

CITATION: *Valler v Millingbarrwarr Aboriginal Corporation*
[2003] NTMC 040

PARTIES: STEPHEN VALLER
v
MILLINGBARRWARR ABORIGINAL
CORPORATION

TITLE OF COURT: Local Court of Katherine

JURISDICTION: Civil

FILE NO(s): 20203458

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DECISION OF: D. TRIGG SM

CATCHWORDS:

Schellenberg v Tunnel Holdings Pty Ltd (2000) 200 CLR 121 @ 137
Maitland City Council v Myers and Another (1988)8 MVR 113
Southwell v Tomomoto and Others (1992) 109 FLR 12
Mummery v Irvings Pty Ltd (1956) 96 CLR 99

REPRESENTATION:

Counsel:

Plaintiff: Mr Cole
Defendant: Mr Spazzapan

Solicitors:

Plaintiff: Graham Cole
Defendant: Markus Spazzapan

Judgment category classification: B
Judgment ID number: [2003] NTMC 040
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IN THE LOCAL COURT
AT KATHERINE IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20203458

BETWEEN:

STEPHEN VALLER
Plaintiff

AND:

MILLINGBARRWARR ABORIGINAL
CORPORATION
Defendant

REASONS FOR DECISION

(Delivered 21 November 2003)

Mr D TRIGG SM:

1. This matter commenced in the Local Court at Katherine on the 7th day of March 2002. On that day the plaintiff filed a statement of claim claiming \$9,525.00 plus costs and interest. This matter was within the limit of the *Small Claims Act*, but the matter was commenced and proceeded in the Local Court. The hearing proceeded before me in Katherine on 1 and 2 July 2003.
2. The plaintiff's claim against the defendant arises out of the sinking of a barge on the Roper River on or about the 13th day of January 2001.
3. The plaintiff Stephen Valler (hereinafter referred to as "Valler") is a carpenter by trade. He was employed at the relevant time and now by H & H Builders of Katherine.
4. The plaintiff was on the said barge when it sank on the 13th of January 2001 as were his tools of trade and some personal effects.

5. It is not in dispute before me that:
 - The defendant is incorporated.
 - On or about the 13th day of January 2001 the defendant transported the plaintiff together with his tools and personal effects from Ngukurr in the direction of Roper Bar on the defendant's barge on the Roper River.
 - On the said journey Stephen Campbell, a servant and agent of the defendant, was the master and operator of the said barge from Ngukurr towards Roper Bar.
 - At a point on the river near to Roper Bar the barge sank and all the tools and personal effects belonging to the plaintiff were lost.
 - A certificate of survey was not in force in relation to the barge at the relevant time.
6. Whilst the question of the certificate of survey was raised in a notice to admit facts and admitted; and questions were also asked in relation to a prosecution arising out of the sinking; the significance of this matter was never explained. I was not referred to any legislation relating to this matter nor was it suggested that I was able to infer anything from the absence of the certificate of survey. For instance, it has not been suggested that I can infer that the barge was somehow inherently unsafe. Accordingly, the fact that the barge may not have had a certificate of survey at the relevant time would appear to be irrelevant to my considerations.
7. The Statement of Claim claims damages from the defendant and the basis for the claim is expressed to be as follows:

“3 The defendant failed to steer or otherwise conduct the barge in a proper manner and as a result the defendant suffered loss and damage.”

8. That is the full extent of the pleading. Accordingly, the claim does not appear to be based on any breach of any contractual duty but appears to be based on negligence alone. There were two witnesses only called in the plaintiff's case. The first witness was Valler. Valler gave no evidence to

suggest that he had any knowledge, experience, or expertise in relation to the handling and operation of barges or indeed any form of marine vessel. Accordingly, I give no weight to any opinions (which would call for qualifications as an expert in a relevant field to give) that he may have expressed in the course of his evidence.

9. The other witness called in the plaintiff's case was Brian Trebbin (hereinafter referred to as "Trebbin"). Trebbin was also on the barge on the fateful day. He appears to have had some experience (although I do not know the extent of it) in relation to handling mono-hulled vessels such as are commonly referred to as "tinnies". He was not qualified as an expert and was therefore unable to express any expert opinions as to the cause of the sinking. Accordingly, I give no weight to any opinions (which would call for qualifications as an expert in a relevant field to give) that he may have expressed in the course of his evidence.
10. There was only one witness called in the defence case and that was Stephen James Campbell (hereinafter referred to as "Campbell"). As noted earlier he was the operator of the barge on the fateful day. There was no evidence introduced to suggest that Campbell had any knowledge or experience with any form of marine vessel prior to commencing employment with the defendant in March 1998. Whilst he had some experience with the handling of the barge in question, for the reasons that appear subsequently herein, I do not accept him as an expert and therefore give no weight to any opinions (which would call for qualifications as an expert in a relevant field to give) that he may have expressed in his evidence.
11. Campbell remains employed with the defendant. He is the store manager of the Ngukurr store and is in charge of the day to day operations of the defendant Corporation. When he was employed part of his duties included being a barge operator.

12. The barge that was operated by the defendant at the relevant time was a four-hulled dolphin design barge apparently built in South Australia approximately 20 years before. The four hulls were basically four pontoons which ran down the length of the barge (bow to stern) with gaps between them for water to pass through. There was a floor over the top of the pontoons. At the back of the floor and towards the stern of the vessel was a platform from which the barge was steered and operated. The barge was powered by two outboard motors that were at the stern of the barge. These could be lowered into or raised from the water automatically from the steering platform and fully operated from the steering platform. Each of the four pontoons came to a point at the bow end. There was a detachable ramp (or ramps) at the front of the barge. This ramp(s) allowed vehicles to be driven on or off the barge. No pictures of the barge were placed into evidence.
13. Campbell gave evidence (T52) that the height of the side of the barge from bottom to top was 28 inches. He gave further evidence that there was a rail that ran along both sides of the barge and that this was 17 inches from the bottom therefore leaving 11 inches above the rail. This evidence was not challenged and I accept it as there is no contrary evidence. Trebbin gave evidence of this rail at T37 as follows:

“Okay, can you recall these side structures of the barge what they looked like on the outside – the hull structure?---No, they were pretty much straight down with just one reinforcing rib as far as I can recall.

How – how – how far down was the reinforcing rib?---Roughly half-way I think.

150 mil?---I think the side of it was a lot higher than that.

So the reinforcing rib was something that ran parallel down each side of the, you know, the hull, and it was something that was fairly visible, wasn't it?---Yeah, on the earlier trip it was yeah.” (emphasis added)

By reference to “the earlier trip” Trebbin was referring to his trip into Ngukurr on the barge. I accept his evidence that there was a noticeable difference in the height of the rail/rib in relation to the water line on the two trips that he undertook on the barge.

14. Further, Campbell gave evidence (T58) in relation to the pontoons that “there is a crack in either hull” about 3 inches long. It is to be noted that there were four hulls but he was not asked to explain how many he meant by “either”. On this evidence alone I would be unable to find whether each of the four hulls had cracks in them or, if not all then, which ones. In relation to these cracks Campbell went on to say “while the barge is stationary it lets the water in, when you’re up on the plane that actual crack is out of the water”. His explanation for the cause of the cracks was “just the wear and tear over the years”.
15. He was asked in an hour how much water would enter those cracks if they were submerged and he replied “sitting in the river for an hour not moving would – basically about 50 litres each side”. I do not know what the actual volume of each hull was, and therefore I am unable to find whether 50 litres was or was not a significant amount. This evidence was unchallenged. However, it was not asked whether this would be the case whether the barge was empty, heavily laden or what. Nor do I know the basis of this evidence. I therefore do not know whether it was based on observation or assumption. I am unable to give much weight to this evidence.
16. He went on to say (T58) that where he stood to operate the barge from he could actually look down and see what water was in the barge. He said that he could see into the bottom of the pontoons (but he did not say whether this was into all four of them). He went on to say that when the barge is up on a plane the front is higher than the back so that the water collects down the back of the pontoon. At T72 he said:

“No, no, because when I’m operating the barge, the barge is going up the river on a plane. The water comes down to the back of the barge. I am standing directly over the pontoon. I can see how much water is in that pontoon and how much water is in the outside pontoons. The two outside pontoons, if there is excess water in those pontoons I will always bilge them out.”

It follows from this evidence that at least three of the pontoons allowed water to enter them, and I find accordingly. It may well be that all four in fact had leaks, but the evidence does not allow me to be satisfied of that on the balance of probabilities.

17. The evidence of Campbell in relation to the cracks was not challenged. No evidence was called to suggest that the cracks were (or were not) a potential problem or danger. No evidence was called to suggest that the cracks should have been repaired, and if so, how and why. As a matter of common sense if there were two identical vessels, one which leaked and one which did not, then (all other things being equal) the non-leaking vessel would be safer than the leaking one. To be able to quantify the difference you would need a lot more information. Sadly a lot of that information was not put before me.
18. When Campbell commenced his employment he was shown how to operate the barge by Phillip Bush (hereafter referred to as “Bush”). Bush was not called to give evidence in the case. Bush is and was the Chairman of the defendant and apparently had worked on that barge previously.
19. I do not know whether Bush holds any qualifications in the operation of a barge or any other form of marine vessel or exactly what his experience and knowledge is. I do not know how many times Bush had operated the barge. I therefore am unable to find that Bush was, or was not, a suitable person to show anybody how to properly operate the barge. The failure to call Bush was not commented on by Mr Cole and I was not invited to draw any inference from this failure. I therefore don’t do so.

20. It appears from the evidence that the barge was only used during the wet season when the roads to Ngukurr became impassable.
21. There was no evidence introduced (or any questions asked) about the maintenance (or lack thereof) of the barge. I am therefore unable to make any finding on the balance of probabilities that the barge was not properly maintained. It may well have not been (especially given what I know about the presence of cracks in at least three of the hulls) but the evidence is silent on this. This is evidence that would be within the knowledge of the defendant. If the evidence was beneficial to the defendant then I would normally have expected the defendant to introduce it (*Jones v Dunkel* (1958-59) 101 CLR 298). But in the absence of any allegation in the pleading about the general condition, maintenance, or safety of the barge it does not appear that any inference is available, especially since the plaintiff did not invite me to draw any inference in this regard. If the plaintiff had specifically alleged that the barge was not properly maintained (or similar) then the defendant would have been on notice of the case that it needed to be prepared to meet. That however is not the case. I therefore draw no inference that the barge was inherently unsafe prior to being loaded for the fateful voyage.
22. In Campbell's first wet season at Ngukurr, Bush did most of the operating of the barge and Campbell assisted him. Bush apparently showed Campbell the river, the snags in the river, the rock bars in the river. Campbell said that he learned the operation of the barge on the job.
23. Campbell said the first wet season went from December through to roughly 15 May and they would do about two to three trips a week. The following wet season ran from about Christmas day until about 20 May and again they did about two to three trips every week. He estimated that he'd been up and down the river over 100 times on the barge before the day that it sank.
24. At T52 the following evidence was given by Campbell;

“When you commenced employment were you instructed of how to safely load the barge?...Yes.”

That was the extent of the evidence in this regard with the exception of the matter referred to in the next paragraph herein. Campbell did not expand on this evidence at all nor was he asked to. I do not know who instructed him nor do I know what the instructions were. It isn't possible for me to make any decision about the adequacy or otherwise of any such unexplained instructions. Nor is it possible for me to decide whether Campbell did or did not follow any such instructions on the fateful day, as I don't know what the instructions were, apart from what follows in the next paragraph.

25. Further at (T52) Campbell gave the following evidence:

“Were you informed of any don'ts?...Basically never to overload. There's a rail that runs down the side of the barge and we use that as a guide to our safe working load.”

Again this evidence was not expanded on at all. I do not know who the advice was given by (it may have been by Bush). I am unable to decide whether this advice (assuming that it was given) was good or correct advice or not.

26. No manufacturers operating instructions were referred to or tendered in evidence. I do not know whether there were any instructions applicable to the safe operation of the barge in question, but I would be surprised in there weren't. No evidence was called from any person as an expert in relation to the loading, maintenance or operation of this barge or barges in general. I do not know whether the barge needed to be loaded in a certain way (but I would be surprised if it didn't). I do not know whether the barge had a maximum load capacity (but I assume that it must have had). I do not know what the maximum safe load weight for the barge was. I do not know whether the barge was in such a state of disrepair as to be inherently unsafe. I have been told very little by way of direct evidence but asked to find (in part) that the defendant “failed toconduct the barge in a proper manner”.

27. It transpired that the barge itself had been recovered from the river subsequently and was currently located at Ngukurr. Accordingly, it would appear that the barge was available for inspection but there was no evidence before me to suggest that this had been done. A qualified inspection of the barge may have been helpful in resolving the causation aspect of this case. In addition, expert evidence going to the loading and safe operation of the vessel on the day in question in the conditions that were prevailing would also have been of assistance. In the absence of this evidence I must decide the case on what evidence I do have.
28. Apart from the three witnesses who gave evidence before me there was a fourth person present on the barge at the time, namely a Mark Early. He also was an employee of H & H Builders at the relevant time. He did not give evidence before me. I have not been invited to draw any inference from the failure to call him and therefore don't do so.
29. H & H Builders apparently had a contract to carry out work on a Health Department house in Ngukurr. As a result of that Valler and Early were sent over to Ngukurr with a Toyota tray top Troup carrier and four-wheel trailer. They took with them all the equipment they would need to perform their task as well as all the personal items they would need for the duration of their time in Ngukurr. Trebbin remained in Katherine completing cabinets and then came out to Ngukurr with these cabinets subsequently.
30. It appears that the employer of Valler contacted the defendant in relation to arranging the initial barge transport for Valler and Early and the equipment. Bush operated the barge on this occasion, which was about two weeks before the 13th of January 2001. Campbell in his evidence said that when he heard about the size of the load to come over with Valler and Early he instructed Bush to make the journey in two trips. I infer from this that Campbell was concerned that there may be some problem with carrying the loaded Toyota and the loaded trailer in the one trip on the barge.

31. In early January 2001 Valler and Early drove the loaded Toyota and loaded trailer to Tomato Island where they met the barge. The trailer was driven onto the barge and then detached. This was transported by Bush down river first and the Toyota was left at Tomato Island. Valler went with the trailer which was then unloaded at Ngukurr. Valler then returned with the barge up river to Tomato Island where the Toyota was driven on and then transported down river to Ngukurr. During no part of these journeys did Valler give any evidence of the barge having to be stopped for any reason whatsoever, and all three trips appear to have been totally uneventful. Valler had no recollection of the amount of freeboard available on any of the three trips.
32. Valler and Early then worked in Ngukurr. Sometime later Trebbin drove a truck laden with a pre-fabricated kitchen and tools and his personal gear to Roper Bar. There he met the barge which, this time was being operated by Campbell. There was no suggestion in the evidence that the truck was taken on the barge, and it appears that it was just the kitchen, tools, Trebbin and his gear that travelled by barge to Ngukurr.
33. This journey from Roper Bar to Ngukurr appears also to have been uneventful and without any stops for any reason. In relation to the freeboard during this trip to Ngukurr Trebbin gave two answers. At T36 he said:

“So can you remember how much freeboard you had when you travelled to Ngukurr?---Probably over a foot.

That’s 12 – over 12 inches?---Yep.

And how many centimetres would that be?---A foot it’s just over 30 centimetres.” (emphasis added)

However, on the following day when his evidence continued he said at T46:

“Can you remember the freeboard that you had when you came up the river?---Yes.

Sorry, down the river – when you came into Ngukurr?---Yes.

And how much was that?---Pretty well the whole vessel, the whole side. It was pretty well only just the pods in the water.

How much height are we talking about?---Probably a foot and a half.

What would that be in centimetres if you don't mind?---40-45 centimetres something like that." (emphasis added)

These two answers are not clearly inconsistent. A foot and a half is over a foot. When this evidence is read together with his evidence referred to at paragraph 13 hereof, it is clear that on this trip to Ngukurr the barge was sitting comfortably high in the water, and I so find.

34. After the time that Valler arrived in Ngukurr and his departure about two weeks later there had been more rain in the area. On the 13th of January 2001 the Roper river was running about a metre higher than it had been during the earlier trips referred to herein.
35. On the first trip to Ngukurr the trailer was loaded with materials such as painting materials and patching and fixing gear. I do not know if Valler and Early both went with the trailer on this journey, or if Early stayed with the Toyota. If Early did go on the first trip I don't know whether he then stayed in Ngukurr with the trailer or whether he then returned to pick up the Toyota.
36. On the way out of Ngukurr on 13.1.01 the trailer was laden with empty water bottles, eskies, a few half tins of paint. Valler (T15) agreed that there wasn't very much weight in it for the return journey. Trebbin estimated the weight in the trailer for the return journey (T44) as "probably, oh, 100 kilos or something like that".
37. In relation to the kitchen and other gear taken to Ngukurr with Trebbin, he estimated the weight (T46) as "probably 400 kilos, at the most".
38. In relation to the Toyota going to Ngukurr, Valler (at T15) said it was laden with his and Early's tools, swags, bags, the boss's tools, fixings, more repair

gear and paint brushes and the like. Although he said it wasn't loaded to the max he said it was "pretty close but not to the max but a good load on it, yes".

39. In relation to the return journey Valler said at T15:

"When talking about what was on the boat – when you travelled back up river when you left the community, is it correct to say that you had a Toyota tray-top Landcruiser that was loaded in exactly the same manner, with about the same gear that you took down?---We had an extra man's gear.

Man's gear who came some days later – the cabinet maker?---Yes."

40. There was no evidence to suggest that any other items or persons were transported to Ngukurr, or from Ngukurr, on any of the journeys which were the subject of evidence in this case.

41. The heaviest of the 3 loads taken to Ngukurr was the taking of the laden Toyota with an additional one or two adult males. I find that the load for the journey from Ngukurr on 13 January 2001 was significantly heavier than this load. I find that the laden Toyota was at least the same weight as it had been on the journey to Ngukurr. In addition there were three adult male passengers, when on the previous journeys to Ngukurr there had been a maximum of two. In addition there was the weight of the four-wheeled trailer plus its load of about 100 kilograms.

42. There was no evidence of any weighing device or devices used in Ngukurr or anywhere else prior to loading the barge. It appears that the defendant's usual practice was to load the barge, then reverse out onto the river to check on how the barge was sitting and then make a decision as to whether it was overloaded or not. In this regard, it appears that Campbell relied upon the rail down the side. I do not know whether this was good practice or otherwise. Campbell gave evidence of one time that he did this and decided that he had too much weight on board (not being any of the trips relevant to

this matter). He said that on that occasion he drove back onto the bank and off-loaded some weight before undertaking the journey.

43. The defendant was the operator of the barge at all times. Campbell was the employee and agent of the defendant. The defendant (through Campbell) decided what to allow to be transported on the barge at any time. Campbell could have decided to take two trips to transport the men and equipment out of Ngukurr on 13 January 2001 (in the same way that he had decided earlier not to transport the Toyota and trailer in the one trip to Ngukurr).
44. On the morning of the 13th of January 2001 the Toyota and trailer were driven to the barge. They were both driven onto the barge and then the trailer was unhooked. The A-frame of the trailer was then pushed under the back of the Toyota. The trailer also was at an angle and was more towards the port side of the barge than the starboard side. The Toyota was approximately in the middle of the barge, but the evidence does not enable me to conclude whether it was more to one side than the other. Nor can I conclude whether it was more towards the back or the front. The loading ramp(s) were then placed behind the trailer.
45. When the barge was backed into the river (with some difficulty getting off the “hard”) loaded with the Toyota, the trailer, Valler, Early and Trebbin a conversation took place between Campbell and Valler. Valler gave evidence of the conversation as follows:

At T5

“I said to him, “oh, you right with the two vehicles on?” and he said to me, “Oh, she’s floating all right, isn’t it?”

And at T17

“I asked Steve, “do you think it will be alright?” and he said, “she’s floating, isn’t she?”

Trebbin gave evidence of this conversation as:

At T31

“I think he said, “we’re still floating - we’re still floating”.

And at T40

“Mr Valler said something about, “should we do it in two trips”. And when we finally got off of the concrete bank, Mr Campbell said, “well, we’re still floating”.

Campbell said in his evidence:

At T56

“Someone had said, “what do you think”, and I said, “we’re still floating”.

46. This evidence indicates a somewhat cavalier approach by Campbell. The barge clearly was floating, but that was not the only issue. I will deal with this in more detail later in these reasons.
47. At the end of the day is there evidence from which I could determine on the balance of probabilities that the barge was overloaded or incorrectly loaded on the 13th day of January 2001? Mr Spazzapan submits that there is no evidence that this was the case and therefore any finding along those lines would have to be based on supposition. I do not agree. For the reasons that follow I am satisfied that, after loading, the barge was sitting uncomfortably (and too) low in the water and this was (and could only have been) due to it being overloaded with weight.
48. At T56 Campbell gave evidence that once he’d moved into the river he checked both the left and right hand sides of the barge to see how much freeboard he actually had. He said that he had roughly 17 inches of freeboard at the front of the barge and 14 inches at the back and went on to say “ I was quite confident that we had a safe load”.

At T15-16 Valler gave the following evidence on this topic:

“On the way out of Ngukurr, did you notice how much freeboard there was?---Yes.

How much freeboard?---About 8 inches.

So what’s 8 inches – can you?---About 200-250 mil thereabout 8 to 10 inches.

If I put it to you that the empty freeboard is approximately 18 inches and that loaded the freeboard is 14 inches, would you disagree with that?---Yeah, I think we were sitting a little bit lower than that in the water.”

At T33 Trebbin said that the freeboard on the barge was “roughly 200 millimetres”. At T44-45 he went on to say:

“---stop. How was the vessel sitting in the water?---It took about four or five hard reversing action from side to side to walk it – walk the nose off of the concrete, and then it sort of dobbed (sic “bobbed”) right down low in the water and settled right down, and then sat there sort of.

Was there anything untoward in the way it was sitting?---No, it was just very low in the water.

Do you know what – did you know at the time what the normal displacement height was of that vessel?---No.

Why do you say it was low?---Because the water was just below the edge sort of.

Which edge are we talking about?---The top edge of the boat, just where the handrails are.” (emphasis added)

Valler was unable to say what the freeboard was on his two trips to Ngukurr (T14 and T15). Trebbin’s estimates in his evidence at T36 and T46 are set out and referred to earlier.

49. Neither Valler or Trebbin gave any evidence to suggest that there was any difference in the freeboard as between the front and rear of the barge. None of the witnesses suggested that there was any difference in the freeboard on

the port side as opposed to the starboard. Further, there was no evidence to suggest that any of the witnesses noticed that the height of the freeboard altered (either up or down) at any time from entering the river at Ngukurr until the sinking.

50. From the evidence it also appears that Valler (T14) had not noticed the rail along the outside pontoons. If he did he did not give evidence of it.
51. It is difficult to decide what the actual height of the freeboard was at the commencement of the fateful journey. It is not necessary for the court to prefer one estimate to another. However, I am satisfied on the balance of probabilities that the estimates by Valler and Trebbin are more likely to be closer to the truth than that of Campbell. My reason for this is that if in truth there was 14 to 17 inches of freeboard, then I do not think the conversation set out in paragraph 45 hereof would have taken place at all. I find that the freeboard at the commencement of the fateful journey was less than a foot, but no less than 8 inches. I am unable to be more accurate.
52. One thing is clear from the evidence, and, I find that the barge was sitting noticeably lower in the water at the commencement of the fateful journey than it had been on any of the three aforementioned trips to Ngukurr. The difference was such as to be immediately noticed by Valler and Trebbin, and sufficient to cause Valler to express immediate concern to Campbell. In none of the three earlier trips to Ngukurr (to take the Toyota, the trailer and the kitchen) was there anything to suggest any concern about the size of the loads or the way that the barge was sitting in the river.
53. I find that Valler and Trebbin were concerned about the way the barge was sitting low in the river. They felt uncomfortable, but in continuing the journey they relied upon the skill and judgment of Campbell as the operator of the barge. Thus the barge started it's journey with a substantial load; sitting low in the water; with at least three pontoons that had cracks which

allowed water into them; against a fast flowing, flooded, wet season river which had debris in it.

54. In the journey upriver there were five events that occurred concerning the operation of the barge. On one occasion Campbell used a bilge pump to pump water out of some of the pontoons whilst the barge was still in motion and being steered by Valler. In addition, the barge was stopped on three occasions due to fouling of propellers, changing over fuel supply and clearing of a log from the motors. The fifth event was the sinking of the barge. I will deal with each of these various events in turn.
55. On the evidence there is a conflict as to whether the bilge pump was used before or after the first stopping. Both Valler and Trebbin suggested that the bilge pump was used before the first stop, however Campbell in his evidence had it the other way around.
56. This difference might be important as the longer the gap between the using of the bilge pump and the sinking then the more opportunity there was for water to enter the pontoons. There is however no evidence from which I could be satisfied on the balance of probabilities that there was any certain amount of water present in one or any of the hulls immediately before the sinking. Again the person in the best position to give evidence of this was Campbell, as he was the person operating the barge from the platform, and on his evidence could therefore see down into at least three of the pontoons. His evidence was silent on this. He did not give evidence to suggest that he looked into the pontoons to check on them at any time after he used the bilge pump on the first occasion. If he did look he did not say what he observed. I do however find that there would have been water present in at least three of the pontoons immediately prior to the sinking.
57. In relation to the bilge incident Valler said (T5):

“Oh probably 10 - 10 - 15 minutes or so after we'd gone up the river he asked me to steer the boat while he got the bilge pump out and

pumped all the water out of the bottom. Because he reckons it wasn't real good to have all the water floating around in the bottom of the boat, because when you pull up if you have to pull up, water goes to the front of the boat and makes it nose heavy."

Valler estimated that Campbell pumped out the bilge for about 5 minutes.

He was asked how much water was pumped out and replied:

"Oh, I couldn't tell you exactly - there's a floor in the boat you can't really see right underneath the boat."

58. Trebbin in his evidence was aware that Campbell had asked Valler to steer for a little bit while he bilged out the water in the hull of the boat, but he was further down the barge and couldn't hear and also probably couldn't see how much water there was. He certainly gave no evidence as to his observation of any water in any of the hulls at any stage.
59. Campbell in his evidence (T58) explained "we have a(n) electric bilge pump which I connect to the batteries, place it in the rear of the barge in the hulls, and just pump the water out over the side." He didn't indicate (nor was he asked) how much water was in which pontoons, nor how much water he pumped out from which pontoons, nor how much water (if any) was left in any of the pontoons.
60. The next event was that the propellers became fouled with debris. As a result of this Campbell was obliged to stop the barge. Campbell raised the engines mechanically, then got down and physically removed the weed and debris from each propeller. Campbell then got back onto his platform, lowered both engines and powered up to get the barge back on the plane.
61. In relation to the length of this stop Valler estimated it at between 3 to 4 minutes and Campbell estimated it at about 4 minutes. Trebbin was not asked nor did he give any estimate of time.
62. It was the evidence of all witnesses that when the barge would come to a stop the wave wake from the barge would pass it for a period of time

causing the barge to bob forward and back. After the first stop and before starting off again it was effectively the evidence of all three witnesses that the bobbing had settled down before the barge started off again.

63. On the evidence I find on the balance of probabilities that the duration of the first stop was between 3 and 4 minutes, and the barge had ceased bobbing due to the effect of the barge wake before taking off again. I further find that some water would have entered into at least three of the pontoons during this stop. I am unable to say how much water.
64. In relation to the second stopping it was the evidence of Valler that this was effectively the same as the first one namely a fouling around the motors (T6) and Campbell lifting the motors clearing them then lowering the motors back in the water. Trebbin said (T33) that the second stopping was due to fuel running out of the original tanks so they had to pull up to hook up the auxiliary fuel tanks. Subsequently in cross-examination the following was put to Trebbin:

“The second incident was fouling of the props? --- and I think the fuel changeover as well.”

This somewhat confuses the evidence as his evidence-in-chief was simply that the second stop was for a fuel changeover and he made no mention of any fouling of the propellers. It is now unclear as to whether Trebbin is saying that both took place on this occasion.

65. The evidence of Campbell (T64) was that the second stop was for a fuel change and he made no mention of any fouling of the motors on this occasion. Accordingly, Mr Spazzapan has put to Trebbin a proposition which appears to be inconsistent with his own witnesses subsequent evidence.
66. This might be relevant in terms of deciding how long the barge had been stopped for. Valler (at T7) said the second stop was for about 2 – 3 minutes.

Campbell (at T64) said that the stop on this occasion was for less than a minute, and again Trebbin wasn't asked and didn't give any estimate of time.

67. At the time that the vessel started up again after the second stopping again Campbell said (T64) that there was no bobbing of the barge. Trebbin said (T33) that the barge had pretty well levelled out. However, Valler did say that there was a little bit more spray over the front of the barge on the second taking off than the first (T21). Trebbin also referred to this in part (at T45) when he said "a couple of times when we accelerated off after killing the props there was water splashing over the front.
68. I find on the balance of probabilities that the duration of the second stop was more than one minute and less than three minutes. I further find that any bobbing due to the wake of the barge had either stopped or was minimal by the time that the barge started off again. I also find that some further water entered at least three of the pontoons during this stop.
69. All three witnesses agreed as to the nature of the third stopping incident. There was debris and tree branches travelling down the river against the direction of travel of the barge. A tree branch went under the front of the barge and lodged itself between the back of the barge and the motors. As a result of this Campbell stopped the barge. He then raised the two motors which enabled the branch to be released and float away. He then lowered the motors without having to get down from his platform and then accelerated the engines of the barge to power up.
70. In relation to the time of this stopping Valler said (at T24):

"What was the time frame from the engines becoming idle and the engines being lifted? --- same probably – probably within the minute for the whole lot.
Were both engines lifted at the same time? --- yes.
And were both engines lifted at the same time? --- yes.

On this occasion was there a time delay between the engines being lowered and the engines being powered up? --- No.

Was there any time delay between the engines being lowered and the engines being powered up on the previous two occasions? --- Yeah, an extended period of having to actually bend over and remove the debris.

No, after the debris was removed, the engines were lowered back into the water, was there a period of time that elapsed between the engines hitting the water, or being in position in the water and Mr Campbell powering up the engines? --- No.”

Although the transcript records the two questions effectively as being the same relating to “lifted” it’s my recollection and my note of the evidence that it was actually referring to “lowering” on the second question. I have not checked the tape to verify this.

71. Campbell in his evidence (T 64) estimated the time for stopping for the log incident was roughly a minute.
72. As to whether the barge was still bobbing when Campbell powered up Campbell said (T64) “No”. Valler said (T8) “we were sort of bobbing”; and Trebbin said (T33):

“Right so you saw the – the log being released and bobbing away down behind the boat, what happened next please?---He proceeded to lower the outboards and then we took off in a bit of a hurry---

Before – before you proceed what was the demeanour of the boat at that particular time?---It was – as the last two times because of the – the little bit – a little bit more aggressive because of the quicker speed in which we pulled up or stopped. And it seems---

What was the result of that?---Front to back bobbing the same situation and ---

Was the boat still bobbing when you took off?---Yes, and lowered the outboards and proceeded to move forward in a – rather – a little bit aggressive sort of – for the way the vessel was bouncing.”

73. Trebbin was asked (T34):
- “What do you mean “aggressive”? --- Well, a lot faster than we had taken off the prior two times”.
74. There is no evidence from Valler or Campbell to suggest that the barge took off faster on the third occasion than on any of the other two stopping occasions. At T7 Valler stated that Campbell “barreled the motors to get it up on the plane”, but did not suggest that this was noticeably different from the other two times.
75. On all the evidence I find that the third stopping was the shortest of the three and was for less than one minute. I further find that the barge had not settled (and was still bobbing) when Campbell started off. Again I find that more water entered at least three of the pontoons during this stop.
76. The final event occurred almost immediately after Campbell accelerated the barge on the last occasion. It is clear from all the evidence that the barge never got onto a plane. I find on all the evidence that after Campbell accelerated, the barge quickly took on water over the front of the barge causing the whole barge to dip and roll to the right and then sink very quickly. This happened within a matter of seconds. All the occupants of the barge had to jump into the river and swim to safety. There was no chance to grab any belongings.
77. Fortunately all four persons were able to make it to the bank and were safely rescued. The barge and all items on it went to the bottom of the Roper River. It was the evidence of both Valler and Trebbin that water came over the right front (T8, 23 and 24) of the barge. However, it appears from Ex P1 that both Valler and Trebbin were on the starboard side of the barge and that they would not have been in a position to have been able to see the left front of the barge because of the Toyota being in their way.
78. Campbell said there was a foot of water coming over the front of the barge.

79. On the evidence I am unable to find where Campbell was looking at the moment he started to power up. I do not know if he was looking forward or elsewhere. He did not tell me.
80. On the evidence, I find that the barge sank on the 13th day of January 2001, as a result of water coming over the front of the barge, when Campbell quickly accelerate the barge, after having stopped for a period of less than a minute in order to clear a log from the engines, and whilst the barge was still bobbing. The question is why did water come over the front of the barge?
81. In relation to the pontoons I am not told whether they were completely open like a canoe or whether they were partly enclosed like a kayak. The evidence is silent on this.
82. As noted earlier there is absolutely no evidence as to how much water was or might have been in any of the four pontoons prior to Campbell accelerating on the last occasion. I find that there was water in at least three of them, but am unable to determine how much. Campbell was in the best position to assist me in this regard but was not invited to do so.
83. There is no evidence to suggest that the barge was sitting lower in the water than it had been at any other stage of the journey. Nor is there any evidence to suggest that it wasn't. However, given my findings as to the intake of water after the pontoons had some water pumped out I find that the barge was sitting lower in the water immediately before the sinking than it had been immediately after the use of the bilge pumps. The evidence does not enable me to find by how much.
84. There is no evidence to suggest that the barge was tilting towards the front, (as noted above, Campbell said that the rail on the sides was about three inches higher at the front than the back), or to any particular side, or a combination of any of these, or level when Campbell started to power up the

engines on the last occasion. There is no evidence of the movement of any water within the pontoons.

85. There is no evidence to suggest that there was any abnormal water condition (such as a sudden wave of water) at the time of the last acceleration. Campbell gave evidence that he had seen such an unexpected wave on one other occasion (not related to this journey) but there was no evidence to suggest such an occurrence on this occasion. At best this is a mere possibility, and I don't find that this happened on this occasion.
86. There was no evidence to suggest that any of the cargo on the barge had shifted such that this might explain the initial sinking. Valler (T23) denied that anything moved on the barge. I find that there was no movement of the cargo that led to the initial start of the sinking.
87. The plaintiff bears the onus of proving on the balance of probabilities that the barge sank because "the Defendant failed to steer or otherwise conduct the barge in a proper manner". To achieve this the plaintiff may rely on inferential reasoning if there is sufficient evidence to do so (see: *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121 @ 137).
88. It is clear that the barge sank because water from the river started coming over the front of the barge. There is no direct (or opinion evidence) as to why water came over the front of the barge. There is evidence (referred to above) from which I make the following findings on the balance of probabilities:
 - The barge was about 20 years old;
 - The barge basically comprised a platform which was supported upon four pontoons;
 - The four pontoons formed the hull or flotation for the barge;

- The barge had cracks in at least three of its four pontoons due to wear and tear;
- These cracks had not been fully repaired by 13.1.01;
- These cracks allowed water to enter into at least three of the four pontoons;
- Prior to the first stop on the fateful journey sufficient water had accumulated in the pontoons to cause Campbell to use the bilge pump to remove some of the water;
- More water had accumulated in at least three of the pontoons immediately before the sinking;
- The barge was heavily laden with a loaded Toyota tray top, a four-wheel trailer with about 100kgs of cargo, plus four adult males (including Campbell);
- The load on this occasion was significantly more than on any of the three trips to Ngukurr undertaken in the preceding fortnight and involving M&M Builders;
- Campbell had previously declined to take the Toyota and trailer in the one trip to Ngukurr for safety reasons;
- As a result of the load the barge was sitting noticeably lower in the water than it had on any of the aforementioned trips to Ngukurr;
- The barge was sitting sufficiently low in the water as to cause Valler and Trebbin to be concerned;
- The river was about a metre higher than it had been on any of the aforementioned journeys into Ngukurr;

- The river was flowing quickly;
- The river had debris flowing down it against the direction of travel of the barge.

89. On the basis of these findings I find (by inferential reasoning) on the balance of probabilities that water started coming over the front of the barge (at least in part) because the barge was too low in the water at the time Campbell attempted to power up on the last occasion. I further find that the primary reason for the barge being too low was that Campbell had caused or permitted too much weight to be loaded onto the barge for the journey in the conditions that existed on the river that day.
90. It is a matter of clear logic that if the barge had up to 17 inches of freeboard (as Campbell suggested, and which I have rejected) then it would have been significantly less likely to have had water come over the front than if it had as little as 8 inches of freeboard (as I have found that it did). This is not a matter that would require direct or opinion evidence. It is in my view a matter of logic, and a matter of common sense.
91. There was no evidence to suggest the presence of any waves or even significant chop on the river at the relevant time. Given the nature of the river at the time it was clearly not a “mill pond” either. There was no evidence to suggest that the barge was designed to operate in conditions (such as at sea) with water coming over the top of the pontoons.
92. When I was contemplating attempting to conclude this matter in Katherine by delivering ex tempore reasons I was leaning towards the plaintiff being unsuccessful. This was because of the lack of any direct evidence of negligence. However, upon further analysis and reading of the evidence and based upon *Schellenberg's case* (supra) I am satisfied that negligence can be properly inferred against the defendant based upon the findings of fact that I have been able to make. It would have been preferable if the plaintiff had

called evidence and thereby rendered this process unnecessary. I accept Mr Spazzapan's submission that any finding should not be based upon supposition, but am satisfied on the evidence that no supposition is necessary in this case. I am satisfied on the balance of probabilities that the sinking of the barge was due to the negligence of the defendant's agent, Campbell, by failing to steer or conduct the barge in a proper manner. In particular, I find that Campbell caused or permitted the barge to be overloaded and this was the primary reason for water coming over the front of the barge and sinking it.

93. I find that Campbell should have off-loaded (or not loaded at all) the trailer, and made two trips rather than trying to do it in the one. In trying to take it all in the one trip he should have known that there was a risk (which was not low or minor) of damage or loss to the passengers and cargo. I find that that risk was reasonably foreseeable. In choosing to adopt that risk he breached a duty of care (I find that there was a sufficient relationship of proximity between the plaintiff and the defendant) that he owed to the plaintiff. There was no evidence to suggest that there was any financial or other imperative for choosing to adopt the risk as the defendant did. Further, I find that the plaintiff would have had no argument if the transporting had been broken into more than one trip. On the contrary he was concerned about the safety of the barge due to how low it was sitting in the river, and would have been happy to do it in more than one trip. I do not find that the plaintiff did anything to encourage the defendant to take the risk that it did. On the contrary he queried the wisdom of such an action from the outset.
94. I will turn now to the question of damages.
95. On the day after the sinking or the very next day (therefore on 14 or 15 January 2001) Valler sat down and made a list of everything he had lost in the sinking (T8). He then went to Mitre 10 and to Home Timber and Hardware (T8) and noted down the replacement retail price next to

everything on the list he had prepared. A copy of the list with the replacement retail prices was tendered and became Exp2.

96. Valler had obtained most of his own tooling over time, but his employer also supplied some other tools for his use at work as well. He advised (T10) that the items in Exp2 were a list of his tools. Some of the tools he had inherited from his father, who was also in the carpentry trade. Some items were new such as the Makita compound saw that was still in it's box.
97. It was submitted that on the question of value the plaintiff should not recover replacement value for tools that were say more than 12 months old. In the instant case we are dealing with a large list of tools. A tool which is in good working order has the same value to the user of it whether it is new or 5 years old. Some tools do not wear out over time if used and maintained appropriately. Some of the items such as blades, discs, and bits (for example) would be expected to be replaced over time depending upon their usage. Electrical tools may have a limited life, but there was no evidence that any of the items the plaintiff had with him were broken, damaged or not in reasonable working order. If the plaintiff spent a lot of time going to second hand stores and lawn sales he might be able to pick up some comparable replacements, but he might not be able to pick up all of them. In any event there is nothing to suggest that this would be an easy or quick process.
98. If the loss was only of one or two items then obtaining second hand replacements might be realistic. However, in my view, given the large quantity of lost items in this case this is not a reasonable expectation herein. I consider that the most practical and sensible means of valuing the loss is by replacement value. I accept the evidence of the plaintiff in relation to the various items he has lost and their replacement value as set out in Exp2. I have added up the total of this loss to be \$9063.

99. I note that this differs from the plaintiff's calculations as shown in ExP3. The difference is that in ExP3 is recorded the item:

Sidchrome Shifters x 4 \$154	616
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Whereas in ExP2 it is recorded as:

Shifters x 4	154
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In ExP2 where the plaintiff has obtained the price per item (as opposed to the total replacement cost) he has included the word "each" after the relevant price. As can be seen here he has not done this in this instance. I therefore infer that the price of \$154 is the total price of the 4 shifters.

100. I therefore find that the plaintiff is entitled to a judgment against the defendant in the sum of \$9063. In addition, the plaintiff has claimed interest and he would be entitled to interest in accordance with Section 21(1)(f) of the *Local Courts Act* and Rule 39 of the *Local Court Rules*. Before making final Orders herein I will hear from the parties on the form of the final orders and on the questions of interest and costs. There may have been offers that were made that might impact on the final Orders.
101. Before leaving this matter I will turn to consider another issue that arose in the course of the trial.
102. *Res ipsa loquitur* was raised and was the subject of some debate and submissions before me. I feel obliged to deal with it albeit that it is no longer relevant based upon my earlier findings. In the course of the case I raised with Mr Cole that the doctrine of "res ipsa loquitur" did not appear to be relied upon in his pleadings as an alternative. He agreed that he did not seek to rely upon it. I was initially of the opinion that if this doctrine was to be relied upon then it needed to be pleaded. However, upon researching the point overnight I had cause to reconsider this preliminary view, and re-raised the issue with counsel.

103. In England it is not necessary to plead the doctrine, it is enough to prove facts which make it applicable (*Scott v London and St Katherine's Docks Co* (1865) 3 H& C 596 @ 601; *Bennett v Chemical Construction (Great Britain) Ltd* (1971) 3 AllER 822).
104. In Australia the position appears to be that although the doctrine need not be specifically pleaded it is desirable to put the other party on notice. In *Maitland City Council v Myers and Another* (1988)8 MVR 113, Kirby P said at page 114:

“The pleading did not in terms rely upon the doctrine or principle of *res ipsa loquitur*. That doctrine or principle is often pleaded in particulars of negligence. This is desirably so in order to put the other party on notice that this means of proving the case will be relied upon at the trial. But *res ipsa loquitur* is not, strictly, a particular of negligence so much as a mode of drawing an inference of negligence from the facts proved. It is an evidentiary tool, used on the way to establishing the case which a party brings upon the facts proved as they are ultimately adduced at the trial. In any case, the fifth and seventh particulars, in my view, sufficiently alerted the first respondent to the possible reliance on a case based on *res ipsa*.”(italics added)

The words in italics were respectfully agreed with by Kearney J in *Southwell v Tomomoto and Others* (1992) 109 FLR 12 @15. His Honour went on to conclude at page 19 of that judgment:

“I consider that it is the better practice, however, specifically to plead *res ipsa loquitur* in a statement of claim when it is intended to rely on it at trial: see generally *Mummary v Irvings Pty Ltd* (at 110-117, and 121-122).”

105. When I advised counsel of the cases that I had considered Mr Cole advised that he would now wish to avail himself of the doctrine, if it were available. Mr Spazzapan advised as follows (T6 of 4.7.03):

“MR SPAZZAPAN: My position is this, if the plaintiff intends to rely on the doctrine or *res ipsa loquitur* then the evidentiary version (sic burden) for – it’s to the defendants to show that it was some other cause or some other reasonably explainable cause to the

accident, and not the inference that (inaudible) that – I note (inaudible) I would have run my case completely differently.

I would also like to submit that court hearing commence. I spoke to Mr Cole and raised the issue of res ipsa loquitur with him, of whether he intends to plead it (?) in amended pleadings, and he said that for the time being he didn't wish to. So therefore, even having given him the opportunity, before the hearing commenced, he didn't avail himself to that opportunity.

.....

HIS WORSHIP: Would it have affected the way in which you cross-examined the plaintiff's witnesses? Or would of just of altered the way---

MR SPAZZAPAN: It would have – I would have run my case completely differently because I would have needed to rely on other evidence.

HIS WORSHIP: Yes. So it may not be a case that you would have cross-examined differently, it may have been a case that you would have asked, perhaps, different questions of your witnesses, and perhaps called other witnesses.

MR SPAZZAPAN: Certainly.”

106. At T7 Mr Cole replied to this suggestion as follows:

“Sir, Mr Spazzapan is correct. We did speak about raising res ipsa loquitur prior to the hearing and he gave me some material in relation to it, which I looked at and I indicated to him – not that I didn't wish to do that - I just simply said, “this is a negligence case”, and that's how I was approaching it.

And the importance of res ipsa loquitur did not occur to me until much later in this case, which has led to today. And after the case I read some material which indicated that – yes, it just avoided the chance of a non-suit against the plaintiff, and that was the extent of my research in relation to it, but as the evidence by the defendant turned out, it is of much greater importance.”

107. As can be seen from this Mr Cole presented the plaintiff's case on the basis that res ipsa loquitur was not being relied upon. Further, Mr Spazzapan (properly in my view) sought to clarify this with Mr Cole before trial, and

based upon this non reliance presented his case accordingly. In the case of *Maitland City Council v Myers* (supra) an important reason for allowing the plaintiff to raise the doctrine on appeal when it had not been referred to at trial was noted by Kirby P at page 120 as:

“counsel for the first respondent, although directly asked by me, could not point to a single question which could have been asked which was not asked, nor to evidence that could have been brought which was not brought which such particularisation before the trial would have permitted.”

108. This is clearly to be distinguished from the present case. I accept that Mr Spazzapan prepared and conducted his case to meet the case as pleaded, and that he gave Mr Cole a reasonable opportunity before trial to seek to rely upon *res ipsa loquitur* if he wished to. Mr Spazzapan was therefore, in my view, entitled to prepare his case, cross-examine the plaintiff’s witnesses, and call his own evidence on the basis that *res ipsa loquitur* was not to be relied upon at trial. In my view, the defendant would have been unfairly prejudiced if I had proceeded to determine the case (on the evidence before me) in favour of the plaintiff by application of the doctrine of *res ipsa loquitur*.
109. However, in his written submissions Mr Spazzapan did not submit that the defendant would be prejudiced in a way that could not be compensated for. Rather he said that he “seeks leave to re-open this case so as to allow the calling of expert evidence as to the possible causes of the water ingress and sinking of the barge.” However, that in my view would not be the end of it. Any expert evidence would have to be served in accordance with the Rules, and the plaintiff would be entitled to call evidence in rebuttal including calling experts of their own. Hence, the case would take on a new flavour altogether. In addition, there would be the potential need to recall witnesses who have already given evidence.

110. Also, if further evidence were allowed (on the basis that I was unable to make any specific finding of negligence) it is possible, in my view, that at the end of this evidence a specific finding of negligence might then be open (which was not open on the evidence as it existed). If that were the case then the doctrine would no longer be available, but could be used as a means of having a second go at proving what was not proved originally. That in my view should not be permitted. The plaintiff chose to run his case the way he did, and he should not get two or more chances.
111. In light of these matters, if I had not been able to make a specific finding of negligence I would have ruled that the plaintiff was not entitled to belatedly seek to rely upon the principle of *res ipsa loquitur*.
112. If the plaintiff had been so allowed then the starting point in considering *res ipsa loquitur* would have been the High Court decision of *Mummery v Irvings Pty Ltd* (supra). In that case the plaintiff lawfully entered the defendants premises to purchase some timber and was struck in the eye by a piece of wood. In the joint decision of Dixon CJ, Webb, Fullager and Taylor JJ, Their Honours said at pages 116 and 117:

“At this stage it is appropriate to return to the language used in *Scott v London & St Katherine Docks Co.* (2) and to observe that **the vital condition for the operation of the principle is that “the accident is such as in the ordinary course of things does not happen if those who have the management use proper care”**. Indeed, to overlook or to exclude this requirement might well be thought to produce the result that mere proof of any occurrence causing injury will constitute sufficient proof of negligence in any case where an object which, physically has caused injury to the plaintiff is under the control of management of the defendant and the actual cause is, therefore, not known to the plaintiff and is, or should be, known to the defendant. **The requirement that the accident must be such as in the ordinary course of things does not happen if those who have the management use proper care is of vital importance and fully explains why is such cases *res ipsa loquitur*.**

In other words the question is whether the latter occurrence was such “as in the ordinary course of things does not happen if those who

have the management use proper care”. To that inquiry in this case there cannot be an affirmative answer. We are told nothing of the characteristics of circular saws and we are not told that such an occurrence is usual or unusual or indeed highly improbable. Moreover we are told nothing concerning the size of the piece of wood in question and it is difficult, if not impossible, in these circumstances to attribute the accident to some act of negligence on the part of the operator. If the question is posed “was the accident such as in the ordinary course of things does not happen if those who have the management use proper care?” the answer, on the evidence in the case, must be “We simply do not know”. One may but conjecture but cannot as a matter of inference attribute negligence to the respondent’s foreman. As Kennedy L.J, speaking of the principle of *res ipsa loquitur*, said in *Russell v London & SW Railway* (1): “The meaning, as I understand, of that phrase... is this, that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed, than that the occurrence took place without negligence. The *res* speaks because the facts stand unexplained, and therefore the natural and reasonable, not conjectural, inference from the facts shows that what has happened is reasonably to be attributed to some act of negligence on the part of some body; that is, some want of reasonable care under the circumstances. *Res ipsa loquitur* does not mean, as I understand it, that merely because at the end of a journey a horse is found hurt, or somebody is hurt in the streets, the mere fact that he is hurt implies negligence. That is absurd. It means that the circumstances are, so to speak, eloquent of the negligence of somebody who brought about the state of things which is complained of ”.(emphasis added)

113. I would have applied that decision as explained in *Schellenberg’s case* in order to resolve the matter if the doctrine of *res ipsa loquitur* had been applicable. Fortunately it hasn’t been necessary. In deciding this case I have proceeded on the basis that the plaintiff bears the evidential and legal onus throughout. I have not proceeded on the basis that I must make a finding based on negligence (either for or against the plaintiff). Although there was no direct evidence of negligence by the defendant I am readily able to find it for the reasons set out above.
114. I will publish these reasons by causing them to be posted on 21 November 2003 to the solicitors for each party. I do so because the plaintiff’s solicitor

and counsel reside in Katherine, and the defendant's solicitor and counsel reside in Darwin. I will list the matter for mention before me in Court in Darwin on Friday the 5th day of December 2003 at which time I will hear the parties on the form of the final orders, interest and costs. I grant leave for Mr Cole to appear by video conference at that time if he prefers, and will leave it to him to make the necessary arrangements with the Court.

Dated this 21st day of November 2003.

DAYNOR TRIGG
STIPENDIARY MAGISTRATE