that no such complaint had ever been recorded until after this incident. Dr Wong was unsure and believed that based on the history given by the plaintiff, he was still of the opinion that the symptoms began after the use of the crutches (T338.37-40). Dr

Moloney reiterated the position in the Joint Neurosurgical Report, being that use of the crutches aggravated the plaintiff's neck problems (T339.13-18). Both experts noted that it was possible that the plaintiff's complaints regarding her neck may simply not have been recorded by doctors, but Dr Wong accepted that he did not have that history (T340).

410 In relation to the plaintiff attending the gym and lifting a significant weight above shoulder height, Dr Wong said that was not an activity that he would advise his patients to do if they had ongoing pain (T340.48-341.5). Dr Moloney said that it was inconsistent with a patient who was being treated for neck and shoulder pain (T341.26).

411 Both experts agreed that, assuming the history that the plaintiff first complained about numbness and tingling in her left hand after completing one day of lashing, the lashing activity could have exacerbated the problem (T344-346).

412 In relation to the observation of Dr Ling, the orthopaedic surgeon who reviewed the plaintiff over a year after her ankle surgery, about her level of exercise at that time, Dr Wong was unable to comment on whether the bursitis had resolved but Dr Moloney accepted that the bursitis of the shoulder had resolved (T347-T349).

413 Dr Moloney held the view that there had not been a real degenerative change between the MRIs dated 14 October 2021 and 2 April 2025 whereas Dr Wong believed that there had been a progression over that time (T351-352). Both doctors noted that radiologists may interpret things differently (T353). Based on the MRI of the plaintiff's neck in 2021 at age 35, Dr Moloney accepted that the nature and conditions of her job as a lasher likely contributed to her neck problems such that, she would eventually not be able to do that work (T355.49 -T356.4). Neither doctor was able to say for how much longer the plaintiff would have been able to work as a lasher (T356). Dr Wong accepted that in his report dated 9 February 2023, he considered that she would be fit for suitable work within four to six months, suitable work such as an information officer, receiver or dispatch clerk, or a receptionist at a hair salon (T357-T358).

414 Dr Wong agreed that in trying to get better and return to normal life, the plaintiff could have further exacerbated her condition which was triggered by use of the

crutches (T360.42-44). Dr Moloney disagreed and stated that someone with neck and arm pain would not be able to go to the gym and engage in such a high level of exercise (T360.48-361.3).

The plaintiff's submissions

415 As to the proposition put to the neurosurgical experts in conclave that the events during the hospitalisation from 7 January to 10 February 2020 may have precipitated the symptoms in the plaintiff's neck, there is no recorded complaint of neck pain or arm symptoms during the psychiatric admission and nothing was put to the plaintiff in cross-examination concerning an onset or change in symptoms at that stage.

416 Dr Wong said: (T338.27-40)

> "PARKER: ….What I'm putting to you is that the first report recorded by a doctor of symptoms approximating the complaint about neck pain and shoulder pain did not occur until 4 June 2020, and that before then, she was physically restrained and was violent, needing to be restrained, at the Prince Alfred Hospital. Is it not more likely that the symptoms she complained of on 4 June 2020 derived from the events of January 2020? Can you answer that, Dr Wong?
>
> WITNESS WONG: I, I'm not sure. I, I can't answer that. I, I, I don't know whether it is. More likely it's from the physical restraint, but based on the history given to me by the patient, that she had symptoms starting after the use of the crutches, so, and that's still my opinion."

417 Dr Wong said: (T336.1-14)

> "WITNESS WONG: My opinion is that the use of the crutches has exacerbated the ankle symptoms relating to the radiculopathy, but the nerve may be in a situation where there is ongoing irritation, inflammation. Once it's set in that there's ongoing inflammation that would continue to, to cause pain. So I don't completely agree that once she stopped using crutches therefore, you know, you'd expect all the symptoms to dissipate.
>
> PARKER: But it's possible that the symptoms would have dissipated, do you accept that?
>
> WITNESS WONG: I would accept that, but it's also possible that with the degree of stenosis that there would be - once started there is ongoing inflammation in the nerve and I see patients with ongoing radiculopathy from an initial precipitant."

418 The neurosurgeons gave the following evidence (T359.30-360.19)

> "KING: Both Dr Wong and Dr Moloney, I want to come back to the history involving the development of symptoms initially in the hand and arm after use of crutches for some time and culminating in the detection of symptoms later on in the shoulder and neck, leading to Dr Wong's surgery. In relation to that

history, if it is correct that symptoms came on initially in the hand and arm after the use of crutches for some time and didn't resolve, they persisted and went on to include symptoms in the shoulder and neck, may I take it that on that basis you would adhere to the views expressed in the joint report that the use of the crutches created an aggravation of the underlying degenerate condition, provoking symptoms which went on to require surgery? Dr Wong, is that the situation?

WITNESS WONG: That's been my consistent opinion.

…

KING: But, doctor, what I'm asking you to assume is that there was indeed a continuation of the symptoms. If you accept that, isn't it the case that you would agree with the sentiments you agreed to in the joint report?

WITNESS MOLONEY: I did add a rider and say that my report was different. And I mean that was a heads up to whoever was reading it that I didn't agree 100%. But if I take your assumption that there was a continuum of symptoms from the time of her using the crutches, then, then yes, the performance of the operation that Dr Wong did seems to stretch back to the crutches."

419 At a review of the plaintiff on 27 May 2025, Dr Wong noted a deterioration in the plaintiff's cervical spine with a possible need for surgery in the future. Dr Wong attributes the plaintiff's cervical problems and the consequent need for surgery to the incident.

420 The plaintiff made the following submissions as to the connection.

421 The long-established law is that if the necessary scientific or expert evidence, here medical evidence, is that a connection is possible, it is always open to the court to find on the totality of the evidence that the connection is probable: *EMI (Australia) Limited v Bes* [1970] 2 NSWR 238. In particular, the reference to *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262; [2000] NSWCA 29 at [119] is misconceived and erroneous:

"[119] There is a tension between the suggestion that any increased risk is sufficient to constitute a "material contribution", and the clear line of authority that a mere possibility is not sufficient to establish causation for legal purposes. The latter is too well established to be qualified by the former. The reconciliation between the two kinds of references is to be found in the fact that, as in *Chappel v Hart* and in the cases that suggest the former, the actual risk had materialised. The "possibility" or "risk" that X might cause Y had in fact eventuated, not in the sense that X happened and Y had also happened, but that it was undisputed that Y had happened because of X."

422 Not only was that case factually different and involved focus on epidemiological studies, it nonetheless affirmed the established law. It is significant that in the Joint Neurosurgical Report, Dr Moloney supported the causal connection here

and only departed from it on the basis that he would have expected the aggravation from using crutches to resolve. But on the plaintiff's evidence it did not. When one looks at the surrounding evidence, there is no other cause for her neck problem. She had no symptoms before the period of use of crutches and even though she had some degenerate change she was very young and Dr Wong's evidence as to when they those changes might have become symptomatic puts it speculatively in the future. There is no basis for saying it would have come about in the plaintiff close in time to the injury.

423 The plaintiff's evidence has consistently been that her next complaint to a medical practitioner about the symptoms was on 4 June 2020. The plaintiff gave evidence that in June 2020, she reported the left-hand pins and needles to Dr Ben Dixon. Separate histories on that day were recorded by Dr Dixon and by the psychologist at Dr Lim's practice. The 'hand is quite numb' entry was made by the practice psychologist during the telehealth consultation.

424 The plaintiff was cross-examined about the numerous opportunities she had to report the symptoms prior to 4 June 2020. At no stage has the plaintiff sought to embellish her evidence by reference to the sight, nature or intensity of her symptoms or as to complaints being made but not recorded. The fact that the plaintiff did not complain about those symptoms to a doctor between about October 2018 and 4 June 2020 does not make them any less real. The fact that she has not sought to embellish her evidence makes her account very credible. Her evidence about this was entirely consistent during extensive cross-examination (T110-124).

425 When it was suggested to the plaintiff during cross-examination that she did not complain about her hand to Dr Dixon on 4 June 2020, her response was compelling (T124.25-124.30)

> "Q. You didn't mention anything about your hand to him, did you?
>
> A. Yes.
>
> Q. No you didn't. You mentioned your shoulder with pins and needles, but not your hand?
>
> A. I mentioned pins and needles in my hand. It - that's where it started"

426 The plaintiff knew that she must have referred to pins and needles in her hand if she was complaining about her left shoulder. Her evidence is compelling in relation to both the onset of symptoms and their continuum.

The shipowner's submissions

427 The shipowner submitted that the plaintiff had multiple medical consultations between the incident and 4 June 2020. The resulting records list numerous symptoms and complaints reported by the plaintiff. She underwent extensive medical investigations and had ample opportunity to bring medical complaints to the attention of an objectively, if not excessively, large number of treaters. The reported symptoms and complaints ranged from significant to minor medical issues; the full spectrum of medical concerns was raised. However, there were no reports involving the left hand, neck, or left shoulder until 4 June 2020, that is, 21 months and 17 days post-incident. By that stage, the plaintiff had not used crutches for over eighteen months. Furthermore, in that time the plaintiff had been participating in strenuous, heavy exercise at the gym, as recorded by Dr Ling and accepted as true by the plaintiff.

428 If it is accepted that the plaintiff's evidence that she experienced cervical symptoms - such as left-sided neck pain, left shoulder pain, and pins and needles in the left hand - six weeks post-incident, these symptoms are either unrelated to the injury, or had resolved within approximately three months (T339.20-40, T340.10-34).

429 The use of crutches could have caused bursitis of the left shoulder but did not cause the cervical spondylosis for which the plaintiff was surgically treated by Dr Wong on 1 December 2022. The cervical spondylosis is not related to the injury.

430 In his report of 10 May 2022, Dr Kim Slater, orthopaedic surgeon, said that the plaintiff was non-weight bearing for two months, and for the first two weeks she used crutches, then subsequently a knee walker around the home. She developed left shoulder bursitis due to the use of crutches. The cervical spondylosis was pre-existing. As of 10 May 2022, the plaintiff had no limp. She was relatively normal and had pain free function of the right ankle. The injury to her left shoulder was a temporary aggravation.

431 The plaintiff had pre-existing pathology in the form of foraminal stenosis at left C5/6/7 which was asymptomatic.

432 The plaintiff's submissions on causation of the subsequent cervical spinal surgery depends on the assertion that the use of crutches precipitated symptoms of paraesthesia, neck and left shoulder pain and that such symptoms continued from onset in 2018 until the consultation with Dr Wong in 2021. That assertion should not be accepted.

(1) Firstly, there is no evidence that the plaintiff complained to any doctor of symptoms with respect to her hand, left arm, left shoulder or neck before 4 June 2020. On 8 August 2019, almost a year after the incident, the plaintiff was comprehensively examined by a number of doctors and other professionals at the Workers Doctors practice. There was no record of any complaints in relation to the plaintiff's hands, shoulder arm or neck. The first record of complaint occurs on 4 June 2020 to Dr Dickson.

(2) Secondly, the plaintiff said that four to six weeks post-operation, she experienced pins and needles and altered sensation in her left hand and reported those symptoms to Dr Ling. She says that the symptoms did not resolve. There are reports from Dr Ling beginning on 13 November 2018 and concluding with a final report on 7 November 2019. None of those reports make any mention of any such complaint by the plaintiff.

(3) Thirdly, the plaintiff testified to ongoing pain in her left shoulder and neck, as well as persistent pins and needles, symptoms that worsened over time (T97.31-45). It is unlikely an orthopaedic surgeon would have missed these continuous complaints reported from six weeks post-surgery. It is equally unlikely that the plaintiff would have failed to raise them. To the extent any inference can be drawn from the reports of Dr Ling, that inference is adverse to the plaintiff's case. Dr Ling said the plaintiff was recovered remarkably well.

(4) Fourthly, in the report dated 7 November 2019, Dr Ling noted that the plaintiff was engaging in intense exercise at the gym.

(5) Fifthly, cervical spondylosis is a degenerative condition which gradually worsens over time (T332.19-50) and may become symptomatic because of a known provocation or unknown provocation (T333.40-48).

(6) Sixthly, if it is accepted that the use of the crutches caused symptoms for a time, the more plausible explanation is that the aggravation resolved as expected by Dr Moloney (T335.36-336.8-49) and presumably Dr Ling. Even Dr Wong was prepared to concede this is "possible":

> "PARKER: But it's possible that the symptoms would have dissipated do you accept that?

> WITNESS WONG: I would accept that, but it is also possible that with the degree of stenosis that there would be – once started there is ongoing inflammation in the nerve and I see patients with ongoing radiculopathy from an initial precipitant.”

433 The plaintiff’s activities prior to seeing Dr Wong in November 2021 were inconsistent with the cervical radiculopathy being related to the incident of 22 August 2018 and more consistent with becoming symptomatic as a result of some other intervening cause.

(1) Firstly, the plaintiff engaged in strenuous gym activities.

(2) Secondly, she was physically restrained at RPA in January of 2020.

(3) Thirdly, Dr Kyra Jones’ referral to Dr Wong is proximately close to the plaintiff performing two hours of lashing duties working above shoulder height with bars weighing 25 kilograms on 7 October 2021. On that occasion, she consulted with a physiotherapist for tension in the muscles of the neck and left shoulder.

434 Dr Wong received an incomplete history. The neurosurgeons were asked whether the symptoms reported on 4 June 2020 more likely stemmed from the January 2020 events when the plaintiff was physically restrained at RPA. Dr Moloney stated that any aggravation associated with the use of the crutches would have resolved within three months (T339.25). He said he thought there was no evidence to suggests a continuation of neck or arm pain after use of the crutches. Dr Wong agreed it was possible that other triggers occurred, perhaps during the RPA admission, but he was not given that history from the patient (T340.15-50).

435 It is also apparent that Dr Wong was not given the history of the plaintiff performing “clean and jerk” gym exercises that involved lifting 45-kilogram weights (T132.44-49). When presented with that history, Dr Wong said he “… wouldn’t advise for patients to lift weights above their head to that extent … that would be my normal advice.” (T341.4-5).

436 It is highly improbable that the plaintiff would be lifting heavy weights above shoulder height if she were continuously suffering neck and shoulder symptoms, including radiculopathy, from six weeks after the incident (T341.20-50). When asked, Dr Wong (T339.25-52, T340.15 T132.43-50, T341.5, T341.26) agreed such activities worsened her symptoms (T344.10–46). Dr

Moloney similarly acknowledged that lashing aggravated existing spinal changes at C5/6 and C6/7 (T346.11-16).

437 The Court should make the following findings with respect to the plaintiff's complaints about her cervical spine:

(1) Firstly, if the plaintiff experienced symptoms associated with use of crutches, those symptoms were likely caused by bursitis which, as predicted by Dr Ling, resolved very shortly after she ceased using crutches in about late November 2018.

(2) Secondly, the plaintiff remained asymptomatic with respect to her cervical spine until shortly before she reported symptoms to Dr Dickson on 4 June 2020.

(3) Thirdly, the symptoms related to pain in the shoulder were not related to the use of crutches but more likely related to other events such as gym activities, the January 2020 admission to RPA which involved physical restraint of the plaintiff on account of her violent conduct at the hospital, lifting lashing bars as part of a return to work program, or triggered by some other unknown provocation.

(4) Fourthly, the need for surgical treatment arose from aggravations unconnected with the treatment provided in response to the incident of 22 August 2018, most likely the events recorded in Dr Jones' note of 7 October 2021 when the plaintiff engaged in lashing activities.

(5) Fifthly, consistent with the opinion expressed in the Orthopaedic conclave, with some qualification by Dr Endrey-Walder, "for the cervical spine there is underlying spondylosis and the symptomatology was coincidental rather than caused by the use of crutches. The use of crutches is not associated with causation or aggravation of cervical spondylosis".

438 The incident of 22 August 2018 did not cause or materially contribute in the sense that it was not a "necessary condition" to the need for the surgery(s) performed by Dr Wong (T344.10-46, T346.15) on 1 and 28 December 2022. Section 5D(1) is not established with respect to the condition or surgery to the cervical spine. Dr Wong has indicated that further surgery with respect to the radiculopathy at C7 is a possibility.

439 The shipowner submitted that the plaintiff suffered from pre-existing foraminal stenosis at left C5/6 and C6/7. The pre-existing pathology was not caused by the incident, was inherently degenerative ("unrelenting" according to Dr Wong) and was, according to Drs Wong and Moloney, advanced for her age (T355.10-16). In terms of her long-term prognosis, both experts agreed that, irrespective

of the incident, she would not have been physically able to continue working as a stevedore until retirement age. Dr Moloney's view was that "…if she continued in that job, then eventually she would get to the point where she would not be able to do the work of a lasher". Dr Wong said: "I think that she has enough foraminal stenosis that would predispose her to further exacerbations in the future within that role. So, I don't, I can't predict how long she could stay in that job for. 15 years, 20 years. There's no way that I can - it's pulling a number out of my head" (T356.34-37).

440 While neither neurology expert was able to say precisely how long the plaintiff would have been physically capable of working as a stevedore with her pre-existing cervical pathology. The shipowner submitted that it would not have been to retirement age and likely have been no more than twenty years.

The employer's submissions

441 Despite the concession made by the employer in the Personal Injury Commission, there exists controversy surrounding the plaintiff's assertion that her hand, shoulder and cervical spine condition were as a consequence of the incident of 22 August 2018 when she was required to use crutches after the first operation, permitting this court to reject the plaintiff's argument for the following reasons.

(1) The contemporaneous records do not mention any cervical component.

(2) The plaintiff's treating orthopaedic surgeon Dr Ling does not mention any other injury than to her right lower limb.

(3) The first reference to any hand, shoulder or possible cervical complaint does not occur until the 4 June 2020 (nearly two years later) when the plaintiff makes complaints to a psychologist and her then GP, Dr Ben Dickson, and assigns their origin to the use of crutches despite the plaintiff in evidence suggesting that the shoulder and hand complaints were increasing in severity from approximately six weeks after the incident.

(4) The plaintiff had been to the practice of at least four general practitioners during the relevant time and made no complaint of shoulder or cervical discomfort before the 4 June 2020.

(5) X-rays showed degenerative changes to the plaintiff's cervical spine prior to the 22 August 2018, and the neurosurgeon agreed that this condition is progressing (see neurosurgical conclave at T351-354).

442 If it is found that the concession made is binding against the employer, this does not apply to the shipowner. At the very least it is a critical credit issue that resonates against the plaintiff's assertion that she is totally incapacitated for any type of employment duties.

443 It is submitted that the any cervical condition suffered by the plaintiff is not a consequence of the injury that occurred on 22 August 2018, and any incapacity arising is not in relation to her work injury.

Resolution

444 The experts agreed that the plaintiff had a pre-existing pathology of foraminal stenosis at left C5/6 and C6/7 but also that it was asymptomatic at the time of the incident, when she was a relatively young woman.

445 I accept the evidence from both the orthopaedic experts and neurosurgeons. As to the injury's prognosis and the plaintiff's work capacity, I accept that it has been diminished by the incident that occurred on 22 August 2022.

446 As to the plaintiff's injuries to the left-hand shoulder, left hand and neck, I accept the plaintiff did not mention these issues to any medical practitioners until 4 June 2020. However, as far as medical records are concerned, it is important to have regard to *Mason v Demasi* [2009] NSWCA 227 where, at [2], it was said that inconsistencies in histories provided by doctors should be approached with caution.

447 As to the submissions made by the defendants that the injuries to her neck and shoulder arose on her admission to RPA, there is no evidence to support this submission, and it is my view that this is mere speculation.

448 When the plaintiff used crutches for a six-week period, the use of the crutches caused bursitis in her left shoulder, but, after that time, the bursitis abated. The plaintiff's injuries in her cervical spine and right shoulder ended shortly after she ceased using crutches.

449 So far as concerns the plaintiff's neck injury, the neurological experts agreed that the "unusual loading strain on the neck caused by treatment and the use of crutches led to the need for surgery", which took place on 1 December 2022 in order to reduce the plaintiff's neck and arm pain. The subsequent operation

that took place on 28 December 2022 was unexpected and was necessary to treat an infection.

450 The prognosis in relation to her neck is good but the plaintiff needs to avoid employment that places a loading strain on her neck. Subject to restrictions such as extending her neck, for example in forklift work or lashing, there would not be a significant impact on her daily life. Nonetheless, her future work capacity is impacted.

451 There is no persuasive medical evidence to support the plaintiff's assertion that the pins and needles and pain she experienced in her left hand was caused by the incident.

452 The plaintiff gave evidence that in 2025, she had been working out regularly in the gym during her sessions and was doing low impact exercises. She was able to carry out a squat and pick up weight and put it back down, but she did not perform any movements overhead and did not lift and weights for more than 10kgs. She admitted that although it affected her ankle, it was not to the extent that she could not go to the gym. I agree with Dr Moloney that someone such as plaintiff with neck and arm pain would not be able to go to the gym and engage in such a high level of exercise (T360.48-361.3). In relation to the plaintiff attending the gym and lifting a significant weight above shoulder height, Dr Wong said that was not an activity that he would advise his patients to do if they had ongoing pain (T340.48-341.5). Dr Moloney said that it was inconsistent with a patient who was being treated for neck and shoulder pain (T341.26).

453 The result is that the incident caused the plaintiff cervical and shoulder injuries, this is despite the fact that this involved an aggravation of a pre-existing condition. That condition may have continued to be asymptomatic for the foreseeable future.

454 It is my view that the plaintiff has substantially recovered from the injuries to her neck and shoulder. However, there are three qualifications: (1) the neck and shoulder injuries (including the two surgeries) aggravated her psychiatric condition; (2) despite recovering, the need to prevent reinjury to her neck and shoulder means that she cannot perform heavy labour and therefore cannot

carry out certain types of employment but is restricted to the duties as are referred to later in this Judgment; and (3) she will possibly need future cervical surgery on account of the injuries sustained from the incident, if so, doing the best I can, I assess that it will take place in about ten years.

Psychiatric injuries

Expert psychiatric evidence

455 All three parties also relied upon expert psychiatric evidence. There is also not much dispute between the psychiatrists' evidence. The plaintiff relied on Dr Robert Gordon, the plaintiff's treating psychiatrist, and his reports dated 21 January 2020, 5 March 2020, 20 October 2020, 17 November 2020, 9 March 2021, 8 April 2021, 29 June 2021 and 1 February 2025, and Dr Russel Davies and his report dated 17 October 2024. The shipowner relied on Dr Wendy Roberts and her reports dated 22 September 2022 and 27 April 2025. The employer relied on Dr Peter Young and his report dated 6 January 2025.

456 The psychiatric experts also wrote a joint psychiatric/psychological report dated 4 July 2025 (Joint Psychiatric Report). Drs Gordon, Roberts and Young also gave concurrent evidence in Court (with Dr Gordon dialled in via AVL). Dr Davies did not give evidence at the hearing. During the conclave, the liability experts were mostly in agreement with each other.

457 Drs Davies, Gordon, Young and Roberts were largely in agreement with each other. Their opinions have been summarised below.

458 The experts agreed that:

(1) The plaintiff "has a premorbid history of borderline personality disorder, ADHD and substance use disorder" with the latter possibly having been "largely in abeyance at the time of the injury" but noted that it is not possible to conclude "whether the conditions were in remission or not and how they would define remission".

(2) While the incident did not cause any new psychiatric conditions, it materially contributed to the exacerbation of her pre-existing emotional conditions, particularly substance abuse. This exacerbation is "consistent with complex trauma, borderline personality disorder and active substance use".

(3) As a result of the incident, the plaintiff has suffered physical trauma and an aggravation of her pre-existing conditions "resulting in more severe

symptoms which have reportedly restricted her social interactions and daily activities and overall functioning".

(4) The plaintiff "has chronic relapsing conditions, which inherently do not have a good prognosis," but that the pain and physical restrictions stemming from her injuries "are significant ongoing factors" which will likely continue to exacerbate her conditions unless there is improvement.

(5) In relation to the question about the reasonable treatment that the plaintiff has undergone for her psychological/psychiatric conditions, the hospital admissions for the increase in substance abuse were reasonably necessary but queried whether pain management could improve her emotional conditions. On this point, Dr Roberts noted the plaintiff's long pre-incident history of psychological/psychiatric treatment and said that while some post-incident treatment is reasonably necessary "a significant proportion … is not likely to be reasonably necessary in relation to the incident per se". Nevertheless, Dr Gordon said that treatment needed "to continue in light of what is going on for her at the moment".

(6) The plaintiff would require ongoing treatment, particularly to prevent relapse with regard to her substance use disorder, for the foreseeable future. They also noted that an exact timeframe cannot be provided given the relevant factors beyond their expertise like orthopaedic issues and pain management.

(7) In answer to the question regarding the impact of the psychological/psychiatric conditions on the plaintiff's work capacity, her work capacity was "significantly impoverished". Dr Roberts added that the plaintiff did some work post-incident, and referred to the history contained in the Vale Medical Practice subpoena materials which included a return to work plan that anticipated a gradual increase in hours and return to pre-incident injury duties by late 2019 – but that this did not occur following the death of her ex-partner in mid-2019 and she was put off work. Dr Roberts concluded that the plaintiff's "work capacity has been impacted by incident and non-incident-related factors".

(8) In terms of the plaintiff's future work capacity, despite the potential for "partial improvement" if her pain improved and substance use decreased, it was "likely to remain compromised". They further said that due to her "chronic psychological vulnerabilities, risk of relapse and ongoing emotional dysregulation", she was likely to face "significant barriers to stable and productive employment".

(9) While there was a significant chance that the plaintiff would have relapsed without the incident, "due to the chronic nature of her substance abuse", the risk was substantially elevated by the incident. They also noted the existence of non-incident-related risks including drug-related relationship issues and pre-existing personality issues.

(10) The plaintiff continues to experience her pre-existing conditions and that they have "substantially contributed to the plaintiff's post-incident

psychological state, alongside the exacerbation linked to the incident". The experts further commented that her pre-existing conditions have created "a significant underlying vulnerability perpetuating her present psychological impairment".

(11) As to the plaintiff's prognosis related to her pre-existing psychological conditions, unless her pain and physical symptoms are relieved, her psychological state is likely to "continue indefinitely". Apart from this, they believe that her prognosis "is already guarded because of the conditions themselves, which inherently have a moderately poor prognosis".

(12) Finally, in terms of the question relating to whether the plaintiff's relapse is consistent with the relapse patterns of a person with a pre-existing dependency disorder, Drs Young and Gordon agreed that the plaintiff's post-incident drug and alcohol use relapse was consistent. They noted that a relapse is often precipitated by "psychosocial stressors" and stressful events, which means the plaintiff's "current situation [is] consistent with exacerbating the expected trajectory of substance use disorder". Dr Gordon also believed that the plaintiff's previous symptoms were likely intensified by the incident. Dr Roberts deferred to the opinions of Drs Young and Gordon on this question as it was not her area of expertise.

(13) In answer to the question regarding "prior to the incident, what symptoms, restrictions and limitations did the plaintiff more likely than not suffer as a result of any pre-existing condition and during what period", the experts restricted themselves to psychological symptoms, limitations and restrictions. Prior to the incident, the plaintiff experienced: mood instability chronic anxiety, depressive symptoms, emotional distress, periodic substance abuse and sporadic functional impairment, difficulties maintaining constant employment, interpersonal relationships and regular social engagement.

459 On 30 July 2025, Drs Gordon, Young and Roberts gave concurrent evidence in conclave. The experts agreed that prior to the conclave, they each believed that the plaintiff suffered from post-traumatic stress disorder (PTSD) as a consequence of the injury (T291.5-18). However, in answer to the question "[o]n the balance of probabilities, what if any psychiatric/psychological conditions were caused or materially contributed to by the accident?", both Drs Young and Roberts clarified that PTSD was deliberately excluded as a new condition consequent upon the injury because, while there was some PTSD symptomology, a diagnosis other than PTSD was more fitting (T293.7-30). Dr Gordon disagreed, by stating that as the plaintiff developed symptoms subsequent to the injury, a diagnosis of PTSD would be appropriate (T293.36-

39). All the experts agreed that the incident exacerbated the underlying condition and symptoms that were already present (T294-295).

460 Drs Young and Roberts opined that they did not believe that the plaintiff had been symptom free prior to the incident (T294.38-295.6). Having been the plaintiff's treating doctor for some time, Dr Gordon had a different opinion, namely that the plaintiff's symptoms had been in remission for some time before the incident (T295.26-31). Drs Young and Roberts accepted that some inconsistencies in the presentation history are to be expected when a person sees multiple people over a long period of time (T296.14-21). They also agreed, that on the assumption that the plaintiff had been symptom-free for the 18-month period prior to the incident, the underlying condition would have been in remission (T296-297). Unlike Dr Gordon, they did not agree that to the extent that there was a risk of relapse, it was the incident that brought it about (T297.7-15).

461 Dr Gordon accepted that the statement in his letter dated 27 January 2021, that the plaintiff had ceased drug and alcohol consumption 18 months after commencing treatment by him, was not as accurate as it should have been (T304-T305). On that basis, Dr Gordon accepted that the earlier assumption that the plaintiff had been abstinent from drug and alcohol consumption for 18 months was incorrect; but he did note that the employer conducted random spot checks and the plaintiff never tested positive (T304-T305). As a result, Dr Young and Roberts confirmed that they did not believe the plaintiff was abstinent for 18 months (T306.40-50). Here, I note that the plaintiff failed to attend one random drug check. This was the only occasion during the course of her employment that she failed to attend a random drug test. I do not attach any significance to this as it occurred around the time that her partner died.

462 The experts agreed that, at present, it would be difficult for the plaintiff to hold down any kind of job given her pain levels (T297.24-37). They also agreed that the chronic nature of the plaintiff's pain would contribute to a continuation of her psychological and emotional conditions (T297.44-298.10).

463 Dr Gordon agreed that based on his letter dated 31 July 2019, the plaintiff had been able to minimise her drug and alcohol consumption notwithstanding the

continuing pain (T308-310). He disagreed that the relapse the plaintiff experienced in January 2020 was not likely to be caused by the incident, rather there was “a progressive deterioration in her psychological state subsequent to the incident and she was then returned to taking large doses of alcohol and G” (T311.1-3). Drs Young and Roberts believed that these conditions involve periods of remission and exacerbation such that the incident in January 2020 may not have been connected to the incident (T311). The experts agreed that the use of the drug ice in the two weeks prior to the plaintiff’s admission in January 2020 may have been the cause of her admission to RPA (T313.10-25).

464 Unlike Dr Gordon, who attributed the increase in substance use in 2019 to be worsening pain, Drs Young and Roberts’ opinion was that a stressful event like the death of a partner would be likely to lead to a relapse in someone who has a history of chronic substance abuse (T314.33-39).

465 The experts agreed that the plaintiff uses substances as a coping mechanism for life events but that the extent to which any post-incident events have overtaken the effects of the injury cannot be quantified (T316). Dr Young suggested that the incident was a significant and substantial factor in the plaintiff’s presentation, “somewhat less than 50% at that sort of level”; while neither Drs Roberts nor Gordon estimated a figure, they agreed that it was a factor (T316.43-317.19).

466 The experts agreed that in the plaintiff’s case, the exacerbation that she has experienced is more of a chronic or permanent one, at least until the ongoing pain is resolved (T318.22-319.8). The experts also agreed that if the plaintiff were to use a different coping mechanism than substance use, it is expected that her condition and exacerbation would improve somewhat (T319.41-49). While the experts agreed that substance use as a coping mechanism is extremely harmful, Dr Gordon described it as “a compulsion”, Dr Young said it was not “entirely voluntary”, and Dr Roberts said it was “a process that involves voluntary actions” (T320.30-321.19).

467 The experts were unable to quantify the extent to which incident and non-incident factors have impacted the plaintiff’s capacity for employment but

agreed that the pre-incident psychological conditions of itself impacted her ability to pursue employment (T321-322). Dr Young noted that the impact of the exacerbation of the plaintiff's psychological condition on her capacity to work was complex and involved other factors including pain, issues relating to the incident-site and that she would need to maintain motivation "in the face of pain and physical restrictions", the degree of which, is "greater than if those [factors] weren't present" (T321.34-43).

468 Dr Gordon disagreed that, had the plaintiff not had this incident, the risk of relapse would have impacted on her employability and that she would have experienced pre-injury illness episodes where she was unable to work because he was not aware of any gaps in her work history prior to the incident (T323.32, T324.7-11).

469 The experts agreed that the plaintiff's family history in relation to alcohol consumption was a negative and significant factor, and that alcohol abuse was one of the characteristics of borderline personality disorder, which the plaintiff had been diagnosed with (T325).

470 The experts agreed that given the plaintiff was already suffering from the effects of her physical injury and the psychological and emotional problems that attend on that injury, it is likely that that her reaction to adverse news would be greater than if her pre-existing conditions were in remission (T327-328).

<u>The plaintiff's submissions</u>

471 The plaintiff had a complicated medical history in the years leading up to her employment with the employer, including ADHD, first diagnosed in childhood, and alcohol/substance abuse.

472 In Michelle Hopkinson's report dated 9 January 2016, it was noted that the plaintiff was ready to make some changes. In January 2017, she came under the care of Dr Gordon with good results. The plaintiff was successfully managing her ADHD with medication, Vyvanse, and had been free of alcohol and drug use for some months prior to commencing work with the employer in November 2017.

473 As a matter of ordinary human experience, working in an enjoyable job with the prospect of advancement would be helpful in relation to any emotional or psychological problems. The employer had a strict drugs and alcohol policy which was enforced by random testing. The plaintiff had no difficulty with that prior to her injury. That is unsurprising as she had found a niche and had no reason to self-medicate.

474 Practitioners reporting to the workers' compensation insurer from time to time provide valuable insight in relation to the plaintiff's psychological injury.

475 Ms Rosalind Bolitho in her report dated 14 October 2024 reported that she saw the plaintiff on behalf of the workers' compensation insurer on five occasions during 2020 between May and October 2022, and on six occasions between January and October 2024. Her report includes comments in relation to DASS (Depression, Anxiety, and Stress Scales) scores:

> "Results
>
> The first assessment demonstrated severity in all three scales
>
> The last assessment demonstrated even higher levels of severity.
>
> While I might normally be ready to accept a rather exaggerated expression of anxiety, depression, and stress evidenced by the latter DASS scores, I take the following statements from Amie to confirm both the reality of those scores as a representation of her state of mind, currently and indeed her diagnosis of Complex PTSD:
>
> These were her words
>
>> After my spinal surgery and after I recovered from the staff infection after the surgery I've been in a pretty bad place.
>>
>> Stopped going to the gym, I think I've been maybe 4 times this year I used to go 4 times a week!
>>
>> I am not active like I used to be. My whole life was active! Now from the pain from injuries and the restrictions it's put on my life, I can't do anything that makes me happy.
>>
>> This job was perfect for me. Plenty of the physical work I love doing and great career opportunities.
>>
>> I have Anxiety and pain every day I feel depressed and find it difficult to connect with people on any level. I don't socialise like I used to. Nothing brings me any joy in life.
>>
>> 2 or 3 days a week I don't even get out of bed, have a shower or leave my house
>>
>> I've been on anti depressants for almost 3 months and I don't think they help Duloxotine

> I feel on edge, jumpy and in general shit about everything in my life.
>
> While Amie has not spoken of any suicidal ideation, I am concerned that the ambiguity of the situation is of real concern."

476 The plaintiff's mental health deteriorated following the incident. Over the 7 years since the incident the plaintiff has been diagnosed as suffering from conditions including PTSD, persistent depressive disorder. Through self-medication she has redeveloped addictions to alcohol and GHB, for which she has undergone a number of periods of hospitalisation and rehabilitation.

477 The numerous post-incident attendances referencing psychological issues identified above demonstrate the seriousness of the plaintiff's condition. They also demonstrate frank disclosure in relation to both her pre-and post-incident substance abuse.

478 The plaintiff has continued under the care of Dr Gordon and has had multiple hospital admissions associated with her incident related drug dependency issues.

479 It should be common ground that in relation to any vulnerability that was present, the defendants take the plaintiff as they find her.

480 In his report to the plaintiff's solicitor, which, although undated, appears to have been prepared in about early 2020, Dr Gordon diagnosed PTSD.

481 Dr Davies, who saw the plaintiff on 17 October 2024 said:

> "Ms Jackson describes a constellation of signs and symptoms consistent with that of Post-Traumatic Stress Disorder. These include intrusive re-experiencing phenomena in the form of daytime imagery, hypervigilance, pervasive anxiety and nocturnal fragmented sleep and nightmares. She also describes some experiential and emotional avoidance consistent with this diagnosis. As such, it would seem reasonable to opine that this relates to the injury on 22nd August 2018."

482 On 5 December 2024, Dr Young saw the plaintiff. The references to symptoms of PTSD feature throughout parts of his report. He said:

> "Ms Jackson presents with a longstanding history of ADHD. She has a longstanding history of substance use disorders pre-dating the current condition. Her current symptoms include post-traumatic symptoms as well as secondary depressive symptoms due to ongoing severe pain and associated restrictions.
>
> Overall, the prognosis is poor. There is a significant pre-morbid history and genetic loading of psychiatric disorder. She has chronic pain symptoms for

> several years which have been unrelieved which have served to further exacerbate her underlying conditions… … Ms Jackson did not appear to demonstrate overt inconsistencies or exaggerated behaviours during the interview. While she does have a pre-existing pattern of substance use and ADHD, her current presentation aligned with plausible posttraumatic and depressive features.”

483 As to diagnosis Dr Young said in his report:

> “Based on her history of persistent intrusive memories, marked anxiety in reminders of the incident, social withdrawal, low mood, and the chronicity of her pain, Ms Jackson meets criteria for Post-Traumatic Stress Disorder (PTSD) coexisting with a secondary depressive component. Her longstanding ADHD remains relevant but distinct. Additionally, she has a Substance Use Disorder background (GHB, alcohol, and other substances), which appears to have been exacerbated by her injury and subsequent chronic pain.”

484 As to causation, Dr Young said in his report:

> “Ms Jackson has a history of ADHD and had pre-existing substance use vulnerabilities. Although these factors may predispose her to stress reactivity, they do not fully explain the severity and nature of her current post-traumatic and depressive symptoms. The workplace injury—being struck by falling steel, pinned down, requiring extensive hospitalisation, and resulting in ongoing pain — has contributed most directly to her post-traumatic symptoms and functional decline.”

485 As to current barriers preventing a return to work, Dr Young said in his report:

> “Chronic unrelieved foot and leg pain, ongoing substance use challenges, and post-traumatic anxieties around the original site and conditions of injury pose primary barriers. Lack of confidence in safely performing heavy or high-risk tasks worsens her sense of helplessness and prevents full re-engagement.“

486 Dr Gordon had the advantage of both treating the plaintiff before and after the incident and of specialising in borderline personality disorder, the latter being a condition that the experts agree the plaintiff suffered from prior to the incident.

487 Dr Gordon’s opinion is that the plaintiff suffers from PTSD. He said (T293.36-39):

> “WITNESS GORDON: Well, I think she developed symptoms subsequent to the injury that weren’t there previously. I would have thought that the diagnosis of post-traumatic stress disorder can be applied in this condition – in this situation.”

488 In spite of those matters detailed above, Dr Young, without providing reasons or touching on the diagnosis, abandoned the diagnosis of PTSD in the Joint Psychiatric Report. It is submitted that his oral evidence as to the basis for his changed opinion was unconvincing. The following exchange took place between Dr Young and counsel for the plaintiff at T293.11-30:

> "WITNESS YOUNG: Because I – in the light of the further evidence that I had available I reconsidered what the original diagnosis was and I came to a different conclusion.
>
> KING: So are you saying that you depart from your original report in relation–
>
> WITNESS YOUNG: Yes.
>
> KING: Dr Roberts, what do you say? Do you accept that there was an oversight leaving out PTSD which might have been there for a time post injury?
>
> WITNESS ROBERTS: No, Mr King. I actually concluded in my report in 2022 that the problems at that time were best explained by a personality disorder with cluster B traits, predominantly borderline personality disorder with some antisocial features and substance use disorder and I also said that she actually described some PTSD symptomatology since the incident. She filled in a form and it's a question of what weight you put on that and I said she described PTSD symptomatology and I have doubts that she actually met criteria for PTSD."

489 It is clear that the plaintiff had a history of mental health issues. In the Joint Psychiatric Report, the experts agreed:

> "The experts agree the plaintiff has a premorbid history of borderline personality disorder, ADHD and substance use disorder. The latter may have been largely in abeyance at the time of the injury. They note that it is impossible to say whether the conditions were in remission or not and how they would define remission. Dr Gordon notes that the Plaintiff was enjoying a period of symptomatic stability; she was functioning well socially and occupationally but agreed re her history of borderline personality disorder, attention deficit disorder and substance use disorder. He stated that the latter was largely in remission at that time. Dr Young adds the natural course of these conditions is chronic with periods of exacerbation and of partial remission, which seemed to be the Plaintiff's state immediately before the incident.
>
> …
>
> … the incident materially contributed to the exacerbation of the Plaintiff's preexisting emotional conditions. They do not believe it caused any new condition but exacerbated those conditions which were already present, particularly substance abuse. The Plaintiff now reports physical symptoms as well, which she did not have previously. She demonstrates exacerbation of her previous underlying emotional instability, consistent with complex trauma, borderline personality disorder and active substance use."

490 Mr King of counsel sought elaboration by the experts to that answer by both Drs Young and Roberts on the basis of an assumed history (T296.38):

> "KING: If you also accept, as I ask you to do, that getting the job at Patrick's was a great fill up to her, that she regarded it as a dream job. It was highly paid and very physical, which suited her right down to the ground. If you take account of those matters and accept them rather than challenging them, is that not a picture consistent with any pre-existing problem as having been in

> remission at the time of the injury and deteriorating thereafter? Dr Young, what do you say to that? Is it consistent, that's what I'm asking."

491 Dr Young answered that the history put is consistent with it being a period of relative remission. Dr Roberts said the assumption were accepted that there "may have been period where she was functioning better."

492 Dr Gordon said (T 295.26):

> "WITNESS GORDON: I'm the only one who actually has seen her from December, or January, 2017 until today. Therefore I have I think the best knowledge of her progress across this period of time. My understanding is, and I saw what changes occurred subsequent to the incident, that there was a very significant change in her personality subsequent to the incident that had been in remission for quite some time before."

493 The experts agreed that "the plaintiff has been traumatised physically and this has aggravated the pre-existing conditions resulting in more severe symptoms which have reportedly restricted her social interactions and daily activities and overall functioning."

494 As to the plaintiff's mental health prognosis, there is agreement in the Joint Psychiatric Report that "the presence of reported pain and physical restrictions associated with her injuries are significant ongoing factors which, if unimproved, are likely to continue to exacerbate her problems and result in a worse prognosis, particularly her substance use, but the chronic personality disorder and ADHD are ongoing."

<u>The shipowner's submissions</u>

495 The shipowner relied heavily upon the evidence of Dr Roberts. Dr Roberts recorded a detailed history from childhood that properly contextualises the plaintiff's present complaints. A summary of that history appears in the Joint Psychiatric Report. On the basis of that updated history, Dr Young revised his opinion.

496 The plaintiff read Dr Roberts' report and accepted that her long and detailed history is accurate (T40.27-40.38). Dr Roberts' report contains a review of the plaintiff's clinical record from 1991 to the present. Those records disclose a long history of behavioural problems, medical treatment, drug use and mental health struggles. This is significant since Dr Gordon's records are unavailable.

497 In the Joint Psychiatric Report, Dr Roberts provided the following summary of the plaintiff's pre-existing psychological/psychiatric problems:

"Specific emotional problems identified between 1993 and 1998 include:

Extensive behaviour problems throughout her childhood (and as early as 15 months of age), such as impulsivity, unresponsive to discipline, not considering consequences of her actions, disobedience, hyperactivity, explosive behaviour, [redacted], ADHD, poor self-esteem, learning difficulties, stealing, lying, problems relating to family and peers, multiple social problems, no respect for boundaries, and lack of concentration.

From 1998 to 1999 (aged 11 to 12), she and her family had extensive therapy, including from Dr A Milch, child psychiatrist, who diagnosed ADHD, Oppositional Defiant Disorder, Conduct Disorder, Impulse Control Disorder and poor frustration tolerance.

From 2001, aged 14, she was diagnosed with depression and put on antidepressants, following two overdoses (thought to be impulsive and associated with significant cannabis abuse – up to 7 cones twice a day for months). She was hospitalised for both overdoses and denied suicidal intent ("I wanted to hurt myself"). She later described these as attention seeking and to get back at her partner. She had follow-up treatment. She has a documented history of substance abuse from early adolescence, including:

Cannabis abuse, from Year 7 (7 to 8 cones daily from 12 to 15); experienced paranoia.

Ecstasy – recreational use, ages 16 to 19 (up to six in one night).

Recreational Cocaine. • Amphetamines – Ice; developed paranoia in 2005.

Alcohol use (4 to 5 drinks twice a week) (p 189 of 204).

In 2006, when she was 19, there was reference to Dysthymia, "Borderline Personality Organisation" and an Eating Disorder (Bulimia) for two years. She had difficulty with mood regulation, and anxiety. In 2016/17, Ms Jackson saw Ms Hopkinson, clinical psychologist, for seven sessions. There was reference to anxiety, depression, relationship issues, and drug use (including "G") which affected her motivation, but was an escape and a method of coping. She used Ice for six months. She had an Eating Disorder. She had one boyfriend who made her feel scared for her life.

She began seeing Dr Gordon in January 2017. He treated her for approximately 120 sessions between then and the incident, for ADHD, depression, anxiety, and drug and alcohol issues (including use of “G” fairly regularly). No clinical notes were available”.

498 The shipowner submitted that the psychiatric experts did not accept that the plaintiff suffered PTSD as a result of the incident. When challenged by the plaintiff’s counsel during cross-examination, Drs Young and Roberts gave specific evidence to the effect that they did not accept the diagnosis of PTSD (T293). Dr Davies, who was unavailable for cross-examination, must be taken to have departed from his previous opinion. Dr Gordon gave equivocal and unpersuasive evidence in support of the diagnosis (T293.35-40).

499 The incident did not cause the plaintiff to experience PTSD. The events of 22 August 2018 exacerbated the plaintiff’s entrenched pre-existing psychiatric conditions, that is, made them symptomatically worse, but did not cause them.

500 Dr Young said the natural course of the pre-existing conditions was for chronic periods of exacerbation and of partial remission, which seemed to be the plaintiff’s status immediately before the incident.

501 The plaintiff’s parents and sister had a history of psychiatric disorders. Dr Young said “[w]hen there’s such a strong family history, that’s a negative, it’s generally a negative prognostic indicator” (T325.13-14). The other witnesses, Drs Roberts and Gordon, agreed.

502 It is a characteristic of substance abuse and borderline personality disorders that the patient will abuse alcohol and drugs. There is no dispute among the psychiatric witnesses as to that proposition (T325.29-50).

503 The psychiatric experts agreed during cross-examination that the plaintiff’s history of borderline personality disorder and substance abuse disorder made her susceptible to “triggers” leading to alcohol and drug abuse (T315.31-46).

504 The psychiatric experts answered the following question in cross-examination (T316.2-14):

> "If you look at the history of the Plaintiff's substance abuse from childhood to present time, her coping mechanism for life's events is abuse of alcohol and drugs. Do you agree with that Dr Gordon?
>
> WITNESS GORDON: Yes.
>
> PARKER: Dr Young?
>
> WITNESS YOUNG: Yes.
>
> PARKER: Dr Roberts?
>
> WITNESS ROBERTS: Yes."

505 The plaintiff's post-incident pattern of drug use is consistent with the psychiatric experts' shared conclusion. The plaintiff accepted her response to the death of her former partner in July 2019 was to use alcohol (T42.12-15). Similarly, the plaintiff's attendance at the Northside Clinic for drug detoxification in 2021 coincided with her sister facing the prospect of imprisonment (T61.1-5).

506 Dr Gordon was the only witness to seriously contend that the plaintiff was abstinent of alcohol and illicit drugs for a period of 18 months prior to the incident on 22 August 2018 (T294). Dr Gordon, who had not retained his notes, was relying on faulty memory, an incomplete patient history, or both.

507 Dr Young resisted when urged to make that assumption (T294.40). Likewise, Dr Roberts did not believe that the plaintiff was symptom free prior to her incident (T295.1-2).

508 Dr Gordon said (T 295.26-31):

> "I'm the only one who actually has seen her from December, or January, 2017 until today. Therefore I have I think the best knowledge of her progress across this period of time. My understanding is, and I saw what changes occurred subsequent to the accident, that there was a very significant change in her personality subsequent to the accident that had been in remission for quite some time before."

509 Dr Gordon's understanding is incorrect as shown plainly by a letter dated 27 January 2021 (Ex D1/2). The plaintiff continued to consume alcohol and GBH for 18 months after Dr Gordon commenced her treatment. This end date was July 2018. (T304.19-26).

510 This accorded with the clinical expectation of Drs Young and Roberts who regarded the letter as confirming their opinion that the plaintiff was never totally abstinent of alcohol and drugs.

511 The central point, however, is that Dr Gordon's fundamental assumption that the plaintiff was essentially abstinent from alcohol and drug abuse before the incident is falsified.

512 In a letter from Dr Gordon dated 31 July 2019 addressed to a psychologist (Ex D1/3), he records that since the incident the plaintiff had been treated with painkillers and physiotherapy but still had some pain and limitation of movement. The plaintiff was complaining at that stage of anxiety about boarding a ship and working on it, and that that was restricting her capacity to fully work and that it had affected her income. Dr Gordon said this: "[a]lthough her drug and alcohol intake is markedly diminished since she first saw me, it is still not quite under control since the time of her incident. I am hoping you may be able to help with the underlying anxiety state."

513 According to Dr Gordon, the plaintiff's substance abuse was, as of July 2019, "markedly diminished".

514 In evidence, Dr Gordon said that, though she had some continuing pain and restriction of movement, the plaintiff was able to control and minimise her drug abuse and alcohol abuse (T309.30-34).

515 On 7 January 2020, the plaintiff was admitted to RPA upon referral by Dr Gordon. Drs Young and Roberts regarded this deterioration in the plaintiff's substance abuse to be part of the normal course of the condition (T311.16, 311.20). The two experts regarded it as possible that the hospitalisation in January 2020 may not be connected to the events of 22 August 2018. Dr Gordon took a contrary view. He regarded the evidence as showing a progressive deterioration in her psychological state subsequent to the incident,

that she had been returning to taking large doses of alcohol and GHB (T311.1-3).

516 That conclusion was altered when the history recorded in the RPA admission records was presented to the doctor. “[s]he recently started using Ice again 2 weeks ago. No clear triggers for the relapse but people around her were using ice daily at 5 grams per day, smoking, swapping for GHB.” When informed of that history, Dr Gordon said he was not aware that the plaintiff had used ice – “she never mentioned it” to him (T313.11). Dr Gordon was prepared to concede it was possible that the admission in January 2020 was due to the consumption of ice two weeks beforehand (T313.10). Drs Young and Roberts thought, on the probabilities, that the admission to hospital was due to the ice consumption two weeks prior (T313.22-35).

517 The shipowner submitted that the deterioration in the plaintiff’s condition resulting in her admission to hospital in January of 2020 is, on the balance of probabilities, explicable by the consumption of ice, which was entirely consistent with an entrenched pattern of drug use that had nothing to do with the events of 22 August 2018.

518 The plaintiff’s former partner died in July 2019. Dr Young said “[t]he death of a partner in a circumstance like that is an extremely stressful situation and if a person has a history of drug and alcohol abuse which is chronic that would be something you would expect is likely to lead to a relapse”. Dr Roberts agreed (T314.32-39). Dr Gordon also agreed, with the qualification that it was not the only cause of her alcohol and drug consumption (T315.18-20).

519 Dr Young said (T316.25-28):

> “Certainly there have been other independent events that have had their effect and after the injury which are significant. The extent to which those have overtaken the effects of the injury are really not – I mean, it’s, it’s not easily quantifiable.”

520 Dr Roberts agreed with Dr Young. Ultimately, Dr Young was prepared to say that, in terms of the plaintiff’s present presentation, the events of 22 August 2018 would account for somewhat less than 50% (T317.02).

521 The psychiatrists said the pain was significant to the plaintiff's psychiatric condition. However, the psychiatrists agree the exacerbation of the psychiatric condition would resolve if the pain were under control (T318.35, 319.16, 319.41-50).

522 The plaintiff knows, and has known since her teens, that her coping mechanism of alcohol and drug abuse is extremely harmful. Although the doctors equivocated on whether the substance abuse was voluntary, they all agreed that the consumption of illicit drugs and abuse of alcohol involves "voluntary action" (T321.15-25).

523 The shipowner submitted that the plaintiff's psychiatric condition limits her employability and earning capacity and that her substance abuse, adopted as a coping mechanism, is a reflection of an underlying condition that was not caused by the events of 22 August 2018.

524 The plaintiff's adoption of a coping mechanism involving the consumption of illegal drugs and alcohol abuse breaks the causal chain.

525 The Joint Psychiatric Report makes apparent that there is a significant chance that the plaintiff would have experienced the same degree of substance abuse and consequent conditions whether or not the incident occurred. The Court's task is to evaluate the chance: *Malec v JC Hutton Pty Limited* (1990) 169 CLR 638; [1990] HCA 20 (*Malec v Hutton*).

526 Professor Luntz in *Assessment of Damages for Personal Injury and Death* (5th ed, 2021, LexisNexis Butterworths) put the proposition as follows at p 234):

> "Neither *Watts v Rake* nor *Purkess v Crittenden* were referred to in *Malec v JC Hutton Pty Limited.* To reconcile these different lines of authority it is necessary to say that the plaintiff must prove, on the balance of probabilities, that the defendant's negligence did contribute materially to the present symptoms (this is the legal onus that rests on the plaintiff). This is now also required by the Civil Liability statutes where they apply. Once the plaintiff has discharged this onus, there is an evidential onus on the defendant of proving that the alleged preexisting or subsequent natural condition did exist and that this condition in its natural progression would have produced similar symptoms. ….If, however

it appears that there is a real chance that the Plaintiff would have developed similar symptoms from a natural condition attaching to the plaintiff, the court will make a greater reduction than normal to reflect the increased chance. In other words the effect of *Malec* on the defendant's evidential onus of proof as established in *Watts v Rake* and *Purkess v Crittenden* is that the disentanglement of various causes of the plaintiff's damage is more easily achieved in relation to hypothetical past events, and future events because the court evaluates possibilities in that respect."

527 That passage was substantially approved of by Ward JA *in DC v State of New South Wales* [2016] NSWCA 198 at [354]-[355].

528 The shipowner submitted that:

(1) the plaintiff psychiatric conditions were present and well established at the time of the incident;

(2) the plaintiff's assumed history of being abstinent from alcohol and drug abuse for a substantial period before 22 August 2018 is falsified. The plaintiff's evidence in re-examination that she only used drugs "recreationally" before the incident ought to be rejected because it is contradicted by the extensive medical records reviewed by Dr Roberts;

(3) the psychiatric conditions from which the plaintiff suffers are prone to partial remission and relapse. There is no evidence that the pre-existing conditions in plaintiff's case would have totally resolved at any time;

(4) the natural course of the pre-existing psychiatric disability is for partial remission and relapse depending on the events in life with which the plaintiff is confronted at the time;

(5) for many years, the plaintiff has used and abused illicit drugs and alcohol as a coping mechanism. The incident did not cause the plaintiff to adopt harmful methods of coping with the consequence of the incident. She was entrenched in adopting alcohol abuse and drug consumption well before;

(6) the incident exacerbated the symptoms of the plaintiff's pre-existing psychiatric conditions but did not cause those conditions; and

(7) the incident contributed significantly less than 50% to the plaintiff's current psychiatric presentation (T317.2).

529 Furthermore, the shipowner submitted that the pre-existing conditions would themselves have impacted upon the plaintiff's employment (T322.24-42) and that the plaintiff would have experienced periods of remission and relapse

limiting her employability whether or not she had had the incident of 22 August 2018 (T323.10-27).

530 Drs Roberts and Young accepted that the plaintiff's pre-existing psychiatric conditions were likely to have impacted her future work capacity irrespective of the incident. Both posited that the plaintiff may have become symptomatic on occasion and would be unable to work because of the pre-injury illnesses (T323.34-42). That evidence should be accepted because it more accurately reflects the course of the pre-existing illnesses and the plaintiff's pre-incident history.

531 The plaintiff should not be compensated for her inability to engage in employment consequent upon her psychiatric conditions which pre-date 22 August 2018. In terms of the residual psychological impact, she should be modestly compensated for the exacerbation of symptoms by way of damages for non-economic loss and not otherwise.

532 The plaintiff's psychiatric conditions were not caused by the incident but are the result of her pre-existing psychiatric ill health, namely her borderline personality disorder and substance abuse disorder. In terms of her employability, the plaintiff would be in the same position she now experiences whether or not the incident occurred.

533 The plaintiff's substance abuse is voluntary, with no causal link between the incident and her excessive use of alcohol and illicit drugs. Claims of self-medication are unfounded. By knowingly engaging in harmful behaviours, the plaintiff has failed to mitigate her loss; in fact, her substance abuse constitutes a novus actus interveniens.

<u>Resolution</u>

534 I accept the psychiatrists' and the psychologists' opinion where they are in agreement. To summarise, the experts agreed that:

(1) The plaintiff has chronic relapsing conditions which inherently do not have a good prognosis**.** While the incident did not cause any new psychiatric condition, it materially contributed to the exacerbation of her preexisting emotional condition, and particular substance abuse. This exacerbation is consistent with trauma, borderline personality disorder and active substance use.

(2) While there was a significant chance that the plaintiff would have relapsed without the incident “due to the chronic nature of her substance abuse**”,** the risk was substantially elevated by the incident.

(3) As to the plaintiff’s prognosis related to her pre-existing psychological conditions, unless her pain and physical symptoms are relieved, her psychological state is likely to “continue indefinitely”. Apart from this, they believe that her prognosis “is already guarded because of the conditions themselves, which inherently have a moderately poor prognosis”.

(4) The plaintiff’s relapse is consistent with the relapse patterns of a person with a pre-existing dependency disorder, the plaintiff’s post-incident drug and alcohol use relapse was consistent.

(5) The plaintiff will require ongoing treatment, particularly to prevent relapse with regard to her substance use disorder, for the foreseeable future.

(6) Her work capacity was “significantly impoverished”. Dr Roberts concluded that the plaintiff’s “work capacity has been impacted by incident and non-incident-related factors”. In terms of the plaintiff’s future work capacity, despite the potential for “partial improvement” if her pain improved and substance use decreased, it was “likely to remain compromised”. They further said that due to her “chronic psychological vulnerabilities, risk of relapse and ongoing emotional dysregulation”, she was likely to face “significant barriers to stable and productive employment”.

535 The experts agreed that the plaintiff uses substances as a coping mechanism for life events but that the extent to which any post-incident events have overtaken the effects of the injury cannot be quantified (T316). Dr Young suggested that the incident was a significant and substantial factor in the plaintiff's presentation, "somewhat less than 50% at that sort of level"; while neither Drs Roberts nor Gordon estimated a figure, they agreed that it was a factor (T316.43-317.19).

536 While the experts agreed that substance use as a coping mechanism is extremely harmful, Dr Gordon described it as "a compulsion", Dr Young said it was not "entirely voluntary", and Dr Roberts said it was "a process that involves voluntary actions" (T320.30-321.19). The experts differ on this issue. I prefer the evidence of her treating psychiatrist Dr Gordon that the plaintiff’s coping mechanism of substance abuse is a compulsion. However, it is not necessary to decide this issue as is it essentially a philosophical one.

537 My view is that although the incident did not cause the plaintiff a new psychiatric condition, her existing psychiatric conditions (including drug and alcohol dependency) were significantly exacerbated. In one respect, her psychiatric conditions are sensitive to her physical condition and in particular bodily pain. So, if her physical condition were to improve, her psychiatric condition would likely also improve to a degree. Nonetheless, as it now stands, her work capacity has been significantly impoverished and it seems that it will stay at this level for the foreseeable future. In line with the regular principle, appropriate degree of compensation is ascertained by determining in what state the plaintiff would have been had the wrong not occurred. This will be dealt with below.

Apportionment and Reduction

538 The shipowner submitted then the injury, loss and damage was caused by the negligent acts or omissions of the plaintiff's employer, and the shipowner says that any damages which the plaintiff recovers against it should be reduced proportionally pursuant to s 151Z(2)(c) of the *WCA*, to the extent that the negligent acts or omissions of the plaintiff's employer contributed to the damage.

539 S151Z(2) *WCA* reads as follows:

> (2) If, in respect of an injury to a worker for which compensation is payable under this Act--
>
> > (a) the worker takes or is entitled to take proceedings independently of this Act to recover damages from a person other than the worker's employer, and
> >
> > (b) the worker also takes or is entitled to take proceedings independently of this Act to recover damages from that employer,
> >
> > the following provisions have effect--
> >
> > (c) the damages that may be recovered from the person by the worker in proceedings referred to in paragraph (a) are to be reduced by the amount by which the contribution which the person would (but for this Part) be entitled to recover from the employer as a joint tortfeasor or otherwise exceeds the amount of the contribution recoverable,
> >
> > (d) the amount of the contribution that the person is entitled to recover from the employer as a joint tortfeasor or otherwise is to be determined as if the whole of the damages were assessed in accordance with provisions of Division 3 as to the award of damages,

…

540 Apportionment requires an exercise in judgment as to the relative culpability of each defendant.

The plaintiff's submissions

541 If it were held that the fabrication of portable hooks was an employment responsibility of employer, the operative negligence remains that of the shipowner which specified and procured the hooks. The employer would truly only be liable on a nondelegable basis rather than upon the basis of any direct and independent act of negligence of its own. In such circumstances, the employer would be entitled to a full indemnity from the shipowner, but from the plaintiff's perspective, which is of course the concern of these submissions, in the absence of a direct and independent act of negligence on the part of employer, no discount in her damages against the shipowner under s 151Z is available to the shipowner: see the clear exposition of Hislop J in *Hodge v CSR Limited* [2010] NSWSC 27 at [41]-[45].

542 However, if it is held that the employer was guilty of some direct and independent act of negligence, it could, with respect, only be upon the basis that it did not second-guess the shipowner's specification for the new hooks by having the finished product examined by an appropriate expert. The reasonableness of such a course in the circumstances is to say the least doubtful, but if it is regarded as having substance, the apportionment of blame to the employer should be minor. It should be less than the 25% allocated to the employer in *TNT Aust Pty Ltd v Christie* (2003) 65 NSWLR 1; [2003] NSWCA 47. The plaintiff adheres to her opening submission (which it is noted the employer now adopts) of 10%.

543 It is trite that an employer like the employer owed the plaintiff a non-delegable duty of care. The evidence indicates that what the Employer could do, or they endeavoured to do, and that the source of the problem is the cause of the injury, is difficult to attribute to the Employer with much weight.

544 Mr Maybury's conclusion in his report dated 30 August 2018 (8 days post-incident) was that:

> "[i]n regards to the storing of the high quantity of loose lashing equipment on the fore / aft walkway hooks and given the risk of injury to stevedores in order to the transfer the equipment to / from the required position, it should be assessed by stevedores and ship's staff as to whether the implementation of lashing hooks on the transverse walkways resulting in isolated reduced clearances would be an acceptable risk compared to the alternative".

545 The employer had already undertaken an assessment in that regard and determined that it was appropriate to position lashing hooks on the transverse walkway.

546 The employer was not involved in requisitioning the hooks and did not see them until the evening of the incident. Mr Maybury gave evidence (T249.33-35):

> "WITNESS MAYBURY: They were inspected in the sense that they were in position and a safety facilitator would generally only comment on the apparent condition of it. Like I mentioned before, they're not structural engineers. They're not experts in the field of structural steel."

547 Because it did not requisition, receive or deploy the hooks, the employer had no opportunity to inspect them other than on the evening of the incident in circumstances where it could not have been expected to observe that they were not fit for purpose.

548 Consistent with the desirability of having portable stowage hooks, Mr Todorovski said in his statement:

> "The other point that I wish to make is that on the night of Amie's incident, the stowage racks which I saw were full, or close to full, with lashing bars before we commenced. In most cases, the ship's crew will clear the stowage racks and place the surplus bars in dedicated purpose built stowage spaces on the sides of the vessel on the main deck. This allows the lashing gang a place to put the bars which they are removing from the containers. On this night, we had only been working for 10 minutes or so and already the stowage racks that we encountered were already pretty full with lashing bars. It was not practical for us to put the bars we were unlashing on the walkway deck because the walkways are narrow and this constitutes a tripping hazard. It was also not practical for us to take the bars which we were removing and placing them in the dedicated stowage spaces because this was on the main deck and below the level which we were working on."

549 Captain King said that in order to be fit for purpose, they should have been able to hold a full load of lashing rods (T207.11-14).

The employer's submissions

550 The faulty equipment, namely the stowage hooks, were supplied by the shipowner and were unsuitable for the assigned task. It would be a heavy onus

indeed to expect the employer to suspect by mere observation of the loaded hooks on the evening that they were different to the others and not fit for purpose.

551 Further, it would be an unreasonable onus to impose upon the employer that there was an obligation to check equipment which it could be assumed was supplied and fitted to the vessel by an operator apparently both experienced and suitably skilled in such matters.

552 The point in relation to inspection is well made in Mr Dubos' evidence at T248.22-28:

> "WITNESS DUBOS: Yeah. So what I was saying, that common sense could be applied if you compared the existing old racks which were far more robust than the - to the flimsy nature of the new portable racks. I - if you're a, a ship's officer I would say that you'd be quite familiar with, with, with, with stowage racks for lashing bars, and if you're a stevedore you'd be relatively familiar with them as well. So, you know, with that familiarity may lead to a, a common-sense assessment. "

553 At T250.9-10:

> "WITNESS MAYBURY: Again, they would only visually inspect that they were in those areas and the apparent condition."

554 In the circumstances, if the employer is liable, liability should be apportioned at 90% against the shipowner and 10% against the employer.

555 What the Court of Appeal said in *DIB Group Pty Ltd t/as Hill and Co v Cole* [2009] NSWCA 210 (*DIB*) is relevant here. It should be said immediately that it is factually different from this case, but from the point of view of general principle it is helpful here because Basten JA, (with whom Beazley and McColl JJA agreed), commented on the concept of an employer's non-delegable duty and what the situation could be if the relevant danger were in effect someone else's and what could reasonably be expected by way of inspection by an employer.

556 In *DIB,* Basten J at [27] and [53] – citing Toohey J in *Northern Sandblasting Pty Ltd v Harris* [1997] HCA 39; (1997) 188 CLR 313 – pointed out that to say an employer's duty is non-delegable or stringent should not distract from the real enquiry which is as to reasonable care. Basten JA and Toohey J accept that "non-delegable" has become part of the vocabulary of the law. As to an

inspection that might be made by an employer, in that case of the state of premises, in this of the lashing hooks, it was accepted that such an inspection might not be effective.

557 Finally, *DIB* is relevant to the import of *Davie* to which the shipowner refers in its submissions on liability. In *Davie,* where the facts were that the employer had no role in the creation of the chisel and could not have picked up its defect, it was not liable. It can be said that the manufacture of chisels was not part of the employer's personal duty. But here the situation is starkly different and adverse to the shipowner: it was directly responsible for the way the new lashing hooks came into being and their inadequacy.

Resolution

558 It is my view that it was reasonable that the employer did not instruct its employees to leave the lashing bars on the walkway given that it was only 60cm wide. That would have posed a trip hazard.

559 The shipowner should be apportioned with 80% for its negligent acts and omissions.

560 The employer bears 20% liability for the plaintiff's incident that occurred on 22 August 2018 on basis that Mr Little failed to draw to shipowner's attention that when the ship arrived in Port Botany the portable stowage hooks were full or nearly full and request that the shipowner empty the portable stowage hooks before the stevedore commenced work.

561 This apportionment takes account of the law as set out in *Formosa* where, at [68] (as is also quoted above), the Court of Appeal stated:

> "[A shipowner is required] to exercise reasonable care to avoid exposing a stevedore coming on to his ship to risk of injury which reasonable care would see eliminated or ameliorated, whether by attending to it physically or by warning or otherwise. This is especially so if the danger or risk on board is created by a particular operation of the ship. The duty is to exercise reasonable care for the safety of those coming on board to work the ship, here by loading her. The scope and content of that duty included a duty to exercise reasonable care to see that the workplaces of such stevedores on board were reasonably safe."

562 The shipowner bears the majority of the responsibility for causing the plaintiff's injuries because it was the shipowner that provided the equipment that failed

and caused the plaintiff's injuries. The employer bears a lesser responsibility for not drawing attention to the shipowner's attention that the portable stowage hooks were full or nearly full. In these circumstances, the appropriate apportionments are 80% to the shipowner and 20% to the employer.

Contributory negligence

563 Both defendants allege contributory negligence as against the plaintiff.

564 Section 55 of the *CLA* reads:

> 55 Contributory negligence can defeat claim
>
> In determining the extent of a reduction in damages by reason of contributory negligence, a court may determine a reduction of 100% if the court thinks it just and equitable to do so, with the result that the claim for damages is defeated.

565 Sections 5R and 5S read:

> 5R Standard of contributory negligence
>
> (1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.
>
> (2) For that purpose:
>
> (a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and
>
> (b) the matter is to be determined on the basis of what that person knew or ought to have known at the time.
>
> 5S Contributory negligence can defeat claim
>
> In determining the extent of a reduction in damages by reason of contributory negligence, a court may determine a reduction of 100% if the court thinks it just and equitable to do so, with the result that the claim for damages is defeated."

566 In *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529; [1985] HCA 34 (*Podrebersek*), the High Court determined at 532-533 that with regards to contributory negligence, the just and equitable apportionment of the liability ought to be examined as follows:

> "The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris* (1956) 96 CLR 10 at 16) and of the relative importance of the acts of the parties in causing the damage; *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 682; *Smith v McIntyre* [1958] Tas SR 36 at 42-49 and *Broadhurst v Miliman* [1976] VR 208 at 219, and

> cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the incident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance."

567 The question is whether, in the circumstances giving rise to the incident, the plaintiff failed to exercise reasonable care their her own safety: *T & X Company Pty Ltd v Chivas* [2014] NSWCA 235 at [4]. This involves an objective test based on the facts and circumstances of the case, including what the plaintiff knew or ought to have known at the time: *CLA* s 5R(2)(b); *Joslyn v Berryman* (2003) 214 CLR 552; [2003] HCA 34 [16] (McHugh J); *Origin Energy LPG Pty Ltd v BestCare Foods Ltd* [2012] NSWCA 407 at [217].

568 The employer also alleged that the plaintiff was negligent in failing to take sufficient care for her own safety and damages should be reduced pursuant to section 151O of the *Workers Compensation Act 1987* (NSW) (*WCA*).

569 The allegations made by the shipowner including that the plaintiff: failed to adhere to proper work procedures when loading the stowage hooks with lashing bars; take any or adequate care of her own safety in the circumstances; take any or any appropriate steps to avoid an obvious risks; keep a proper lookout; placed herself in a position of danger and at risk of injury; failed to pay sufficient attention to, and to concentrate upon, the fact that the stowage hooks had been loaded with lashing bars; and failed to perceive and avoid a risk which the plaintiff knew, or ought to have known, in the circumstances. Some of these are the same allegation that were made in respect to obvious risk, dealt with below. These allegations were not made out.

570 The incident occurred when the plaintiff was carrying out her duties when, without warning, the new portable stowage hooks failed and the lashing bars collapsed on her feet. The stowage hooks were full or almost full. Mr Todorovski suddenly heard a crash followed by the plaintiff screaming, and when he turned around, he saw that she had been pinned against the opposite rail of the walkway, whose width, as stated, was only 60cm. Mr Todorovski saw that the plaintiff’s legs had been pinned under lashing bars which had fallen out of the failed stowage hooks on the adjacent rail.

571 The plaintiff did exercise reasonable care for her own safety. It is not just and equitable to reduce the plaintiff's damages at all for contributory negligence. Therefore, I do not attribute any responsibility to the plaintiff. The claims for contributory negligence whether under the *CLA* or *WCA* fail.

Obvious risk

572 The shipowner submitted that the incident occurred as a result of the plaintiff's voluntary assumption of risk of and/or failure to avoid an obvious risk, for which the plaintiff is presumed to have been aware, and the shipowner was not required to warn of, pursuant to *CLA* ss 5F, 5G, 5H and 5I.

573 The shipowner denies liability to the plaintiff in the ways alleged, or at all, and says that the circumstances alleged in the FASOC:

(1) constituted an obvious risk for the purposes of *CLA* s 5F;

(2) were the materialisation of harm associated with an inherent risk for the purposes of *CLA* div 4;

(3) that by virtue of *CLA* ss 5F and 5G, the plaintiff is presumed to have been aware of the matters alleged in the FASOC and the circumstances of her incident, those circumstances constituting the materialisation of an obvious risk by her failing to keep a proper look out, check her surroundings and maintain a safe distance from the stowage hooks in circumstances where the stowage hooks were loaded with lashing bars;

(4) that by virtue of *CLA* s 5H, the shipowner did not owe the plaintiff a duty of care to warn of an obvious risk to the plaintiff associated with her failure to keep a proper look out, check her surroundings and maintain a safe distance from the stowage hooks in circumstances where the stowage hooks were loaded with lashing bars; and

(5) that the circumstances alleged in the FASOC constituted the materialisation of an inherent risk, namely the risk of being struck by lashing bars in circumstances where the stowage hooks holding the lashing bars were loaded with lashing bars.

574 The shipowner denies that it is liable to the plaintiff, as alleged or at all, and says it had work systems in place for the safe loading of lashing bars onto stowage hooks. In further answer to the whole of the FASOC, the shipowner says the circumstances alleged in the FASOC constituted the materialisation of an inherent risk for the purposes of *CLA* s 5I, and the shipowner is not liable to the plaintiff as alleged.

575 Even though the shipowner owed a duty of care to the plaintiff (which is not admitted) the shipowner says it wholly delegated and discharged that duty of care to the employer, the plaintiff's employer and a competent contractor experienced in taking precautions against the risks of injury associated with stevedoring work, to attend to unlashing operations and ensure the suitability for use by the plaintiff of any lashing bars and stowage hooks.

576 The shipowner referred to *Babayi v Eden Park Fruits Pty Ltd* [2023] NSWSC 473 (*Babayi*), where I said at [149]-[156]:

> "Obvious risk
>
> [149] Eden Park pleads that any risk of injury to the plaintiff by virtue of not using the correct technique, was an "obvious risk" as that expression is defined in s 5F of the *Civil Liability Act 2002* (NSW) and therefore no relevant duty existed to warn of that risk pursuant to s 5H of the *Civil Liability Act*.
>
> [150] In determining the application of s 5H in this case, it is first necessary to consider whether the risk undertaken by the plaintiff was "obvious" under the *Civil Liability Act.*
>
> [151] Mr Williams' view is that of the plaintiff's version of events it is an obvious risk. According to the liability experts, Mr Roweth and the measurements of the height of the tree trunks, there was no need for the plaintiff to be on the top run of the ladder to prune the watershoots.
>
> …
>
> [153] In *CG Maloney Pty Ltd v Hutton-Potts* [2006] NSWCA 136 ('CG Maloney'), Santow JA observed at [173] that "[m]uch depends, in the application of provisions dealing with obvious risk, upon the degree of generality or precision with which the risk is stated".
>
> [154] The question for this Court is whether the risk was one which, in the circumstances, would have been obvious to a reasonable person in the position of the plaintiff exercising ordinary perception, intelligence and judgment. That was the position at common law as stated in *Vairy v Wyong Shire Council* (2005) 223 CLR 422; [2005] HCA 62 ('*Vairy*') at [126]-[129]; *Mulligan v Coffs Harbour City Council* [2004] NSWCA 247 per Tobias JA at [161], and continues to apply under the *Civil Liability Act*: see Tobias JA in *Jaber v Rockdale City Council* [2008] NSWCA 98 ('*Jaber*').
>
> [155] "Obvious", under its ordinary meaning and in s 5F(1), means something which is "clearly apparent or easily recognised or understood"; see Jaber at [35], Whether a risk is obvious is a matter to be determined objectively.
>
> [156] Section 5F(2) states that an obvious risk includes one which is "common knowledge". What is common will depend on the background and experience of a reasonable person in the position of the plaintiff, including his age, observations and previous involvement with the activity; *Great Lakes Shire Council V Dederer* [2006] NSWCA 101 at [152] ('*Great Lakes*'); *Doubleday v Kelly* [2005] NSWCA 151 at [19]."

577 While the law set out in [153]–[156] in *Babayi* is correct, the factual circumstances in that case bear no resemblance to the factual situation here, particularly where *Formosa* set the specification out the duties of a shipowner.

578 When the plaintiff and Mr Todorovski were in the process of putting the lashing bars in the stowage hooks, they were already quite full. While the plaintiff was waiting for her work buddy Mr Todorovski to finish his work, the portable stowage hooks next to her collapsed. As I accepted earlier in this Judgment, the collapsing of the new portable stowage hooks was mainly caused by firstly the shipowner providing insufficient specifications in the requisition form for the new portable stowage hooks, and secondly failing to check that the new stowage hooks were of the same quality of the old stowage hooks. The new stowage hooks had a wider mouth and were made of thinner, less reinforced steel. In turn, the shipowner's new stowage hooks were not fit for purpose.

579 The collapsing of the portable stowage occurred simultaneously and without warning. This situation could not have been prevented by the plaintiff keeping a proper look out, checking the surroundings and maintaining a safe distance from the stowage hooks in circumstances where the walkway of the vessel is only of 60cm width. The risk of the new portable stowage hooks collapsing is not obvious to a reasonable person in the plaintiff's position.

580 Therefore, the collapsing of the portable stowage hooks did not constitute an obvious risk under s 5F. This submission fails.

Damages

581 In an action at common law for negligence as against the employer, the employer is only liable for 'damages for past economic loss due to loss of earnings and damages for future economic loss due to the deprivation or impairment of earning capacity': s 151G *WCA*. Where there are co-tortfeasors, and by virtue of *WCA* s 151G only one of the tortfeasors is liable for a certain head of damage, the damages recoverable under that head are to be reduced in proportion to that tortfeasors' fault: s 151Z(2)(c).

582 The result is that even though the plaintiff suffered non-economic loss and economic loss not due to loss of earnings or of earning capacity (for example, medical expenses) because of both the shipowner's and employer's

negligence, it can only recover non-economic loss and out-of-pocket expenses against the shipowner and only that non-economic loss or those out-of-pocket expenses for which the shipowner was responsible.

Duty to mitigate loss

583 In answer to the whole of the FASOC the shipowner states that the plaintiff has failed to mitigate her loss by undertaking suitable employment or retraining or rehabilitation, and by using alcohol, tobacco and drugs.

584 For the reasons set out as the length earlier, I am also not satisfied that the plaintiff has failed to mitigate her loss. As to not undertaking suitable exercises, retraining or rehabilitation. My findings are that she has not failed to mitigate her loss. The plaintiff had a pre-existing psychiatric condition, ADHD, and also used drugs and alcohol. The joint psychiatrist's view is that she would have had difficulty with these psychiatric conditions and needed time off work had the incident not occurred.

585 The plaintiff sought appropriate medical care (including psychiatrists, psychologists, orthopaedic surgeons, physiotherapists, neurosurgeons) and made an attempt to return to work. This medical care was reasonable in her context.

Non-economic loss

586 As mentioned, non-economic loss is only applicable as between the plaintiff and the shipowner: *WCA* 151G(1).

587 Section 16(1) of the *CLA* relates to non-economic loss, it reads:

> **16 Determination of damages for non-economic loss**
>
> (1) No damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case.
>
> …

588 It is common ground that the plaintiff's non-economic loss exceeds 15% of the most extreme case.

589 The definition of a most extreme case pursuant to *CLA* s 16 has been discussed in *Matthews v Dean* (1990) 11 MVR 455; [1990] Aust Torts Reports

81-037 at 68,014; *Southgate v Waterford* (1990) 21 NSWLR 427 at 440, and *Dell v Dalton* (1991) 23 NSWLR 528 at 533.

590 Non-economic loss means any one or more of the following, pain and suffering; loss of amenities of life; loss or expectation of life; disfigurement: see *Sutherland Shire Council v Major* [2015] NSWCA 243.

591 The plaintiff seeks 72% of non-economic loss on the basis that she has suffered considerably and will continue to do so. The plaintiff did not provide any further submissions, but I have taken into account the evidence in relation to this head of damage.

The shipowner's submissions

592 The plaintiff is now 39 years of age. The shipowner submitted that non-economic loss is limited to compensation for the ankle fracture and the symptomatic exacerbation of pre-existing psychiatric conditions. No award should be made with respect to the plaintiff's cervical spondylosis.

593 The shipowner further submitted that an appropriate award for non-economic loss is 30% of the maximum. Such an award would be consistent with:

(1) *Jackson v KAH Australia Pty Ltd t/as Bayview Boulevard Sydney* [2017] NSWSC 747 (*Jackson*), where a 48 year old who suffered undisplaced fractures of the medial and cuneiform bones was awarded 20% of the most extreme case;

(2) *Powell v Success Leadership Pty Ltd* [2015] NSWDC 269, where a 49 year old suffered a distal calcaneus fracture was awarded 29% of the most extreme case;

(3) *Ajia v TF & RF Fordham Pty Ltd trading as Trn Group* [2020] NSWDC 371, where a 33 year old who sustained a fracture of the right ankle necessitating three surgeries was awarded 29% of the most extreme case;

(4) *Than v Galletta & Ors* [2019] NSWDC 9, where a 40 year old who suffered a Lisfranc fracture of the left foot was awarded damages that equated to approximately 28% to 29% of the most extreme case.

Resolution

594 It is trite to say that every case depends on its facts. I was the trial Judge who gave Judgment in *Jackson*. In that case, I accepted that Jackson slipped on water on the hotel floor because another witness also slipped in the foyer of then around the same time. She suffered fracture to her foot. However, I made

a finding that the plaintiff was not a credible witness, particularly in relation to damages. There is no correlation to the plaintiff's case as to the award of non-economic loss.

595 Here, the plaintiff was 31 at the time of the incident. She had pre-existing psychiatric conditions, but she was physically fit and active. She was employed as a stevedore. She enjoyed her job.

596 At the physical level, prior to the incident, the plaintiff enjoyed both indoor and outdoor activities, such as pool and beach swimming, cross-fit exercise programs including high intensity activities like running, jumping, gymnastics and balance work, bushwalking, camping and dancing; work that involved her lifting heavy weights above shoulder height.

597 After the incident, she has not engaged in these activities. She is still able to undertake some gym work but not for as prolonged periods and as intensely as she could before the incident. It is disputed whether, after the incident, the plaintiff lifted weight above her head at the gym. Her evidence is that she did not lift heavy weights above her head. I accept her evidence. She underwent an operation on her neck. An infection developed at the site of that operation and so she had to have a further surgical procedure. She also cannot drive a motor vehicle for long distances due to the right ankle injury. She must also wear orthotics in both shoes, and she has gone through five sets since the incident. She finds it difficult to wear heels and some flat shoes as well. The scarring on her right foot and ankle can become irritated and be a constant reminder of the incident, which causes her sadness.

598 At psychological level, the right ankle problems disrupt her sleep and have negatively impacted her sex life. The psychiatric pre-existing condition has been exacerbated after the incident. After the incident, the plaintiff has suffered from significant depression and anxiety, nightmares and a lack of confidence. She is always on edge, often ruminates about the incident, and has relapsed into consuming drugs and alcohol. These relapses have led to her admission to psychological or detox wards on a number of occasions.

599 At social level, the plaintiff treated her stevedore job as her dream job. After the incident, the medical experts agreed that she cannot carry out the physical

work required as a stevedore due to the injury and pain she still experience in her right foot. She has lost her ambition and fears not having any prospects in life. She also spends most of the day in bed, does not like leaving her home and is no longer interested in mixing with people socially. As a result, she has lost many friends.

600 Taking these circumstances into account, I assess plaintiff's non-economic loss at 55% of a most extreme case. A most extreme case is in the sum of $804,000.00 under *CLA*. Therefore, a 55% of the most extreme case equates to $442,000.00. I award the plaintiff damages in the sum of $442,000.00 for non-economic loss.

Economic loss

601 Economic loss is financial loss. It includes past loss of earnings, past out-of-pocket expenses, future out-of-pocket expenses and loss of earning capacity (also known as future loss of earnings).

602 Sections 12 and 13 of the *CLA* deal with damages for past or future economic loss. They read,

> 12 Damages for past or future economic loss - maximum for loss of earnings etc
>
> (1) This section applies to an award of damages:
>
> (a) for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity, or
>
> (b) for future economic loss due to the deprivation or impairment of earning capacity, or
>
> …
>
> 13 Future economic loss—claimant's prospects and adjustments
>
> (1) A court cannot make an award of damages for future economic loss unless the claimant first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury.
>
> (2) When a court determines the amount of any such award of damages for future economic loss it is required to adjust the amount of damages for future economic loss that would have been sustained on those assumptions by reference to the percentage possibility that the events might have occurred but for the injury.
>
> (3) If the court makes an award for future economic loss, it is required to state the assumptions on which the award was based and the relevant percentage by which damages were adjusted.

Past out-of-pocket expenses

603 The plaintiff seeks $304,249.35 for past out-of-pocket treatment expenses. The shipowner submitted that the past out of pockets should be $100,000.00.

604 The plaintiff submitted that the past out-of-pocket expense including hospital, medical and rehabilitation expenses amounts to the sum of $304,249.35. The past treatment expenses have in the main being covered by the workers' compensation insurer.

605 The plaintiff bears the onus of proving the cost of her past medical treatments was reasonably incurred as a consequence of the defendant's negligence. While the plaintiff has provided a list of payments made by the workers' compensation insurer, the shipowner submitted that the list does not readily differentiate between the alleged injuries to the cervical spine, ankle or psychiatric conditions, nor does it discharge the plaintiff's persuasive burden.

606 The shipowner's solicitors have reviewed the list of payments and attempted to correlate the treatment item with the alleged injuries. The results of those efforts are as follows:

(1) Right Ankle - $89,699.10;

(2) Psychology - $92,839.81;

(3) Left Shoulder - $30,373.54;

(4) Unknown - $58,385.07;

(5) Invoice - $10,391.42; and

(6) PBS - $10,391.42.

607 The plaintiff developed a shoulder injury of bursitis as a result of using crutches, as noted earlier in this Judgment. The shipowner submits that its liability for past medical expenses should be limited to the cost of treating the ankle injury. The costs also include the treatment for operations to the plaintiff's neck. It is accepted that this would include some expenses captured in the PBS figures. This head of damage ought to be assessed at $100,000.00, however, and subject to the plaintiff discharging her onus of proof, the shipowner accepts that the quantum will be higher if it is found liable for the psychiatric injuries and consequential injury of the cervical spine.

608 The plaintiff is to be awarded the costs incurred in the medical treatment of her physical injuries to the date of judgment. These costs are primarily attributable to the plaintiff's surgeries and ancillary treatment. Those costs were reasonably incurred.

609 Determination of the plaintiff's costs for psychiatric and psychological treatment is a difficult exercise and cannot be exact because some of the costs for psychiatric and psychological treatment (including rehabilitation) are attributable to the incident, but others are not. Evidence of the plaintiff's costs for pre-incident psychological and psychiatric treatment have not been adduced, but she had psychological and psychiatric treatment prior to the incident. Doing the best I can in the circumstances, it is my view that the incident is responsible for 60% of the plaintiff's costs for psychological and psychiatric care so far. The plaintiff was vulnerable to the psychiatric harm caused by the physical injury suffered in the incident. That harm was foreseeable.

610 The parties are to attempt to agree and calculate the amount of past out-of-pocket expenses in light of these findings.

Future out-of-pocket expenses

611 The plaintiff seeks the sum of $287,174.00 for out-of-pocket future treatment expenses. The shipowner allowed the future out-of-pockets should be $67,689.00 ($8,424.00 for right ankle plus $9,265.00 for cervical surgery plus $50,000.00 for recurring medical expenses).

612 The plaintiff submitted that the plaintiff has undergone substantial treatment in the past, including attendance with general practitioners and with specialists and the need for such treatment will inevitably continue.

613 It is common ground that the plaintiff has a 50% chance of undergoing a right ankle fusion. The shipowner states that the cost of that fusion of $27,440.00 should be deferred for 10 years.

614 The shipowner submitted that the plaintiff will not have a further cervical operation and that even if she did, it would not be attributable to the incident of 22 August 2018. If, to the contrary, the plaintiff is allowed the further cervical

surgery, the estimate is $77,047.00. The shipowner submitted that that should be deferred 15 years and that the chance of the surgery occurring should be assessed at 25%.

615 In terms of recurring medical expenses, the plaintiff claims at the rate of $189 per week for life. This is highly speculative and conjectural leading to an excessive sum for future recurrent medical expenses. The costs should be rounded down to $50,000.00 to take account of contingencies.

616 The plaintiff claims the recurring expenses of $189 per week for life for the following predicted costs:

(1) 12 yearly general practitioner consultations;

(2) 4 yearly psychiatric consultations;

(3) 4 yearly psychological consultations;

(4) annual orthopaedic consultation;

(5) annual foot and ankle surgery consultation;

(6) annual podiatry (regular replacement of orthotics and of shoes);

(7) medication (Panadol, Celebrex, Mobic, Esomeprazole, Alprax, Valium);

(8) an annual gym program/membership.

617 If assessed at $189 per week for life, the amount for these recurring costs would amount to approximately $182,687. In my view, it is not appropriate in this case to assess recurring future medical costs on this basis.

618 It is reasonable to allow the plaintiff 6 annual general practitioner consultations, 4 annual psychiatric consultations, and 4 annual psychological consultations. Doing the best I can to account for contingencies, I assess that the plaintiff is to be awarded $80,000 for future out-of-pocket expenses for medical treatment and pharmaceuticals.

619 For the purposes of the calculation required by *Malec v Hutton*, I accept that the plaintiff has a 50% chance of having to undergo a right ankle fusion, but it is likely that the operation will not take place for at least another 10 years. In accordance with the Joint Neurosurgical Report, I also accept that the plaintiff has a 30% chance of having to undergo further cervical surgery. This is to be deferred for 10 years. The plaintiff and shipowner are to calculate this amount.

Past loss of earnings including superannuation and loss of earning capacity including superannuation (future loss of earnings)

620 The shipowner and the plaintiff agreed that for the period from 6 November 2017 to 26 August 2018, the plaintiff earned $75,136. 96 gross. That equates to $1,333.49 per week. During the hearing, the plaintiff submitted that this is common ground (T423.8). I accept that to be correct. The employer did not make any submissions to the contrary.

621 The plaintiff seeks $1,836,524 for future loss of income (the sum of $2,576 per week net to age 70 years = $2,574 per week x 839.4 x 0.85 = $1,836,524).

622 The shipowner submitted that the sum should be $309,672 for future impaired earning capacity (the sum of $450 per week net to age 67 years = $450 per week x 809.6 x 0.85= $309,672).

623 The employer submitted that $509,769 should be allowed for future loss of income (the sum of $900 per week net to age 60 years = $900 per week x 666.4 x 0.85 = $509,769).

624 The plaintiff agrees to 20% for vicissitudes of life. The shipowner sought 25%.

<u>The evidence of Paul Keating</u>

625 Mr Keating is the Sydney Branch Secretary of the maritime division of the Construction Forestry Maritime and Employees Union (the union). He has held this position since 2021. Prior to that date he had held the position of Deputy Branch Secretary since 2011. The union has industrial coverage for Australian seafarers and stevedores. He relied upon his affidavits dated 10 July 2025 and 29 August 2025.

626 On 19 September 2025, he gave evidence and was cross-examined. When the hearing had to be adjourned, Mr Keating travelled to China for Maritime Union relationship building (T348.45-50). As video link was not available in China, it was necessary to await his return to Australia to be cross-examined. In the end, most of his evidence was uncontroversial. His evidence is as follows.

627 Before becoming an elected union official, he had been employed by the employer at Port Botany from 2000 to 2011. He worked as a stevedore performing lashing duties and other roles. Whilst an employee he served as a

union delegate and was a member of the union's National Bargaining Committee from about 2004 until he became an elected official in 2011.

628 Mr Keating is very familiar with stevedoring employment in Port Botany and the operations of the three stevedoring employers in that port, namely the employer, DP World and Hutchisons. He is also very familiar with the employment practices of all three companies. The employer as a large employer of waterfront labour in the port takes up a considerable amount of his time. His knowledge of the employer’s employment practices stem from the following:

(1) His years spent as an employee and a delegate of the employer between 2003 and 2011.

(2) Over the years he has observed stevedores at work in all facets of employer operations.

(3) He has taken part in enterprise agreement negotiations with the employer and has a knowledge of the various employment classifications applicable under the relevant enterprise agreements.

(4) He is very familiar with employer' hiring processes.

(5) He had frequent meetings with representatives from the employer’s management and their employees in relation to manning and remuneration.

(6) He has had almost daily communication with the employer’s union members and employee representatives over a full range of industrial issues since 2011.

(7) He has assisted union members in relation to problems arising out of their employment at employer.

629 Mr Keating understood that the plaintiff commenced employment with the employer as a Supplementary Employee in November 2017. She was one of about 40 people hired at that time. She was one of several females who joined the company then. All of the new employees were hired as supplementary workers under the enterprise agreement. The plaintiff, like all the other supplementary workers, commenced performing lashing duties and she remained in that role up until the time of her incident.

630 He explained that employer runs a 24-hour, 7 day a week operation. The company has undergone considerable growth over the last ten years or so. The company benefited from a number of port infrastructure improvements

which increased its yard capacity which allows more containers to be stacked. That increased its capacity to load and unload vessels. As a result, its workforce has increased considerably. Consequently, the demand for permanent employees also increased.

631 Employment on the permanent roster opens up considerable opportunities for employees to increase their earnings. Supplementary workers only perform lashing duties and therefore cannot work in higher graded roles. More overtime is generally available to permanent employees. After obtaining permanency it is usual for employees to receive additional skilling to undertake other roles. The employer encourages its workforce to upskill and runs extensive training programs. The union supports retraining and work as a team leader of a lashing gang or ship's gang. The skills acquired permit employees to perform a range of other roles in the terminal.

632 Mr Keating knows both John Cook (Mr Cook) and Ethan Tipping (Mr Tipping) who commenced employment with the company as part of the same group as the plaintiff in November 2017. They are both currently working performing lashing duties and also doing shifts as lashing gang team leaders. A team leader of a lashing gang works under the direction of the shift manager. He or she will instruct the gang as to which containers have to be either lashed or unlashed. The team leader will also perform lashing duties.

633 He knew the employer's employment practices at the Port Botany terminal based on his knowledge of the various industrial agreements which govern the employment of stevedores at that location, and his participation in the negotiations and discussions which led to those industrial agreements. Relevantly, these agreements include the ‘Patrick Terminals Enterprise Agreement 2016’ (2016 Agreement), the ‘Patrick Terminals Enterprise Agreement 2026’ (2026 Agreement), and a ‘Deed of Agreement’ (2017 Deed).

634 The source of his knowledge also comes from his countless discussions with union members employed by employer and the employer’s management team over the years. When he first became a union official in 2011, he was allocated to deal with matters concerning the union and its members at employer. That remained the position after he became the ‘Deputy Branch Secretary’. Even

after becoming the ‘Sydney Branch Secretary’, the employer remained a particular focus for his attention, although he had other responsibilities in relation to dealing with the other stevedoring companies and other maritime members.

635 Mr Keating further explained that the employer operates stevedoring terminals in Port Botany, Brisbane, Melbourne and Perth. The Enterprise Agreements are national agreements, but Part B of each Agreement contains provisions specific to the four ports. The provisions of Part A apply generally, except in the event of a conflict with any relevant provision in Part B. In that event, the provisions of Part B will apply for the relevant port.

636 New Enterprise Agreements are created at approximately four-year intervals. Prior to each Enterprise Agreement there is always an extensive period of negotiation between representatives on behalf of the union and the employer about changes to the Agreement. During the periods of negotiations prior to formulating new Enterprise Agreements Mr Keating met regularly with delegates from the employer's workforce from around the country at the union's ‘National Enterprise Bargaining’ meetings. He also met regularly with the employer's representatives during these negotiations. Because he is a Sydney Branch official, the main focus of his attention in these discussions was directed to Part B of the Enterprise Agreement, particularly the section relating to Patrick's Port Botany operation.

637 Historically, the enterprise agreements prior to 2016 did not contain any category of employment for casuals. The older agreements recognised a category of employment as a ‘Permanent Guaranteed Earner’. This position was akin to a permanent part-time employee. Part B of the 2011 Enterprise Agreement replaced this position in Port Botany with a new position entitled ‘Permanent Irregular Employee’.

638 The 2016 Agreement, in its application to Port Botany, replaced all those previous categories of employment with a position of ‘Permanent Roster Employee’.

639 Clause 1 52 of the 2016 Enterprise Agreement provided for a capacity to increase the workforce by agreement between the union and the employer.

640 Mr Keating recalled that in about mid-2017, he was contacted by union delegates on the ‘Site Employee Representative Committee’. They informed him that they had been contacted by the employer’s management who were seeking to be able to hire casual employees to work on a flexible basis and to be engaged in the task of lashing and unlashing shipping containers.

641 He recalled that he had a number of discussions with the employer’s management along with the then Branch Secretary, Paul McAleer, on this subject. He had been aware from the time he first commenced work for the company as a stevedore that lashing and unlashing of containers was a critical aspect of the company's business. Prompt turnaround times on vessels berthed at the employer’s terminal impacted on the number of vessels which could be accommodated and directly affected the company's operation.

642 During the discussions with the company, including with Bruce Guy, the then and current Terminal Manager, it was indicated to Mr Keating that the employer was concerned that there were occasional shortages of labour available to lash and unlash containers. Bruce Guy said to Mr Keating that they wanted to introduce a casual pool of employees to meet this demand. This eventually resulted in the 2017 Deed. It addressed the employer's concerns, and also addressed the union's concern to provide a clear path for promotion of permanent employees from the ranks of casual labour. It was his concern that it was desirable to have such a path towards permanency because it provided better job security and an opportunity for transition into other more remunerative roles within the terminal.

643 The 2017 Deed introduced the employment classification of a ‘supplementary’ for Port Botany employees. The supplementaries would only be used to perform the work of lashing and unlashing containers. New supplementary employees were supervised by team leaders and were meant to be integrated into lashing gangs containing more experienced employees. Initially there was a limit of no more than 38 supplementaries.

644 Mr Keating stated that according to the union's membership records, the plaintiff commenced as a union member on 29 November 2017. Her actual first day of work with the company may have been a week or so prior to that date.

Based on the union membership records, all of those employees, beside John Cooke (Mr Cooke), commenced work as supplementaries at around the same time as the plaintiff under the 2017 Deed, they are now all permanent employees. Mr Cooke originally commenced work for the employer in May 1999 and took a voluntary redundancy in 2014. The union's records still refer to his original start date of 5 May 1999. John re-joined Employer on 15 November 2017.

The supplementary deeds

645 The plaintiff made the following short observations in relation to the Supplementary Deeds of Agreement between the employer and the union. There are three Deeds in evidence, namely, the 2017 Deed, The 2022 Deed and the 2025 Deed. Each Deed follows a similar format and relevantly.

646 The 2017 Deed provides:

(1) In recital C that the parties have entered into "this agreement as a result of changes in operational requirements that have arisen since … the 2016 Agreement (The Patricks Terminal Enterprise Agreement 2016)". The intention of the parties is that supplementary employees would be used to supplement the permanent workforce;

(2) in cl 1.1(b) that the number of supplementary employees is limited to 38;

(3) in cl 1.1(e) that the recruitment of permanent labour will come from the supplementary employees in the first instance.

647 The 2022 Deed provides:

(1) in cl 1.1(b) that the number of supplementary employees is limited to 45 (but that constitutes an increased pool of supplementary employees);

(2) in cl 1.1(e) that the supplementary employees are to be the pool from which permanent labour is recruited;

(3) in cl 1(q)(ii) that supplementary applicants on a short list created by the employer with input from the Port Botany Site Committee (i.e. the union) will be the source of recruitment.

648 The 2025 Deed provides:

(1) in recital G that the intention of the parties is that supplementary employees will only be used to supplement the permanent workforce.

(2) in cl 1.1(f) provides that where the number of permanent labour employees is increased, the recruitment from those positions will come from the supplementary employees in the first instance.

649 The 2017 Deed demonstrates the intention of the employer to introduce supplementary employees at Port Botany who would step up to permanent status, which is precisely what occurred to the majority of the cohort of supplementary employees engaged by the employer at the time the plaintiff was engaged. The number of people who transitioned from supplementary to permanent employment was 32 out of 38. Only one employee who commenced in 2017 remains a supplementary to the present date. Six employees were terminated. Of the six employees whose employment status is described as "terminated", three of that number earned no income at all and a fourth only appears to have worked for a few weeks in the 2021/2022 tax year. In relation to the three with no earnings data recorded the likely inference is that although they may have been offered employment, they did not take up that offer.

<u>Evidence of comparable earnings</u>

650 The employer produced records of earnings for the plaintiff, it also furnished pre-incident earnings records and 2018/19 records of Mr Cooke and Katie Evans (Ms Evans). According to Mr Trainor's review of the material:

(1) The plaintiff, Ms Evans and Mr Cooke commenced work as supplementary employees within about a week of each other in November 2017.

(2) In the period prior to her incident the plaintiff earned a gross amount of $75,136.00, Ms Evans earned $65,236.00 and Mr Cooke earned $75,016.00.

651 In the tax year 2018/19 Katie Evans earned $124,500.00 gross, and John Cooke earned $133,872.00 gross. Both Ms Evans and Mr Cooke remained as supplementary employees in that tax year and were subsequently promoted to Grade 3 positions on 16 December 2019 and 7 October 2019 respectively. Annexure "D" to Mr Trainor's affidavit is a "schedule of comparable earners", which was forwarded to the defendants on 9 October 2025. In Annexure D to his affidavit Mr Trainor notes the following in relation to the 38 people who commenced employment as supplementary employees (Grade 2) on or close to the time of the plaintiff's commencement:

(1) Only one worker (Unnamed Employee 8) has remained as a supplementary employee since his/her commencement of employment in 2017.

(2) Six workers are described as having been terminated. There is no earnings data provided in relation to three of that number. Of the other three, one was hired on 15 November 2017 but only worked for the company briefly for a few weeks in the 2021/2022 tax year. Of the remaining 31 employees, all were promoted to at least Grade 3 positions on the AOR. The mean promotion date is 7 October 2019.

(3) Of that number, two individuals to date have received further promotion to Grade 4 positions as crane operators (Stewart Mills and an unnamed Employee 4).

652 13 of the 38 employees had either no earnings data, broken periods of employment, significantly reduced earnings overall, or various periods of reduced earnings in comparison to the other 25 employees.

<u>The earning capacity report dated 11 April 2024</u>

653 In the earning capacity report dated 11 April 2024 (Ex D2/1) and produced by ‘Rehabilitation Services by Altius’ (the earning capacity report), the experts identified the suitable employment to which the plaintiff is currently suited as being:

(1) Information officer with average weekly wage: $1,373.32 (gross) per 38 hours;

(2) Receive and dispatch clerk with average weekly wage: $1,392.95 (gross) per 38 hours;

(3) Beauty salon receptionist with average weekly wage: $1,127.33 (gross) per 38 hours.

654 The report states that “[t]he employment option is considered suitable following consideration of the [plaintiff’s] injury, age, skills, training and suitable employment considerations”.

<u>The plaintiff’s submissions</u>

655 The plaintiff submitted that apart from brief returns to suitable duties she has not worked since the incident. Like the past loss of earnings should be qualified by reference to the difference between probable earnings uninjured and actual earnings.

656 The plaintiff was happy to perform any overtime that was offered to her. As a supplementary employee it is unsurprising that she worked limited hours and

minimal overtime. This point is borne out by the increase in employee earnings as they progressed from supplementary grade 2 to permanent grade 3.

657 Mr Trainor's affidavit sets out average earnings of employees to reflect the plaintiff's likely earnings in the event that she had continued, uninjured, in the employ of the employer. The claim made by reference to comparable earnings uninjured assumes that the plaintiff would have continued in the employers' employ as a grade 3 permanent employee (without further promotion) working overtime as offered.

658 The claim for future loss is based on the average weekly earnings of the identified comparables for 2024/2025 added to the average weekly earnings for the period 1/7/2025 to 28/9/2025 and divided by 2 ($2545 + $2693) x 0.5 = $2619.

659 Any discount to be applied to the plaintiff's likely earnings uninjured based on arguments put by the defendants (if allowed) should be applied after the quantification of comparable earnings—not before as is proposed by the defendants.

660 The plaintiff conceded that it is arguable upon the basis of a chance that a greater discount for the vicissitude than 15% might be made, but submits that the evidence does not support a discount to more than 20%.

661 The plaintiff relies upon the wage records produced by the employer on 3 October 2025.

662 In relation to the shipowner’s submission that the earnings of Mr Cooke and Mr Tipping should be removed from the calculations, it is submitted that they must form part of any realistic pool of comparable employees. For a start, Mr Cooke cannot be described as an outlier. There are several higher earners than him in the cohort. A wide sample of 27 employees was used to make up the calculation. All of the employees commenced work at the same as the plaintiff and in the identical employment classification, and of that number the vast majority were promoted to permanent positions (at least to Grade 3 level) by December 2019. The plaintiff does not submit that the Court should rely simply on the earnings of Mr Cooke and Mr Evans. The plaintiff’s position is that a

sample drawn from the records of 27 fellow employees is likely to produce a more statistically valid result in circumstances where all of the cohort commenced work within a year prior to the plaintiff's incident.

663 In response to shipowner's submissions, the earnings of seven people were discarded in total, for the good reason that there was insufficient data to provide a calculation. It seems that the shipowner agrees with this. Of the remaining 5, only those parts of the individual's records which were so out of step with the rest of their pay records were excluded from the calculation.

664 The pay records indicate the availability of considerable overtime, higher duty allowances and bonus payments. The plaintiff submitted that a worker who regularly earns such payments is unlikely to cease doing so, unless for a reason such as ill health, incident or some other personal circumstance. It is not appropriate to include those years in the calculations.

665 The shipowner contends that, for the purposes of future economic loss calculations, the most appropriate method would be to average the earnings of the cohort for the past three years. No reason is advanced for that proposition. There is little basis to depart from what is the common practice of having regard to the last 12 months' earnings. In this instance, because there is only data available during the 2025/26 year up to 28 September 2025, the plaintiff has averaged the 2024/25 and 2025/26 wages to arrive at a figure for future wage loss. The total gross salaries for all employees over the years since 2019 demonstrates a steady increase (apart from a minor fall in 2020/21). To use just the past 3 years to arrive at a figure for future economic loss would be unfair to the plaintiff.

666 The plaintiff's economic loss should be assessed in accordance with the comparable earnings data as referred earlier set out in Annexure "D" to Mr Trainor's affidavit before any consideration of the application of any reduction for vicissitudes of life.

<u>The shipowner's submissions</u>

667 I have omitted the parties' submissions which are in agreement and the submissions on topics in which I have already made factual findings.

668 On 15 November 2017, the plaintiff commenced employment with the employer as a casual supplementary stevedore. She worked in that capacity for nine months and seven days up to the date of the incident. Her position was not permanent.

669 The shipowner submitted the plaintiff had very little prospect of having her casual supplementary stevedoring role upgraded to permanent employment or, in the alternative, of maintaining employment as a stevedore in the near to mid-term.

670 Firstly, in the confidential medical report dated 1 November 2017, the plaintiff failed to disclose her substantial pre-injury drug or alcohol problems.

671 Secondly, the plaintiff's drug use and alcohol abuse problems are recalcitrant and prone to partial remission and relapse. There is a high probability that the plaintiff would have relapsed into drug use and alcohol abuse without the incident. In the Joint Psychiatric Report, the psychiatric experts agreed "given the chronic nature of her substance abuse the chances of the plaintiff relapsing without the incident were significant".

672 The plaintiff's pattern of relapse into drug and alcohol use "post-incident is consistent with the relapse patterns for individuals with pre-existing dependency disorders. Stressful events and significant psychosocial stressors commonly precipitate relapse making the plaintiff's current situation consistent with exacerbating the expected trajectory of substance use disorder".

673 The death of her former partner in July 2019, the recreational use of ice leading to her hospitalisation in January 2020, and the response to her sister's potential incarceration were examples of significant psychosocial events resulting in relapse. As these events were completely unrelated to the incident of 22 August 2018, the plaintiff would not have been able to continue employment as a stevedore in any event.

674 This is so because of the employer's drug and alcohol policy. If the plaintiff had gone on to secure a permanent position, she would have been required to submit to random alcohol and drug testing as a condition of her employment. Given her history of drug and alcohol abuse, the probability is that there

inevitably would have been an occasion, such as the death of her former partner in 2019, where she would have turned to drugs and alcohol as a coping mechanism. The expert evidence establishes a high risk of relapse in a person like the plaintiff when faced by one of life's unexpected but inevitable crises. It is highly probable that such a relapse would eventually have coincided with a drug and alcohol test, leading to detection and consequential job loss.

675 Thirdly, the plaintiff's overall employment history is plainly against long term permanent employment.

676 The Joint Orthopaedic Report indicates that the plaintiff is not restricted for sedentary or light duty work.

677 Apart from her drug and alcohol problems, the plaintiff does have a substantial ongoing residual capacity for employment.

678 The earnings capacity assessment report dated 11 April 2024 and the cross-examination of the plaintiff by the employer demonstrate that, even as she gave evidence to the Court, she would be fit enough and sufficiently qualified to work as an information officer, receive and dispatch clerk, and receptionist, either medical or salon. That report makes clear that such work is readily available in the labour market accessible by the plaintiff.

679 In assessing future economic loss, it is submitted that the Court should engage with the following:

(1) The plaintiff's employment with the employer was too brief and too insecure to be a reliable metric for the assessment of future economic loss over a 28 year period to retirement age.

(2) The plaintiff's pre-injury earnings were modest. In the 2016 financial year, her gross earnings were $13,840. In the 2017 financial year, her gross earnings were $7,845.

(3) As a consequence of her remitting/relapsing drug issues, it is highly probable that the plaintiff would inevitably have failed a drug and alcohol test and lost her employment with the employer. This probably would have occurred with the death of her former partner in 2019 or on some other occasion between the date of the incident and trial.

(4) The plaintiff's pre-existing psychiatric injury would have affected her earning capacity in any event and likely resulted in periods out of employment.

(5) The plaintiff's pre-existing cervical pathology would inevitably have become symptomatic and precluded her from working as a stevedore. It is submitted this would likely have occurred by no later than twenty years into the future.

(6) The most significant impediment to the plaintiff currently pursuing employment is her pre-existing psychiatric illness, particularly her drug and alcohol abuse disorders. The drug and alcohol abuse, which is unrelated to and predates the incident, is responsible for more than 50% of her current psychological presentation.

680 The plaintiff retains a significant residual earning capacity with the ability to earn a higher income than the earnings she received in the 2016 and 2017 financial years.

681 The plaintiff's future loss should be assessed as submitted by the employer at the rate of $900 net per week but discounted by 50 percent to reflect the principles from *Watts v Rake* (1960) 108 CLR 158; [1968] HCA 58 (*Watts v Rake*) and *Malec v Hutton* as discussed by Professor Luntz above, as well as the plaintiff's failure to mitigate her loss by voluntarily consuming drugs and alcohol in the knowledge that those behaviours were harmful. The shipowner agreed with the employer's submissions.

682 Consistent with the failure to mitigate submission, the plaintiff's past damages for economic loss should be discounted by 25 percent.

683 The plaintiff had pre-existing psychiatric conditions of borderline personality disorder and substance abuse disorder. The shipowner urges that, on the balance of probabilities, so far as the immediate past is concerned, the incident did not cause the condition and that any exacerbation has resolved.

684 So far as the future is concerned, the Court has to assess the chance that the plaintiff would be in the position that she is now notwithstanding the incident. This is not a case in which there is no evidence to enable the Court to evaluate that chance.

685 The plaintiff's consumption of alcohol and illegal drugs is voluntary. The evidence of Drs Young and Roberts (T321.15-19) is that these are "voluntary actions". Dr Gordon's equivocal evidence is, "[t]hey have got to determine whether compulsion is a voluntary action".

686 All three psychiatrists agreed that abuse of alcohol and drugs is characteristic of borderline personality disorder (T325.29-50). The claim that the plaintiff abuses alcohol and consumes narcotics to ameliorate the pain caused by the incident should be rejected on the medical evidence.

687 Although the plaintiff claims to use alcohol and illegal drugs to relieve pain from the incident, the Court should find that this behaviour has disrupted any causal link with the incident. Furthermore, the plaintiff has failed to mitigate her damage and has likely worsened her condition by choosing such a path. It is probable that her actions have compromised her overall health.

688 Since the incident, the plaintiff has exhibited periods during which she has been abstinent from both alcohol and drugs. Relapse into abuse of those substances is characteristic of and entirely consistent with the disorders which pre-dated the incident (T325.30-326.1).

689 The plaintiff voluntarily and habitually abused alcohol and took illegal drugs before 18 August 2018. The incident did not cause her to engage in those harmful behaviours.

690 Given the plaintiff's significant psychiatric history and advanced cervical spondylosis, a 20% discount for contingencies is insufficient; a minimum discount of 25% is warranted.

691 The plaintiff presses a high claim for future economic loss based principally on the earnings of two ostensibly comparable employees, Mr Tipping and Mr Cooke. A schedule of damages has been provided to the shipowner that quantifies the claim. Mr Tipping and Mr Cooke were members of the cohort of 38 workers who commenced with the plaintiff at approximately the same time. For the reasons that follow, the shipowner submitted that there are significant issues with the plaintiff's approach.

(1) First, six of the cohort of 38 have had their employment terminated and one further worker remains employed as a supplementary to this day. That is, seven of the thirty eight workers, or 18 per cent of the plaintiff's cohort, either no longer work for the employer or never made it past supplementary. The probability is that, but for the incident, the plaintiff would have found herself in this class of worker because of, inter alia, her drug and alcohol issues.

(2) Secondly, thirteen of the cohort of 38 (inclusive of the seven employees referred to above), or 35 per cent of the workforce, have either no earnings data, broken periods of employment or significantly reduced earnings. The plaintiff contends that these workers aren't comparable however, again, it is likely that she would have found herself in that class because of, inter alia, her drug and alcohol issues.

(3) Thirdly, it appears the plaintiff will be contending that she is comparable with certain workers who worked considerable overtime. Workers who worked minimal overtime have been excluded from the plaintiff's approach. During her employment with the employer, the plaintiff was a worker who did minimal overtime. Her wage records reveal that she worked 26 hours of overtime in 42 weeks, which equates to approximately 0.6 hours of overtime per week.

692 The shipowner has undertaken its own calculations based on the wage records. The figures include the workers the plaintiff has excluded, excludes the workers who were terminated or never made it past supplementary, and excludes Mr Tipping and Mr Cooke because they are outliers. Obviously, the figures would be significantly lower if the terminated workers were included.

693 In terms of the future economic loss claim, the more appropriate method (on the plaintiff's approach, which should be rejected) would be to average the past three years of earnings across the cohort, which produces a figure of $2,269 net per week. That calculation then becomes: $2,269 x 797 (28 year multiplier to age 67) less 20 per cent for vicissitudes = $1,446,714. This is self-evidently significantly lower than the $1,856,163 claimed by the plaintiff.

694 The shipowner does not consider the plaintiff's approach to be appropriate. It should be eschewed because it assumes the plaintiff would have had a linear progression through the ranks to age 70 despite her significant pre-existing psychiatric conditions, drug and alcohol problems and the premature curtailment of her capacity to work as a stevedore as a result of her cervical spine condition.

695 Furthermore, there is simply no evidence to support a finding that the plaintiff would have worked to age 70. At no stage has the plaintiff ever said that was her intention. Consistent with orthodoxy, the claim for future economic loss should not be calculated beyond age 67.

<u>The employer's submissions</u>

696 The medical evidence on capacity breaks into two camps.

697 In the Joint Psychiatric Report, the psychiatrists say that the plaintiff's capacity, based on her subjective complaint is "significantly impoverished" but some capacity remains.

698 The orthopaedic surgeons do not agree, and their conclave report would suggest that she retains the capacity for suitable duties. This opinion is shared by the treating neurosurgeon Dr Wong who agreed that she had some capacity for clerical and other selected duties in the form of an information officer, receive and despatch clerk and a hair salon receptionist.

699 The plaintiff sought to advance an argument that her employment was protected by an industrial agreement ensuring a pay of at least that of a lasher. While the employer agrees with that proposition it does not agree that the plaintiff would have advanced beyond that of a lasher because of her antecedent issues. After all it took Mr Bellingham twelve years to progress to grade six (T174.11) and he has no antecedent issues.

700 The employer has provided a wage schedule which it maintains reflects the proper calculations. In addition, the employer relies upon the caps provided by section 151I of the *WCA* that limits the claim for comparable wages.

701 The employer asserts that the plaintiff does have a capacity for employment.

702 There is no doubt that the plaintiff had a problem with drugs and alcohol before her incident and there were periods when her usage of those products ceased only to be rekindled from time to time.

703 The plaintiff has asserted that she was drug and alcohol free during the period where she worked for the employer due to treatment from Dr Gordon. The shipowner has disputed the plaintiff’s assertion and had produced evidence that she skipped a testing. The plaintiff in her employment with the employer had worked for 9 months and passed all of the drug and alcohol testing. She missed only one test.

704 On an overall evaluation, the employer says that there are issues to question the plaintiff's assertion that she is unfit for anything when she relies only on the issue of pain. The shipowner has raised a number of issues that would go to credit including, the delay in reporting, the events leading up to her ultimate

complaint of pain in the shoulder/cervical region, avoiding alcohol and drug tests (once) and her on and off again approach to alcohol and drugs and the reasons. If it is accepted that the plaintiff has been unreliable in her complaint, then this would demonstrate her capacity for work is greater than what she is prepared to admit.

Resolution

705 The medical evidence is clear. The plaintiff can no longer carry out the work required of her as a stevedore. The orthopaedic and neurological specialists agreed that plaintiff is fit to return to work as information officer, receive and dispatch clerk and receptionist, either for a medical practice or a salon.

706 From both the psychiatric and psychological point of view, the specialist agreed that the pain levels suffered by the plaintiff will impede her working performance for any jobs and contribute to a continuation of her psychological and psychiatric conditions.

707 Both the defendant's submitted that the plaintiff's pre-existing cervical condition may have become symptomatic overtime regardless of the incident such that it would have precluded her from working as a stevedore. Hence I take into account the possibility that the plaintiff may have become unable to carry out strenuous or arduous work. Doing the best I can in accordance with *Malec v Hutton* I assess that it may occur by 60 years of age. The plaintiff is not entitled to be awarded damages for loss of earning capacity past the age of 60. It is my view that it is more likely than not that the plaintiff would not have been working as a stevedore until the retirement age of 67 years.

708 The shipowner disagreed with the plaintiff's approach as to her future employment trajectory had the incident had not occurred because it assumes the plaintiff would have had a linear progression through the ranks to age 70 despite her significant pre-existing psychiatric conditions, drug and alcohol problems and the premature curtailment of her capacity to work as a stevedore as a result of her cervical spine condition.

709 The plaintiff submitted that she would have continued to do stevedoring duties until she attained the age of 67. The employer agrees that her employment is protected by industrial agreement but her underlying degenerative changes

when combined with the nature of her employment (heavy duties) would have restricted her working capacity beyond 60 years of age. As I understand it, the industrial agreement between the plaintiff and her employer does not extend to the shipowner.

710 Both the shipowner and the employer submitted that significant impediments to the plaintiff's ability to pursue work as a stevedore was caused by her pre-existing drug and alcohol psychological issues such that the plaintiff is responsible for 50% of her current psychological presentation. I do not agree. While I accept that the plaintiff would, regardless of the incident, continue to have episodes of aggravation of her psychiatric conditions from time to time that would have necessitated time off work, the incident exacerbated her pre-existing diagnosed psychiatric conditions.

711 The shipowner submitted that given the plaintiff's significant psychiatric history and advanced cervical spondylosis, a 20% discount for vicissitudes is insufficient; a minimum discount of 25% is warranted. The employer suggested that a 15% discount should be made for contingencies. Vicissitudes relevantly include sickness, accidents, short periods of unemployment due to her pre-existing psychiatric condition and industrial disputes. While the conventional deduction for vicissitudes is 15%. In order to allow for these contingencies, it is reasonable to allow 20% for vicissitudes.

712 The shipowner submitted that in terms of the future economic loss claim, the more appropriate method would be to average the past three years of earnings across the cohort, which produces a figure of $2,269 net per week. That calculation then becomes: $2,269 x 797 (28 year multiplier to age 67) less 20 per cent for vicissitudes which equates to $1,446,714. The amount is lower than the $1,856,163 claimed by the plaintiff. But the plaintiff used the best performing comparable employee as the base of her calculations. I prefer and accept the shipowner's approach as it is reasonable is to use the average of comparable employee's wage rates.

713 So far as past economic loss is concerned, using the shipowner's calculations the average comparable weekly wages are as follows: FY18/19 $1,701;

FY19/20 $1,800; FY20/21 $1,774; FY21/22 $1,926; FY22/23 $1,940; FY23/24 $2,256; FY24/25 $2,436; FY25/26 $2,114.

714 To recap, it is my view that if the incident had not occurred, the plaintiff would nonetheless have had periods of time when she resorted to drugs and/or alcohol and that that would, from time to time, have necessitated her taking some relatively short periods off work. Nevertheless, as she enjoyed the job and was well-suited to it, it is my view that she would have been able successfully to sustain a long career as a stevedore.

715 While the plaintiff had worked a number of jobs prior to the incident, she made a genuine attempt to change the nature and trajectory of her life and was actually taking steps to achieve this. She considered the job with the employer her 'dream job' because it was 'outdoors' and 'physical' convincing.

716 The plaintiff had her maximum earning capacity in a job centred around strenuous physical labour, such as stevedoring. Because of her physical injuries, she can no longer carry out this heavy manual labour work. The plaintiff has a pre-existing cervical pathology which was aggravated by the incident which resulted in two operations. The natural progression of this pre-existing pathology and the continued heavy labour but for the incident more likely than not would have prevented the plaintiff from working as a stevedore past age 60.

717 It is my view, that but for the incident, the plaintiff would have remained in employment as a stevedore and like the majority of her cohort, she would have become a permanent employee. She would have, according to the shipowner's calculation, begun to have earned the average wage for a permanent employee from 7 October 2019, the mean promotion date of her cohort. From the date of the incident to 7 October 2019, she would have continued to earn $1,333.49 per week (the average of her earnings as a supplementary employee).

718 The plaintiff does retain some residual earning capacity. From my assessment of the earning capacity report referred to earlier, it is my view that the plaintiff could, on a part time or casual basis, carry out work as an information officer ($1,373.32 gross / 38 hours a week), a receive and dispatch clerk ($1,392.95

gross / 38 hours a week), or a beauty salon receptionist ($1,127.33 gross / 38 hours a week). These wages amount to an average weekly wage of $1,297.82.

719 On account of her physical injuries and the exacerbation of her psychiatric injuries, it is my view that she will not be able to pursue full time employment, but only a mix of part-time or casual employment. I asses that her work capacity for the three jobs referred to above to be the equivalent of three days per week. Her earning capacity in these different roles therefore amounts to $1,297.82 x 0.6 = $778.69 per week. Using the shipowner's figure for future economic loss, the loss in weekly earning capacity is therefore $2,269 (full time stevedoring) - $778.69 (receptionist/information officer like work, part time) = $1490.31 loss per week for future economic loss.

720 The final question that needs to be answered is when the plaintiff became suitable for the part time work as described. From the date of the incident to 8 December 2021, the plaintiff and the employer are in agreement as to when the plaintiff was totally incapacitated and when she was partially incapacitated:

- Total incapacity 22 August 2018-2 December 2018 (13.5 wk);
- Partial incapacity 3 December 2018-28 July 2018 (34 wk);
- Total incapacity 1 August 2019-26 September 2021 (112 wk);
- Partial incapacity 27 September 2021-7 October 2021 (1.5 wk);
- Total incapacity 8 October 2021-28 November 2021 (7 wk);
- Partial incapacity 29 November 2021-8 December 2021 (1.2 wk).

721 The employer accepted that the plaintiff was totally incapacitated from 9 December 2021 to 8 February 2023, but then stated that she was only partially incapacitated from 9 February 2023. However, in his report dated 9 February 2023, Dr Wong, the treating neurosurgeon, opined that "I feel that it would too early to perform an assessment of her permanent disabilities and I would wait until at least 4-6 months before determining her suitability for a return to work."

722 During the cross-examination, Dr Wong clarified the statement in his report dated 9 February 2023. He considered that she would be fit for suitable work within four to six months, suitable work such as an information officer, receiver or dispatch clerk, or a receptionist at a hair salon (T357-358). Accepting Dr

Wong's evidence, I find that the plaintiff had residual earning capacity for the work from 9 August 2023, which is 6 months after Dr Wong's report.

723 The calculation for loss of future earnings is to be conducted on the 5% tables (see s 151J of the *WCA*).

724 The parties are to calculate both past and future economic loss based on my findings.

Loss of past and future superannuation

725 The parties agree that the past superannuation should be 11.45% of past loss of income. The parties agree that the future superannuation should be 14.4% of future loss of income.

726 The parties are to calculate the sums for loss of past and future superannuation.

Fox v Wood

727 The plaintiff seeks $65,000 under *Fox v Wood* (1981) 148 CLR 438; [1981] HCA 41 (*Fox v Wood*). Both shipowner and employer submitted that it should be $50,000. The parties are to calculate the amount payable under *Fox v Wood*.

Costs

728 Costs are discretionary. Costs normally follow the event. I propose to order that the defendants are to pay the plaintiff's costs unless the parties notify my Associate that some other order is sought.

Orders

(1) Judgment for the plaintiff against the first defendant in an amount to be calculated by the parties.

(2) Judgment for the plaintiff against the second defendant in an amount to be calculated by the parties.

(3) The parties are to take steps to reach agreement on the amounts of the judgments, including judgments on the cross claims, within 14 days.

(4) The parties are to forward consent orders to my Associate within 14 days, or failing that, to contact my Associate to have the matter relisted for further directions within 14 days.

(5) The defendants are to pay the plaintiff's costs unless the parties seek a different order within 14 days.

(6) It is noted that the second defendant is to be paid back what it has paid in workers compensation.

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