SUPREME COURT OF QUEENSLAND

CITATION:	*Distant v Qld Rail* [2002] QSC 190
PARTIES:	**DISTANT, Kevin Raymond** **(applicant)** **v** **QUEENSLAND RAIL** **(defendant)**
FILE NO:	S52 of 2000
DIVISION:	Trial Division - Toowoomba
DELIVERED ON:	28 June 2002
DELIVERED AT:	Brisbane
HEARING DATES:	8-10 May, 17 June 2002
JUDGE:	Mackenzie J
ORDER:	**Judgment for the plaintiff in the sum of $227,191.71. Unless submissions to the contrary are made in writing within 7 days, the defendant pay the plaintiff's costs, including reserved costs, if any, to be assessed.**
CATCHWORDS:	TORTS - BREACH OF STATUTORY DUTY - where plaintiff suffered injury from electrical accident - whether plaintiff suffered post traumatic stress disorder or depression - whether predisposition to depression - phobic fear of electricity - whether recurrences of symptoms related to accident - whether plaintiff would have left employ of defendant - effect on future economic loss - lost superannuation
COUNSEL:	G Mullins for plaintiff MT O'Sullivan and S Brown for the defendant
SOLICITORS:	Shine Roche McGowan for plaintiff Blake Dawson Waldron for defendant

[1] **MACKENZIE J:** This is an action for damages in which both liability and quantum are in issue. The plaintiff was employed as a power linesman by the defendant and his action is based on an incident which happened on 23 May 1995 at Yelarbon. The Amended Statement of Claim alleges negligence and breach of statutory duty.

The accident and related issues

[2] His evidence was that on 22 May 1995 he had been instructed to "strip" a pole upon which there was a switchboard into which railway gangs could plug electrical

equipment when working in that vicinity. He understood the instruction was to take all of the components belonging to the defendant from the pole. The pole carried four wires connected to the relevant electricity authority's system. The wires carried 415 volts.

[3] The three wires carrying power phases and the earth were connected by short wires to a fuse on the pole near the cross arm. From the fuse, an insulated wire ran down the pole to a switchboard which was at a convenient height on the pole for workers who needed to connect to electricity to reach it. Removing the fuse would deenergize the wire down the pole and the switchboard. However, the wires above the fuse would remain live unless the mains power was turned off. There was evidence that, because the electricity authority had cut off the power at the pole about 20 months before the accident at the request of the defendant, the wires and switchboard below the fuse were deenergized, although the wires carrying power phases as part of the electricity distribution system remained energized.

[4] The plaintiff said that he climbed to the top of the pole and commenced the work of removing the various pieces of apparatus from the pole while in a safety belt. He had disconnected everything when Mr Haig, another Queensland Rail employee, arrived and said that there would be a gang working in the area which would require power from the switchboard. After the plaintiff told him that he had instructions to strip the pole, instructions were sought about what was to be done and the plaintiff was told to put the power back on. He connected the switchboard and had successfully connected the system to the neutral and the A and B phases when, in the course of connecting the C phase, he reached across with his right hand, a manoeuvre which resulted in his left shoulder being close to the live wire carrying the B phase. He gave evidence that he was not sure whether he actually brushed against it or whether he was close enough for it to arc across to his body.

[5] He gave evidence that in any event he received an electric shock. His hand spasmed onto a live piece of apparatus. He did not fall from the pole because of his harness. After a period which he was not able to recall his contact with the wire ceased. He climbed down the pole and felt ill. His assistant, Mr Oliver, made inquiries about getting an ambulance but in the end he was driven by the assistant to Inglewood District Hospital. After being detained for a couple of hours, during which period his heart was monitored, he was allowed to leave. He had also been required during the course of the trip to do work at Wallangarra and they worked there for the next three days although the plaintiff says he was in pain and distressed. Mr Oliver was not watching when the accident happened, but heard the plaintiff call out and say he had received a shock.

[6] On 26 May 1995, on his return to Toowoomba the plaintiff met Mr Coss and Mr Hammermeister, superiors of his in Toowoomba, about the incident. In consequence of his complaint, memoranda referring to the fact that there was no firm policy concerning work on live wires and directing that work not be done unless the power was turned off were issued.

[7] The evidence established that the understanding prior to the incident was that where possible the power should be turned off before working on wires but if that was not practicable the work could proceed on live lines. The evidence also established that it was part of normal training to work on live wires, but safety equipment in the form of low voltage mats (which insulated the wires if placed over them) had never

been provided. At times there had been inquiries about whether such mats could be made available but all that anyone ever remembered seeing were mats that were stiff, cracked, and therefore useless. In any event, they were not used by the workers. Evidence from employees and former employees Mr Rae, Mr Love, and Mr Neville was to similar effect to the plaintiff's with regard to the fact that there was no direction not to work on energised lines and as to the fact that low voltage mats, at least in workable condition, were not provided. Mr Rae said that he improvised by using potato sacks if he was working on energised lines.

[8] The possibility existed of asking the relevant electricity authority to temporarily turn the power off while the work was done. There was evidence that there was a system involving a written request and written reply from the electricity authority to be followed in that regard but the plaintiff did not regard it as part of his responsibilities to make such arrangements.

[9] When the plaintiff was examined at Inglewood Hospital there were no visible signs of his having suffered an electric shock. The plaintiff's case is that as a result of the injury he developed post traumatic stress disorder (PTSD) which persisted to an extent that he could not work in connection with electricity. I am satisfied that the plaintiff suffered an electric shock of a degree sufficient to cause him fright and to contemplate and reflect on what the outcome may have been had it been more severe.

[10] The extent to which the diagnosis of PTSD is correct is in issue since Drs George Blair-West, Gary Persley and Peter Mullholland (all psychiatrists) support a diagnosis of post traumatic stress disorder, whereas Dr Varghese (also a psychiatrist) was of opinion that the plaintiff developed an adjustment disorder with anxiety and mood symptoms in the immediate aftermath of the incident. According to Dr Varghese, there was a marked phobia of electricity following the episode which went on to become major depression which had to be understood in conjunction with constitutional and personality factors, adverse developmental history and current circumstances including issues to do with the breakdown of the plaintiff's marriage and the accident and its aftermath. He concluded that following remission and apparent good functioning for a number of years, there was evidence of recurrence of an episode of depression. He said that while the reason for it was not clear the plaintiff had recurrent major depression. It will be necessary to analyse the medical evidence in a little more detail later.

The plaintiff

[11] The plaintiff had worked for Queensland Rail for about 17 years prior to the accident. He gave evidence that he had various skills as a rigger, dogman, communications linesman and as a power linesman. At the time of the accident he was classified as a section linesman. He gave evidence that with that range of experience and the emphasis on multi-skilling he intended to continue in the employment of the defendant.

[12] However, there were hints of dissatisfaction on his part in the evidence. He gave evidence that he had been relieving in the position that he occupied for about 4 years. He had made representations on many occasions to have the position filled on a permanent basis. About 12 or 18 months prior to the accident he had in fact suggested that if steps were not taken to have the job filled on a permanent basis he

would take voluntary early retirement. However, his subsequent formal application for voluntary early retirement was not accepted. He said that even if it had been accepted, he had the right to decline and would not have accepted it.

[13] In February 1996, at a time when he could not bring himself to go back to work because of his fear of electricity and the consequent emotional state that thinking about it induced, he took voluntary retirement. He said that he applied for it because he knew he would not be able to go back to work and that it provided a source of income. It was not the case that his employment was terminated because of the accident. It was an offer that was made for the purpose of downsizing by Queensland Rail. Nevertheless, I am satisfied that the inability to return to the kind of work which he had been doing was a factor in his accepting it. However, a further issue in this regard is whether irrespective of that, he may in any event have ceased his employment with Queensland Rail at some future time, notwithstanding his evidence that he intended to work for it until retirement.

[14] The plaintiff had been interested in first aid for some time prior to the accident. He had obtained a qualification as a first-aid trainer through Queensland Rail Ambulance Corps. He became an instructor after several years and after working in a voluntary capacity in that regard with the defendant, graduated to doing paid work teaching first-aid, pole top rescue and the like. Towards the end of 1995, after the accident, he began to work with St John's Ambulance on a part-time basis training groups of people. He said that he found it fairly traumatic at the start. In early 1996 he took the voluntary early retirement from Queensland Rail. In 1997 he began to do part-time work for a company that provided first-aid at sporting and community events.

[15] In early 1998 he began working for a company that sold first-aid kits and provided first-aid training to companies and the public. He engaged in part-time work servicing the company's customers in the Toowoomba area. In late 1998 he became aware that a different company involved in the same kind of business was on the market. He did not feel capable of running it himself, but friends of his wife were interested in acquiring it. They had no expertise in first-aid supplies. The plaintiff entered into an arrangement with them under which he would work for them fulltime, doing sales work and first-aid training. Principally for tax effectiveness, his earnings were paid to a family trust. His wife performed paperwork and did some cleaning of items used by the plaintiff in his training courses.

[16] This work continued until September 2001 when he collapsed at work and suffered an episode of emotional disturbance. Although he contemplated the possibility of returning to work with the company a few months later, a dispute over his level of remuneration which had been raised intermittently on previous occasions developed again and according to the plaintiff his employment was terminated. There is no evidence to the contrary of this. He said that he was told that because of his moods he was upsetting clients and making it difficult for those involved in running the company and that it was better that he not return to work.

[17] His relationship with his wife deteriorated from about September 2001, according to his evidence, and they separated in November 2001. (As will appear later there was some evidence in what he told medical practitioners of disharmony extending over a significantly longer period than this).

[18] About a month after he and his wife separated, a woman whom he had known for some years who said she also suffered from depression moved in with him, having done so with the agreement of her husband from whom she had recently separated. She described the relationship as "a very good friendship" in which they gave each other emotional support, not a romantic relationship.

[19] The overall picture was that after the accident there was a period of about 2 years where he was only in part-time work. Then he went back to full-time employment until he suffered the episode in September 2001. After that he did part-time work rendering first-aid at sporting events. He was unsure if he would be able to undertake full-time work, although he would like to be able to do so. Given the plaintiff's stable work history and my assessment of him while giving evidence, I do not doubt that he will work to the best of his ability in future, once the litigation has finished. He said in his evidence that he was uncertain whether he would be able to teach first-aid again because he was not sure that he could impart the information successfully having regard to his problems. He said that had the accident not occurred he would have stayed with Queensland Rail until his retirement.

[20] In addition to the evidence so far related about his work after the accident, it was also established that he had for a period of at least some months done lawn mowing. He advertised his availability with a sign on his utility and attracted custom in that way. There was a significant cash component in this activity and it was not declared in any of the documentation relating to his earnings, although it was mentioned to some of the medical practitioners by way of history.

Medical issues

[21] There was some exploration of his pre-accident health. In this regard the plaintiff's recollection of detail was not good. There was evidence of occasional chest pains, a hernia operation and other transitory injuries and ailments. There was in my opinion nothing which would significantly shorten his working life in those respects. He also had an unhappy childhood. He had an alcoholic father who was prone to emotional and physical abuse and he had been abused by an older brother although he had not dwelt on it until the problems associated with the accident occurred. This family background was set in the context of whether the plaintiff had a tendency to depression prior to the accident. There was evidence that for periods, but not continuously, he had consumed alcohol to the extent that he felt that he should cut his consumption back because it had reached problem proportions. He explained that when he was working away from home for extended periods the only form of relaxation was usually to go to the hotel with workmates and drink for extended periods.

[22] There was particular focus on an occasion when certificates were issued by Dr Thrupp and his locum Dr Henderson in successive weeks in March 1987 certifying that the plaintiff was unfit for duty from 24 March 1987 until dates in early April 1987 because of "acute dyspepsia" and "nervous dyspepsia" respectively. There was also a letter from Dr Thrupp dated 5 March 1987, produced from the defendant's records, in the following form:

> "This is to certify that this man, in my opinion, is suffering from depression and acute nervous dyspepsia.

> In my opinion, being away from home so much contributes to this and I must strongly recommend that his employment be adjusted so that he can live at home 7 days a week."

[23] Dr Thrupp had passed away by the time of trial. Nor was Dr Henderson called to give evidence. The plaintiff had no specific recollection of the occasion, rather surprisingly since the letter sought a major adjustment of his employment. There was some dispute whether the description of the cause of the disability in the two certificates necessarily related to an illness of a depressive kind. The obvious conclusion from the sequence of the letter of 5 March 1987 which describes a condition of depression and nervous dyspepsia and the certificates that the plaintiff was unfit for work because of nervous dyspepsia or acute dyspepsia is that the plaintiff was suffering from depression of some degree and subsequently became in need of sick leave because of its consequences. However, as the period of the episode is quite short it is necessary not to over-estimate the depth of the condition in the absence of further explanation. It may be observed that as the years have passed, the terms used in the certificates have become unfashionable, which provoked some debate among the doctors as to what they implied.

[24] Dr Persley, a psychiatrist who began to treat the plaintiff in June 1995, gave a report dated 29 August 1995. He diagnosed PTSD with secondary depressive symptoms. He also diagnosed phobic anxiety associated with his work. Initially, he had tried to treat the plaintiff without medication but when he developed features of a major depressive disorder the doctor prescribed an anti-depressant. He formed an opinion that the plaintiff would not be able to return to work as a power linesman. He also expressed the view that there would be a less complicated and probably more rapid rehabilitation if he were to find employment outside Queensland Rail.

[25] Treatment with the anti-depressant ceased about the middle of 1996 but by September 1996 it was necessary to prescribe another anti-depressant because of the return of symptoms of anxiety with some features of PTSD. In a letter of 20 November 1996 referring him to Dr Andrews, a medical practitioner with an interest in electricity because of his previous career as an electrical engineer, Dr Persley noted that in September 1996 the plaintiff had said he was considering marital separation. In January 1997 he also referred the plaintiff to Dr Blair-West, a psychiatrist who practises a technique known as eye movement desensitisation and reprogramming (EMDR), a form of therapy which appears to have proponents and those who are sceptical about it. Fortunately, it is not necessary for me to try to adjudicate on that controversy to dispose of the case.

[26] Dr Blair-West agreed after his initial consultation with the plaintiff that he had PTSD. In a report of 14 May 1997, he described a phobic response to electricity. Dr Blair-West also stated that the plaintiff had "no psychiatric history prior to the accident". He also noted that the plaintiff displayed anger towards his employer because he felt that it had failed to support him following the accident. (It is convenient to note here that in his evidence the plaintiff said that when he realised in settlement negotiations in 2000 that the defendant was disputing liability, he became very upset and scared).

[27] In the report of 2 October 1997 he said that the plaintiff reported in May 1997 that he was functioning at 85% level. His confidence had not returned to its previous level but he was no longer suffering nightmares and flashbacks about the accident.

In August 1997 there was an increase in anxiety response to powerlines but at the end of September the plaintiff had said he was almost 100% of his old-self. Dr Blair-West predicted "full recovery" from his problems and advised the Workers' Compensation Board on 17 December 1997 that he would expect the plaintiff to remain in complete remission as long as he did not experience any traumatic situations that too closely emulated his original trauma. He said that there was "no permanent impairment of significance".

[28] On 24 December 1997 he repeated that assessment to solicitors then acting for the plaintiff. He said the plaintiff had almost complete resolution of his PTSD. The risk of recurring problems was not significantly greater than that of other people.

[29] On 5 December 2001 in a report to the plaintiff's present solicitors, following the setback in September 2001, he said that the plaintiff's symptoms in the recurrence were components of the condition created by the 1995 incident. He said that when the plaintiff re-presented to him, the plaintiff saw the beginning of the deterioration as dating back to the end of 2000 when he was distressed to find that the defendant was not prepared to accept his claim and that they were trying to blame him for the accident. He thought that this was a betrayal. Dr Blair-West said it was not unusual to see sufferers of PTSD relapse when they receive messages of this kind. He repeated that the plaintiff's state at the time of report represented an exacerbation of the PTSD that he sustained in 1995 and that even though the nature of the new trauma was different from the original one they were bound together. The doctor's notes at this time record a statement made by the plaintiff that he had not loved his wife for a long time.

[30] The plaintiff attended on Dr Mulholland, a psychiatrist, on 16 July 2001 and 23 August 2001. In his report dated 28 August 2001, Dr Mulholland concluded that the plaintiff had initially developed PTSD and then went on to develop major depressive disorder. His assessment was that he seemed to have been precipitated into psychiatric illness by the direct and indirect effects of the accident. He said that the plaintiff did not have any pre-existing condition. His premorbid personality was reasonably normal. He said there was nothing to suggest any pre-existing increased vulnerability, susceptibility or previous disposition to psychiatric illness. He thought that the treatment had gone as far as it could and that the plaintiff's psychiatric status had plateaued at below his premorbid state.

[31] He expressed the opinion that at the time of the report the plaintiff had mixed somatoform disorder with partial features of hypochondriasis, conversion disorder and chronic pain disorder in addition to partial residual PTSD and major depressive disorder. He believed the lack of finalisation of the civil proceedings would be aggravating his condition and that in the long run finalisation of the proceedings would result in some improvement of his symptomatology and his disability. He predicted a 50% chance of relapse of depression in the 5 years following the report. As to the long term he thought the condition would remain much the same. It would not stop him working, but it would lower his working ability and quality of life.

[32] In his report of 13 February 2002, Dr Mulholland refers to a conversation with the plaintiff concerning the breakdown in the previous September. According to what the plaintiff told him, by the time of the conversation in February his symptomatology was not as severe as it had been immediately following the

breakdown. The loss of the plaintiff's job was referred to and the final breakdown of his marriage had aggravated his psychological condition. Dr Mulholland said that the marriage breakdown was a consequence of the pre-existing psychiatric condition and in turn an aggravation of that condition. A relapse so soon, in view of his previous assessment of risk was a bad sign. It was highly likely that relapses would occur every 2 to 3 years. His employability would not be lost but seriously impaired.

[33] Between the two reports, there was another dated 22 November 2001 where Dr Mulholland comments on Dr Varghese's report. In particular he accepted that a history of former excessive intake of alcohol may be consistent with underlying personality problems and/or potential towards development of depression, and that the view that the plaintiff had a constitutional tendency towards depression was arguable. Dr Mulholland had also been unaware of Dr Thrupp's letter.

[34] Dr Varghese reported on 15 October 2001, after seeing the plaintiff on 29 August 2001 which was prior to the September breakdown. The plaintiff described himself as stressed by legal issues and worried about his future and finances. He said that although he had improved he was not emotionally normal. He said that he had had a recurrence of symptoms recently and was scared of "going down hill". With respect to alcohol consumption he said that he used to have a problem with drinking when working away from home. He gave up drinking but resumed soon after the accident but again stopped. Dr Varghese raised the question of whether this was indicative of masking a depressive illness by use of alcohol.

[35] Dr Varghese reviewed the reports of other medical practitioners and concluded that the plaintiff suffered recurrent major depression. After suffering from a significant adjustment disorder with anxiety and depression he developed a major depressive episode following the accident at work. He was in the early stages of a recurrence of depression after a period of remission.

[36] Typically in recurrent major depression several factors were likely to be of importance, according to the doctor. Some constitutional predisposition was invariable. Dr Varghese said that personality factors are important but he was not aware of any particular personality vulnerabilities in the plaintiff. Adverse developmental circumstances would make a person particularly prone to develop a depressive illness.

[37] The episode of depression following the adjustment disorder as a result of the accident was precipitated by the accident. The subsequent episode from which he recovered (treated by Dr Blair-West) could be attributed to the accident with influencing factors being the loss of his occupation and the stress on his marital relationships because he had been previously depressed. Dr Varghese said that the phobic disorder in regard to electricity was solely the result of the accident. He observed that it was likely that the plaintiff was beginning to experience a recurrence of major depression and suggested that he should consult a psychiatrist promptly. He also said that resolution of the medico-legal issues would be to his advantage in responding to treatment.

[38] In his report of 29 April 2002 Dr Varghese reviewed more reports and notes of medical practitioners and expressed the opinion that overall the additional information confirmed his original impression that the principal clinical issue was

recurrent major depression. He said that the plaintiff had a propensity, for constitutional reasons, to develop episodes of major depression. He accepted that the accident brought about a "recurrence of major depression". He regarded the evidence of alcohol use in the past as a reason to think that previous episodes of major depression would have been covered up by alcohol use. He noted the cycle of remission after treatment by Dr Persley, recurrence which was treated by Dr Blair-West and remission following that treatment. Dr Varghese summed-up his opinion in the following way:

> "Although his disorder is largely of constitutional origin and more over the developmental history would make him particularly vulnerable to depression within a multi factorial model it would have to be accepted that the accident has had some impact on the recurrence of depression which in turn would be playing a part in the ongoing dysthymia if only for the secondary effects. There are however a multiplicity of other causes including the marital situation, family problems, work problems and chronic illness unrelated to the accident."

[39] It should be recorded that I have had regard to the reports and evidence of Dr Andrews, but I gained no additional assistance from that evidence over and above what is in the reports of the psychiatrists. The reports of Dr Tucker and Dr Cameron were uncontroversial and peripheral to the major issues in the trial.

Findings on medical issues

[40] There is no real dispute between the medical witnesses that the accident caused the plaintiff to suffer serious consequences. The classification of his condition and the extent to which the consequences of the accident will endure are in issue. Another issue is whether the plaintiff was more prone than average to suffer recurrent depressive illnesses in any event. A good deal of the cross-examination of the doctors was directed to these issues. There is also a commonly held view amongst them that the fact that the claim has been fought by the employer has been a component of the plaintiff's ongoing problems. Vindication of his position should remove that element when the proceedings are over.

[41] There is clearly some evidence in the form of a letter written by Dr Thrupp in 1987 that the plaintiff was in a mood which persuaded him to write it. However, there is no clear evidence of the level of seriousness of the condition and it was of quite short duration, as far as the evidence extends. There is no evidence of a recurrence of a similar kind of condition between then and the accident. I accept that excessive drinking may in some cases be engaged in to mask an underlying depression. However, it is less easy to draw the inference that the two conditions coexist where there is an explanation that the heavy drinking was done out of boredom in a social context away from home. Dr Mulholland made this point in his evidence. He also accepted that the plaintiff's developmental background put him at slightly elevated risk of developing depression than the average person. That evidence broadly accorded with Dr Varghese's.

[42] The best view of the evidence is that it is not satisfactorily established that the plaintiff was in a similar state of depression in 1987 to that which he developed after the accident. I accept that there was some disturbance of mood in 1987 and that the plaintiff was a little more prone to develop depression than the average

person. Reference has previously been made to aspects of dissatisfaction with his employment. Dr Thrupp's letter is another example, at the least.

[43] There seems to be no dispute in the evidence of the medial practitioners that the episode treated by Dr Persley and the first of the episodes treated by Dr Blair-West were consequences of the accident. With respect to the September 2001 episode its causation was more complex. From what he said to the medical practitioners, it is apparent that the plaintiff was emotional about the litigation at that time. It is also apparent from what he told the medical practitioners at various times that there was a long standing risk that the marriage would break down in any event. It did so during the course of this episode. The plaintiff also lost his job. The best view of it is that notwithstanding its complexities the episode was the direct consequence of the effects of the accident. However, because of the particular factors which were there at the beginning of the episode or developed during it a coincidence of all of those factors is unlikely to occur again in the same way. The litigation factor should be removed once the proceedings are over. The other two are unlikely to be replicated in the same way as in the present instance. This in my view bears on the question of the frequency with which it may be expected that recurrences will occur. One continuing area of stress may be relationships with his children which have been disrupted by the separation and the presence of his friend in what had been the matrimonial home.

[44] Another issue that spilt over into the medical evidence was the implications to be drawn from the plaintiff's use of graphic photographs of victims of electrocution as part of his presentation when conducting first-aid lectures. The principal argument of the defendant was that this was evidence of a marked lessening of the plaintiff's phobic reaction to electricity and things associated with it.

[45] It became a medical issue because the plaintiff said he had begun to use the photographs as a form of therapy to get himself over the problem. None of the psychiatrists disagree that to do so may be beneficial. I am satisfied that the plaintiff began to use the photographs with that as a motive. I am also satisfied that he still has residual fears over situations concerning electricity but at a substantially lower level then originally. However, he will not be able to work in an occupation which relates to electricity.

[46] I will assess damages on the assumption that there will be some occasions when there is a recurrence of an episode which affects his capacity to work and which can be treated as a consequence of the condition caused by the accident. I will also have regard to the slightly elevated risk that he may have suffered depression in any event.

Findings concerning liability

[47] With regard to liability, I am satisfied that the defendant breached its statutory duty to the plaintiff by not providing appropriate safeguards against injury and was negligent in failing to provide adequate means of protection when a worker was working in proximity to live wires or to have in place clear instructions not to work on live wires without taking steps to have the power turned off, if that was possible. The evidence supports the conclusion that working on live wires was tolerated prior to the present accident. Appropriate safety equipment was not provided. To the extent that it was part of the defendant's case that the plaintiff should be found

guilty of contributory negligence by reason of his working unnecessarily in the proximity of live wires, I am satisfied that the plaintiff believed that his instructions were to take all equipment belonging to the defendant from the pole. He acted in pursuance of what he believed to be the instruction. I am not satisfied that any instruction was given to him that should have been construed by him as only an instruction to disconnect the box itself. I am satisfied that there was no contributory negligence on the part of the plaintiff.

Damages

[48] With regard to general damages I am satisfied that the plaintiff has suffered substantially as a result of the accident. With regard to the future I consider that there is a probability that the effects of the accident will diminish once the litigation has finished although it is by no means certain that they will disappear entirely. I will award $35,000 under this heading. Interest at 2% on $25,000 for past loss over 7 years is $3,500. Past economic loss, although the methodologies of the accountants are different, is almost identical. The sum of $70,500 will be allowed in this regard. Interest of $17,500 is allowed.

[49] With regard to lost superannuation, I prefer the methodology based on the particular scheme of which the plaintiff was a member, especially as it does not appear to have as many uncertainties as non-public sector schemes. There is an element of uncertainty whether the plaintiff would have remained employed by the defendant for the whole of the relevant period but since there is no clear indication that he would not have done so notwithstanding his threatening to take redundancy and his concern that the position he was occupying was not being permanently filled, and the difference involved is small, I propose to allow $10,500. Since the future is subject to more doubt, I will allow 9% of future economic loss.

[50] With regard to future economic loss, when the plaintiff was working fulltime in the job he lost in December 2001, he was earning more than he was earning from the defendant. While he lost that job, the evidence suggests that work is available in connection with first-aid services. It is uncertain whether the plaintiff could obtain an employed position at the same remuneration in the short term, or whether, if he felt he could be self-employed, he could generate that level of income immediately. Consistently with my findings, there will probably be periods when his working capacity is diminished because of relapses due to the condition developed after the accident. The evidence does not establish that there is a substantial possibility that his earning capacity will be destroyed or that it will be unable to be exercised for long periods because of the consequences of the accident. In my judgment, they will probably be intermittent and relatively short. I have taken into account that conclusion of the litigation will remove a factor which appears to be an important aggravating feature in the plaintiff's condition.

[51] Precise calculation of an appropriate sum for future economic loss is not possible in a case like this. Allowing for my view of the probabilities and allowing for contingencies, I will allow $80,000. Lost superannuation will be assessed at $7,200.

[52] Special damages are agreed at $17,777.84. The *Fox v Wood* component is agreed at $2,818.00. There will be occasions when the plaintiff will need medication and treatment, for which I allow $7,500. Past care is, as the evidence demonstrates,

modest. I allow $500.00. Interest on it is $175.00. No future care was sought. There is a sum representing the refund due to WorkCover of $25,779.13 to be deducted in arriving at the judgment sum.

[53] The following is the summary of the damages:

General damages	35,000.00
Interest	3,500.00
Past economic loss	70,500.00
Interest	17,500.00
Superannuation (past)	10,500.00
Future economic loss	80,000.00
Superannuation (future)	7,200.00
Special damages	17,777.84
Fox v Wood	2,818.00
Future medical	7,500.00
Past care	500.00
Interest	175.00
	252,970.84
WorkCover refund	25,779.13
	$227,191.71

[54] I give judgment for the plaintiff in the sum of $227,191.71. Unless submissions to the contrary are made in writing to my Associate within 7 days, the defendant is ordered to pay the plaintiff's costs including reserved costs if any, to be assessed.