DISTRICT COURT OF QUEENSLAND

CITATION:	*Boyd v Trindall & Ors* [2022] QDC
PARTIES:	**STEWART WILLIAM BOYD** (Plaintiff) **v** **DESMOND JOHN TRINDALL** (First Defendant) **and** **TRINDALL THOROUGHBREDS PTY LTD** **ACN 613 573 327** (Second Defendant) **and** **TONY GOVESIS** (Third Defendant) **and** **GEA PARK PTY LTD ACN 142 091 790** (Fourth Defendant)
FILE NO/S:	4693/19
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	17 March 2023
DELIVERED AT:	Brisbane
HEARING DATE:	20, 21 and 22 June 2022
JUDGE:	Rinaudo AM DCJ
ORDER:	**1. Judgment for the Plaintiff.** **2. The first and third defendants pay the Plaintiff damages as assessed in the sum of $209,705.20.** **3. Interest.** **4. Cost.**

CATCHWORDS: NEGLIGENCE – personal injuries – where plaintiff injured his thigh/leg when a filly kicked the plaintiff.

DUTY OF CARE – whether defendant owed a duty of care to the plaintiff – where plaintiff alleges the defendants engaged plaintiff to be the breaker/trainer of horses at a Lodge – whether defendant breached duty of care

LEGISLATION: *Workers' Compensation and Rehabilitation Act 2003*

Civil Liability Act 2003 ss 9, 10, 11, 13, 14, 16, 24

CASES: *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1.
Australian Securities and Investments Commission v Hellicar [2012] HCA 17.
Bing N.C. 476
Czatyrko v Edith Cowan University [2005] HCA 14
Derbyshire Building Co Pty Ltd v Becker (1962) 107 CLR 133
Do Carmo v Ford Excavations Pty Ltd (1984) 154 CLR 306
Ermogenous v Greek Orthodox Community of SA Inc [2002] HCA 8
Ferraloro v Preston Timber Pty Ltd, (1982) 56 ALJR 872
Heaven v Pender (1883) 11 QBD 503
Heywood v Commercial Electrical Pty Ltd [2013] QCA 270
Jones v Dunkel (1959)101 CLR 298; [1959] HCA 8
McHale v Watson [1966] HCA 13; (1966) 115 CLR 199
McHugh v BKE Pty Ltd as trustee for the B W King Family Trust [2018] QDC 254
McLean v Tedman [1984] HCA 60; (1984) 155 CLR 306
Muir v Glasgow Corporation [1943] UKHL 2; (1943) AC 448.
Pollard v Trude [2008] QSC 119
T.G. Kere v *BM Alliance Coal Operations Pty Ltd* [2016] QSC 304
Vaughan v Menlove (1837) 132 E.R. 490

COUNSEL: A. Morris KC for the plaintiff

C. Steiner for the first defendant

G.C. O’Driscoll for the third defendant

SOLICITORS: Sterling Law for the plaintiff

Main Lawyers for the first defendant

Barry Nilsson Lawyers for the third defendant

Overview of Plaintiff's case

[1] The plaintiff, Stewart William Boyd, (Mr Boyd) was an experienced horse trainer and horse breaker.

[2] On 4 October 2017, he received a call from the First Defendant, Desmond John Trindall, (Mr Trindall) who asked him to move to a property at 328 Biddaddaba Creek Road Biddaddaba, (the property) to break and train horses. He was told that there was a good opportunity to earn between $50,000.00 and $150,000.00.

[3] Mr Boyd subsequently met with the Third Defendant Tony Govesis (Mr Govesis) who was the owner of the property. Mr Govesis told Mr Boyd, if he wanted the job, he would be the breaker/trainer for Gea Park Lodge, (Gea Park Lodge) and would get free rent and electricity. The rent was $660.00 per week. Mr Boyd moved in the next day.

[4] On 3 November 2017, Mr Boyd was injured whilst training a horse. He claims damages for injuries suffered as an employee.

The Pleadings:

[5] Mr Boyd claims that on 3 November 2017, he was injured at the round yard of the property, in the course of his work for Gea Park Lodge when a two-year old filly owned by Donna Koitka, Mr Boyd was training, kicked him in the left thigh/hip ("the incident").

[6] Mr Boyd claims the incident was caused by the negligence of the defendants in breach of their duties of care to Mr Boyd.

[7] Mr Boyd pleads the particulars of negligence as, the defendants:

(a) failing to provide the plaintiff with a safe system of work by not providing any, or any adequate instructions to the plaintiff on how to perform his work safely by minimising the risk of being kicked by horses;

(b) failing to provide the plaintiff with a safe system of work by not providing any, or any adequate training to the plaintiff on how to perform his work safely by minimising the risk of being kicked by horses;

(c) failing to conduct any, or any adequate risk assessment with respect to the risks posed by horses kicking which would have identified such risks and a practical means of overcoming such risks;

(d) failing to provide appropriate warnings to the plaintiff concerning the risks posed by horses;

(e) failing to construct or place a barrier, such as a horse crush, to prevent contact between the plaintiff and the untrained horses; and

(f) failing to have a horsewalker at the property available for use.

[8] Further, and alternatively, Mr Boyd claims the incident was caused by the negligence of the first and third defendants, Mr Trindall and Mr Govesis, as owners/occupiers of the property by failing to take reasonable steps to ensure the safety of the plaintiff while he was at the property in breach of their duties of care to him.

[9] Mr Boyd pleads the particulars of negligence as, the defendants:

(a) failing to conduct any, or any adequate risk assessment with respect to the risks posed by horses kicking the plaintiff on the property which would have identified such risks and a practical means of overcoming such risks;

(b) failing to provide appropriate warnings to the plaintiff concerning the risks posed by horses on the property;

(c) failing to construct a barrier to prevent contact between the plaintiff and the untrained horses on the property; and

(d) failing to have a horsewalker at the property available for use.

[10] Further, and alternatively, Mr Boyd claims that each of the defendants are vicariously liable for the incident due to the negligence of the other defendants in breach of their duties of care to him as pleaded by him, and stated below:

(a) failing to provide him with a safe system of work by not providing any, or any adequate instructions to him on how to perform his work safely by minimising the risk of being kicked by horses;

(b) failing to provide him with a safe system of work by not providing any, or any adequate training to him on how to perform his work safely by minimising the risk of being kicked by horses;

(c) failing to conduct any, or any adequate risk assessment with respect to the risks posed by horses kicking him which would have identified such risks and a practical means of overcoming such risks;

(d) failing to provide appropriate warnings to him concerning the risks posed by horses;

(e) failing to construct a barrier to prevent contact between the plaintiff and the untrained horses; and

(f) failing to have a horsewalker at the property available for use.

[11] As a result of the incident, Mr Boyd claims to have suffered the following personal injuries ("the injuries"):

(a) Severe fracture of the left femur with limb length discrepancy and muscle wasting;

(b) surgical scarring; and

(c) a psychological injury.

[12] In consequence of the injuries, Mr Boyd claims that he has undergone and will in the future undergo, pain and suffering and loss of amenities including:

(a) Pain in the left hip/thigh, including nocturnal pain;

(b) Limping;

(c) Surgical scarring;

(d) Leg length discrepancy requiring heel/gait support;

(e) Inability of difficulty walking without a walking aid;

(f) Restriction of movement:

(g) Lower back pain;

(h) Symptoms in his right knee caused by his consequential leg length discrepancy; and

(i) Depressed mood and suicidal thoughts.

[13] By amended schedule of loss and damage the Plaintiff claims damages as follows:

TOTAL	**$**
Pain and Suffering	$31,150.00
Past Economic Loss	$381,108.76
Future Economic Loss	$330,400.00
Loss of Superannuation	$70,555.45
Past Griffiths v Kerkemeyer	$NIL
Future Griffiths v Kerkemeyer	$NIL
Out of Pocket Expenses	$47,187.75
Future Medical Expenses	$16,415.38
Interest on special damages & Past Economic & Super Loss (3 years)	$54.622.08
TOTAL AMOUNT CLAIMED	**$927,840.66**

Defendants Defence

[14] The Defendants deny a breach of duty of care causing the Plaintiff to be injured as:

(a) The incident occurred while the plaintiff was carrying out work for himself and undertaking his own system of work; and

(b) The Plaintiff caused or contributed to him sustaining injury by reason of his conduct and actions.

[15] The Defendants particularise this in the way that the Plaintiff:

(a) Failed to take reasonable care for his own safety;

(b) Failed to keep any or any proper lookout; and

(c) Undertook an activity that constituted an obvious risk.

Evidence at trial

Mr Boyd

[16] Mr Boyd gave evidence of the events leading up to and following his conversation with Mr Trindall. He gave evidence of his meeting with Mr Govesis and subsequently moving into the unit at the property.

[17] He said that he had met Mr Trindall once, some weeks prior, through a friend Peter Gray. Mr Trindall called him on 4 October 2017. Mr Trindall said he wanted Mr Boyd to move out to the property. Mr Boyd said he couldn't move out as he had a partner and they were in the process of entering into a new lease. He said Mr Trindall sounded "a bit frantic".

[18] Over the course of three or four conversations (phone calls) Mr Trindall said, "come and have a look at the property, it's a training complex… you won't regret it." Mr Boyd said Mr Trindall was "adamant he wanted to go and have a look at the place". He called his partner Debra (Debra Joyce Ainsworth) and asked her if they could at least have a look at the place. So they went to the property, that day.

[19] Phoebe Trindall (Mr Trindall's wife) met them. She showed them around the property. Mr Trindall arrived about half an hour later. Mr Boyd gave evidence that Mr Trindall said, "Phoebe can't ride horses any more. We are stuck for a – a horse trainer – a horse breaker/trainer, and you're it."… "There's a good opportunity here for you to earn between 50 and 150 thousand dollars in the first year." … "you can have the unit; free electricity; full use of the amenities; full use of everything on the place and power included." This, Mr Boyd said, "sounded pretty attractive to me and Debra."

[20] In response to the question, "in October 2017, what experience did you have as a horse breaker?" Mr Boyd replied, "I worked in the meatworks in Mackay for 10 years; broke in horses for 10 years. I'm a racehorse trainer since 18. I'm 58 now. I worked on cattle stations and cane farms all my life. I grew up in the bush. … to understand what a horse is thinking by it dropping its ear, or anything like that, the question you asked me was, what experience did I have; I have a lot of experience."

[21] Mr Boyd was told that the finer points would be worked out with Mr Govesis.

[22] Mr Boyd gave evidence about John Govesis, (brother of Mr Govesis), and gave evidence that "For the first meeting Des [Mr Trindall] kept taking videos and photos of me riding horses, of me doing this and doing that and the way I went about things, and he did mention that he had to run everything by John Govesis to put on a website for Gea Park Lodge."

[23] At the meeting with Mr Govesis, Mr Trindall said that they were starting a new business and they wanted him to be the breaker/trainer. Mr Boyd gave evidence that Mr Govesis said "Look, there's a good opportunity here for you to earn 50 to $150,000 a year." This evidence followed, "I thought, "Well" – I didn't answer Tony. I thought – because, you know, this is the second time I've heard this. Then it went on to what we had to do to get the business going because I – you know, I'm – I don't know whether I'm coming or going at that time, but Des happened to mention that, "First things first, the website is going good. We need horses – we need horses to start the business," and he mentioned the website again and, you know, I said, "Well, that shouldn't be too hard."

[24] Mr Boyd said there was some conversation with Mr Govesis about training horses which Mr Boyd found ludicrous, "but I went along with it because at that time I wanted a job".

[25] Mr Boyd said that Mr Govesis said, "If you want this job you'll be the breaker/trainer for Gea Park Lodge," and I just was in awe of – "and you can have – the unit's free, the electricity's free. The unit's worth $660 a week, so you're getting that for free, free electricity," and full use of all amenities and everything that was on the property."

[26] It was agreed that Mr Boyd could finish breaking the four horses he had been breaking in Beaudesert at John Rodgers' place. He said anything after that would be invoiced through the new entity Gea Park Lodge.

[27] Mr Boyd's evidence was, "Like, I was just going to move into a house and keep going the way I was going. An opportunity like that is one in a lifetime. I said, "Yes, okay." They started moving in the next day.

[28] No agreement was signed.

[29] Subsequently, Mr Boyd arranged for a horse named Grimhild's Revenge to be brought to the property by its owner Donna Koitka. She had been to the property to have a look and "she loved the place". Ms Koitka spoke to Mr Trindall and arranged for the horse to come to the property. Mr Boyd told her that, "anything from here is nothing to do with me; it's – it goes through Gea Park Lodge." When asked about the facilities at the property Mr Boyd said that it did not have a crush. He said most people have a crush.

[30] His evidence about this was as follows; "for a horse, and for someone that's not a horse person, I liken it – because I train – I educate people, as far as horses go – I liken it to the best way I can explain it is if a rocket ship, a space ship, came and landed beside you and started snigging you into the rocket ship, then you'd be back-pedalling like a horse would be. But if you put it into a crush – depending on the horse, because all horses are different – if you put it into a crush, if you think it's a bit too agitated, you can, what they call, bag it down; have a towel and bag it down; make friends with it enough that you can get a halter on it. And a lot of horses at a lot of foaling properties have these crushes. Nearly all foaling facilities – studs – have these crushes to get horses onto a float.

Right. And as part of the process for training, or initially for breaking a horse, is a crush used in that context?---Like I just said to you, you've got to do a crush if a horse comes in – all horses that you don't know, and they are a bit agitated, if they're not halter broken and – and – and, you know, you're always looking over your shoulder, if they're doing anything wrong then, yes, a crush. If they seem like they're accepting of you, and accepting of the environment, then, yes, maybe not a crush."

[31] Mr Boyd went on to explain a round yard having one gate and being a place where you can put a horse to roll in the sand. He said this wasn't something you would use until you get to know the horse. He then explained what a horse walker was. There was no horse walker at the property.

[32] When the horse arrived at the property, it was taken off the truck and placed in an enclosed stable. After a while, Mr Boyd said he heard the horse striking at the box and not wanting it to be injured, he decided to walk it. As there was no horse walker to use to "deplete some of the energy that it had, I thought I'd put it in the round yard that was there." He said, "I've walked into the round yard with this horse in tow,

constantly looking over me shoulder – and if you don't look over your shoulder with young horses, then you're in trouble. You shouldn't be doing it. And I've walked into the round yard, turned her around, shut the pin on the gate, and it was a little bit hard to shut – shut the pin on the gate, and I've proceeded to walk to the middle of the round yard. When I – as I took a couple of steps towards it – it was a big round yard. The round yard would – would have been and still is, if it's there, the size of this courtroom nearly. So, I proceeded to walk to the centre of the round yard. But as I've taken two steps, I've unclipped this horse and I've walked to the middle of the round yard. And she's then done two laps, whinnying and carrying on. She might have done two and a-half laps, two and three-quarter laps. I'm not 100 per cent sure, but she did more than two laps of the round yard that way. Then she stopped, looked over the rail and I thought, "Oh, don't you." … . Referring, from his experience to the horse possibly jumping, which it didn't.

[33] Mr Boyd explained the incident in the following way, "Then she's pulled up a horse length away. If – if this is the round yard here and the gate is here, she's pulled up. She's done two laps of the round yard this way, and then she's done – and I'm in the middle a long way away from her just to watch she doesn't go over the side. Then I've walked – sorry, she's – she's done two laps this way and she's pulled up a horse length from the gate. The gate's here. She's pulled up one – we call it a length. It's a horse length. She's pulled up a horse length or a horse length and a-quarter away from the pin on the gate, which I thought was ample. I've been doing this long enough. Like, it's – you know. You know, and anyone would say the same, but when she pulled up there, as I went to open the – because, you know, I've come from the middle of the round yard straight to the latch. Knows exactly straight to the latch, and she stayed there, and I thought, "Well, that's good, she's not going to jump out." I've grabbed the latch, undone the latch, and I don't think I got it completely undone and the way to tell with a horse if they're nasty is either they're flicking their tail or they'll drop one ear like that ... If they drop two ears, they're real nasty, and I just happened to catch out the corner of the eye she dropped an ear like that at me and, you know, and it's a – it's implanted into every horse breaker that when that happens it's a – I don't know how you'd explain it. It's – it's a sign of they're not happy or nastiness. So – and then I saw her flinch and I thought – within a split second I thought, "Move." So I did, and I moved, but what I did instead of walking – instead of jumping to one

side, I bent down like that just ... in case she kicked. Well, she did kick, but when she kicked she got me right in the head, smashed it.

[34] Mr Boyd said that, "religiously every horse came out [of the box or stable] and went on the walker religiously." This had the effect of releasing energy like a shaken up Champagne bottle. There had been discussion about transferring a horse walker Mr Trindall had previously built from Gleneagle to the property, but in the end it was "just too much trouble".

[35] Mr Boyd gave evidence that Mr Govesis said, "I'm the fucking boss here. What I say goes." Mr Boyd was asked what happened then and he replied, "I shook hands with Tony. And he said, "Welcome to the family." He was told he could start work on a horse, Ustinov, belonging to Mr Govesis' brother John, "straight away."

[36] Mr Boyd gave evidence that as a result of the injuries, he was homeless. He said he tried to make another business in training horses and re-educating horses, with the help of a government program. He said he was taking 24 Endone tablets a day. He said, "he went over and above what I thought I could do, and I just can't do it." He said he had trained a rooster once not to crow until 8 o'clock. He had trained dogs, worked in the mines, as a mechanic sales rep and truck driving but horses were his passion, his life. He said he had lost everything including his partner, his daughter, and he was homeless.

[37] Mr Boyd was cross-examined by counsel for Mr Govesis about his ability to work since the accident including what he had disclosed in his statement of loss and damage. Mr Boyd gave evidence about Stewart Boyd Equine, which he said was a business that NEIS program through Centrelink helped him set up. He said, "I wanted to work for myself."

[38] Mr Boyd confirmed that over a 12 month period, he was out riding horses and breaking horses and retraining and educating them. He confirmed that he was able to do that within the limits of his pain and restriction. Mr Boyd said he was taking a lot of Endone. Otherwise, he couldn't have done it.

[39] He confirmed that, "So notwithstanding the limitations on your hip that you're talking about these difficult horses that need retraining, you're able to do that, and did it? I

did with enough Endone and I did have a helper at the time, yes. That was Jessica Hayward who rode a horse next to the horse he was riding.

[40] Mr Boyd was shown videos of him riding various horses, and breaking them in. Mr Boyd said he would take 6 Endone to be able to get on and off the horse. He said "I don't want Endone. I'm not going to live on Endone. The Doctor said they'll kill me. That amount anyway."

[41] Mr Boyd was asked if the dangers of a horse kicking were well known to him. He replied that "every horse is different, but yes." When asked if it is a risk, he was aware of, he replied "it's always a risk, yes." He said, he had been off Endone for seven or eight weeks. He could not remember ringing Dr Miles for a prescription of Endone on 29 March 2022.[1]

[42] Cross-examination proceeded on this point, "And how many Endones were you consuming a day?---Lots. And Targin, and other stuff that – because I couldn't sleep. I was on several different med – strong medications to – because I wanted to better myself at the same time. So there was 25 four or five strong painkillers that I tried, and to the point where I didn't know whether I was Arthur or Martha, so I stopped taking them. I put to you specifically that at least over the 12 months we were talking about with respect to the issuing of the invoices for work being carried out, you were able to 30 break horses and train horses, and did so?---Yes, with that – as long as I was taking the Endone I could, yes. And I probably still can, but I – look, it's – it's not feasible, and my doctor said if I keep taking that amount of Endone – I'm coming out in spots on my face – he said that it will inevitably kill me. Your GP recommended you be referred to a pain clinic?---Yes. I did – I don't know if it makes a difference. I did delve into with a doctor about medical marijuana. Now, I don't know – I don't know the side effects of it. I don't know whether I can drive on it. I've still got a daughter that I like to go and see. I – I – if that works, I don't want any medication if I can get off it. But I just can't – you know, I just 40 physically can't. I'd throw myself off the bridge."

[43] He said he had never met Mr Govesis before 14/15 October 2017 and had never seen or met Mr John Govesis.

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[1] See page 727 of the bundle.

[44] It was put to Mr Boyd that Mr Govesis never said, "I'm the fucking boss, I'm in charge" or, let's do this, or, that he wasn't part of any conversation about setting up an entity, Gea park Lodge to which Mr Boyd said "you are wrong." It was also put that there was never any conversation with respect to Mr Boyd potentially earning 50,000 and 150,000, to which he replied, "You're wrong again." When asked if it was the lure of big money that made him move out there, he replied, "Yes, it was."

[45] Mr Boyd was cross-examined by counsel for the first defendant and asked if in the videos he was shown he was wearing a helmet. He agreed he wasn't. He said that he was wearing a safety vest under his shirt in some of the videos.

[46] Mr Boyd agreed that he started to move into the property on 5 October 2017. He was not sure if he had spent this first night in the property on 5 October 2017. Mr Boyd denied, needing accommodation urgently and that he was looking for somewhere to live and work.

[47] Mr Boyd said that on or about 18 November 2017, Mr Govesis came to see him with Mr Trindall and said, "I'm sorry I couldn't come and see you sooner, all I wanted to do was kill ya." He was given till 30 November 2017 to vacate the property.

[48] Mr Boyd accepted that he had never been paid any money by Mr Trindall or Phoebe Trindall. He replied, "I wasn't there to work for Phoebe Trindall or – I was there to work for Gea Park Lodge." The – the Gea Park Lodge is what I was employed by, and that was Des Trindall and Tony Govesis."

[49] Mr Boyd denied working for himself under his ABN after he moved to the property. He said, "If you're trying to say that I was working for myself, you're incorrect, I am sorry."

Ms Ainsworth

[50] Debra Joyce Ainsworth (Ms Ainsworth) gave evidence. She confirmed that Mr Boyd had received a call from Mr Trindall and as a result had attended the property. Ms Ainsworth said that, "That Sunday he [Mr Govesis] came over and he said he was the boss and that was it. Like, you'd answer to him. But they could earn up to 50 to 150,000. And it might get higher – like, more. But that's what he said. I'll – you'll answer to me. Like, he was the boss." She said Mr Trindall was there at the time.

[51] In cross-examination by counsel for Mr Trindall, Ms Ainsworth said she didn't mention the amount of 50 to $150,000 in her statement, because she didn't think it was important at the time. She confirmed that the first time she heard the figures was at the meeting with Mr Govesis. Ms Ainsworht agreed that she was not at the meeting on 14 October 2017 and had no personal knowledge of who was at the meeting. She was told what happened when Mr Trindall and Mr Govesis came down and spoke to her later and told her what Mr Boyd would be earning.

[52] Ms Ainsworth agreed that she provided a written reference to Mr Boyd so he could obtain his horse trainer's licence.

[53] In cross-examination by Mr Govesis' counsel that the figures "were broad generalisations. There was this wonderful opportunity, jump on board?" she replied, "Well, do you think I'd really pack up and go out there if there wasn't a job there?"

Ms Koitka

[54] Ms Donna Koitka gave evidence by phone. Ms Koitka said that in 2017, she owned a filly which came from Amber Gray and Grimhild's Revenge. She arranged for Mr Boyd to break it in.

[55] Ms Koitka gave evidence that Mr Boyd said he would honour his commitment and break in the horse, for the same price he had previously agreed, to be invoiced by Gea Park Lodge. She was provided with Mr Trindall's phone number but didn't recall phoning him.

[56] She said that she was never invoiced by Gea Park Lodge, "Because the incident happened right from the beginning when I dropped it off." Ms Koitka said she looked at the website, briefly.

[57] In cross-examination by Mr Trindall's counsel, Ms Koitka couldn't recall if Mr Trindall was at the property when she dropped the horse off. She agreed she was never invoiced by Mr Tindall, Mrs Phoebe Trindall or Trindall Thoroughbreds.

Mr Trindall

[58] Mr Trindall gave evidence that he was married to Phoebe Trindall for about two and a half years. She was a restricted racehorse trainer. This meant she could train up to five horses that were owned by her or her family.

[59] Mr Trindall said that in 2017, he was a licensed stable hand under Phoebe. He and Phoebe operated a family company called Trindall Thoroughbreds Proprietary Limited. He said that Phoebe did all the marketing and advertising through Facebook and other social media and ran a website.

[60] Mr Trindall said that he met Mr Govesis in about September 2017. He said they were looking for stables at Bundall but as they were not available, they looked at the property and entered into a lease agreement,[2] which provided for shared use of facilities.

[61] Mr Trindall said he had not worked in any capacity for Mr Govesis, Mr John Govesis or Gea Park Proprietary Limited, nor was he paid any money from any of them.

[62] Mr Trindall said that in about September/October 2017, Mr Govesis asked if Phoebe Trindall could train his horses. She said she could not, as she only had a restricted trainers licence Mr Govesis asked Mr Trindall to "keep my ear open for any trainer – open trainer looking for a place to go, to train. Mr Trindall became aware that Mr Boyd had a licence. Mr Trindall called Mr Boyd and said, "The current property owner was looking for a trainer who was looking for a possible opportunity and had asked me to keep my ear to the ground. Is that something he's interested in looking into." Mr Boyd said he was.

[63] Mr Trindall then called Mr Govesis and said he had someone interested in training but would have to move into the property. Mr Govesis told him the trainer could move into the unit and, "I can't meet him for two weeks; however, when I meet with him, if we can work out a deal, he can stay. But he needs to understand that if we can't, he needs to leave the property." Mr Trindall told Mr Boyd about the conversation with Mr Govesis. Sometime later, Mr Boyd and Ms Ainsworth arrived at the property.

[2] Lease agreement exhibit 11

[64] Mr Boyd moved into the property the next day, 5 October 2017. Mr Trindall assisted Mr Boyd move some horses onto the property and Mr Boyd commenced training.

[65] Mr Trindall said he excused himself after about thirty minutes from the meeting on 14 October 2017 with Mr Boyd and Mr Govesis and himself.

[66] Mr Trindall denied telling Mr Boyd he would move the horse walker to the property or reduce his risk.

[67] Mr Trindall said that he received a call from Mr Boyd on the day of the incident who said a horse had kicked him. By the time he got back to the property, the police had arrived. Mr Trindall also gave evidence about an offer of a plane from Mr Boyd, if he would sign a statutory declaration confirming his employment with Mr Govesis. He also gave evidence about a demand made on him by Mr Boyd for $5900.00

[68] In cross-examination by Mr Boyd's counsel, Mr Trindall was asked questions about the website Gea Park Lodge. Mr Trindall agreed that the website contained three contact numbers, the first of which was his. The other two numbers belonged to Mr Govesis and Mr John Govesis. Mr Trindall said he had not authorised his number to be put on the website. He was asked questions about the website and its creation and the services it advertised. Mr Trindall distanced himself from it saying it was a matter between Phoebe and Mr Govesis. Mr Trindall was taken to a facebook post on 17 October.[3]

[69] Mr Trindall confirmed he provided the statutory declaration as a result of a court order, and further agreed that an order was made for him to pay Mr Boyd $5905.80. Mr Trindall denied offering Mr Boyd a "position in a business operation which involved, amongst other things, breaking and training horses." He also denied that he "mentioned any sum of money in that conversation."

[70] A number of inconsistencies in Mr Trindall's prior statement were put to him. Mr Trindall agreed that he was aware that the website was being prepared by Phoebe "for the purpose of a business being conducted on the property." He also agreed that he took video recordings of Mr Boyd on horses to be added to the website.

[3] Facebook screenshot pages 154 to 155 of Bundle admitted as exhibit 13

[71] Mr Trindall denied that he had sublet the unit to Mr Boyd and that Mr Govesis had no knowledge of the arrangement. He also denied that Mr Govesis' name had been added to the website without Mr Govesis' knowledge "in an attempt to use my good name to advertise his business and accordingly were made without my knowledge."

[72] In cross-examination by Mr Govesis' counsel, Mr Trindall agreed that Mr Govesis had "very limited experience with horses" and that his business was in transport. Counsel showed Mr Trindall a photo of Mr Govesis on a horse being led by Mr Boyd in the arena.[4] Mr Trindall agreed that Mr Govesis had two of his horse on the property.

Dr Journeaux

[73] Dr Simon Journeaux, a consultant in trauma and orthopaedic surgeon, gave evidence called by Mr Govesis.

[74] Dr Journeaux prepared two reports, dated 14 March 2018 and 17 December 2021. Dr Journeaux initially reported that Mr Boyd was unable to return to his usual occupation and that he could perform sedentary work, based on self-reporting. However, having seen the video evidence Dr Journeaux said, "what I saw in the video evidence he's highly functional … irrespective of whether he has pain relief or not."

[75] When asked about the use of 24 Endone tablets a day, and therefore unable to perform his occupation Dr Journeaux said, "Well, I hear what you're saying, but I just can't accept the proposition. It's my view he's highly addicted to the medication and he's not taking it for pain relief." Dr Journeaux also said in respect to questions about Mr Boyd's arthritic knee, "Well, you can still suffer from and arthritic knee but it's not causing you functional incapacity."

Mr Govesis

[76] Mr Govesis gave evidence. He said, he was the owner of a transport business, PG & S Linehaul or PG & S Transport and Logistics. He said he purchased the property in 2015/2106 as an investment. He had no knowledge of horses. His brother John

[4] Exhibit 15

breeds horses. He had no interest in any commercial venture arising out of the facilities on the property.

[77] Mr Govesis said it was leased to Mr Trindall and Trindall Thoroughbreds. There was also another tenant who he inherited when he bought the property. He understood the Trindall's sold horses.

[78] Mr Govesis was shown exhibit 13, the screen shot of Gea Park Lodge. Mr Govesis denied all knowledge of it and said he did not authorise it, nor did he give permission for his name to be placed on it. Mr Govesis denied any discussions with Mr Boyd about any business arrangement, offering any money or authorising Mr Trindal or Trindall Thoroughbreds to do so.

[79] He said that in 2017, he employed 48 people and had a fleet of 32 trucks.

[80] In cross-examination by counsel for Mr Boyd, about his tenancy agreement with Mr Trindall, he was vague as to the terms of it, but after further questions agreed that Mr Trindall had no right to sublet to Mr Boyd. He said that initially he was happy for the arrangement because Mr Trindall was paying rent, but that changed, so he asked Mr Boyd to pay rent or leave. He agreed that he was on a horse being led around but could not remember if it was Mr Boyd.

[81] Mr Govesis denied having any conversation with Mr Boyd that he "would be residing and working on the property." He said he had seen Mr Boyd on the property when he would mow the lawns at the property.

[82] His evidence was that he had met Mr Boyd once with Mr Trindall and Phoebe. Mr Govesis denied having a conversation with Mr Trindall "about getting someone onto the property who could break horses."

[83] Mr Govesis said he could not remember the first time he saw the website but denied having seen it online. He said he didn't complain about his name and details being on the website. He denied receiving a facebook message from Mr Trindall. He said, "well when people say, "I don't recall", that can mean it never happened or it can mean it might have happened and I have no memory one way or the other." Mr Govesis denied saying he wanted to kill Mr Boyd after the accident. He said he told

Mr Boyd he would have to pay rent, but couldn't remember if he gave Mr Boyd a timeframe.

[84] Counsel for Mr Trindall asked Mr Govesis questions on behalf of Mr Trindall. Mr Govesis agreed that when Mr Trindall and Phoebe moved into the property, they were paying rent of $1,000.00 per week. He denied that there was a change to the rent after discussions with Mr Trindall about the cost of electricity. He said, "they paid a bit more to cover the ones down the bottom there."

[85] Mr Govesis said he could not recall a meeting on 14 October 2021.

Plaintiff's submissions:

[86] It was submitted on behalf of Mr Boyd, that it was uncontentious that from 5 October 2017, Mr Boyd lived at 328 Biddaddaba Creek Road, Biddaddaba, Queensland.

[87] It was further submitted that (the property) the third defendant Mr Govesis owned and occasionally visited the property where he had exclusive use of part of the main residence. The first defendant, Mr Trindall lived on the property and occupied the balance of the main residence.

[88] Mr Boyd, Mr Trindall and Mr Govesis each owned horses. Mr Govesis' horses were depastured at the property.

[89] A website advertised horse training services at the property (the website). The website listed the name of Mr Trindall, the name of Mr Govesis and contact telephone numbers.

[90] On 3 November 2017, at the property, Mr Boyd was kicked by a horse owned by Donna Koitka (the incident).

[91] Following the incident, Mr Govesis required Mr Boyd – who had previously lived rent free at the property – to commence paying rent; and as a result of the incident, Mr Boyd has suffered injuries and loss.[5]

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5 Paragraph 1, plaintiff's submissions.

[92] At trial, Mr Boyd gave evidence that he was approached and encouraged to take up residence at the property and to work there by Mr Trindall and Mr Govesis separately.

[93] He gave evidence that he was told he could live rent free on the property and would not be required to make payments towards the utilities and that he would receive an income of between $50,000 and $150,000.

[94] Mr Trindall gave evidence that he merely acted as an intermediary between Mr Boyd and Mr Govesis, and that he left the meeting on 14 October 2017 after some 30 minutes of "small talk".[6]

[95] Mr Govesis' evidence was that he never spoke to Mr Trindall about getting someone on the property to work with horses,[7] had no dealings with Mr Boyd prior to the incident, and only saw Mr Boyd in passing when he went to the property to mow the lawns.[8]

[96] Mr Boyd submitted that the following are identified facts or may be inferred from the objective evidence:

(a) Firstly, that there was a business being conducted from the property.

(b) Secondly, that the nature of the business can be gleaned from the only objective evidence, namely the website. As Mrs Trindall has been identified as the person who created the website – and as she was not called – the Court could infer that any evidence given by her would not assist the defendant with respect to the conclusions which can be drawn from the evidence.[9]

(c) Thirdly, that the business required someone with experience to fulfill the role of breaking and training horses.

(d) Fourthly, that after Mrs Trindall was injured, someone was required to be brought into the business to take up the role of breaking and training horses.

(e) Fifthly, that Mr Boyd did not pay the rent to occupy accommodation on the property and was not asked to until after the incident in November 2017.

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6 Paragraph 2, plaintiff's submissions, transcript, day 2, p 58, ll 1-6.
7 Transcript, day 3, p 16, ll 19-23.
8 Transcript, day 3, p 14, ll 42-43.
9 *Jones v Dunkel*, (1959), 101 CLR 298; [1959] HCA 8.

(f) Sixthly, that the Trindalls had not been receiving rent for the accommodation made available to Mr Boyd; and

(i) had no authority to sublet it.

(g) Seventhly, that Mr Govesis:

(i) was content for Mr Boyd to occupy the accommodation, rent free until he was injured; and

(ii) only demanded rent when Mr Boyd was unable to work on the property.

[97] It was submitted that from those objective facts the following conclusions were inescapable:

(a) that the horse training business was being conducted on the property;

(b) that Mr Trindall and Mr Govesis were conducting that business;

(c) that Mr Boyd was engaged to work in that business; and

(d) that Mr Boyd's remuneration for working in that business included, at least, rent-free accommodation.[10]

[98] In respect of issues of credit, it was submitted that there were major issues with respect to Mr Trindall's evidence, including that Mr Trindall gave evidence that Mr Boyd offered him an aeroplane if he provided a statutory declaration saying that he was employed by Mr Govesis. This was subsequently retracted by Mr Trindall.

[99] It was further submitted that Mrs Trindall could have given evidence to support Mr Trindall's claims but she was not called to give evidence.

[100] Mr Trindall gave evidence which included a "bizarre" claim that Mr Boyd had demanded $5,900 from him on Facebook. This proved to be the amount of an order of the Court made against Mr Trindall in the sum of $5,905.80 which was owing to Mr Boyd.

[101] It was submitted that this showed Mr Trindall gave evidence that was deliberately misleading, and which cast doubt on Mr Boyd's honesty and integrity.

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10 Paragraph 3 and 4 of the Plan of Submission.

[102] Mr Trindall denied that the website had anything to do with him notwithstanding that he conceded that he was involved in promoting the website.[11] He took videos of Mr Boyd riding horses for it.[12] The website was used to promote the business being conducted at the property. Facebook described the website as "our website".[13] Mr Trindall gave evidence that his name had been placed on the website without his permission but that he had not complained,[14] "because my name was being taken off the website".[15]

[103] It was submitted that the obvious conclusion was that the website was not misstating the facts, since he was involved in the business being conducted at the property.[16] Mr Trindall's evidence was that the business being conducted at the property involved Mrs Trindall and Mr Govesis but not himself,[17] and Mr Trindall was the only person who published and registered the website using his account details.[18] It was submitted that his evidence should be rejected, due to the unexplained failure to call Mrs Trindall, which gave rise to an inference that her evidence would not have supported these self-serving (and otherwise uncorroborated) claims.[19]

[104] It was further submitted that Mrs Trindall could have given evidence as a restricted racehorse trainer whether:

(i) it was <u>not</u> a common precaution to provide a horse walker, crush or other barrier to protect a person working, breaking and training horses;

(ii) experienced horse trainers, like herself and Mr Boyd, do <u>not</u> commonly use such facilities for their own protections; or

(iii) for some unknown reason, it would have been impractical or economically unfeasible to provide such facilities for the protection of Mr Boyd.

[105] Accordingly, it can be inferred that Mr Trindall's evidence about these things cannot be established.

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11 Transcript, day 2, p 65, ll 19-46.
12 Transcript, day 2, p 65, ll 27-36.
13 Transcript, day 2, p 46, ll 1-19; p 58, ll 33-47.
14 Transcript, day 2, p 48, ll 33-37.
15 Transcript, day 2, p 48, l 35.
16 Paragraph 6(e) plaintiff's submission.
17 Transcript, day 2, p 48, ll 41-42.
18 Transcript, day 2, p 46, ll 35-41.
19 Paragraph 6(f) of the plaintiff's submissions.

[106] It was further submitted that Mrs Trindall could have been called to confirm who was conducting the business on the premises, in support of Mr Trindall's case. That it was consistent with Mr Boyd's case that, given Mrs Trindall's injuries in 2017, it necessitated Mr Trindall and Mr Govesis "headhunting" Mr Boyd to perform her duties within the business which they conducted.[20]

[107] Mrs Trindall could have given evidence in respect of the creation of the website and the inclusion of Mr Trindall's name, telephone number on the website.[21]

[108] It was submitted that Mr Govesis' evidence raised more major issues including:

(a) His evidence about the number of times he had met Mr Boyd[22] which was contrary to his own statutory declaration which claimed he had only met Mr Boyd once in passing.[23]

(b) Mr Govesis' evidence concerning the website was similar to Mr Trindall's evidence in that his contact details had been placed on the website without his knowledge or permission.

(c) Mr Govesis gave evidence that Mr Boyd would have to pay rent after the incident – having been allowed rent free accommodation before the incident – because he "needed to pay his way".[24]

(d) It was submitted that if the only relationship between Mr Govesis and Mr Boyd was that of landlord and tenant it was submitted that Mr Govesis could only have had a direct pecuniary interest in having Mr Boyd "pay[ing] his way", as a reason to offset the value of rent-free accommodation, if Mr Boyd was employed to perform services for a business in which Mr Govesis was involved.[25]

[109] Mr Govesis answered questions in cross-examination with "I don't know", sometimes even before the question was finished.[26] It was submitted that the only

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20 Paragraph 6(c) plaintiff's submissions.
21 Transcript, day 2, p 48, l 5; para 6(d) plaintiff's submissions.
22 Transcript, day 3, p 14, ll 42-43.
23 Transcript, p 3, para 14, ll 42-43.
24 Transcript, day 3, p 12, l 21.
25 Paragraph 8 plaintiff's submissions
26 Transcript, day 3, p 19, l 12.

conclusion open was that most of the answers were false and perjurious.[27] It was submitted that Mr Govesis also refused to clarify his answer, "I don't recall", in response to being asked if Mr Trindall had published Facebook messages to him about the website being up and running.[28]

[110] It was submitted that Mr Boyd's evidence would be accepted because:

(a) he did not make demonstrably false statements in support of his own case;

(b) his evidence was consistent in cogency. He appropriately conceded matters when they were put to him in cross-examination;

(c) his evidence was largely supported by Deborah Ainsworth;

(d) his evidence with respect to Mr Govesis' involvement was ordered by Mr Trindall in key respects.[29]

(e) It was further submitted that the video taken by Mr Boyd working with horses after the incident did no harm to Mr Boyd's credit, because he had in fact disclosed his own horse breaking activities in the statement of loss and damage and in his tax returns which were disclosed to the defendants.[30]

(f) Further, Dr Journeaux conceded that if Mr Boyd was taking unsafe levels of Endone in order to perform the work, he was not medically fit to perform such work. Mr Boyd had given evidence that he was unable to break in horses because of the levels of Endone he was taking.[31]

[111] It was submitted that Mr Boyd would be accepted as a witness of truth and that Mr Trindall and Mr Govesis were not credible witnesses. Mr Trindall and Mr Govesis gave untruthful evidence to distance themselves from Mr Boyd and the events that occurred leading up to the incident, for the purpose of escaping any findings of responsibility or liability for the incident.[32]

[112] It was submitted that Mr Trindall's evidence was to be preferred over the evidence of Mr Govesis, in particular Mr Trindall's evidence that Mrs Trindall injured herself in

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27 Paragraph 8(e) plaintiff's submissions.
28 Transcript, day 3, pp 19-20.
29 Paragraph 9, plaintiff's submissions.
30 Paragraph 10 and 10(c), plaintiff's submissions.
31 Transcript, Day 1, p 24, ll 20-27.
32 Transcript, Day 2, p 58, ll 33-47.

September or October 2017. That he was asked by Mr Govesis to keep his ear open for horse trainers because Mrs Trindall could not undertake that work. Mr Trindall's evidence that Mr Govesis met Mr Trindall and Mr Boyd on 14 October 2017 for the purpose of working out the details of Mr Boyd's employment and renumeration at the property.[33]

[113] It was submitted that, having regard to the evidence, the following facts have been established on the balance of probabilities:

(a) Mr Trindall and Mr Govesis enticed Mr Boyd to relocate to the property with promises of free rent and an annual renumeration of $50,000 to $150,000 to work horses for a business.

(b) That business was conducted at the property by Mr Trindall and Mr Govesis.

(c) The website was published with the knowledge and permission of Mr Trindall and Mr Govesis to promote and advertise that business.

(d) The meeting on 14 October 2017 took place at the property, and both Mr Trindall and Mr Govesis attended with Mr Boyd.

(e) At that meeting, Mr Trindall agreed to provide Mr Boyd with a horse walker but subsequently failed to do so.

(f) Mr Govesis told Mr Boyd at that meeting that "I'm the fucking boss around here and what I say goes", or words to that effect.[34]

(g) Mr Boyd worked horses at the property for the business which was being conducted by Mr Trindall and Mr Govesis.

(h) Mr Trindall and Mr Govesis exercised control over Mr Boyd by telling him that he was subject to their authority and instructions and determining what horses he could work on the property.

(i) It was an expressed term of their agreement with Mr Boyd, that Mr Trindall and Mr Govesis would provide the equipment for his use in training the horses at the property.

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33 Plaintiff's submissions, para 12.
34 Transcript day 1, p 27, ll 27-28.

(j) Mr Boyd worked horses at the property for the benefit for Mr Trindall and Mr Govesis in that:

(i) he worked Mr Govesis' horses; and

(ii) Donna Koitka had agreed to pay the business being conducted by Mr Trindall and Mr Govesis for the services being provided by Mr Boyd.

(k) Mr Boyd was rewarded for working horses at the property in the form of rent-free accommodation and utilities until the incident, after which he was no longer able to work horses. There was also an expectation of monetary renumeration in due course.

(l) Mr Trindall and Mr Govesis failed to take any steps to avoid or prevent the risk of Mr Boyd being kicked by horses at the property.

(m) Mr Boyd would have used a horse walker, crush or other barrier with the horse that kicked him, if one had been made available for his use.

(n) A horse walker, crush or other barrier would likely have prevented the injuries which Mr Boyd sustained in the incident.[35]

[114] It was further submitted that the objective evidence established that Mr Boyd was engaged to perform work, he did perform work, he was renumerated for performing work by the provision of rent-free accommodation and with the expectation of monetary renumeration in the future and performed work for the purposes of a business conducted by Mr Trindall and Mr Govesis.[36]

[115] Mr Boyd submitted that it was not essential to show that he was an employee in the strict legal sense, but rather that the relationship was "akin to that of an employer"[37] or at the very least, a relationship of principal and independent contract, where the principal supplied the equipment to be used for performing work on the principal's property.[38] It was submitted that the essential element is a relationship which creates proximity. It was submitted that that element may be satisfied by the relationship of

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35 Plaintiff's submissions, para 13.
36 Plaintiff's submissions, para 14.
37 Reid DCJ, *McHugh v BKE Pty Ltd as trustee for the B W King Family Trust* [2018] QDC 254 at [78].
38 *Derbyshire Building Co Pty Ltd v Becker* (1962) 107 CLR 133.

employer and employee, the relationship of principal and contractor, or the relationship of landlord and tenant.

[116] The plaintiff noted, reflecting on the relevance of a contractual relationship in an action for negligence, Brett MR observed in *Heaven v Pender*[39]

> "… it may not be useless to observe that it seems difficult to import the implied obligation into the contract except in cases in which if there were no contract between the parties the law would according to the rule above stated imply the duty."

[117] It was further noted that the statement of principal is that of Lord Atkin in *Donoghue v Stevenson*:

> "At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

[118] It was submitted that the relationship of employer and employee is but one example of people who are "neighbours". In *McLean v Tedman*:[40]

> "The employer's obligation is not merely to provide a safe system of work; it is an obligation to establish, maintain and enforce such a system. Accident prevention is unquestionably one of the modern responsibilities of an employer… . And in deciding whether an employer has discharged his common law obligation to his employees the Court must take account of the power of the employer to prescribe, warn, command and enforce obedience to his commands."

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39 *Heaven v Pender* (1883) 11 QBD 503, 509.

40 *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 306 at 313; see also *Ferraloro v Preston Timber Pty Ltd*, (1982) 56 ALJR 872, 873.

[119] In *Czatyrko v Edith Cowan University*, Gleeson CJ, McHugh, Hayne, Callinan and Heydon JJ said:[41]

> "The appellant relied in this Court on these basic general principles. An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury. If there is a real risk of an injury to an employee in the performance of a task in a workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards. The employer must take into account the possibility of thoughtlessness, or inadvertence, or carelessness, particularly in a case of repetitive work. The appellant's reliance on those principles is well founded."

[120] It was submitted that the evidence demonstrates breaking in horses was a risky occupation and the risk of injury to Mr Boyd from being kicked by horses was foreseeable, and therefore a risk against which the defendants had to take proper precautions to the extent that was practicable and economically feasible. It was noted that in *Heywood v Commercial Electrical Pty Ltd*, Muir JA observed that:[42]

> "It is not an answer to an allegation that an employer has breached its duty of care to establish that the risk of injury was obvious and known to the employee."[43]

[121] It was submitted that there is no evidence that Mr Trindall and Mr Govesis took any steps to mitigate the risk to Mr Boyd being kicked by a horse at the property. It was submitted that it is plain that they breached their duty of care, because they made no effort to or pretence at discharging their obligations.[44]

[122] It was submitted that a simple and practical way to mitigate the risk was by the provision of a horse walker, crush or other barrier to protect a person working, breaking and training horses and this precaution was one commonly taken by people involved in those activities.[45] There was no evidence to suggest that it was impracticable or economically unviable to adopt a measure which could have saved Mr Boyd from serious injury.[46]

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41 *Czatyrko v Edith Cowan University* [2005] HCA 14 at 12-13.
42 *Heywood v Commercial Electrical Pty Ltd* [2013] QCA 270 at [22].
43 Plaintiff's submissions, para 24.
44 Plaintiff's submissions, para 27.
45 Plaintiff's submissions, para 28.
46 Plaintiff's submissions, para 29.

[123] It was submitted that although Mr Trindall and Mr Govesis had no control over the way Mr Boyd conducted the activities of horse training and breaking, they had complete control over the facilities provided at the property for that purpose.[47]

[124] It was submitted that it was Mr Trindall and Mr Govesis' obligation to ensure the property was safely equipped.[48] It was further submitted that, "whether Mr Boyd was an employee in the strict sense, or in a position akin to that of an employee, or an independent contractor, or even an invitee or licensee, the duty owed by him – knowing that he was to be working horses on the property – was to provide a safe system for that to happen, including appropriate safety equipment. The failure of Mr Trindall and Mr Govesis to do so should be found to have been negligent."[49]

[125] It was submitted that there was no genuine issue with regard to causation, Mr Boyd's evidence was largely unchallenged and uncontradicted that:

(a) the provision and use of appropriate safety equipment, in the form of a horse walker, crush or other barrier, would have prevented Mr Boyd's injuries and had such equipment been made available Mr Boyd would have used it.[50]

[126] It was further submitted that there was no evidence Mr Boyd failed to take proper care for himself at the property with the limited equipment made available to him. Mr Boyd was under no obligation to source or pay for any safety equipment. It was submitted that even if Mr Boyd adopted a workplace which was unsafe, this would not constitute contributory negligence. In *McLean v Tedman and Brambles Holdings Pty Ltd*[51] referring to the situation in which employees had adopted a work practice which routinely exposed them to a significant risk of injury.

[127] Mason, Wilson, Brennan and Dawson JJ. said:

> "In such a situation it is not an acceptable answer to assert that an employer has no control over an employee's negligence or inadvertence. The standard of care expected of the reasonable man requires him to take account of the possibility of inadvertent and negligent conduct on the part of others. This was acknowledged even in the days when contributory negligence was a common law defence:

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47 Plaintiff's submissions, para 30.
48 Plaintiff's submissions, para 31.
49 Plaintiff's submissions, para 32.
50 Transcript day 1, p 14, l 29; p 19, l 28; p 23, l 40; p 24, l 2; paragraph 33 and 34 of plaintiff's submission.
51 *McLean v Tedman* [1984] HCA 60; (1984) 155 CLR 306 at 311-312.

> *Wheare v. Clarke; Henwood v. Municipal Tramways Trust (S.A.).* The employer is not exempt from the application of this standard vis-a-vis his employees, whether his obligation to provide a safe system of work is one which is expressed as a requirement of ensuring that the system is as safe as reasonable care, can make it or is expressed as one which requires him to take reasonable care in providing such a system. The employer's obligation in this respect cannot be restricted to the provision of a system which safeguards the employee from all foreseeable risks of injury except those which arise from his own inadvertence or negligence. There are many employment situations in which the risk of injury to the employee is negligible so long as the employee executes his work without inadvertence and takes reasonable care for his own safety. In these situations, a possibility that the employee will act inadvertently or without taking reasonable care may give rise to a foreseeable risk of injury. In accordance with well-settled principles the employer is bound to take care to avoid such a risk."

[128] It was noted in response to Mr Govesis' submissions, that it was well-established that a person working on another's property can be owed a duty of care and may successfully sue, even if Mr Boyd is not a "worker" within the meaning of the *Workers' Compensation and Rehabilitation Act 2003*[52] and there being no other contractual relationship between the plaintiff and the defendant.[53] It was submitted that Mr Govesis' claim that he did not owe or breach any relevant duty of care because he knew little about horses, did not afford him an arguable defence for three reasons:

(a) the argument would provide "*carte blanche*" to anyone setting up or operating a business, who chose to keep themselves in ignorance regarding the appropriate safety precautions which the owner of such a business would take to protect employees;

(b) by using the words, "I am the fucking boss around here and what I say goes", Mr Govesis has assumed absolute authority for the manner in which the horse-training business was conducted; and

(c) Mr Govesis should have consulted people like Mr Trindall or Mrs Trindall who could have informed him of the need to provide safety equipment.

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52 Section 11 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld).

53 *E.g. Kerle v BM Alliance Coal Operations Pty Ltd* [2016] QSC 304 at [360] – [382].

[129] It was submitted that this argument was rejected by Tindle CJ in *Vaughan v Menlove*, who said:[54]

> "The care taken by a prudent man has always been the rule laid down; and as to the supported difficulty of applying it, a jury has always been able to say, whether, taking that rule as their guide, there has been negligence on the occasion in question. Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgement of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe." [55]

[130] It was also noted that in *Glasgow Corporation v Muir*, Lord McMillan said:

> "The standard of foresight of a reasonable man is, in one sense, an interpersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question."

[131] It was submitted that an attempt to characterise Mr Boyd as an independent contractor would be rejected. It was submitted that it would be highly unusual, if not legally impossible, for an independent contractor to be remunerated even in part by rent-free accommodation. It was submitted that this is inconsistent with the provision of rent-free accommodation without any record of hours worked or tasks performed.

[132] It was submitted that there was no evidence to pay for services rendered whether at a piece-rate, at an hourly rate or to complete a specified task. It was further submitted that it was inconsistent with Mr Boyd's evidence that he was offered monetary remuneration of between $50,000 and $150,000.

[133] It was also submitted that Mr Boyd was not required or expected to supply horse-training facilities, as might be expected of an independent contractor supplying the necessary "tools of trade".[56] It was submitted that even if Mr Boyd was found to be an independent contractor, he was still owed a duty of care which Mr Trindall and Mr Govesis breached.

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54 *Vaughan v Menlove* (1837) 132 E.R. 490; see also *McHale v Watson*, (1966) 115 CLR 199; *McHale v Watson* [1966] HCA 13 per Menzies J.

55 [Bing N.C. 476]

56 Paragraph [43] (a), (b), (c) – Plaintiff's submissions.

[134] It was further submitted that the submission that Mr Govesis' statements were "mere puffs", should be rejected. It was submitted that Mr Govesis' evidence would be rejected, having regard to other indicia of his credibility. It was submitted that there was no evidence to suggest that anything said by Mr Govesis to Mr Boyd in the course of negotiating a commercial relationship was to be regarded whether objectively or subjectively – as "mere puffery". Mr Govesis further submitted that there can be no liability arising from the manifestation of an obvious risk.[57]

[135] It was submitted that it was not asserted nor pleaded that horse-breaking was a "dangerous recreational activity" under s 19 of the *Civil Liability Act 2003*. It was submitted that, "the only mentions of obvious risk are the assertion in Mr Govesis' amended defence that there was no duty toward Mr Boyd of that risk"[58] and an assertion of contributory negligence on the part of Mr Boyd.[59] This recent assertion is not only wrong in law but is not pleaded in Mr Govesis' amended defence.

First defendant's submissions

[136] Mr Trindall submits that he did not owe a duty of care to Mr Boyd arising from any relationship akin to employee/employer.[60] It was noted that there was no written contract or any collateral evidence (such as email messages, text messages etc) confirming the terms and conditions of any agreement between Mr Boyd and Mr Trindall or any of the defendants.

[137] It was submitted that Mr Trindall did not owe a duty of care to Mr Boyd arising from his part-occupation of the property, because the first defendant did not have exclusive control over the round yard in which Mr Boyd was injured.

[138] It was submitted the evidence establishes that each of the parties were independent contractors or businesses carrying on their own business activities under their own Australian business numbers, without any intention to create formal legal relationships between them.[61]

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57 Paragraphs [61] and [62], Third Defendant's submissions.
58 Paragraph [15(e)], Third Defendant's Amended Defence.
59 Paragraph [18(b)], Third Defendant's Amended Defence.
60 Paragraph [2], First Defendant's Submission.
61 Paragraph [5], First Defendant's Submission.

[139] It was submitted that in the absence of any unequivocal evidence such as written evidence, Mr Boyd's evidence would be rejected as unreliable. It was submitted that Mr Boyd's evidence of various meetings and conversations was inconsistent with prior statements made by him and he failed to disclose the earnings he received from his training activities in 2019/2020, even though he claimed deductions from business expenses. It was submitted that, in the circumstances, Mr Boyd's credibility was undermined.

[140] It was noted that in *Ermogenous v Greek Orthodox Community of SA Inc*[62] the High Court stated that:

> "It is essential to a valid contractor to parties intend to create a relationship which give rise to obligations enforceable by law in amongst other things, the terms of the agreement must be certain."[63]

[141] It was submitted that in this case the evidence established that the First Defendant exercised "absolutely no control over the plaintiff's activities, generally or on the date of the accident". It was submitted that the evidence did not establish that the first defendant provided any plant or equipment to Mr Boyd on the property to carry out task for the benefit of the first defendant, nor did it establish that the first defendant was conducting a commercial horse-training operation.

[142] The evidence did not establish that the first defendant had ever or ever intended to assign horses to Mr Boyd to train, nor was there any evidence that the first defendant provided accommodation to Mr Boyd, as the area Mr Boyd leased was not part of the area Mr Trindall leased or controlled. The evidence showed that any rent paid by Mr Boyd was paid to the owner of the property.[64]

[143] It was further submitted that there was no evidence that Mr Trindall had any commercial interest in the activity that Mr Boyd was engaged in at the time he was injured or in general.[65]

[144] It was further submitted that in the alternative, the incident was not caused by any breach of duty by the first defendant. It was submitted that the risk was not foreseeable to a person in the position of Mr Trindall because:

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62 *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8 at [24].
63 Paragraph [8], First Defendant's Submission.
64 Paragraph [15], First Defendant's Submission.
65 Paragraph [15.5], First Defendant's Submission.

1. Mr Trindall was absent from the property at the time of the accident;

2. Mr Trindall did not and could not have reasonably known that Mr Trindall was going to try and work with that horse on that day;

3. Mr Trindall had not arranged for that horse to come to the property on that day and did not know anything about that horse;

4. Mr Trindall did not know the owner of the horse and had never worked with the owner previously.

[145] The first defendant noted *Pollard v Trude*,[66] where the Supreme Court considered the meaning of s 9 and concluded that:

> "Unless a risk is insignificant, it should lead to the taking of precautions if it is foreseeable that the risk might lead to harm and if a reasonable person in the circumstances would have taken precautions."

[146] It was submitted that Mr Trindall could not have possibly taken any precautions in circumstances where the risk was not at all foreseeable. It was further submitted that Mr Boyd had failed to establish that the provision of a horse-walker, horse barrier or crush would have assisted in this case. Mr Boyd was an experienced horseman who did not adopt any safety precautions when training horses including not wearing a helmet or safety vest. It was submitted that, in the circumstances, Mr Boyd had failed to prove that if those precautions had have been taken, he would not have been kicked by any horse anyway.

[147] It was submitted that Mr Boyd bears the onus of establishing causation and has failed to do so.[67] It was submitted that therefore, the harm that eventuated was, for all the reasons stated, not within the scope of any liability of the first defendant.

[148] It was further submitted that the evidence unequivocally establishes that the risk of Mr Boyd being kicked by a horse, in the circumstances of this case, was an obvious risk as defined by s 13 of the CLA. It was submitted that the risk is akin to the risk of being struck by a golf ball on a golf course, which had been held to be an obvious

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66 *Pollard v Trude* [2008] QSC 119 at [40].
67 Section 12 of the *Civil Liability Act 2003*.

risk for which no duty to warn was owed by virtue of the operation of s 15 of the CLA.[68]

[149] In respect of damages, Mr Trindall says that Mr Boyd 's claim is for damages for negligence and not for breach of contract, and in those circumstances, damages are to be assessed strictly in accordance with the CLA.

[150] It was submitted that, in light of the demonstration of Mr Boyd 's functional capacities in his training videos, it is submitted that Mr Boyd's ISV should be assessed at the lower end of the ranges of ISVs applicable for that injury. It was further submitted that Mr Boyd 's earnings for breaking in horses for the full year 2016/2017 prior to the accident, was $4,800.00 or $92.31 per week. There is no evidence of any earnings made by Mr Boyd since that time.

[151] It was submitted that damages for past economic loss should be calculated at the rate of $92.31 per week. It was further submitted that the training videos show that Mr Boyd has been working and is capable of earning $92.30 per week. It would not be appropriate to award Mr Boyd damages for future economic loss.

Submissions of the third defendant

[152] The third defendant submits that the following are the issues for consideration:

1. Were any legal relations created between the parties, particularly the third defendant and the plaintiff?
2. What was the nature of those relationships?
3. Did any duty arise out of the relationship?
4. What was the nature, scope and content of any duty?
5. Did the third defendant breach the duty?
6. Would the alleged breach have made any material difference i.e. causation?
7. What damages flow from the alleged breach?

[153] Mr Govesis submits that even at their highest, the pleadings would not lead to a finding that the conversation held on 14 October 2017 constituted a binding

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68 *Pollard v Trude* [2008] QSC 119.

agreement as against Mr Govesis or some articulated relationship akin to an employer/employee when he was never a party to any of the antecedent negotiations. It is submitted that the language could be seen to have been no more than mere puffery.

[154] It is submitted that at best, there were broad general conversations about a legal entity clearly not in existence at the material time. It is submitted the conversations were never precise and were merely speculative. It is noted that at paragraph 10(a) of the pleading the defendant asserts:

"The relationship between the plaintiff and the defendant is akin to that of employer and employee from the provision of plant and equipment on the property to carry out tasks the plaintiff was performing for the benefit of the defendants.

[155] It is submitted that this could not be for the benefit of Mr Govesis as he was the owner and operator of a transport company but did own the property as an investment and would attend there irregularly to mow the lawns.

[156] It is submitted that Mr Trindall was a tenant on the property.

[157] It is further submitted that there was no certainty with respect to the terms of the agreement that would bind the parties and Mr Govesis did not intend to create legal relations.

[158] It is submitted that the only contact between Mr Boyd and Mr Govesis was when Mr Govesis was introduced to Mr Boyd and it was limited to greetings.

[159] Mr Govesis submits that no legal relationship existed at all, relying on the authorities of *Woolworths Ltd v Perrins* [2015] QCA 207, *Vella's Plant Hire Pty Ltd v Mistranch Pty Ltd & Ors* [2012] QSC 77 and *McGlashan v QBE Insurance Australia Ltd (No. 2)* [2014] NSWCA 486.

[160] The third defendant submitted that:

(a) Assumption of responsibility; there are no facts which would support a conclusion that Mr Govesis had assumed responsibility of advising Mr Boyd about how to safely perform horse breaking, Mr Govesis could not even ride a horse let alone break one in.

(b) Reliance; there is no evidence capable of showing known reliance. That is, it is plain Mr Boyd did not rely upon Mr Govesis in any aspect.

(c) Vulnerablity; there is no notion of vulnerability in the Wilcox sense as discussed by Campbell J in that Boyd was an independent contractor. It is submitted that Govesis was not present for any preliminary discussions that the initial negotiations occurred between Boyd and Trindall as follows:

> "Des Trindall called me and said that he wanted me to move out to Biddaddaba.[69] It sounded that he was a bit franctic actually. He said to me 'come and have a look at the property it's a training complex' and something along the lines of 'you won't', I'm trying not to speculate something along the lines of 'you won't regret it' and this is over three or four conversations, three or four phone calls while I was still sitting in the car that morning.[70] It is submitted that at that stage the negotiations were either precontractual or otherwise Govesis had no knowledge and no part in them. As to 4 October the third defendant submits that it is uncontroversial that the motivation for the engagement of Boyd was the injury to Phoebe she was the horse trainer. The urgency of the arrangement was because Phoebe was incapacitated to train as follows:
>
> > Des Trindall said that 'look we are, Phoebe can't ride horses anymore, we are stuck for a horse trainer or horse breaker/trainer and your'e it'. (The only logical inference is that is a reference to further the commercial purpose of Trindall thoroughbreds). Did he say anything more about the basis upon which you would? Yes he did. What did he say? Des said there is a good opportunity for you to earn between $50,000 and $150,000 in the first year. It was submitted there was absolutely no evidence whatsoever as to the basis of that assertion, whether it was truly meant to reflect contractional relations or was really mere puffery and speculation that there may have been an opportunity for a viable business."[71]

[161] It was submitted there was no evidence to suggest that the figures were anywhere near the figures that were talked about could have been achieved or that there was sufficient certainty in the contractual negotiations for a binding agreement to be effective.

[162] The third defendant noted the evidence given by Mr Boyd that:

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69 Transcript, p 10, ll 1-9.
70 Transcript p 9, l 10, Transcript p 9, ll 25-35.
71 Third defendant's submissions, paras 22, 23 and 24.

> "Do you recall the date of the meeting?". "The date of the meeting look, I had just come out of hospital and I was taking 24 Endone tablets a day but the date of the meeting, the exact date, I started on Tony Govesis or John Govesis' new filly. I think you've got a picture of that. That's the date of the meeting was. Yes."

[163] It was submitted that this evidence was non-sensical, as Mr Boyd had not got out of hospital because the accident had not yet occurred.

[164] The third defendant noted that after the initial meeting it is not in dispute that Mr Boyd went on to the property and was working subject to disputed conversation with Tony Govesis as follows:[72]

> "What do you recall of that meeting? I was actually over at the stables with Deborah Ainsworth and she was sweeping, I was sweeping and Des Trindall came over in a buggy and picked me up. As I hopped into the buggy he said 'Tony's here we're having a meeting'.
>
> 'Alright and moving on to the conversation who did most of the talking?'
>
> 'Des Trindall.'
>
> 'All right and what did Des Trindall say?'
>
> 'Well he said that we're starting a new business, we're starting a new business and we want you to be the breaker/trainer. It's little things in that meeting.'[73]
>
> 'Yeah well do your best as to what he was saying.'
>
> He mentioned about Tony Govesis jumping in the middle of all of that and he said 'Look there's a good opportunity for you to earn $50,000 to $150,000 a year'.
>
> 'I thought well I didn't answer Tony, well because you know this is the second time I've heard this. Then it went on to what we had to do to get the business going because you know I don't know whether I'm coming or going at that time but Des happened to mention that 'first things first the website is going good' ."

[165] It was submitted that it was inconsistent that Mr Govesis purported to state that the horses need to be trained his way as he did not know how to train horses and in fact did not ride.

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72 Transcript p 13, l 45.
73 Transcript, p 14, ll 15-20.

[166] It was submitted that the negotiations were broad, general and imprecise as follows:

> "In no uncertain terms Tony Govesis said 'If you want this job you'll be the breaker/trainer at Gea Park Lodge' and I was just in awe of that. You can have unit free and electricity is free. The unit is worth $600 a week so you're getting that for free. Free electricity and use of all the amenities, everything that was on the property."

[167] It was noted that Mr Boyd gave evidence as follows:

> "Yes. And what else was said? – Anything after that will be invoiced for the new entity Gea Park Lodge.[74]

[168] It was submitted that Gea Park Lodge was not in existence at that time. There were no bank accounts and there was no mechanism for Gea Park Lodge to invoice accounts, or money be received on behalf of it, or what the cost of horse breaking or re-educating would be. The third defendant submitted that even at its highest, the purported agreement is scant in detail. It was submitted that no evidence of any discussion about what in fact was relayed to Tony Govesis (if anything) of the antecedent negotiations purportedly conducted between Mr Boyd and Des Trindall. The following was submitted to be relevant:

"MR MORRIS:	Bearing in mind that we are all grownups in this courtroom, do you recall something that Tony Govesis said using some emphatic language about his role, about his part in the agreement?
MR BOYD:	Yes I do.
MR MORRIS:	What did he say?
HIS HONOUR:	Go ahead just say it as it is---
MR BOYD:	I'm the fucking boss here what I say goes. Pardon for saying that.
HIS HONOUR:	No, that's alright.
MR MORRIS:	Do you remember anything that he said after that?
MR BOYD:	Well let's start, let's do this.
MR MORRIS:	And at the discussion as you were going to separate do you recall what happened?
A:	Yes.
MR MORRIS:	What happened then?

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74 T, p 15, l 22.

> MR BOYD: I shook hands with Tony and he said 'Welcome to the family' and he said he also stated as I was, I was shaking his hand…[75]

[169] It was submitted that this does not confirm the nature of the commercial relationship. It was further submitted that it is clear that:

(a) no agreement was signed;

(b) no lease or rental agreement was signed;

(c) there was no evidence how much the service would cost or what they needed to do to earn $50,000 to $150,000;

(d) what was to be Trindall's cut; and?

(e) what was to be Govesis' cut.

[170] It was submitted that Mr Boyd had not disclosed income from horse training with Zeilke and although he had put in income from Frank and Dorothy Tipper Hire Pty Ltd as casual driver, it showed modest income. He could see that in his evidence, he knew he was to be truthful when preparing his statement of loss of damage.[76]

[171] It was submitted that Mr Boyd had the capacity to carry out breaking in work and did so as the video showed without difficulty which he confirmed commenced in 2018 but carried it out maybe up to 12 months.[77]

[172] It was submitted that the taxation returns tendered showed that the expenses contained therein were conflated. Mr Boyd asserts that the invoices would have been paid on and lined up with his bank records but the records were not produced.[78]

[173] It was submitted that Mr Boyd was still going to his GP for Endone on 29 March 2022 as per the GP records[79] and therefore his assertion of getting off the Endone should be scrutinised very carefully. It was noted that Mr Boyd's GP had recommended he go to a pain clinic but there is no evidence that he ever went to a pain clinic.

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75 T, p 15, l 30-40.
76 T, p 30, l 45, T, p 31, l 35 – Exhibit 1, T, 33, l 35.
77 T, p 36, ll 15 – 20.
78 T, p 47, ll 15 – 20.
79 T, p 59, ll 30 – 35.

[174] It was submitted that there was a clear conflict between Mr Govesis and Mr Boyd. Mr Govesis denies that there was ever any agreement.

[175] It was submitted that Mr Boyd's evidence was as follows:

> "Whilst you were living at the property Desmond Trindall or his wife never offered to employ you? – They didn't have to, they asked if I wanted the job on the fourth and that was all worked out on the 14th or 15th and I was not asked to work for Des and Phoebe Trindall but I was asked to hop on a horse for Des and Phoebe and Des Trindall videoed that."[80]

[176] It was submitted that the preliminary discussions did not include Mr Govesis. It was noted that under cross-examination, Boyd conceded that he was never paid for any work performed:

> "And as far as you're aware, Des Trindall and Phoebe Trindall or Trindall Thoroughbreds weren't party to any contract with the owner of that horse to be trained or worked or whatever? – I told Donna any new horses have to be invoiced through Gea Park Lodge, and that's why she asked for Des' number after the meeting with Tony Govesis and Des Trindall."[81]

[177] It was again noted that there was no capacity for payments to be received on behalf of Gea Park at that time.

[178] Mr Govesis noted the *Civil Liability Act* and in particular General Principles, s 9, and Other Principles, ss 10 and 11. S 9 provides:

> (1) A person does not breach a duty 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 reasonably to have known); and
>
> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
>
> (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things)—
>
> (a) the probability that the harm would occur if care were not taken;

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80 T, p 79, ll 40 – 45.
81 T, p 84, ll 40 – 45.

(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.

[179] S 10 provides:

In a proceeding relating to liability for breach of duty happening on or after 2 December 2002—

(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 relation to the risk and does not of itself constitute an admission of liability in connection with the risk.

[180] S 11 provides:

(1) A decision that a breach of duty caused particular harm comprises the following elements—

(a) the breach of duty was a necessary condition of the occurrence of the harm ("factual causation");

(b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused ("scope of liability").

(2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1) (a) —should be accepted as satisfying subsection (1) (a) , the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.

(3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty had not been so in breach—

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

> (b) any statement made by the 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 deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty.

[181] Mr Govesis submitted that both breach and causation have not been proved where there is no evidence a walker would have made any material difference.

[182] Mr Govesis submitted that the facts of *McHugh v BKE Pty Ltd as Trustee of the B W King Family Trust* [2018] QDC 254, did not assist Mr Boyd, as the factual circumstances of that case were clearly distinguishable from the present where the plaintiff had been carrying out work for the defendant on this for some considerable period of time including using an ATV.

[183] It was submitted, after consideration of that case, as follows:

> "There are significant differentiations to be made with the provision of a quadbike or an electrical saw, clearly where both are dangerous objects. In these circumstances the plaintiff was a very experienced horse breaker and educator."

[184] It was submitted that Mr Govesis could not have instructed him into carrying out the tasks which would have changed the event in question. It is submitted it was clear that this authority does not assist the court in the determination of the issue.[82]

[185] It was submitted that Mr Boyd was doing nothing to further Mr Govesis's interest, the demand for rent only came because the Trindalls had stopped paying rent.

[186] It was submitted that in this case, there was no written contract confirming the terms and conditions of any employment agreement between Mr Boyd, first and third defendants. It was submitted that there is insufficient evidence of there being any offer of employment and acceptance of that offer between Mr Govesis and the entity Gea Park Lodge whatever legal status, if any, it enjoyed. It was further submitted that it was clear that on behalf of Mr Govesis, he did not intend to enter into any legal relations with Mr Boyd.

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82 Third Defendant's Submission para [51].

[187] It was further submitted that Mr Boyd conceded on many occasions he was aware of the risk of being struck by a horse, such risk for a horse trainer of many years' experience such as he is, is a given.

[188] It was noted that s 13 of the *Civil Liability Act* states section 13 meaning of obvious risk. It provides:

> (1) For this division, an
>
> "obvious risk" to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
>
> (2) Obvious risks include risks that are patent or a matter of common knowledge.
>
> (3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.
>
> (4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.
>
> (5) To remove any doubt, it is declared that a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless the failure itself is an obvious risk.

S 14 of the *Civil Liability Act* provides:

> (1) If, in an action for damages for breach of duty causing harm, a defence of voluntary assumption of risk is raised by the defendant and the risk is an obvious risk, the plaintiff is taken to have been aware of the risk unless the plaintiff proves, on the balance of probabilities, that he or she was not aware of the risk.
>
> (2) For this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

S 15 of the *Civil Liability Act* provides:

> (1) A person (defendant) does not owe a duty to another person (plaintiff) to warn of an obvious risk to the plaintiff.
>
> (2) Subsection (1) does not apply if—
>
> > (a) the plaintiff has requested advice or information about the risk from the defendant; or

(b) the defendant is required by a written law to warn the plaintiff of the risk; or

(c) the defendant is a professional, other than a doctor, and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service by the defendant.

(3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

(4) In this section –

a professional has the same meaning as it has in division 5.

S 16 of the *Civil Liability Act* provides:

(1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.

(2) An inherent risk is a risk of something occurring that can not be avoided by the exercise of reasonable care and skill.

(3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

[189] It was submitted:

> "In all the circumstances, the third defendant had nothing to do with the horse being on the property at the date of the injury, that is something clearly that the plaintiff had organised himself because of a prior relationship he had with the owner of the horse.
>
> Him being kicked on the day in question was the manifestation of an obvious risk with him choosing to do so in circumstances where it is clear he was doing so without the horse walker there present and so the injury suffered to him was the manifestation of an obvious risk that he chose to undertake.
>
> That therefore disentitles the plaintiff to any damages, even if there was some duty owed."[83]

[190] S 24 of the Civil Liability Act provides:

In deciding the extent of a reduction in damages by reason of contributory negligence, a court may decide a reduction of 100% if the court considers it just and equitable to do so, with the result that the claim for damages is defeated.

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83 Third defendant's submissions, para 60, 61 & 62.

[191] Insofar as quantum is concerned, Mr Govesis noted that Mr Boyd claims in a statement of claim damages for orthopaedic injuries, scaring and a psychological injury. No evidence was adduced with respect to any psychological injuries, so no assessment can be made.

[192] Mr Govesis submitted that Mr Boyd's claim for pain suffering and loss of amenities in the sum of $31,150 calculated on the injuries scale value (ISV) of 17 is excessive and submits that an ISV of 12 is a reasonable assessment of his loss in the amount of $19,580.

[193] In respect of past special damages, whilst Mr Boyd accepts that WorkCover has paid sums of $2,350.23 and $927.75. Hospital expenses refundable to WorkCover of $37,887 and Medicare refund of $2,855, whilst Mr Boyd claims $51,043.00, there is no evidence in support of global claims of travel and pharmaceutical expenses. In the circumstances, Mr Govesis accepts his reasonable assessment of $44,019.98.

[194] It is submitted that past economic loss was claimed and $1,800 net per week based on the "erroneous factual premises that the business would have been viable". It is submitted that there is no evidence capable of ascertaining what income is purported to be arrived. Mr Boyd has asserted that, notwithstanding that he was able to carry out some horse breaking work for the period of 12 months, he derived no income from same. It was submitted in the circumstances that it was appropriate to assess past economic loss on the basis of his preinjury earnings, as established by his statement of loss and damage as follows: he had only worked since the accident for Frank and Dorothy … $491.24 and the only records available between 2013 and 2016 show he received $2,889.

[195] Mr Boyd notes he was doing horse breaking work from 2016 to 2017 with the earnings asserted to be variable showing no loss. In 2019, 2020 tax return shows the loss of $9,132.

[196] It was submitted that a nominal sum for past economic loss reflecting the potential earnings and also the chance the business would have become viable. It is noted that for factors unrelated to Mr Boyd or Mr Govesis, Trindall Thoroughbreds are not continuing in existence, it was noted that an amount of $24,300 should be allowed for past economic loss, interest on that amount would be $1,391 which would be allowed.

[197] It was submitted that there was no evidence capable of creating an employment relationship, so, on the pleaded case, the provisions of the *Superannuation Guarantee Act* not apply.

[198] As for future economic loss, Mr Govesis says that Mr Boyd is now 58 years of age and has another 9 years until retirement. The third defendant adopted the same methodology moving forward and there is no loss, as he has never really had any money at least on the disclosable documents.

[199] It is proposed that an assessment of some global loss of $100 per week (multiplier 412) giving $41,200 less 15 percent discount giving an amount of $35,020 as for the same reason, there is no component of future loss of superannuation.

[200] It was submitted that there should be some relatively modest component for ongoing medications. It is clear that Mr Boyd has been on analgesic medication for a long period of time and that he was attempting to wean himself off Endone. An allowance of $2,000-$3,000 is appropriate.

[201] In the circumstances, the defendant submitted that a reasonable assessment of Mr Boyd's loss and damages is $126,310.98.

Reply submissions on behalf of the third defendant

[202] In respect of the submission made by Mr Boyd as to adverse interest to be drawn by the failure to call Mrs Trindall, the third defendant submits that relying on the decision of *Klein v SBD Services* [2013] QSC 134, following the approach of the High Court in *Australian Securities and Investments Commission v Hellicar*,[84] it was submitted that there was no obligation on behalf of Mr Govesis in his case (and even if there were), no adverse inference of the type argued by Mr Boyd is available.

[203] In so far as the nature of the relationship was concerned, Mr Govesis, relying on the High Court decision of *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*,[85] set out guidelines for the approach to be taken in determining the nature of legal relationships. Specifically, reference was made to paragraphs 34, 56, 58 and 103. In conclusion, Mr Govesis submitted that, based on

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84 *Australian Securities and Investments Commission v Hellicar* [2012] HCA 17.
85 [2022] HCA 1.

the formation of legal principles set out in that case, there was no legal relationship between Mr Boyd and Mr Govesis.

Reply submission on behalf of the first defendant

[204] In respect of the *Jones v Dunkel* submission by Mr Boyd, Mr Trindall submits that contrary to Mr Boyd 's submissions, there was absolutely no obligation on the part of Mr Trindall to call any evidence, including witness evidence from Phoebe Trindall.

[205] It was further submitted that Mr Boyd was also in a position to and could have called Phoebe Trindall to give evidence, if he considered her evidence would assist his case and he failed to do so.

[206] Similarly, it was submitted Mr Boyd could have sued Phoebe Trindall together with the other defendants in these proceedings, but he elected not to do so. In the circumstances, Mr Trindall submitted that there was no inference adverse to Mr Trindall available.

[207] In respect of the nature of the relationship, Mr Trindall submitted that on proper application of legal principals as set out by Mr Govesis in his reply submissions, there was absolutely no legal relationship (employment or otherwise) between Mr Boyd and Mr Trindall that gave rise to any duty of care (whether arising in tort or contract) on the part of Mr Trindall, with respect to Mr Boyd's own horse training activities or the accident, was subject to these proceedings.

Discussion and conclusion

Was there a legal relationship between the parties?

[208] There are three versions of what occurred in October 2017. The version of Mr Boyd, who effectively says that he was invited to come to the property to work as a horse trainer/breaker with free rent and the possibility of earning between $50,000.00 and $150,000.00 per annum. The version of Mr Trindall, who says he was acting at the request and direction of Mr Govesis. The version of Mr Govesis, who says he was not a party to any agreement whatsoever, and that any arrangement was the responsibility of Mr Trindall.

[209] I am satisfied that Mr Boyd's version of the discussions should be preferred. The evidence of Mr Govesis is rejected. His evidence was self-serving. His memory of the events was in my view deliberately vague. He was belligerent and evasive. This is particularly so having regard to his evidence about the inclusion of his name on the website, and his evidence about the rental arrangements.

[210] Mr Trindall's evidence was, also in my view, self-serving. He deliberately downplayed his involvement in the initial discussions. Insofar as his evidence contradicts that of Mr Boyd, the evidence of Mr Boyd is preferred.

[211] So, what then was the arrangement and does it amount to, as submitted by Mr Boyd, an employment contract or akin to that of an employer/employee contract,[86] or at the very least a relationship of principal and independent contract, where the principal supplied the equipment to be used for performing work on the principal's property?

[212] I accept Mr Trindall called Mr Boyd on the morning of 4 October 2017. I accept the enquiry was made at the request of or at least with the acquiescence of Mr Govesis. This was brought about by the unavailability of Mrs Trindall to do the job.

[213] At that time Mr and Mrs Trindall were actively pursuing the establishment of a business on the premises to be known as Gea Park Lodge. I find that this was done with the consent and approval of Mr Govesis. Mr Govesis says that he bought the property as an investment, but it was a property on which there were many facilities to train and break horses. Mr Boyd was amazed by the facilities.

[214] Mr Govesis was a businessman and his brother owned horse.

[215] Mr Trindall asked Mr Boyd if he was interested in a position of horse-trainer/breaker at the property and that he could earn $50,000.00 to $150,000.00. Mr Boyd attended the property with Ms Ainsworth. Discussions took place about staying in the unit. It was agreed after a phone call to Mr Govesis that they could stay in the unit rent free. Ms Ainsworth's evidence largely corroborate this version. In particular, I note her evidence that, "Well, do you think I'd really pack up and go out there if there wasn't a job there?"

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86 Reid DCJ, *McHugh v BKE Pty Ltd as trustee for the B W King Family Trust* [2018] QDC 254 at [78].

[216] This arrangement was subsequently formalised in the meeting with Mr Govesis. Who confirmed he was the boss.

[217] I find that Mr Govesis had at the least, tacitly gone along with the production and publication of the Gea Park Lodge website. Mr Boyd could only have been approached to come to the property to train and break horses, if there were going to be horses to train and break. Whether they came from Mr Trindall, Mr Govesis or Mr John Govesis.

[218] It is clear from the website, for Gea Park Lodge, that Mr Trindall, Mrs Phoebe Trindall, and Mr Govesis had plans for the property. I accept that the website is evidence of this. Mrs Phoebe Trindall wasn't called to give evidence. I therefore accept the details set out in the website as evidence of the intention to embark on the venture. This is also confirmed by Ms Koitka. I have no reason to doubt her evidence on this point.

[219] Gea Park Lodge was never registered as a trading entity and at no relevant time operated a bank account. Ms Koitka was never invoiced by Gea Park Lodge because, as she said, the injury occurred the day the horse was delivered to the property.

[220] I accept that Mr Boyd was enticed to the property, by the offer of free rent and the prospect of earning $50,000.00 to $150,000.00 per annum. He was asked to come to the property because Mr Trindall knew him to be a horse-trained/breaker and the enterprise Gea Park Lodge needed one, since Mrs Phoebe Trindall was injured and could not fill the requirements of the position. Mr Trindall had a limited training licence and also could not fill the role. Mr Boyd was allowed to complete training horses he had already started training/breaking. The horse involved in the incident was one such horse. Therefore, neither Mr Trindall nor Mr Govesis were involved in respect of that horse.

[221] The actual formal terms of employment were never agreed. Nor was there any formal written contract. Indeed, there is no written correspondence about the terms of employment at all.

[222] However, having regard to my findings of fact in respect of the discussions that took place and the fact that Mr Boyd, and later Ms Ainswoth moved into the unit, that Mr Boyd was employed by Mr Trindall and Mr Govesis.

[223] I find that, Mr Trindall, phoned Mr Boyd after discussions with Mr Govesis, to invite him to be a horse trainer/breaker on the property owned by Mr Govesis upon which the business Gea Park Lodge was to be run.

[224] I am satisfied that the nature of the employment was that Mr Boyd would live on the premises rent free and train and break horses for Gea Park Lodge, and other horses he had started breaking.

[225] I am satisfied that, if the business Gea Park lodge had have become a legal entity, then Mr Boyd would have been lawfully working for that entity. That did not happen. Mr Boyd was not aware that the entity was not registered and thought he was working for it as evidenced by him telling Ms Koitka that she would be invoiced by Gea Park Lodge. Irrespective, Mr Boyd was employed by Mr Trindall and Mr Govesis in their personal capacities. I find that the failure to register the entity is irrelevant to the issue of Mr Boyd's employment.

[226] Some of terms of the contract of employment are obviously missing. However, what is clear is that Mr Boyd was employed by Mr Trindall and Mr Govesis. He was to work as a horse trainer/breaker on the property. He was to live on the premises. He had the use of the facilities on the property for that purpose. He was allowed to finish working the horses he had already started working with. He could expect to earn somewhere between $50,000.00 and $150,000.00 dollars in a year, although there is no evidence to explain what Mr Trindall was basing this on. It was likely a figure intended to entice Mr Boyd to accept the job. Mr Boyd was to work until, presumably, he was told otherwise.

[227] How he was to be paid and when, are not known. But this was a new business and no doubt those matters would have been resolved in due course once cash flow was established. In my view, they are not sufficient to make the terms of the contract uncertain.

[228] In the circumstances, I am satisfied Mr Boyd was employed by Mr Trindall and Mr Govesis in anticipation of the formal registration of Gea Park Lodge, as a horse trainer/breaker at the property.

Liability

[229] Mr Boyd says he was owed a duty of care pursuant to the *Civil Liability Act 2003* (Qld), and that his employer was required to provide him with a safe workplace. This he says should have included a horse walker, crush or other barrier to protect a person working, breaking and training horses and this precaution was one commonly taken by people involved in those activities.

[230] In this case the equipment said to be missing from the property which could have enabled Mr Boyd's to avoid injury was a horse walker. I accept here were discussions with Mr Trindall about bringing one to the property. This did not eventuate. There was no horse walker on the property the day the injury occurred. I am satisfied that if a horse walker was on the property Mr Boyd would have used it on this occasion.

[231] I accept his evidence that a horse walker, "has the effect of releasing energy like a shaken up Champagne bottle" and on this occasion Grimhild's Revenge would have benefited from being placed on the horse walker.

[232] I accept Mr Boyd's submission that, the evidence demonstrates breaking in horses was a risky occupation and the risk of injury to Mr Boyd from being kicked by horses was foreseeable, and therefore, a risk against which the defendants had to take proper precautions to the extent that was practicable and economically feasible.[87]

[233] In all the circumstances I am satisfied Mr Boyd injuries were caused by a breach of his employer's duty of care by not providing a safe system of work, namely a horse walker and Mr Trindall and Mr Govesis were negligent in not providing one.

Contribution:

[234] Mr Boyd by his own admission was an expert horse breaker. He knew horses and he knew they could be dangerous. His evidence was, that he knew the signs that a horse was nasty.

[235] Notwithstanding, Mr Boyd took the horse from its stable to the round yard. He did this because the horse was agitated. It could not be said in this case that the risk was obvious or inherent. But I am satisfied that Mr Boyd contributed to his injuries. On

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87 *Heywood v Commercial Electrical Pty Ltd* [2013] QCA 270 at [22].

his own admission he says; "So – and then I saw her flinch and I thought – within a split second I thought, "Move." So I did, and I moved, but what I did instead of walking – instead of jumping to one side, I bent down like that just ... in case she kicked. Well, she did kick, but when she kicked she got me right in the head, smashed it."

[236] In the circumstances, I am satisfied that Mr Boyd contributed to his injuries to the extent of 10%.

Damages:

Pain and suffering:

[237] Mr Boyd suffered serious injuries and had a lengthy recovery. Mr Boyd pleads his injuries were, a severe fracture of the left femur with limb discrepancy and muscle wasting, surgical scarring and psychological injury (although there was no evidence of the extent of this which I am prepared to act upon).

[238] Having regard to the orthopaedic medical evidence, I am satisfied it is appropriate to assess Mr Boyd's dominate injury under item 135 of the *Civil Liability Regulation* 2014. Under item 135, the ISV range is between 11 and 20 points. Based on Mr Boyd's lower limb injuries and consistent with the position taken on his behalf regarding that particular item, absent an uplift for multiple injuries which was sought on his behalf, I am prepared to assess an ISV of 13 points. That being the case, I allow $22,330.00 for general damages.

Griffiths v Kerkemeyer damages:

[239] No claim is made under this head as Mr Boyd does not meet the test at section 59A of the *Civil Liability Act 2003* (Qld).

Past economic loss:

I note that Mr Boyd claims $1,800 net per week for 178 weeks for past economic loss, being an amount of $320,000.00. This assumes that he would have earned between $50,000.00 and $150,000 for all of that period. There was evidence that Mr Boyd earned $10,000.00 post accident.

It is noted that his earning from 2013 to 2017 were minimal. I am satisfied that, if Mr Boyd had continued in employment with Mr Govesis, he would have earned more than his average earning of the past couple of years, which, as I said, was minimal. However, it is most unlikely that he would have earned at or near the top of that range. It is also unlikely he would have continued in that employment long term. As I have noted it was unlikely that the business would have continued long term.

I propose to allow an amount of $500.00 net per week for 50 weeks and $200.00 per week for the balance 229 weeks to today being a total of $65,000.00.

Future economic loss:

[240] Based on the assessment of Dr. Journeaux, I accept that Mr Boyd has the capacity to earn income in the future. Dr Journeaux said, "what I saw in the video evidence he's highly functional … irrespective of whether he has pain relief or not."

[241] When asked about the use of 24 Endone tablets a day, and therefore unable to perform his occupation Dr Journeaux said, after viewing the video of Mr Boyd riding horses, "Well, I hear what you're saying, but I just can't accept the proposition. It's my view he's highly addicted to the medication and he's not taking it for pain relief." Dr Journeaux also said in respect to questions about Mr Boyd's arthritic knee, "Well, you can still suffer from and arthritic knee but it's not causing you functional incapacity."

[242] I accept this evidence and therefore discount the assessment of Dr Wallace, who said that Mr Boyd "may be suitable for some sedentary or supervisory work on limited hours.

[243] I accept that Mr Boyd now has about nine years before retirement. Given his earnings prior to his employment with Mr Govesis, during the period of his injury and being generous, I would allow $200.00 net per year for nine years (multiplier 380). I would allow the sum under this head at $76,020.00

[244] Having found a contract of employment, I will allow $6175.00 for past superannuation (calculated at 9.5%) and $7,982.10 for future loss of superannuation (calculated at 10.5%).

Out of pockets expenses and future medical expenses:

[245] I allow the sums of $2,350.23 and $927.75 paid by workcover and hospital expenses refundable to WorkCover of $37,887 and Medicare refund of $2,855. Whilst there is no evidence in support of global claims for travel and pharmaceutical expenses, I accept there would have been some. I allow $2,500.00 for this. I therefore allow $46,519.98 under this head. I also allow $3,000.00 for the future expenses.

Interest:

[246] In respect of the past economic loss and superannuation I would allow $3559.50.

Head of Damage	Amount allowed
General Damages	$22,330.00
Past economic loss	$65,000.00
Past special damages	$46,519.98
Past loss of Superannuation	$6,175.00
Interest	$5,978.70
Future economic loss	$76,020.00
Future loss of Superannuation	$7,982.10
Future Special Damages	$3,000.00
Total:	$233,005.78

[247] Therefore, I assess the Plaintiffs total damages in the sum of $233,005.78, excluding contribution. Applying contribution of 10%, the plaintiff is entitled to damages of $209,705.20, plus interest and costs.

[248] I give judgement for the Plaintiff against the First and Third Defendants. I order that the first and third defendants pay the Plaintiff damages assessed in the sum of $209,705.20, plus interest and costs.

His Honour Judge O Rinaudo AM DCJ