

SUPREME COURT OF QUEENSLAND

CITATION: *Stewart v Continental Ace Services Pty Limited* [2004] QSC 139

PARTIES: **ANTHONY WILLIAM STEWART**
(Plaintiff)
v
CONTINENTAL ACE SERVICES PTY LTD
ACN 056 396 760
(Defendant)

FILE NO/S: S145/2002

DIVISION: Trial

PROCEEDING: Claim for Damages

ORIGINATING COURT: SUPREME COURT

DELIVERED ON: 13 May 2004

DELIVERED AT: TOWNSVILLE

HEARING DATE: 27-29 April 2004

JUDGES: CULLINANE J.

ORDER: **There will be judgment for the plaintiff against the defendant in the sum of \$356,623.31 with costs to be assessed on an indemnity basis.**

CATCHWORDS: PERSONAL INJURIES – BREACH OF CONTRACT – NEGLIGENCE – BREACH OF DUTY – where plaintiff injured back during course of contract employment – where plaintiff attempted to lift fallen steel plates from Eimco - whether defendant failed to provide a proper system of work and to give adequate instructions as to the way in which the work was to be carried out.

DAMAGES – QUANTUM OF DAMAGES – CAUSATION - where plaintiff sustained subsequent injury during employment six years later – whether there was a connection between the earlier injury and the subsequent prolapse – credibility of plaintiff – whether plaintiff exaggerated condition.

COUNSEL: Mr Harrison for the Plaintiff
Mr O'Sullivan for the Defendant

SOLICITORS: Macrossan & Amiet for the Plaintiff
Bruce Thomas Lawyers for the Defendant

- [1] The plaintiff claims damages for personal injuries arising out of an incident which occurred in the course of his employment with his then employer, the defendant, on 10 September 1995.
- [2] The plaintiff was born on 9 March 1969.
- [3] These proceedings were instituted out of time but an order extending the limitation period has been made. Application was made on 30th October 2002 and the order was made on 10th February 2003.
- [4] The defendant does not contest a finding of liability but seeks a finding of contributory negligence against the plaintiff. There is a substantial dispute on the medical evidence as to the nature of any injuries sustained by the plaintiff on 10 September 1995, and whether any injury sustained by him on that day continues to play any role in his current condition and if so the extent of that role.
- [5] The incident occurred whilst the plaintiff was working for the defendant at North Goonyella Coal Mine. The defendant's business involved the installation of and extraction of conveyor systems and the repair and maintenance of such systems.
- [6] The plaintiff described himself as an underground labourer. His work was mainly performed underground. He had previously worked in the coal industry for about a year and a half and before that had worked as an underground miner at Mount Isa.
- [7] He was instructed by his supervisor, one Brendan Burke, to pick up two steel plates which were in a yard on the defendant's premises and take them to another part of the defendant's premises.
- [8] To perform this task he was using an Eimco. A photograph of this type of machine appears in figure 2 of Exhibit 2A, a report of an engineer Mr. Kahler.
- [9] The photograph is not of the precise machine but is of a similar machine.
- [10] The difference however between that machine and the machine which the plaintiff had been provided with was that there were forks on the front of that machine to enable the plaintiff to carry out lifting work.
- [11] The precise weight of the plates cannot be known because there had been parts cut from them for various purposes. However it seems clear that the weight of the plates in their unaltered state was a little under 200 kilograms.
- [12] The plaintiff says that he was given no instructions about how the work was to be performed.

- [13] The plates had a width of about an inch and were approximately two metres long and a metre wide but as I have said had had pieces cut from them.
- [14] The plates were lying on the ground and it was necessary for the plaintiff to move the plates onto the forks.
- [15] His evidence, which I accept, was that there were items of equipment and materials spread over the ground in the area where he had to collect the plates. This limited his capacity to manoeuvre the Eimco.
- [16] The plaintiff in order to manoeuvre the plates onto the forks placed a chock of timber on the ground. He lifted the edge of one of the plates and slid it and pushed it until it was on the forks. He says he placed it against the back of the forks. The second one which had been under the first one when the plaintiff first commenced this manoeuvre was then picked up by him and placed on its edge and then tipped over onto the plate already on the forks.
- [17] The plaintiff got into the machine and proceeded to reverse out of the area where he had picked up the plates but in the course of doing so drove over some items which were on the ground with the consequence that the plates slid to the left and to some extent forward as one looks at the forks from the operating position on the machine.
- [18] Exhibit 2A purports to show what the position with the two plates was in relation to the forks but the plaintiff in another document (Exhibit 25) has drawn what he says is a more accurate position of their location.
- [19] The bottom of the two plates remained partly on one of the forks whilst the other had slid somewhat further along and whilst still being partly on the bottom plate was clear of the forks.
- [20] The plaintiff left the machine and inspected the plates whilst deciding what to do.
- [21] He got back into the machine and slewed the forks somewhat to the left. They have the capacity to be moved laterally for some distance. The consequence was that the left hand fork was thus placed under the centre of the bottom plate.
- [22] The plaintiff says that he tilted the forks back a little and again got a piece of timber which he was able to place under the bottom plate. He got back into the machine and tilted the forks somewhat forward and downwards so that both plates were at this time higher than the forks. This enabled him to lift and slide the uppermost of the two plates onto the forks and then to do the same with what had been the bottom of the two plates but which would become on the forks the uppermost of the two plates.
- [23] The task involved picking up the edge of the steel plate and sliding and pushing it onto and along the forks.
- [24] He placed himself at the back of the plates away from the forks for the purposes of manhandling the two plates back into position.
- [25] Having successfully done this with the first plate, he then picked up the second plate and commenced to lift and slide it onto the forks when he felt a pain across his

- lower back. He describes it as “a sharp pain --- like a pinching - like electric shock type thing generating down the back of my leg.”
- [26] He says he also felt “a bit of a slight pinch” in the groin. The leg that he referred to was the right leg.
- [27] It is not possible to be precise about the weight which the plaintiff would have borne for the purposes of carrying out this exercise. His estimate from his experience in lifting weights is that he bore a weight of approximately 60 to 70 kilograms. There is no real challenge to his opinion in this regard.
- [28] I accept the opinion expressed in the report of Mr. Kahler that the weight which the plaintiff was lifting at this time posed in the circumstances a significant risk of injury to him in accordance with well established criteria and he should not have been required or permitted to lift this weight.
- [29] Mr. Kahler also suggested a means by which the plaintiff might have been able to lift the load without the necessity for anyone to physically manhandle the steel plates onto the machine.
- [30] Obviously an alternative would have been to provide the plaintiff with assistance for the purposes of having the weights placed upon the machine.
- [31] It would seem that the defendant had a workforce in the order of about ten employees at the time who would have been on site but the plaintiff says that he thought that he was the only person on the surface at that time.
- [32] It seems that the plates were to be taken to a shed where a co-employee, Walker, was working. The plaintiff says he does not know where Walker was at that time and had been told to put the plates in “the boilermaker shed”. I take this to be a reference to where Walker walked.
- [33] It was common ground that the apportionment legislation which was enacted following *Astley's case* applied.
- [34] For the defendant it was contended that the plaintiff failed to advert to the risk of injury to himself in lifting such a weight and ought to have sought assistance in doing so.
- [35] The plaintiff acknowledged that he did not turn his mind to any risk of injury to his back.
- [36] The defendant called no evidence on the issue of liability.
- [37] According to Walker he was in the workshop in the contractor's yard at the time. This it would seem is about 15 to 20 metres away from where he saw the plaintiff trying to get off the ground following his injury. He saw that the plaintiff was in a good deal of pain and Walker says the plaintiff was in a position where “I couldn't get him up or put him back down”.
- [38] I am satisfied that the plaintiff had been given no instructions as to how he was to perform the work particularly insofar as placing the plates on the forks was

concerned. It was essential that the plaintiff do so for the purposes of moving the plates and the risk that having placed them on the forks they might be displaced given the circumstances of the yard and again have to be manhandled onto the forks was plainly foreseeable.

- [39] To use Mr. Kahler's words in Exhibit 2A "it is entirely predictable that in the absence of appropriate training people will lift to the limits of their muscle strength (as is likely to have been occurring in this occasion) with the associated high risk of spinal column damage".
- [40] It is said that the plaintiff should have averted to the risk of injury and made some judgment about the lift. The plaintiff says he did not turn his mind to this and I do not think this is surprising given that he was going about his task in a way which seemed to him an appropriate way to do so. I do not think that it was unreasonable for the plaintiff even if he had turned his mind to any risk of injury to have in the circumstances attempted to place the plates on the forks in the way that he did.
- [41] This is not a case in which the risk of injury was so plain that any attempt to lift the plates in the way the plaintiff did was foolhardy.
- [42] Nor in my view was it unreasonable of the plaintiff not to go and seek some assistance from some other employee or employees. He had not been told to do this and I accept he did not know where they were at the time.
- [43] The situation that the plaintiff was placed in was a consequence of a failure on the part of the defendant to provide a proper system of work and to give adequate instructions as to the way in which the work was to be carried out.
- [44] The defendant has not satisfied me that the plaintiff was guilty of a failure to take proper care for his own safety.
- [45] As I have said the plaintiff was born on 9 May 1969. He left school part way through Year 10 at a Queensland school.
- [46] For a number of years he worked at unskilled positions moving around the State and on at least one occasion he travelled interstate to work.
- [47] According to his quantum statement he worked for a period at the Mount Isa Mines as an underground miner and then worked as a trades assistant and labourer for contractors providing services to the mines at Mount Isa.
- [48] He moved to Mackay in 1992 - 1993 and worked in a number of unskilled positions until he obtained employment with the defendant as an underground miner. His evidence was that he had been employed there for approximately two years prior to the day on which he sustained injury.
- [49] The plaintiff says that he was in good health on 10 September 1995 and was not suffering from any difficulties with his back. He had sustained an injury to his back in 1984 when working at a sawmill. He received Workers' Compensation benefits for two days but did not have any ongoing problems with his back.

- [50] I have already described the incident in which the plaintiff sustained his injury and his evidence as to what he felt at the time.
- [51] In Exhibit 35 (records of the Mackay Base Hospital) there appears beside an entry on 9 September 1995 reference to his having at work "today" lifted a heavy sheet of steel and felt "a click" and then had severe sharp right-sided back pain. Amongst the observations was a reference to straight leg raising being restricted to 30% on the right side and 80% on the left side. He was complaining of feeling numb from his buttocks - lower back down also up the back to the neck.
- [52] There is also a reference: "IMP. -- disc bulge."
- [53] On 2 October 1995 there is a note that the plaintiff was requesting a Workers' Compensation clearance and return to work. The note goes on, "Now settled completely - back to work."
- [54] In fact the plaintiff's return to work was delayed because of an industrial issue and he did not return until approximately two months or so after he had received a clearance.
- [55] He worked for the defendant for approximately six months after his reinstatement when he then obtained work with another company providing services to mines. He worked in fact for a number of different employers in this field.
- [56] It is the plaintiff's case that he was able to cope with the various jobs which he undertook. These involved quite heavy work. He says that occasionally he would experience a pain down the back of his right thigh extending to his knee. This he says was something which occurred about five or six times a year only and at its worst never caused him to miss anymore than an occasional day or two's work.
- [57] He sustained an injury in February 1999 when a fellow employee fell off a jib above him where he was installing bolts on a walkway. The fall was about two metres. The plaintiff sustained an injury to his neck at this time and also experienced some pain in the coccyx as a result of the weight of the impact.
- [58] He attended the Caneland Medical Centre (see Exhibit 37) a few weeks later. At this time he was complaining of some tenderness in the coccygeal area. His primary complaint appears to have been of cervical spinal pain.
- [59] Reference is made in the notes to:
- "P/H? lumbar spine lesion? 1995."
- [60] The notes also record:
- "Very keen on not taking time off and not putting in a WCQ claim."
- [61] On 11 March 1999 he attended the Blackwater Hospital following an incident in which he was struck on the coccyx by a hook from a chain. There appears to have been an injury to his neck on 3 April 1999 and as a result of this he spent some time on Workers' Compensation benefits and some time on light duties until June 1999.

[62] The plaintiff attended at the Blackwater Hospital on 2 June 2000. At this time he is recorded as complaining of pain radiating behind his right knee and his right lower back. The notes include the following:

“Pain present for past two months becoming worse last two days.”

[63] He attended at the Bucasia Road Medical Centre on 7 June making similar complaints. It is recorded that by 23 June his back had settled completely “no problems at all”. He had spent some time on light duties following this incident but he did not miss any work. It is not suggested that the symptoms which led to his attending the Blackwater Hospital and the Bucasia Road Medical Centre were produced by any incident of trauma.

[64] In January 2001 he fell and landed on his coccyx and attended at the Bucasia Road Medical Centre again. He was authorised to return to lighter duties on 16 January 2001 (the incident occurred on 4 January 2001) and says he was able to return to his normal duties fairly quickly.

[65] The event which caused the plaintiff to cease work finally occurred on 13 November 2001. It is described in Exhibit 1 in paragraphs 43 to 48.

[66] Whilst it involved some twisting on his part at the time that he experienced the onset of pain the plaintiff was not lifting any significant weight at the time. It is described by the medical witnesses as “trivial” or “minimal”. The general effect of the medical evidence is that this incident was the occasion of rather than the cause of the prolapse of the disc at L5 S1 which was identified when a CT scan was performed on 21 November 2001. It is described in Exhibit 3 as “right sided paracentral disc protrusion L5 S1 level with mass effect on the forming right S1 nerve root.”

[67] Dr Stewart his general practitioner at the time referred him to Dr Coroneos a neurosurgeon of Brisbane who he saw on 6 December 2001. The plaintiff was complaining of severe leg pain which was diagnosed as “severe right sciatica due to disc prolapse”.

[68] Following discussions with Dr Coroneos he underwent a discectomy, laminectomy and facetectomy on 10 December 2001.

[69] Dr Coroneos reports that the plaintiff made an excellent recovery after surgery and mobilised without complication with no continuing leg pain and no neurological deficits.

[70] However when he was seen again by Dr Coroneos on 15 May 2002 he was complaining of lower back pain aggravated by standing and also some associated right groin pain. There was some continuing numbness in the right buttock and intermittent pain in the right leg.

[71] The plaintiff says that he had a return of pain into his right groin and down his right leg to the knee a couple of weeks or so after the surgery.

[72] Dr. Coroneos said that the surgery was successful with there being no evidence of any residual or current disc protrusions and there had been no evidence of any

neurological abnormality on examination. He could not explain the return of the plaintiff's symptoms.

- [73] It is common ground that the plaintiff is not now capable of working in the heavier types of work associated with underground mining following his operation.
- [74] He makes a number of complaints of restrictions in his movement. These are outlined in exhibit 23A a report of Dr Weidmann, a neurosurgeon. It appears he made similar types of complaints when he saw Dr Cook, an orthopaedic surgeon on 19 April 2004 although I do not have the full details of his complaints to Dr Cook. He also made such complaints to Dr Licina, an orthopaedic surgeon which appear in Exhibit 22B.
- [75] In his statement the plaintiff sets out his present complaints. He says he has constant pain in his back which never goes away and experiences pinching pain in the groin and pain shooting down the back of his right leg. He says he still gets a spasm in his lower back and his right leg shakes when that happens. The frequency of this has now reduced to something like once a week.
- [76] The plaintiff has not worked since the incident in November 2001.
- [77] There is a substantial dispute between Dr Cook and Dr Coroneos on the one hand and Dr Weidmann and Dr Licina on the other as to the nature of the injury sustained in September 1995 and any relationship it bore to the prolapse and the plaintiff's present position.
- [78] Dr Weidmann and Dr Licina thought that the 1995 injury was a musculo-ligamentous injury. Dr Licina had initially been prepared to ascribe a small contribution to the prolapse in 2001 of the 1995 incident but later, asked to assume that there had been no symptoms in the right leg until 2000 said that there would be no connection between the 1995 incident and the prolapse. Dr Weidmann had been prepared to allow a minor contribution on the basis that the 1995 incident was but one of many factors causing degenerative change and resulting in the prolapse. This was again however on the basis of ongoing symptoms in the leg.
- [79] There was also a substantial challenge to the plaintiff's credibility. This is relevant in two regards. Firstly, it is said that the opinion of those specialists who link the prolapse to the 1995 incident is dependent upon an acceptance of the plaintiff's evidence that he suffered occasional pain and discomfort radiating into his lower leg from time to time between 1995 and at the earliest 2000 when there is evidence of his complaining of symptoms of sciatica and that the plaintiff's evidence in this regard is not worthy of credit. It is said that this conclusion should be reached upon an examination of the various accounts which the plaintiff has given, the absence of any attendance upon medical practitioners complaining of such symptoms and the history he has given in documents primarily relating to applications for employment. It was also contended that the plaintiff had underestimated the effects of a cervical injury so as to maximise the claim for damages arising from his spinal complaints. Other alleged discrepancies were relied upon.
- [80] In addition it is said that a video which was tendered (and other videos which were not tendered but which are said to show similar activities to those on the video

tendered) show that the plaintiff has exaggerated his disability and has made claims of restrictions in his movements and limitations in his capacities which do not exist and that this should lead the court to adverse conclusions both in relation to his residual earning capacity and also generally upon the issue of credibility to which I have just referred.

- [81] There can be no doubt that the plaintiff is shown on the video (Exhibit 39) engaging in activities which are inconsistent with complaints he made and limitations he asserted to Dr Weidmann and Dr Licina which are related in their reports. It would also seem from what Dr Cook said that when he saw him in 2004 he was making complaints which were inconsistent with what Dr Cook saw on the video.
- [82] The video which was taken in March and April 2004 shows the plaintiff carrying out a variety of activities at a caravan park and doing so without any apparent difficulty. His movements are full and agile. For example, he jumped over a fence three times within a short period. Some lifting was involved in some of the tasks that he carried out.
- [83] The conclusion that he has exaggerated his problems to some of the doctors is in my view unavoidable.
- [84] On the other hand he has made no attempt to hide the fact that he carries out various activities at the caravan park. References to this appear in the report of a psychiatrist, Dr Whiteford (Exhibit 24) and are also to be found in his statement of loss and damage. He also told Dr Cook about it.
- [85] The plaintiff sustained a severe psychiatric reaction to his injuries in 2001 and the resultant disruption to his life. He was diagnosed as suffering from an adjustment disorder with depression. He was prescribed medication which he took for a significant period. (There are reports from Professor Whiteford and Dr Likely, who treated the plaintiff, dealing with his psychiatric problems. Neither was called.)
- [86] Dr Likely outlines the features of his psychiatric condition in his reports. These problems led to the break-up of his relationship at the time. He commenced to use alcohol and marijuana to cope with his problems.
- [87] His condition improved with appropriate intervention and he would seem to have recovered from these problems by and large by the end of 2003.
- [88] Some of the complaints which are plainly unable to be squared with what he appears to be doing on the video were made during the time he was continuing to suffer from psychiatric problems but the evidence does not in my view justify a finding that this condition may explain why he exaggerated his problems. He had overcome these problems by the time he saw Dr. Cook in April 2004.
- [89] I should add that he attributes a change for the better in his situation with his move to the caravan park in late 2003. He sees his activities there as having been therapeutic for him. He has had discussions about acquiring the management of the caravan park but says he is reluctant to take this on because of his lack of experience in conducting a business.
- [90] He does not receive payment for any of the tasks that he performs.

- [91] I am satisfied that the plaintiff presently has the capacity to engage in virtually all occupations except the heavy underground work of a miner or similar work. He has however no experience in clerical or managerial work.
- [92] His continuing neck problems preclude him from carrying out certain tasks underground.
- [93] The picture of the plaintiff at the time of his 1995 incident does not, in my view, suggest a malingerer. Rather it suggests a hardworking man who was in regular employment in heavy physical occupations. It also suggests someone who sought to get back to work as soon as possible after an injury.
- [94] Exhibit 35 records that he wished to obtain a clearance and return to work at the beginning of October 1995 following the injury, the subject of these proceedings. In 2000 when he attended at the Blackwater Hospital and later at the Bucasia Medical Centre it would appear that he had experienced the onset of sciatica for some two months with the onset of more acute symptoms for some two days before he attended the Blackwater Hospital seeking assistance. He is recorded as wanting to avoid having to take time off work following his injury in 1999. The evidence generally is not of a person who made heavy weather of any difficulty he might have had but rather one who wanted to avoid time off work if he could.
- [95] I have already referred to the conflict between the specialists. The defendant, not surprisingly, emphasised the absence of any complaint by the plaintiff of symptoms in his back or right leg between 1995 and 2000 and thereafter until the prolapse in 2001.
- [96] Both Dr Licina and Dr Weidmann thought that if he had made no complaints during this period or had no symptoms then there could be no link between the 1995 incident and what occurred in September 2001.
- [97] Dr Cook and Dr Coroneos both thought for different reasons that the 1995 incident was what initiated the process which culminated in the prolapse in 2001.
- [98] As I understand Dr Coroneos, he thought that the records at the time of the 1995 incident clearly indicated a serious injury and that the straight leg raising limitation on the right side suggested a disk injury. His conclusion was not dependent upon their being ongoing symptoms after 1995.
- [99] Dr Cook's opinion was based upon the absence of any degenerative change in the MRI taken in March 2002 in other parts of the lower spine and an acceptance of the plaintiff's evidence of occasional symptoms in the back and leg after 1995. He thought that the former was inconsistent with a disk prolapse brought about by degenerative processes as suggested by Dr Weidmann and Dr Licina. His view was that such degenerative changes should have been apparent at other levels of the spine also if this was the cause of the prolapse. He thought that the trauma of the 1995 incident had damaged the annulus of the disc and set in train a process which was contributed to by the heavy work the plaintiff performed thereafter and which culminated in the prolapse in 2001. Dr Cook pointed out in court the absence of such degenerative changes in other parts of the spine by reference to the T2 sequence of the MRI which he produced. His observations in this regard were not

challenged by the witnesses for the defendant. He did not think it was surprising that the plaintiff had been able after the 1995 injury to perform heavy work and indeed suggested that this was consistent with what frequently happens in such cases. Dr Cook also thought there was some involvement of the sacro-iliac joint which explains the return of symptoms in the back and leg after surgery.

- [100] These views were expressed against the background of the 2001 incident which seems to have been regarded by all who spoke of it as a trivial or minimal incident which could not of itself have caused such damage.
- [101] Dr Weidmann and Dr Licina disagreed with the opinion of Dr Cook and Dr Coroneos that in the 1995 incident the disc was damaged and that this ultimately resulted in the prolapse. In relation to Dr Cook's opinion each thought that degenerative change could occur at a single level of the spine.
- [102] The defendant contended that the plaintiff's evidence that he experienced symptoms from time to time in the back and leg after 1995 should not be accepted.
- [103] It was said that the first indication of such symptoms was many years later so far as the record is concerned. Reliance was placed by the defendant upon the plaintiff's activities shown on the video as indicating a preparedness to give a false account where it suited him. It was also said that in job applications that he had made no reference was made to any symptoms in his back or leg. The applications (Exhibits 26, 27 and 28) were made in 1998 and 1999.
- [104] In each case the form contained a column of injuries and the plaintiff was asked to tick a "yes" or "no" box. Under the heading "Back pain, sciatica, lumbago, slipped disk" the plaintiff ticked "no". His explanation was that it was well known that any reference to a back injury would be fatal to an application for a job in the mines.
- [105] It was pointed out however that he referred to other injuries. One of these was a neck injury which appears in Exhibit 27. This is the injury sustained in 1999. He says in Exhibit 27, in relation to this "now 100%".
- [106] The credibility of the plaintiff was also attacked on the basis that in his evidence and quantum statement he claims that the injury to his cervical spine in 1999 had cleared up after a couple of months whereas Dr Cook says that he has ongoing symptoms of some significance which restrict him from certain types of work. It was suggested that the plaintiff was seeking to falsify the position with his neck so as to advance the case that his back was the sole cause of any limitations on his capacity to work. However as I have said it is clear that he gave a similar account that his neck resolved in Exhibit 27 at a time before any possibility of a claim for damages could have arisen. He does have some symptoms in his neck but seems to have made relatively light of these.
- [107] So far as the back is concerned, whilst the defendant focussed primarily on the failure by the plaintiff to refer to any ongoing symptoms in his back or leg as he had claimed, it is also clear that he made no reference to the injury to his back in September 1995 which he undoubtedly suffered.
- [108] The salient features then of the case can be summarised:

- [109] (a) The plaintiff was a 26 year old man when he was injured in September 1995. He was engaged in heavy physical work which undoubtedly required a reasonable level of fitness. Although he had an injury to his back in 1984 there was nothing to suggest that he had any disability of it.
- (b) In 1995 he sustained what I am satisfied was a serious injury to his lower back with symptoms on the right side.
- (c) He continued to work in heavy tasks lifting significant weights. Although he suffered further injuries there is nothing to suggest that he suffered any injury to his lower back. It was suggested that in the 1999 incident when a workmate fell some distance onto him he may have sustained such an injury. He complained of some pain in the lower back. However the evidence in my view would not justify a conclusion that he sustained any separate injury to his lower back at that time.
- (d) In 2000 he attended the Blackwater Hospital and subsequently a medical centre with symptoms of sciatica on the right side. These had appeared approximately two months earlier and had become more acute in the two days prior to his attendance at the Blackwater Hospital. It is not suggested that he sustained any injury to the back at that time. The symptoms which he describes himself as suffering for these two months would, on my understanding of things, seem to be of a different order to those he says he had had only occasionally before then. He refers to his leg “giving out” on him.
- (e) The plaintiff suffered a prolapse in 2001 in the course of an activity which was rather minimal in terms of the load placed upon the spine. It is clear that at that time the disk must have been already damaged.
- (f) The evidence then shows episodes of right sided pain at what must be taken to be the same level of the spine. Reference in the records to the L4/L5 level was not regarded by Dr Weidmann as important as this is the adjacent disc (see Exhibit 23C). The first of these episodes was the 1995 incident, the subject of these proceedings, the second was the onset in 2000 of the pain in the back and leg without any trauma and the final episode was the prolapse in September 2001. This coincidence of right sided pain at the same level on those occasions first appearing in 1995 seems to me to be of significance.
- [110] Whilst the plaintiff’s credibility has been damaged by the exaggerated complaints he has made as demonstrated by his activities on the video I do not think that his evidence that after 1995 he experienced occasional symptoms in his back and leg without seeking assistance is implausible. It is in fact consistent with my assessment of him which I have set out earlier.
- [111] I think that the plaintiff would have been likely to regard himself at this time as not suffering from any ongoing back problem. Obviously the development of the symptoms in 2000 fall into a different category leading him to seek help.
- [112] Similarly I do not think that his failure to include any references to either the 1995 injury or the subsequent occasional symptoms in the job application is something which requires rejection of his evidence on this subject. Again I think that his

explanation of this is plausible. I think that his downplaying of the effects of the neck injury is consistent with what he had said about his neck in Exhibit 27 and my assessment of him.

- [113] On my assessment of the plaintiff and of the evidence I think that the proper conclusion to reach is that the plaintiff is telling the truth when he says that he had occasional symptoms in the back and leg after the 1995 incident.
- [114] Dr Cook's opinion is, in my view, the most convincing of those given. It is, I accept, unlikely that degenerative change was the cause of the prolapse in the absence of any signs of such change elsewhere in the spine. The trauma of the 1995 incident most likely caused damage to the annulus which put in train the process which culminated in the prolapse. The occasional symptoms which the plaintiff experienced are confirmatory of that in Dr Cook's view which I accept.
- [115] I therefore propose to assess damages on the basis that but for the 1995 injury the 2001 prolapse would not have occurred. Nevertheless it seems to me there has to be a significant discount for the fact that the heavy work which the plaintiff was engaged in and the weights which he was lifting may have resulted in such an occurrence at some time in any case.
- [116] So far as general damages are concerned I accept that the plaintiff has some pain in his spine with occasional symptoms in his lower leg. I accept Dr Cook's opinion as to the cause of this. However I am satisfied that he is able to engage in a wide variety of activities as the video demonstrates.
- [117] He initially suffered little in the way of symptoms after the initial injury settled down. On the other hand I am satisfied that he suffered from acute and disabling pain following the prolapse and until the surgery.
- [118] I assess his general damages in the sum of \$40,000. I allow interest at the rate of 2% for 8.5 years on \$17,500 representing past pain and suffering. This produces a figure of \$2,975.
- [119] A claim is made for past economic loss in the sum of \$111,000. There is no suggestion of economic loss (except for a short period) following the initial injury and in respect of which he received workers' compensation.
- [120] Since his recovery from his psychiatric problems (approximately the end of 2003) he has had a substantial earning capacity. The ongoing limitations relate to his capacity to engage in heavy underground mining work. There is evidence of what such an underground miner earns (see the evidence of Reid & Brandenburg) and the evidence suggests that such work is and has been available.
- [121] However the plaintiff did not prior to the accident work for 12 months of the year in underground mining. He tended to move from job to job. I allow \$75,000 for past economic loss and \$6,000 for loss of superannuation entitlement.
- [122] I allow interest at 5% on \$7,500 for 2.5 years resulting in an amount of \$937.50.
- [123] So far as the future is concerned the plaintiff is now 35. He is to be compensated for his inability to engage in heavy work such as that of an underground miner. He had

for some time prior to the accident in 1995 and thereafter, worked in this field and I think it is probable he would have continued to do so. However the fact that he may not have done so is something for which an allowance has to be made. The work is arduous and carried out in remote areas and as he got older it might have suited him either for family or other reasons to leave the mining industry and obtain employment in a city or town or it may be that he would have tired of the heavy work of a miner and sought less strenuous employment.

- [124] He was already limited in some activities in this field by his cervical complaints.
- [125] He has a substantial earning capacity being able to engage in virtually all forms of occupation other than the heavy work which places demands on his spine and which he should avoid. He has however no experience in clerical or similar work and it is unlikely that he would obtain employment in this field.
- [126] As I have already said, some allowance should be made for the risk that he may have developed spinal trouble in any case. Nonetheless his loss must necessarily be a substantial one since he is precluded from the more highly paid form of employment which was open to him and which, on his past record, he is likely to have pursued subject to the matters which I have just mentioned.
- [127] I allow \$260,000 for future economic loss. This reflects a loss of \$400 per week for about 20 years. It allows for the factors that I have mentioned as well as the general contingences and vicissitudes of life.
- [128] I allow \$23,400 for future loss of superannuation entitlements.
- [129] The plaintiff is entitled to recover \$35,919.90 representing amounts paid by WorkCover and \$1,149.81 representing special damages paid for by him including an allowance for interest. The *Fox v Wood* claim in the sum of \$18,815.00 is also allowed.
- [130] There is a claim for past care and assistance in the sum of \$5,250. The parties have agreed upon a rate for this head of damage. I accept that the plaintiff required substantial assistance following the 2001 prolapse as he says in his quantum statement. Doing the best I can, I allow \$4,000 together with interest in the sum of \$196.
- [131] The evidence does not satisfy me that the plaintiff has or will have any ongoing or future need for assistance. His activities shown on the video are in my view inconsistent with any such need.
- [132] Dr Cook has suggested some further surgery may be necessary and gives the costs associated with this. The plaintiff is not inclined to have any further surgery. An allowance of \$1,500 is sought against the risk he will have to have it. He would have to pay, at present, cost of about \$4,500. I think the amount claimed is reasonable and I allow it.
- [133] The total of the above amounts is \$469,893.21. From this has to be deducted the refund to WorkCover in the sum of \$113,269.90.

[134] There will be judgment for the plaintiff against the defendant in the sum of \$356,623.31 with costs to be assessed on an indemnity basis.