SUPREME COURT OF QUEENSLAND

CITATION:	*Allwood v Wilson & Anor* [2011] QSC 180
PARTIES:	**RICKY KEITH ALLWOOD** **(**plaintiff) **v** **MILES WILSON** (first defendant) **And** **SUNCORP METWAY INSURANCE LIMITED** **ACN 075 695 966** (second defendant)
FILE NO/S:	S123 of 2010
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court Mackay
DELIVERED ON:	22 June 2011
DELIVERED AT:	Rockhampton
HEARING DATE:	6 -7 June 2011
JUDGE:	McMeekin J
ORDER:	**Judgment for the plaintiff in the sum of $474,170.80**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – – where liability admitted *Civil Liability Act* 2003 (Qld) *Civil Liability Regulation* 2003 (Qld) *Aerial Advertising Co v Batchelors Peas* [1938] 2 All ER 788 *Ashcroft v Curtin* [1971] 3 All ER 1208 *Dessent v The Commonwealth* (1977) 13 ALR 437 *Holmes v Jones* (1907) 4 CLR 1692 *Husher v Husher* (1999) 197 CLR 138 *Kriz v King* [2007] 1 Qd R 327 *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 *McDonald v FAI General Insurance Company Limited*

[1995] QCA 436

Minchin v Public Curator (1965) ALR 91

Seymour v Gough [1996] 1 Qd R 89

Sunley and Co v Cunard [1940] 1 KB 740

Ted Brown Quarries v General Quarries (1977) 16 ALR 23

Van Gervan v Fenton (1992) 175 CLR 327

Woodham v Rasmussen (1953) St.R.Qd. 202

COUNSEL:	PT Cullinane for the plaintiff
	GF Crow SC for the second defendant
SOLICITORS:	Macrossan & Amiet for the plaintiff
	Grant & Simpson for the second defendant

[1] **McMEEKIN J:** The plaintiff, Ricky Keith Allwood, claims damages for personal injuries suffered on the 23rd May 2008 in a motor cycle accident. Liability is admitted. I am required to assess damages.

[2] Mr Allwood was born on the 17th of December 1959. He is now aged 51 years.

The Plaintiff and His Background

[3] The defendant submitted that I should be cautious in my acceptance of the plaintiff's testimony. There was good reason for that submission – the plaintiff seemed unprepared to provide direct answers to the most straight forward of propositions. The cause of that approach I cannot determine with certainty. His counsel, Mr Cullinane, submitted that he appeared much more relaxed when questioned in areas with which he was familiar such as his plant operating and that was so. It may be that Mr Allwood was simply suspicious of the process and thought he needed to be ever vigilant.

[4] While I accept the need for some scrutiny of Mr Allwood's evidence he was supported in many particulars by cogent evidence from witnesses that were impressive. Generally I thought that Mr Allwood was doing his best in an environment that he found very uncongenial.

[5] The assessment was complicated by several problems that Mr Allwood had experienced in the years leading up to the accident. He complained of suffering the onset of industrial induced asthma in about 2002[1] due to exposure to isocyanates and toluene from a joinery business near to his residence. On his account this had had a very significant effect on his health and his capacity to work. He contended that by the time of the accident he had largely overcome these problems.

[1] And perhaps from 1998 – see Dr Chalk's report Ex 1.14 at p 4

[6] As well Mr Allwood had had a separation from his wife in 2006 and a bitter dispute ensued. He claimed that he had been denied access to his financial records and that he was uncertain as to the accuracy of partnership returns prepared since then.

The Civil Liability Act

[7] The assessment is governed by the provisions of the *Civil Liability Act* 2003 (*CLA*) and the *Civil Liability Regulation* 2003 ("the *Regulation*").

The Injuries

[8] Mr Allwood claims to have suffered injuries to his right foot, left hip, right shoulder, and lower back. Dr Shaw, an orthopaedic surgeon, has described the injuries as follows:

(a) Left acetabular anterior column fracture with no hip joint subluxation;
(b) Mechanical low back pain probably secondary to aggravation of pre-existing spondylosis;
(c) Right foot compound second metatarsal fracture with extensive soft tissue loss dorsum of foot managed with multiple procedures and with good outcome.[2]

[9] There is a dispute about the back injury. The defendant's attitude was informed by the lack of any record of complaint of symptoms of back pain in the hospital records until the 12th August 2008, some months after the accident.

[10] In my view it is more probable than not that some injury was suffered to the back in the accident. It is not in dispute that the plaintiff suffered a displaced fracture of the anterior column of the left acetabulum and a compound right foot injury with fracture of the second metatarsal. The first injury in particular was of a type likely to cause very significant pain. The second injury required multiple surgical treatments. It is unsurprising that in those circumstances the plaintiff might make no reference to symptoms that on any view seems to have been of considerably less significance at the time.

[11] As well the plaintiff was relatively immobile for some considerable time and it was on increasing his mobility that the symptoms appear in the records. Again the relative immobility provides some explanation for any lack of complaint or possibly emphasis.

[12] Finally being struck by a motor vehicle when riding a motor cycle, albeit at 40kph, provides a logical cause for the onset of symptoms of pain and there is no evident reason why he would otherwise suffer such symptoms. Dr Shaw explained the prospective injury that the spinal structures might suffer.[3]

[13] The defendant points to the radiological appearance of degeneration as sufficient explanation for the onset of painful symptoms. But it is well accepted that one can have such an appearance without symptoms and conversely. Nor is it apparent why a previously quiescent condition would suddenly flare given the plaintiff's relative immobility caused by his injuries between the accident and the first record of

[2] Ex 1.7 at p8
[3] T2-15/50

symptoms. As well such degeneration renders the individual susceptible to painful back symptoms following trauma, a factor in favour of a causal link.

[14] An alternative theory was advanced that the back pain may be due to altered gait following the hip injury. The difficulty is that the pain was recorded at a relatively early stage – Mr Allwood barely had time to develop an altered gait pattern. In my view the alternative hypothesis of a direct injury caused by the accident is the more likely.

The Aftermath

[15] Following the accident the plaintiff was hospitalised, underwent surgery, discharged, developed an infection and readmitted. He was having difficulties in particular with his right foot which had suffered a de-gloving injury. He underwent three further procedures including skin grafting. He then needed a wheel chair for about two months before progressing to crutches and eventually one crutch and then he became fully ambulant. He reached this stage in about November 2008. Mr Allwood continued to require treatment and review at the hospital until January 2009.

[16] Mr Allwood complains of constant pain in his left hip and lower back. The pain in the hip can be severe. His right foot swells and can be painful. Pain interferes with his concentration. That impacts on his capacity to perform his plant operating work as do the various restrictions that his hip injury has forced on him in terms of mounting and dismounting and getting under and about machinery.

[17] Mr Allwood continues to take medication for his pain and has difficulty sleeping. He has had cortisone injections from time to time which have assisted him. The relief has been temporary.

[18] He has a present need for hip replacement surgery and a probable need for revision of that surgery 15 or more years later.

General Damages – the Procedure

[19] I am required to assess an injury scale value ("ISV") for the injuries from the range of injury scale values set out in Sch 4 of the *Regulation* in order to determine the level of general damages (as defined) in accordance with the rules laid down in Part 2 of Sch 3 of the *Regulation.*[4]

[20] This case concerns multiple injuries. In such a case it is necessary to determine the dominant injury as it is defined[5], have regard to the range of ISVs applicable to that injury, determine where in the range of ISVs provided for that injury it should fall, and determine whether the maximum ISV in that range ("the maximum dominant ISV") adequately reflects the adverse impact of all the injuries.[6] If the maximum dominant ISV is not sufficient then the ISV may be higher but not more than 100 and only rarely more than 25% above the maximum dominant ISV selected.[7] In arriving at an appropriate ISV the court needs to bear in mind that the effects of multiple injuries commonly overlap.[8]

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[4] See s. 61 *CLA*
[5] See Sch 7 of the *Regulation*
[6] Sch 3 s 3 and s 4
[7] Sch 3 s 4(3)(b)
[8] See notes to Sch 3 s 3

[21] Whilst the regulations indicate that the purpose of the elaborate scheme set out there is to promote consistency in awards[9], sight must not be lost of the overriding purpose of the ISVs prescribed – to reflect the level of adverse impact of the injury on the injured person.[10]

[22] The court is required to have regard to the guidance provided by the provisions in Schedule 4 concerning its use in so far as they are relevant to the particular case but is not necessarily limited to those factors: Sch 3 s. 8.

[23] Additionally, in assessing an ISV, a court may have regard to other matters to the extent they are relevant in a particular case: Sch 3 s 9. The examples provided of other matters are the injured person's age, degree of insight, life expectancy, pain, suffering and loss of amenities of life. In assessing an ISV for multiple injuries, the range for, and other provisions of schedule 4 in relation to, an injury other than the dominant injury of the multiple injuries can be considered.

[24] The extent of whole person impairment is an important consideration "but not the only consideration affecting the assessment of an ISV": Sch 3 s 10. The dictionary defines "whole person impairment" ("WPI") in relation to an injury as an estimate "… expressed as a percentage, of the impact of a permanent impairment caused by the injury on the injured person's overall ability to perform activities of daily living other than employment."

Assessment of General Damages

[25] The parties are agreed that the dominant injury is the hip injury. They disagree as to the appropriate item number in Sch 4 of the *Regulation*. The competing contentions are Items 126 ("serious pelvis or hip injury") and 127 ("moderate pelvis or hip injury").

[26] In my view Item 127 is the appropriate item.

[27] Mr Cullinane pointed out that the examples of the injury provided in item 126 do include "a fracture of the acetabulum leading to degenerative changes and leg instability requiring an osteotomy, with the likelihood of future hip replacement surgery". Mr Allwood did not have leg instability requiring an osteotomy but the other circumstances apply. However there are two difficulties. First, his recovery is far better than the commentary in item 126 suggests is contemplated. The comment made in item 126 is: "there will be substantial residual disability, for example, severe lack of bladder and bowel control, sexual dysfunction, or deformity making the use of two canes or crutches routine". Mr Allwood is fully ambulant with no lack of bladder or bowel control or any sexual dysfunction.

[28] Secondly, the comment supplied about the appropriate level of ISV for item 126 is that an ISV at or near the bottom of the range "would be appropriate for an injury causing whole person impairment for the injury of 20%". While Mr Allwood has a significant permanent disability it is not at that level. The orthopaedic surgeons assess the WPI at 14% (Dr Shaw) and 10%-20% (Dr Journeau). After a successful hip replacement the impairment would be at about 15%.

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[9] Sch 3 s 1(a)

[10] Sch 3 s 2(2) and see the references to "the level of adverse impact" in ss 1(b), 3(2), 4(1), and 4(2).

[29] Mr Cullinane points out that Item 127 includes within its ambit "a significant pelvis or hip injury" which Mr Allwood has but "with no major permanent disability". On any view Mr Allwood has a significant permanent disability. However Item 127 specifically includes a "hip fracture requiring a hip replacement" which plainly fits the circumstances here. As well there is the high probability of a need for revision of the hip replacement surgery which is mentioned in the commentary on Item 127 in these terms: "An ISV at or near the top of the range will be appropriate if there is a fracture requiring a hip replacement that is only partially successful, so that there is a clear risk of the need for revision surgery." While not exactly apt to the facts here Item 127 comes closest.

[30] I adopt Item 127 as appropriate and fix an ISV at the top of the range as applicable – that is an ISV of 25. In my view Mr Allwood's problems fall just short of the bottom end of Item 126.

[31] The right foot injury has recovered reasonably well and Dr Shaw assessed an impairment rating of 0%. Item 149 is appropriate – moderate foot injury – with an ISV range of 4 to 8. I would assess the ISV at the bottom of the range.

[32] Dr Shaw assessed the back injury at 7% WPI. The injury seems to me to lie on the borderline of moderate and minor as defined in Items 93 and 94. I assess an ISV of 5.

[33] The multiple injuries to various areas of the body justify an uplift. As well, Mr Allwood faces further multiple surgeries. Pain is a significant feature albeit that will be substantially relieved with surgery if that surgery is successful. He will still have his foot problems. There is a small risk that the surgery may not be successful suggested by Dr Journeau to be a 5% risk. Mr Allwood is middle aged. He has a life expectancy of more than 30 years. His employment and leisure activities have been markedly affected.

[34] I asses an ISV of 30, a 20% uplift.

[35] I assess general damages at $45,000 pursuant to s 62 of the *CLA* and s1(f) of Sch 6A of the *Regulation.*

Past Economic Loss

[36] Mr Allwood has been a plant operator throughout his life. He holds numerous tickets qualifying him to operate plant, graders, loaders, backhoes and rollers. In 1980 he joined his father in an earth working business. In 1996 he and his wife commenced business in partnership. He has worked in the construction of rural roads, rural earth works and civil earthworks. He has performed contract work on commercial sites including bitumen spraying. His business has included the wet hire of equipment and operators. Tax returns going back to 1993 were tendered and demonstrate that he conducted a very successful business over the years and there is no reason to doubt his claim that he was highly experienced and hard working.

[37] The medical and lay evidence is plain that the consequences of the subject accident have had a very significant effect on Mr Allwood's capacity to work as a plant operator. He tires easily. He is greatly restricted in what he can do. His concentration he says is affected by pain. His father gave compelling evidence of his difficulties in

operating plant, difficulties that Mr Allwood Snr had observed. Mr Allwood Snr was an impressive witness.

[38] However the assessment of damages is considerably complicated by the two issues that I mentioned earlier – Mr Allwood's separation from his wife and the asthma problems that he suffered. The asthma significantly restricted Mr Allwood's capacity to work in the years before the subject accident. It seems likely that the separation had a significant effect on him as well. In the year ended 30 June 2006 the partnership Profit and Loss statement shows gross earnings of $92,397.95 – a 40% drop in earnings from the previous year. The business recorded a loss of $4,454. In the 2007 year the gross earnings were much worse again at $43,701 and the net profit before tax $7,911. No financial papers were available for the 2008 year. Mr Allwood says that all papers are with an accountant but are under the control of his wife and there is no co-operation, or indeed trust.

[39] The defendant submitted that these figures, immediately predating the year of the subject accident, are the best guide to the prospective earnings and any assessment had to be extremely modest. My attention was drawn to the statements of principle by Thomas JA in *McDonald v FAI General Insurance Company Limited* [1995] QCA 436. His Honour was there in the minority in not allowing any damages for economic loss past or future. Nonetheless there is no reason to doubt the principles discussed. Thomas JA said[11]:

> "It is helpful to see assessments of this kind as part of a wider spectrum of marginal cases such as those where appropriate proof is lacking, cases where the evidence leaves the Court in such a state of speculation that either nil damages or low damages are the result, through cases where the issues are of their very nature incapable of precise proof and the Court does the best it can on the available material.
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> In a case where damage is capable of precise proof, and a plaintiff fails to produce such proof, no assessment (or a nil assessment) will be made (*Sunley and Co v Cunard* [1940] 1 KB 740, 747; *Woodham v Rasmussen* (1953) St.R.Qd. 202, 215; *Holmes v Jones* (1907) 4 CLR 1692, 1703, 1717; *Ted Brown Quarries v General Quarries* (1977) 16 ALR 23 37). In cases where some loss has apparently been suffered but the plaintiff has failed to take the trouble to produce evidence that would reasonably be expected to be available, no more than a very conservative estimate of damages will be made (*Minchin v Public Curator* (1965) ALR 91, 93; *Ashcroft v Curtin* [1971] 3 All ER 1208; *Aerial Advertising Co v Batchelors Peas* [1938] 2 All ER 788, 796). This may be contrasted with the familiar exercise of assessing damages upon issues which of their very nature are incapable of precise proof, such as future economic loss, and, quite frequently, past economic loss, where the Courts do the best they can on necessarily imprecise matter. (*Malec* (above); *Chaplin v Hicks* [1911] 2 KB 786, 795; *Wheeler v Riverside Coal Transport* [1964] Qd.R. 113, 124; *Biggen and Co v Permanite Ltd* [1951] 1 KB 422, 438, 447). Even in cases of that kind a plaintiff is expected to place before the Court the essential facts upon which the necessary inferences and projections are to be made. There is no difference in the approach of the Courts according to whether the case is based on contract or tort. In all cases the extent of proof required depends upon the nature of the issue to be proved."

[11] At pp 6-7

[40] However the evidence here is far removed from the situation in *McDonald* of which Thomas JA was speaking. Here there is ample evidence demonstrating not only that the plaintiff had a fine pre accident work history and was capable of generating a very significant income, but further that there was ample work available for a man of his skills since the subject accident and reasons were given for the poor performance of his business in the two years highlighted by the defendant. That is not to say that the plaintiff's poor health and domestic situation may not be discounting factors. But they do not justify an assumption of only very modest potential earnings.

[41] The defendant seeks to advance the proposition that any earnings of the plaintiff post accident would necessarily have been shared in accordance with the partnership and so net profit halved, halving any damages allowable. The defendant referred to the principles in *Husher v Husher*[12] as justifying the modest approach urged by the defendant. The case was mentioned only in the defendant's reply, its ramifications were not explored, and why it is thought *Husher* assisted the defendant is not entirely clear to me.

[42] That case concerned the approach the court should take to the assessment of damages for lost earning capacity for an injured plaintiff where the plaintiff was in a partnership with his wife in which the profits were divided evenly and where the injured plaintiff's activities generated the income of the partnership. To that extent the case is on all fours with the present. However, no point of principle decided there, that I can see, requires any modesty of approach here. If anything *Husher* is against the defendant's contentions. The majority judgment,[13] in discussing an earlier decision of the Queensland Court of Appeal, that of *Seymour v Gough*[14], held that "if the decision in *Seymour v Gough* was intended to establish some principle that a plaintiff, who at the time of the accident was a partner in a business, can never recover more for loss of future earning capacity than a sum calculated by reference to the plaintiff's past share of partnership profits, it is wrong and should be overruled."[15] And further: "But finding that past partnership arrangements would probably have continued into the future, had the plaintiff not been injured, does not *inevitably* mean that the calculation of the damages to be allowed for loss of future earning capacity *must* be limited by reference to the amount of the plaintiff's share of partnership profits. Again, if *Seymour v Gough* was intended to establish such a proposition, it is wrong and should be overruled."[16]

[43] In the context of the facts in this case those statements are equally applicable to the assessment of loss between accident and trial. That is so because, here, there is no basis for a finding that but for the subject accident past partnership arrangements would probably have continued into the future.

[44] What *Husher* did establish was that the critical question in identifying the loss likely to follow from an impaired earning capacity in such a factual situation was the amount that the plaintiff was likely to have had "under his control and at his disposal" but for the accident. The majority pointed out:

> "There are two critical elements. First, the whole of the income of the partnership came from the efforts of the appellant and the exploitation of *his* earning capacity. As

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[12] (1999) 197 CLR 138
[13] Gleeson CJ, Gummow, Kirby and Hayne JJ
[14] [1996] 1 Qd R 89
[15] At [14]
[16] At [15]

> a matter of practical reality, his wife's contribution to the income was negligible. Secondly, the partnership was a partnership at will. The appellant would very probably have chosen to maintain those arrangements but that was *his* choice. If he chose to make some other arrangement concerning the fruits of his labour, effect would be given to that choice, whatever view his wife may have held. What the appellant would have had under his control and at his disposal but for the accident was, therefore, the whole of the fruits of his skill and labour. And it is, then, the whole of those fruits that he has lost."[17]

[45] I know little about the partnership arrangements here. As best I can gather the partnership depended on Mr Allwood's earning capacity. His wife apparently looked after the books of account. I assume that it was in the usual form of being terminable at will. There was a bitter marriage break up sometime in 2006. The premise that Mr Allwood, if he had been capable of working to his full capacity, was likely to have shared the fruits of his labour with his wife post accident was very likely nil. Unfortunately the defendant did not question Mr Allwood about these matters. So there is some degree of speculation in the finding, but everything Mr Allwood said about the marriage, the partnership and his wife suggested very strongly that there is no reason to think any sharing was likely. It may be that Mr Allwood would have been required to account to the partnership for the use of partnership equipment. The matter was not explored. What impact that might have had is unknown - I note that Mr Allwood maintained that he had an 80% equity in the partnership. And Mr Allwood was not restricted to exercising his earning capacity through the use of partnership equipment – he could hire out his services without equipment or he could have used his father's equipment.

[46] The principal problem restricting the pre accident earnings was the asthmatic condition. It restricted Mr Allwood to only 20 to 30 hours work per week. However it is evident that through 2008 Mr Allwood was recovering substantially from what had been a very debilitating condition. By the time of the subject accident he had moved away from the source of the industrial chemicals that seem to have been the cause of the onset and maintenance of the condition and he had been under expert medical care for some years.

[47] Testing of function carried out through 2008 and beyond has demonstrated a complete amelioration of the asthma. Mr Allwood remains susceptible to another attack if again exposed to isocyanates but is otherwise well. That has been his condition since the testing undertaken by Dr Pertnikov in December 2008. Testing in January that year had shown that his lung capacity was normal (97%) and he told the doctor he was "reasonably well." He was then on Seretide medication for his asthma which he ceased around July 2008. While the asthmatic condition may have had an emotional or psychiatric impact beyond the physical ones – hence explaining the apparent lack of recovery in earnings suggested by the instructions given to the accountants Vincents[18] - I am satisfied that since the subject accident it has not presented any significant physical impediment to Mr Allwood pursuing his income earning activities.

[48] The defendant's submission assumed the contrary of this finding – that is that Mr Allwood's capacities, uninjured, would have been much the same after the accident as before. I reject that approach.

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[17] At [20]
[18] Ex 1.31 at para 4.11

[49] The plaintiff contended for an award of $127,650 under this head. The plaintiff assumed that but for the accident caused injuries he would have earned, on average, $1,392.25 per week before tax. That figure reflects a notional income worked out by Vincents accountants based on actual earnings and average profit margins up to 2004 thereafter adjusted for CPI changes.[19] The plaintiff adopted a 25% discount to reflect the various contingencies including residual capacity.

[50] However there are some obvious reasons to discount the damages arrived at by that approach. First, Mr Allwood was not earning $1,392 in the week before the accident nor anything like it. In a statement of loss and damage dated 23 June 2008 and filed in the proceedings concerning the asthmatic condition Mr Allwood claimed effectively a complete and permanent destruction of his earning capacity attributable to that condition. That hardly suggests that Mr Allwood felt capable of performing all his normal employment tasks unimpeded at the time of the accident in May 2008.

[51] In early 2008 Mr Allwood had discussions with his father about taking over his father's business. This was attractive to Mr Allwood because with such an arrangement he said he could work "at my own level and pace… as my health allowed."[20] Again that is consistent with an ongoing perception of problems restricting his earning capacity.

[52] Mr Allwood's express instructions to the accountants were that he was still restricted to 20 hours work per week at that time.[21] No explanation for this instruction, if I am to assume it was not accurate as the submission requires, was ever provided. But the report was intended for use in legal proceedings against the proprietors of the business that had allegedly caused the asthmatic condition. One would expect considerable care in the instructions provided in those circumstances to ensure their accuracy. If the instruction was not accurate, then that ought to have been stated in evidence and some explanation should have been given. I assume that the instruction reflected the reality.

[53] Secondly, it seems evident that the physical aspects of the condition were not the only matters impacting on Mr Allwood's capacities.

[54] A striking feature of the performance of the business is that despite the plaintiff suffering apparently very significant problems with his asthma he maintained the earnings of the business at a reasonably high level until the time of the separation in mid 2006. The summary schedule prepared by Vincents shows that the precipitous decline in earnings occurred in 2006.[22] A possible explanation is the disintegrating marriage which can of course affect motivation and attention to one's customers so essential in conducting a small business.

[55] While Mr Allwood wished to argue that the partnership returns post separation did not accurately reflect his actual earnings I can only proceed on the basis that they do, at least roughly. That is so for a number of reasons. First, he tendered no other evidence that would persuade me to the contrary. Secondly, it is not apparent why his wife would wish to minimise the earnings of this business. Normally in a property dispute where the wife seeks a share of the matrimonial assets she would want a finding that there were ample assets and that the husband had a good earning capacity. Thirdly, the level

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[19] Ex 1.31 at paras 7.3 -7.7
[20] Ex 3 at para 24
[21] Ex 1.31 at para 4.11(iii)
[22] Ex 1.31 Schedule "A" showing 2006 at half the earnings of 2004

of earnings is consistent with Mr Allwood's own instructions to the accountants and the loss and damage statement that I have mentioned.

[56] In that statement Mr Allwood speaks of symptoms that are not related, directly at least, to lung function. They include fatigue, depression and anxiety.[23] While there is no evidence that I can see suggesting that any psychiatric condition or emotional reaction to the problems in Mr Allwood's life would have prevented him from working, there seems little doubt that his adjustment through this period was less than optimal. Dr Chalk speaks of the plaintiff developing a secondary depression as a result of the asthmatic problems. These difficulties he says were "compounded by financial difficulties that ensued … and the breakdown of his marriage".[24] One suspects that they were also compounded by the ongoing legal battle involving the joinery business and the physical attacks on him that he says were perpetrated by the proprietors of that business.

[57] While there may have been a physical recovery from the asthmatic condition it seems probable that the secondary depression and other compounding features have resulted in Mr Allwood performing less than optimally explaining the poor earnings.

[58] A check on the hypothetical exercise performed by Vincents can be found in the detail that Mr Allwood has supplied about the work he was doing. Mr Allwood says that during 2007 and into 2008 he was working for a company Platinum Earthworks Pty Ltd as a grader operator up to 2-3 days at a time as well as with Epoca Constructions. He was paid $26 per hour labour only by Platinum Earthworks. As well he worked in his own business. He says in his quantum statement that he could work up to 30 hours per week but as I have mentioned he told the accountants he could work only 20 hours per week. That suggests an earnings capacity of around $520 to $780 gross per week or $460 to $650 net after tax. I assume that the income postulated by the plaintiff in his submission ($1,077 net per week) represents a reasonable estimate of his unimpeded earning capacity.

[59] I am conscious that larger incomes are available in the mining industry[25] but Mr Allwood did not seem attracted to that work,[26] at least not on a full time basis and was not shown to have black coal competencies. I am conscious too of the claim that Mr Allwood was offered work by Platinum Earthworks at $55 per hour[27] but he did not take up this work. It seems to me too speculative to assume the offer would have supported any long term employment. Certainly Mr Allwood did not find it attractive.

[60] There are three further factors relevant to the claim for past loss of earnings – the availability of work, the motivation to work, and the limited residual capacity that Mr Allwood had. The Vincent report prepared in August 2010 does support the claim that there was ample work available to plant operators since mid 2008 - I refer to the long term forecast published by the Construction Forecasting Council.[28] So does the evidence of Mr Muller from Legra Mining Services. Demand in the mining industry has fluctuated but is presently high and has previously been high.[29] While Mr Allwood

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[23] Ex 5 at p 4
[24] Ex 1.14 at p 4-5
[25] Mr Muller: T2-75/5 & 76/15
[26] See the evidence of his father at T2-99/50 – 100/1
[27] Ex 3 at para 22
[28] Ex 1.31 at para 7.12-7.13
[29] T2-75/55 - 76/10

may not have involved himself in that work the attractive rates of pay available in the mining industry would have the tendency to reduce competition in areas that did interest Mr Allwood.

[61] Dr Chalk says that Mr Allwood was not depressed at the time he assessed him in November 2010.[30] That indicates a recovery from the situation in mid 2008. By that time there seems to be no reason why Mr Allwood would not have been capable of full time work but for the consequences of the subject accident. Whether his motivation would have continued to be affected by his ongoing and bitter matrimonial dispute is unclear to me. That aspect of Mr Allwood's life has certainly not resolved.

[62] Mr Allwood has a residual capacity as evidenced by the limited work that he has attempted. However, he is not commercially employable. He has been of only limited assistance to his 74 year old father. He has performed work for charities but the working hours would seem to be well short of a commercially viable level.

[63] Doing the best I can on uncertain materials I assess the past loss at $110,000. Essentially I have taken what I consider to be Mr Allwood's best case – unimpeded earning capacity from the date of the accident adopting the Vincents' calculation[31] - and discounted that figure by about 35% to reflect the restrictions on earning capacity that would have been present in any case, the potentially limited motivation to maximise earnings and the limited residual capacity that he has had since attaining optimal recovery post accident. Alternatively one could assume earnings at 20 hours per week initially, gradually increasing over time, to full capacity in the relatively recent past. The result is much the same.

Future Economic Loss

[64] The significant issue for the assessment of the future is assessing the impact of hip replacement surgery that Mr Allwood will have as soon as he can. It is likely to be successful and if successful will markedly increase his function.

[65] There was a debate about the capacities that Mr Allwood would probably have following successful surgery. While both the orthopaedic surgeons who gave evidence were plainly experienced and knowledgeable, I was particularly impressed with Dr Journeaux's evident great experience with the surgery in question[32] and on patients of a similar age to the plaintiff.

[66] With successful surgery, and there is a 5% risk of failure, Mr Allwood could potentially return to full employment as a plant operator. He may have difficulties with everyday aspects of the work such as accessing the machines, loading and unloading items, getting under machinery and into confined spaces. Then again he may not. The probability is that those difficulties, if there are any, would not prevent him from performing those tasks but rather render them more difficult and time consuming.

[67] Dr Journeaux pointed out that he has operated on linesman who are required to work up and down power poles and carry heavy equipment over uneven ground - work "that

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[30] Ex 1.14 at p 13
[31] $1077 net pw x 160wks = $172,320
[32] Over 800 Birmingham style hip replacements in the last 13 years – T2-93/40

would be regarded as heavy work in the occupational dictionary of titles" as he put it[33] – who have returned to full employment.

[68] Mrs Coles, the occupational therapist, was cautious about Mr Allwood returning to plant operating and no doubt there are risks. But I have little doubt that Mr Allwood will be very attracted to returning to his plant operating activities as soon as he can. I am satisfied that with successful surgery he will very likely be able to. He will need to take some care. The award must protect him from the chance of risks eventuating, his probable slower pace and the risk that the surgery will not be as successful as I anticipate: *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638.

[69] I observe that Mr Allwood is not suited to alternative forms of work particularly given his age and background. That is not to say that he would be unemployable but any employment he would be likely to obtain would not be congenial or particularly remunerative.

[70] With modern materials and techniques Mr Allwood could expect to need a revision of the surgery in about 15 years.

[71] The defendant contends for an assessment of $60,700 based on $300 per week for 26 weeks to cover Mr Allwood for lost earnings until he can have and recover from surgery and thereafter an assumed loss of $100 per week for 14 years to take Mr Allwood to a retirement age of 65.

[72] The plaintiff contends for an assessment of $375,000 based again on Vincents' calculations (ie $1,077 net per week), applied to age 67 years and discounted by 40% to allow for contingencies and residual capacity. The plaintiff points out that his father is working as a plant operator at 74 years of age, albeit semi retired.

[73] I will assume that but for the subject accident Mr Allwood would be maximising his earning capacity now. I assume that he will have surgery in the near future and that his convalescence will take some three months. Obviously there would be a gradual return to full earnings as he would need to get his business back on its feet. For this period I will allow $1,077 net per week for 26 weeks with some discounting for the future aspect of the loss – an assessment of $25,000.

[74] I will allow a global sum to reflect the various possibilities to age 65 years. There is the risk of total failure initially as well as the chance of failure along the way.[34] I will allow $50,000 for these possibilities. While any attempt at precision is probably misleading I have allowed about $30,000[35] for the possibility of initial failure and the balance for the chance of failure along the way.

[75] For the chance of restrictions despite a successful outcome I can only assess a global sum. The range seems to be from nil restriction, an unlikely outcome, to a need to limit the range of machinery driven to avoid climbing and difficult tasks. I will allow $120,000 bearing in mind the potential for these matters to overlap and for the consequent risk of double counting.

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[33] T2-95/12

[34] The statistics suggest a 90% success rate at 10 years: T2-94/10

[35] 5% of $1,077 per week over 15 years (555)

[76] I have been considering the loss to age 65 years as reflecting a prospective retirement date. There is the possibility that if he had not suffered this injury the plaintiff would have wished to work on, like his father. He is much less likely to do so now given the need for revision of the hip replacement surgery at about that time. On the other hand he might be well enough to do so – the chance is not negligible. I will allow $25,000 for the potential loss from 65 years on.[36]

[77] I assess the future loss of earning capacity at $220,000.

Damages for Past Gratuitous Services

[78] The assessment of damages under this head is governed by the provisions of s 59 of the *CLA* which provides as follows:

> "**59 Damages for gratuitous services**
>
> (1) Damages for gratuitous services are not to be awarded unless -
>
> (a) the services are necessary; and
>
> (b) the need for the services arises solely out of the injury in relation to which damages are awarded; and
>
> (c) the services are provided, or are to be provided—
>
> (i) for at least 6 hours per week; and
>
> (ii) for at least 6 months.
>
> (2) Damages are not to be awarded for gratuitous services if gratuitous services of the same kind were being provided for the injured person before the breach of duty happened.
>
> (3) Damages are not to be awarded for gratuitous services replacing services provided by an injured person, or that would have been provided by the injured person if the injury had not been suffered, for others outside the injured person's household.
>
> (4) In assessing damages for gratuitous services, a court must take into account—
>
> (a) any offsetting benefit the service provider obtains through providing the services; and
>
> (b) periods for which the injured person has not required or is not likely to require the services because the injured person has been or is likely to be cared for in a hospital or other institution."

[79] The defendant concedes that gratuitous services were necessary as a result of the subject injury and that the threshold requirements of s 59(1)(c) of the *CLA* have been met.

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[36] I note that his potential prospective earnings after age 65 are not inconsiderable. To age 70 for example - $1077 pw x (666-555) = $119,547.

[80] The only care that the defendant submits was compensable was that required after discharge from hospital post accident and that which will be required during convalescence post hip replacement surgery. The defendant submitted that should result in allowance of $4,212. The plaintiff contends for $44,782.50 assuming a need for care when in hospital, domestic and personal assistance at 4 hours per day for a month after discharge from hospital, 9 hours per week for domestic assistance for the period from then to trial and 3 hours per week for driving assistance for 20 weeks after discharge.

[81] As I have mentioned the plaintiff was wheelchair bound for a period, then restricted to using crutches and only fully ambulant at about November 2008 – say 20 weeks post discharge. His mother provided services to him. They included the provision of meals, the performance of shopping, driving him whenever required, and miscellaneous domestic chores.

[82] The need for such services is a compensable loss and that loss is measured by, in general, the market cost of providing the services: *Van Gervan v Fenton.*[37] The parties were agreed that the market cost of provision of services was $27 per hour for the past claim and $29 per hour for the future claim.

[83] It was submitted that the plaintiff had failed to demonstrate that services were required when in hospital as s 59(4)(b) requires. That is so.

[84] The defendant submitted that no further amounts should be allowed, other than those I have mentioned, by reason of s 59(1)(a) and (b) and s59(3). While those provisions clearly require some moderation of the award they do not require a nil assessment.

[85] For the period immediately following discharge from hospital, Mr Allwood was significantly disabled. He lived in his mother's residence. He needed assistance with showering and toileting, meal preparation, driving to and from hospital, washing, ironing and grocery shopping. As is evident from Mrs Allwood's evidence she managed to combine many of these tasks with those of the household generally. The defendant's submission assumes a need for 6 hours care per week and I think that no more is justified.

[86] For the period of about four months thereafter until Mr Allwood became ambulant his need for assistance increased – he was no longer living in his mother's home but he still required help with cooking, travelling, cleaning, washing and ironing. No longer could Mrs Allwood combine her chores to minimise the extra services her son needed. I would assess the need then at about eight hours per week.

[87] Thereafter a considerable difficulty is that while the evidence of Mrs Allwood would justify the amounts the plaintiff claims it is evident that she is undertaking tasks that he can do himself albeit that he may have to take his time and spread chores out over the week. Mr Allwood has demonstrated a capacity to shovel and lay pipes for between 30 minutes and two hours.[38] That being so it is difficult to accept that normal household chores are beyond him. Clearly Mrs Allwood provides companionship for him. I am satisfied that there was a modest need for services after becoming ambulant but not at the same level. That the services may have fallen below the six hour per week level mentioned in s 59(1)(c) is not a difficulty: *Kriz v King* [2007] 1 Qd R 327.

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[37] (1992) 175 CLR 327.

[38] Ex 1.12 at p10 (Report of Helen Coles); T2-37/1-20

[88] Further it seems clear that Mr Allwood is deteriorating and his present need is probably greater than at an earlier time. I accept Mr Allwood's complaint that he cannot mow – he lives on a 100 acre block – and the evidence is consistent that he would have difficulty with heavier domestic chores. I assess the need at about three hours per week averaged over the entire period.

[89] I assess this head of loss at $15,600.[39]

Future Gratuitous Assistance

[90] Until Mr Allwood has the hip replacement surgery he will continue to need some assistance. While I assume the surgery will occur relatively soon there will inevitably be some delay. After the surgery he will be considerably disabled through his convalescent period.

[91] I will assume a need for assistance at four hours per week leading up to surgery, say for two months and then eight hours per week thereafter for three months. I will allow $3,900 adopting the agreed rate of $29 per hour.

[92] If the surgery is successful then Mr Allwood would have a very limited need for any assistance thereafter – perhaps only for the heaviest domestic chores. I would assess that at about one hour per fortnight. For the next 15 years I would allow $8,050.

[93] The surgery may not be successful and that chance is not so small that it can be disregarded. I will allow $7,500.[40]

[94] There will be a probable revision of surgery in 15 years time and an increased need for help leading up to the surgery and during convalescence. I will allow $1,900, adopting the same assumptions as for the first surgery but deferring the amount by 15 years adopting a 5% discount rate.[41]

[95] The plaintiff's life expectancy is about 34 years. For the remainder of the statistical life expectancy I will assume a continuing need at about one hour per fortnight and allow $4,500.

[96] I assess the future component at $25,850

Miscellaneous Future Expenses

[97] The plaintiff has a need for hip replacement surgery and a revision of it in about 15 years time. There is some debate about the cost of the surgery. Dr Shaw has suggested that the cost of revision will be very substantially greater than the initial surgery. Why he made that claim was not explored. I suspect that he has assumed that inflationary effects can be taken into account. There is certainly no evidence that the revision is in any significant way more complex or time consuming than the initial surgery.

[98] I will allow $28,000 for the initial surgery and $13,500 for the revision.

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[39] Approximately 577 hrs x $27
[40] 6 hrs/wk x $29 x 866 x 5%
[41] Section 57 *CLA*

[99] The plaintiff claims for the continued cost of medications, physiotherapy and attendances on a general practitioner. Such costs are unlikely to be significant if the surgery is successful and so a modest amount is justified to allow for the chance that the surgery is not so successful. He is presently incurring reasonably significant costs in an attempt to alleviate his pain and that will continue until the surgery is undertaken.[42] I will allow $2,000.

[100] The total allowed for future expenses is $43,500.

Special Damages

[101] I see no reason not to allow the out of pocket expenses claimed of $4,600.80.[43]

Summary

[102] In summary I assess the damages as follows:

Pain, suffering and loss of amenities of life	$45,000.00
Past economic loss	$110,000.00
Interest on past economic loss[44]	$9,307.00
Future loss of earning capacity	$220,000.00
Past gratuitous services[45]	$15,600.00
Future gratuitous assistance	$25,850.00
Miscellaneous future expenses	$43,500.00
Special damages	$4,600.80
Interest on special damages[46]	$313.00
Total Damages	**$474,170.80**

Orders

[103] There will be judgment for the plaintiff in the sum of $474,170.80

[104] I will hear from counsel as to costs.

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[42] Note particularly at Ex 3 paras 79-85

[43] Ex 3 at para 87

[44] $110,000 x 2.75% (see s 60(3) *CLA*) x 160 wks.

[45] The plaintiff sought interest on the award for past gratuitous assistance but the statute does not permit any amount to be awarded: s 60(1)(b) *CLA*

[46] I have allowed interest on $3,700 at 2.75% over 160 wks. Neither counsel made clear in their schedules the assumptions underlying their calculations and I cannot reconcile them. As best I can determine the defendant concedes interest ought to be allowed on about $3,700 which I have adopted.