SUPREME COURT OF QUEENSLAND

CITATION:	*Vowles v Osgood & Anor* [2012] QSC 82
PARTIES:	**BENJAMIN MICHAEL VOWLES** (plaintiff) **v** **ROBERT GEORGE OSGOOD** (first defendant) **And** **SUNCORP METWAY INSURANCE LTD** (second defendant)
FILE NO/S:	S111 of 2011
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	3 April 2012
DELIVERED AT:	Rockhampton
HEARING DATE:	26-28 March 2012
JUDGE:	McMeekin J
ORDER:	**Judgment for the plaintiff in the sum of $450,750**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – where personal injuries suffered in a motor vehicle accident – where liability admitted – where the effect on employment in issue – where damages in issue *Civil Liability Act* 2003 (Qld) *Civil Liability Regulation* 2003 (Qld) *Allwood v Wilson & Anor* [2011] QSC 180 *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 *Mallett v McMonagle* [1970] AC 166 *Perfect v MacDonald & Anor* [2012] QSC 11
COUNSEL:	GF Crow SC for the plaintiff RD Green for the second defendant
SOLICITORS:	Chris Trevor & Associates for the plaintiff

Grant & Simpson for the second defendant

[1] **McMEEKIN J:** The plaintiff, Benjamin Vowles, claims damages for personal injuries suffered on the 27th April 2009 in a motor vehicle accident. Liability is admitted. I am required to assess damages.

[2] Mr Vowles was born on the 30th August 1977. He was 31 years old when injured and is now aged 34 years.

The Civil Liability Act

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

The Accident and Consequent Injuries

[4] The accident did not apparently involve substantial forces. Mr Vowles' vehicle was stationary at traffic lights as was the first defendant's vehicle, a short distance behind. A right turn arrow turned green and the first defendant drove forward into the rear of Mr Vowles' vehicle, the first defendant wrongly assuming that Mr Vowles also wished to turn right. Mr Vowles' vehicle was forced forward about two to three meters. There was no significant damage to Mr Vowles' vehicle.

[5] Mr Vowles felt a little shaken by the accident and a little "stiff and sore" but noticed nothing further until the following Monday, two days later. When at work he ducked under scaffold when he noticed that his back felt "a bit funny". He was placed on light duties that afternoon after seeing a general practitioner, with a weight restriction limit of 5kgs.

[6] Mr Vowles has been diagnosed as having suffered soft tissue injuries to the lumbar and cervical spine of a musculo-ligamentous nature. That he suffered injury of this type is not in issue.

[7] Mr Vowles described his symptoms at the early stages whilst on light duties in the following passage of evidence:

> "And in that period for the rest of the job, how was your neck and how was your back?-- My neck stiffened up, locks up in place, and to get my neck to move it cracks type, like, yeah, cracks. Yeah, that happens, or it's sporadic, you can't feel when it's coming on, you just know when your neck locks up.
>
> And what about your back?-- Reaching for things, when I first realised that there could be something serious with the back was when I was reaching around to get a bag of cable ties out of the back of the work ute, and was just reaching for it, and I picked - I went to grab it and it just stopped me in my tracks.
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> How heavy is a bag of cable ties?-- Probably less than that tissue box, couple of hundred grams."[1]

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1 T1-11/28-42

[8] Mr Vowles has sought extensive treatment. He has seen three orthopaedic surgeons. He has had a nerve root injection at the suggestion of one surgeon. He has had physiotherapy and attended a rehabilitation service. He has pursued a home exercise program. As part of this program Mr Vowles engages in bench presses and weight lifting with 10kg dumb bells, which he is required to lift and press above his head. He has attended on his general practitioner from time to time, principally complaining of difficulty sleeping because of back complaints.

[9] His continuing complaints relate to both neck and back. He asserts that his neck continues to lock up three to four times per week and he needs to stretch it to free it. In his oral evidence Mr Vowles complained of sciatica down both legs which again requires stretching or altering position to alleviate any discomfort. He said that being on his feet or sitting for lengthy periods aggravates his back. In a statement tendered Mr Vowles reported his condition as:

> "The pain is constant. It is more severe if I sit or stand for extended periods of time, bend to pick up an object, maintain a fixed position for any length of time or perform household chores. The pain affects my sleep. I have had to resort to the use of endep to help me sleep."[2]

The Issue - Effect on Employment

[10] The issue between the parties centered on the economic impact of any disability consequent upon the accident. The second defendant does not contend that there is no such impact. Its final submission was to the effect that $180,000 ought to be allowed for economic loss, past and future. However the parties were over $1M apart on that assessment.

[11] The significant effect of the injuries, for the purposes of the assessment of damages, was that Mr Vowles gave up his pre-accident employment as a leading hand industrial electrician once the job he was engaged on came to an end, a few months after the accident. He remained on light duties from the time of injury until then. He had worked for a number of years as an industrial electrician, work that was highly demanding physically. The work involved long hours and could be very strenuous. The evidence shows that he was experienced in that work and well regarded by his peers. He felt unable to continue in that work. The work was well remunerated. He was earning nearly $1,500 net per week pre-accident and earnings of up to $10,000 per week were reported as possible within the trade for overseas contracts.

[12] He eventually did take up employment but not until July 2011 when he commenced performing sporadic light work as a stevedore. He obtained a permanent position with Harbour City Motorcycles at Gladstone on 3 October 2011 as a salesperson and workshop coordinator. His employer there said that Mr Vowles had occasional days off with reports of back complaints.

[13] Prior to trial the plaintiff was supported in his decision not to return to his pre-accident work by the medico-legal opinions that had been obtained, at least to the extent that the practitioners thought it was likely that he would have difficulties.

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[2] Ex 1 at para 21

[14] The second defendant led in evidence some two and a half hours of video surveillance of the plaintiff taken over the course of about 12 months. As a result of viewing the DVD evidence the two medical specialists retained altered the opinions that they had expressed prior to seeing the DVDs by reducing the extent of impairment previously adjudged under the AMA guides. One specialist, Dr Fitzpatrick, effectively altered her view as to the plaintiff's employability. She thought that he was as capable of performing hard physical work now as he would have been had the subject accident not occurred. The other specialist, Dr Campbell, maintained that Mr Vowles was, as a result of the accident, vulnerable to injury should he return to his pre-accident work but conceded that he was capable of physical work.

Credit

[15] Obviously Mr Vowles' credit is in issue.

[16] The DVDs tendered show Mr Vowles going about his daily life without any sign of restriction. He bends freely. He carries objects at times, such as a full grocery basket and a carton of beer. He rides his 1000cc road bike to and from work and other places, he manoeuvres motorbikes at work, on some occasions he lifts them into place, sometimes with a nudge of his hip. The manoeuvre requires him to take some but not all of their weight. The larger bikes weigh nearly 100kg. He helps others with lifting objects on two or three occasions where he said the weights were in the order of 30kgs and 40 to 50kgs. He gets up and down from a tray of a utility vehicle. He lifts a ramp at work. He sits on a bar stool for a period, not the two hour period nominated by Dr Fitzpatrick it should be said, but for a reasonable period without evident distress although he does put his foot up at times which he said was a position he used that relieved his back pain.

[17] Both medical specialists called considered that the activities shown on the DVDs and Mr Vowles' lack of any evident distress or impediment in performing them meant that his condition was not as bad as they had thought from their interview with him and examination of him, in both cases long before.

[18] However, in my view this is not a case where the surveillance evidence demonstrated that Mr Vowles had actively sought to mislead. I say that for a number of reasons.

[19] The specialists reported that their clinical examinations were largely normal. Mr Vowles had not said that he was unable to lift or sit or ride. For example he demonstrated a sitting tolerance of two hours to the occupational therapist who examined him.[3] He told that same examiner that he was restricted in reaching forward or overhead only on his "bad" days.[4] So far as the activities at work are concerned he obtained that employment only after seeing the specialists who gave evidence and so had no occasion to talk about his tasks there with them. As well the defendants were made well aware that he had obtained that employment at Harbour City Motor Cycles. Mr Vowles could hardly have expected to hide the tasks and activities associated with his work.

[20] Further, Mr Vowles' description of his level of activities was not shown to be significantly out of keeping with the surveillance evidence. He was criticised for asserting that he had given up his trail bike riding whereas in his evidence he conceded

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3 Ex 2 at p 21 (p 5 of Mr Murray's report)

4 *Ibid* at p 22

to "possibly" having performed that activity on some six occasions over the last year ie in 2011-2012.[5] But his statement to Dr Fitzpatrick that he did not engage in that activity was made before that time, in mid 2010, and was consistent with his brother's evidence that he did not engage in the pastime during that year when the plaintiff lived at the brother's home. He maintained that on the occasions where he had attempted the pastime his endurance was greatly limited compared to his pre-accident capacities.

[21] Significantly Mr Vowles was supported by the observations of other witnesses who, I am confident, were not endeavouring to mislead the Court. For example his brother observed him to stand when watching television and to walk considerably more slowly than he, the brother, could. While the brother gave only short evidence he was a man of few words and apparently not much sympathy. It struck me that his brother was not given to overstatement. And his employer reported occasional complaints of pain and observed him stretching at times consistently with Mr Vowles' account of how he dealt with his symptoms. The surveillance evidence too had him stretching at times, as he said he would do from time to time. There were other indications in the DVDs, albeit small ones, that counted in his favour. The DVDs showed him putting his grocery basket down on the floor at times rather than holding it when I am sure the weight would not normally have troubled a man of his strength. He got up on one occasion when having his lunch, and plainly before he had finished, to put an item in a nearby bin, consistent with moving about to relieve discomfort.

[22] Other features of the evidence supported Mr Vowles. His reporting of symptoms to the specialists and the Court was consistent with his reports to his general practitioner. He sought little in the way of medication, Endep being prescribed for a difficulty sleeping that he complained of associated with back pain, but he reported taking relatively little of that. That is not consistent with overstatement. He actively pursued treatment options, one of which was invasive – the nerve root injection – which he might well have baulked at if, in fact, he had no symptoms.

[23] There is no reason to doubt his statement that he enjoyed his work and that he was an accomplished electrician. He had achieved leading hand status and was plainly well regarded by his peers, two of whom were called. He was well paid and, after his injury, had been offered the chance of very well paid work. To give up all that following what he reports as a relatively minor traffic accident, and an accident that he must have known would be seen in that light, in the hope of a substantial award, an award that he must have realised would probably be reduced by his normal presentation to doctors and by his obtaining of employment makes little sense. As Mr Crow SC who appeared for Mr Vowles submitted, if he was endeavouring to overplay his injuries he went about it in a very odd way.

[24] I should say something too of Mr Vowles' presentation in the witness box. He is a strongly built man to whom a lift of the weights described would be normally well within his capacities. He was not articulate. A person of greater verbal dexterity I think would have explained things better – both in evidence and to medical practitioners. One example of that was Dr Fitzpatrick's view that she had been misled as to his abilities to carry out activities of daily living. As the occupational therapist reported[6] the true

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5 Mr Vowles plainly did not know or recall the precise number of occasions and had volunteered one to two in 2012 and two to three in 2011. In the hands of the cross examiner this became six occasions and Mr Vowles was prompted to answer "possibly": T1-71/55-72/10

6 Ex 2 at p 20 (p 4 of the report of Mr David Morris)

position was that Mr Vowles lived with his brother and the brother's girlfriend at the relevant time and the friend tended to do all the necessary chores rather than Mr Vowles being unable to do so.

[25] His report was, and has consistently been, that he has occasional "bad" days when he is restricted. The DVD material does not disprove that. It is consistent with the accounts of many others with back and neck complaints.

[26] While much was made of the extent of the surveillance, covering some 12 months, its limitations need to be borne in mind. He was under surveillance on 27 separate days over those nearly 12 months. Mr Vowles was under "active surveillance" for 34.5 hours – that is the time he was actually being observed by the investigators. The total hours of DVD recorded are limited to 3 hours and about 23 minutes. So for the entire time he was under active surveillance only about 10% of it was considered worth recording and for much of that time the plaintiff is far from active. And of those 27 separate days, Dr Fitzpatrick identified only five occasions of significant events, and to my observation she has identified all that there were to identify. The movement of cardboard packaging weighing in the order of 5kgs, the lifting of a short ramp, and the movement of motor cycles was not shown to be demanding. His home exercise program would be more demanding in some ways.[7] The lifting of heavier objects was performed with the objects close to the body as is recommended. What pushing there was away from the body was on very few occasions and not shown to involve any significant force. My own observations were that Mr Vowles at times moved carefully – for example in dismounting from the tray of the utility.

[27] In short, while I can well understand that the DVDs demonstrate that Mr Vowles is no spinal cripple, it seems to me to have a more limited bearing on the issue of whether Mr Vowles can maintain employment in the very demanding occupation of industrial electrician, at least more limited than Dr Fitzpatrick assumed. The apparent assumption that the doctor made, apparent because whilst not explicitly stated it seemed necessarily implicit, that because he moves freely in the 3.9 hours of DVD recorded this equates to a necessary rejection of his assertion that he has back pain, that he has good days and bad, that he has attacks of sciatica, and that his neck locks from time to time is not, in my view, made out.

[28] Whether his assertions are established on the balance of probabilities of course requires attention to the DVD material, but they need to be seen in the wider context of the life he led prior to the subject accident, the good reports of his work ethic and skill, the lack of any attempt on his part to overplay either the incident itself or his symptoms, his consistent reporting to his general practitioner, and the support he receives, limited though it must necessarily be, from those who have lived and worked with him post accident.

[29] So far as any difference can be discerned between the presentation to, or assumptions of, medical practitioners and the DVD material I think that the explanation lies not in any dishonesty of Mr Vowles but rather in the healing that has occurred over time following the rehabilitation programmes that the plaintiff has undertaken, and his growing accustomed to his condition and the ways he can accommodate it. As Dr Campbell said it would seem that what has happened is that over time Mr Vowles has improved.

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[7] See his description at T2-27/10-50

Can Mr Vowles Work as an Industrial Electrician?

[30] That brings me to the crucial issue.

[31] The work of an industrial electrician is demanding. It requires an ability to climb, work overhead and in confined spaces or from awkward positions. The positioning of cables and cable trays are a common feature of the work. Cables can be heavy and hundreds of meters long requiring repetitive lifting. Mr Vowles was not challenged in his assertion that such work is heavy and dangerous. The days are long, 10 to 12 hour shifts being common. Mr Vowles said he carried a tool bag weighing about 35kgs and more.

[32] I can well understand that a person with any form of back complaint would be wary of undertaking that work. Still more an employer would be wary of taking on an employee with a history of a significant back complaint. As one witness, Mr Bailey, explained contracts can be won or lost on a company's lost time injury history.[8]

[33] Provided it is accepted, as I do, that Mr Vowles suffered an injury to his neck and back in the subject incident that warranted him ceasing work for a reasonably significant period, then Mr Bailey's evidence shows that he is plainly disadvantaged in obtaining the work of an industrial electrician. So much the defendant conceded.

[34] But the defendant contended that on the basis of the medical evidence there was nothing to stop Mr Vowles doing the work of an industrial electrician and so with perseverance and appropriate clearances, which the defendant asserts ought to be forthcoming, the conclusion should be that only a relatively modest global sum should be allowed for that one disadvantage.

[35] The medical evidence was not entirely consistent. Dr Fitzpatrick originally opined, following her only examination of the plaintiff, that the plaintiff could undertake a graduated return to work as an electrician, but he was likely to suffer back pain if he undertook repetitive bending or heavy lifting and this would make it difficult for him to do the work of an industrial electrician. She changed her mind after viewing the DVD material. She now opines that "he has very little in the way of impairment with regard to heavier activities of daily living such as bending and lifting", that he is fit to return to work as an electrician and that he is at no more "risk of developing back pain than anyone else who has some minor age related degenerative change in their lumbar spine."[9] While Dr Fitzpatrick is the only one who can assert that the assumptions she made at the time of her clinical assessment of the plaintiff's capacities and her consequent assessment of impairment are not in keeping with the plaintiff's presentation on the DVDs, it is a further leap again to assert that the surveillance material establishes that there is "very little in the way of impairment".

[36] Dr Fitzpatrick evidently takes the view that because no restriction was evident on the days filmed it necessarily follows that no restriction exists. She explained that the lack of any demonstrated pain or difficulty was of significance to her. That the significant events that she could identify were limited to only five occasions did not trouble her. I do not think that she denies that patients with back complaints can have good days and bad. But she seems not to doubt that her inability to observe restriction led inevitably to her conclusion. Perhaps medical practitioners can claim some expertise over and above the lay person in assessing the likelihood or otherwise of a stoical man, long

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8 T2-62/35

9 Ex 14 at p 4

accustomed to his condition, inevitably demonstrating through grimaces or alteration to posture or gait or in some other way the presence of pain, but if so their training in that regard was not explained in evidence and without such evidence I am reluctant to accept that the expertise exists.

[37] And Dr Fitzpatrick's reference to degenerative change was interesting. This is not a case where the defendant argues that whilst the plaintiff has symptoms they are no more or less than he would have had irrespective of injury. There is no pleading to that effect and no questions were directed to that topic. Rather the defendant's case is that the plaintiff does not have any significant back injury and that assertion is based on the absence of symptoms consistent with such an injury, as shown by the DVD material. So, if the plaintiff has symptoms, the only cause ever suggested for them and the only cause open to me to attribute them to, is the subject accident.

[38] Dr Campbell was more circumspect in his assessment of the impact of the DVD material. He too downgraded the severity of the condition but not to it being non existent. He doubted that any sciatica could be daily, regular and severe given the DVD evidence. And the performance of lifting tasks suggested to him that any back condition was not "major". In response to a question concerning Mr Vowles' capacity to work as an electrician he said:

> "That's - that is difficult to answer. I would think someone with a back injury, such that he is - had back and neck injury, in an ideal situation it would be unwise for him to return to work as an industrial electrician. Although it would be reasonable for them to attempt to do so, it would be, probably, in the long-term, unwise because that person would be at increase risk of further injury than the uninjured worker doing the same job next to them. So in an ideal situation it would be unwise for anyone with a history of a back complaint to go back to work of a very particular nature. Taking a step down from that, working as an electrician, I guess there is a spectrum of physical activity involved with working as an electrician. So if it was a job that was very physical in nature, that puts him up into the industrial sort of category, so I'd probably advise against that as well. But I think it would be reasonable, you know, if he had a job as an electrician, that it wasn't too physical, I think it would be reasonable for him to undertake that sort of job based on what I've seen on that video."[10]

[39] In cross examination he explained himself a little further:

> "And you said it would be reasonable for him to attempt to return to work?-- Yes. Well, I think there were different scenarios there, so I think what I said, what I was attempting to say, was with regard to returning to work as an industrial electrician, ideally it would - it would be better if he didn't do that, because he's had a back injury. In an ideal world. But that's a - that's my view. If you wanted to be a bit tougher on him you'd say, well, go back to work. But I would argue that anyone with a back injury returning to a job of a heavy physical nature, would be a higher risk of re-injury than someone who didn't have a prior injury. With regard to returning to work as an electrician, a standard electrician, there is going to be a spectrum of physicality involved in that job. So I would - I would probably caution -caution him away from a job of a - that was physically demanding, and if he could find a job as an electrician that was less demanding, that would be reasonable. Or it would also be reasonable for him to find other employment such as he's doing now, where he could manage safely.

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10 T1-48/12-31

> Now, Doctor, the lifting that you see in the video surveillance, I'll suggest to you that that's suggestive of his ability to do heavier type of work?-- Yes, I don't think - I don't think there's any doubt he could go - go back to doing tasks of a physical nature. The problem is that if he was to go back to work as an industrial electrician, he would be at higher risk of a re-injury. It doesn't mean it's going to happen, it just means that he would be at higher risk. So it's a bit like - it's a bit like crossing a quiet street versus a busy highway. It's very unlikely you're going to get run over doing either, but you'd be at higher risk of crossing a busy highway of getting run over. So-----
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> So you - Doctor, you think it would be reasonable for him to attempt that sort of return to work into the-----?-- I think - I think, you know, if he was - if he was willing to and he was - if he was forced to, that would be - that would be reasonable. But it would have to be with the understanding that, you know, there's a potential he could - he could relapse with his - with his symptoms.
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> Doctor, you wouldn't tell him to not return to that sort of work, would you?-- Oh, well, I - I would - if he was seeing me in a clinical setting, you know, outside of a Court, in a doctor/patient consultation, yes, I would be - I would advise him not to return to work as an industrial electrician, although it's not something I would feel strongly about. That would be my general advice to him. Because my advice is going to be, you've got to manage your back now, from now on, and you've got to avoid aggravating factors. And they - they will ask all these questions about what they can and can't do, and generally I just say, well, you can do whatever you want to do, but if you're engaging in high risk activities, you are more likely to aggravate your symptoms than someone who - who engages in low risk activities with a bad back or neck.
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> And it's a risk that can be managed through appropriate techniques of lifting and carrying your body?-- Yes, all that - all that will help of course, yes, yes."[11]

[40] In addition to the specialists called the defendant relied on the views expressed by other treating specialists. Generally they had expressed relatively optimistic views encouraging a return to work.[12] Such views, expressed at an early time and without any demonstrated assessment of the entire history, seem to me to be of little moment, save that they are consistent with the view reached by Dr Campbell that any back condition is not "major".

[41] I note that the occupational therapist suggested at a relatively early stage (October 2010) that the work of an electrical contractor would be appropriate.[13] The therapist at least has the advantage that one might expect him to have some reasonable idea of the activities involved in the plaintiff's work.

[42] I accept the evidence of Dr Campbell. It seemed to me to reflect a balanced assessment of the evidence and a careful consideration of the relevant circumstances. I do not disregard Dr Fitzpatrick's views. There is a measure of consistency in the attitude that the two specialists have taken to what they see on the DVDs. And I note particularly her impression, which I gather Dr Campbell shared, that it was the plaintiff's relative freedom of movement and his preparedness to put his back in a position of "vulnerability" as she called it, that she thought significant.[14]

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11 T1-55/1-56/3

12 See reports of Drs Williams and Ryan in Ex 2 at pp 8, 84 and 120 (but see 124)

13 Ex 2 at p 25

14 T2-42/20-43/40

[43] That leads in my view to a finding that the plaintiff can do significantly more than he is called on to do in his present work, and probably has been in that position for some time. He can return to the work of an electrician and he can do the work of an industrial electrician. While he is at some risk in doing so, it is reasonable in my view that for the purposes of assessing damages it be assumed that he has that capacity and has had it for some time. I say that because what Dr Campbell is concerned about is not an inevitability, or even prospect, of permanent injury from engaging in such work, but an increased chance that symptoms might be aggravated. Dr Fitzpatrick made that point and it was not shown that she was wrong.[15] At what level and for what period those symptoms might continue was not, and probably cannot be, estimated. And while Dr Campbell would not advise such a course that is not the be all and end all of the question from the perspective of a damages assessment.

[44] Mr Crow SC was inclined to argue that upon a finding that his client was honest the evidentiary onus had shifted to the defendant to establish what residual capacity there was and that onus was not discharged, requiring acceptance of his client's assertions – an echo of the heresy in *Thomas v O'Shea*[16], a heresy explained by Chesterman J (as his Honour then was) in *Bugge v REB Engineering Pty Ltd*.[17] But for any argument of this nature to arise the plaintiff must first discharge his onus. It is true that the plaintiff's perception of his problems is that he cannot do the work of an industrial electrician. In my view he does not discharge that onus, at least in a case like the present, without the support of medical evidence for the claimed incapacity. It might be said that the doctors cannot experience his pain – an argument often advanced and not without force. But both specialists came to the view that the impression formed in the surgery, and years before trial, was not consistent with the plaintiff's apparent present capacities. His perceptions of daily sciatica, at least at a significant level, and an experience of daily pain, again at a significant level, are not supported. That does not mean that he is dishonest. There are other possible explanations for his perceptions and beliefs. But it does mean that his case cannot be accepted at the level he contends for.

[45] My conclusion then is that Dr Campbell's evidence puts the plaintiff's case at its highest. And Dr Campbell's opinion is not that the plaintiff cannot do the work in question. What his evidence calls for is an assessment of what a reasonable person should do. And that is a legal question as much as a medical one.

[46] In issue is the concept of fairness between the parties. This is not an ideal world and damages cannot give perfect compensation.[18] Damages, as Professor Luntz has said "are not intended to insure the plaintiff against every possible eventuality, nor to compensate for every loss the plaintiff could possibly have sustained."[19] Acceptance of Dr Campbell's opinion means that the plaintiff's claim comes down to this - because he is at risk of an unidentified and unidentifiable degree of aggravation of his symptoms should he undertake certain work, a risk that is not inevitable but at least possible and perhaps more likely than not, but without a demonstrated prospect of a permanent downgrading of his condition, then it is reasonable that the defendant pay him $1.28M

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15 T2-49/25; 2-41/20

16 [1989] Aust Torts Rep 80-251

17 [1999] 2 Qd R 227

18 *Petroleum & Chemical Corporation of (Aust) Ltd v Morris* (1973) 1 ALR 269 at 271 per Menzies J; *Assessment of Damages for Personal Injuries & Death* (4th edn) Harold Luntz at pp 6-7

19 *Assessment of Damages for Personal Injuries & Death* (4th edn) Harold Luntz at p 7 citing *Pamment v Pawelski* (1949) 79 CLR 406 at 410 per Dixon J and *Sharman v Evans* (1977) 138 CLR 563 at 585.

more or less.[20] The amount of damages claimed is so out of proportion to the potential effects on the plaintiff if he pursues that course as to require its rejection.

[47] With that issue resolved I turn to the various heads of loss.

Assessment of General Damages

[48] I have set out my understanding of the methodology required under the *CLA* to assess damages where multiple injuries have been suffered in *Allwood v Wilson & Anor* [2011] QSC 180. I will not repeat myself.

[49] The parties are agreed that the dominant injury is the lower back injury. They agree too that item 93 is the appropriate item number in Schedule 4 of the *Regulation*. The submissions disagree as to the appropriate ISV but the defendant's pleading concedes the ISV rating of 10 that the plaintiff contends for.[21] As there is no issue I have no decision to make. This avoids the necessity of having to resolve a debate between the specialists as to how the AMA guides are intended to work, a debate worth only $2,400 in damages terms.

[50] In case it be said that the need to amend the pleading in the light of the evidence led during the trial was overlooked, I observe that it was the plaintiff who was taken by surprise by the disclosure, only during the course of his cross examination, of the DVD material. Further I note that the defence was amended when the second defendant had the bulk of the surveillance evidence in its possession, so that presumably the pleading reflected a careful consideration of its case.

[51] In any case I would have accepted the plaintiff's submission for the reasons that Mr Crow SC advanced – multiple injuries,[22] the impact on Mr Vowles' activities,[23] his relative youth, and my assumption of a continuing level of symptoms, albeit at a low grade.

[52] I assess general damages at $11,000.

Past Economic Loss

[53] The finding that the plaintiff has had the capacity to return to electrical contacting work for some time now and my view that he ought reasonably to have attempted to do so requires, as the defendant urged, a global assessment of damages. The defendant contended for an assessment of $80,000.

[54] Section 55 of the *CLA* is relevant in these circumstances. It provides:

> **"When earnings can not be precisely calculated**
> (1) This section applies if a court is considering making an award of damages for loss of earnings that are unable to be precisely calculated by reference to a defined weekly loss.

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20 I have added the various components related to economic loss, loss of superannuation and interest from the plaintiff's claimed schedule of damages – Ex 19

21 See para 7(c) of the Amended Defence.

22 I accept the evidence of Dr Campbell, with a 1% impairment to the neck, and Item 88 being applicable

23 Mr Vowles was quite active prior to his injury enjoying fishing, trail bike riding and riding on his road bike. While he can engage in these activities I accept that he is restricted.

> (2) The court may only award damages if it is satisfied that the person has suffered or will suffer loss having regard to the person's age, work history, actual loss of earnings, any permanent impairment and any other relevant matters.
> (3) If the court awards damages, the court must state the assumptions on which the award is based and the methodology it used to arrive at the award."

[55] I have previously determined that the section makes no alteration to the common law tests to be applied: *Perfect v MacDonald & Anor* [2012] QSC 11 at [46]-[51]. No submission was made here that I was wrong in that view.

[56] Therefore in assessing damages in respect of a past hypothetical event I am required to "make an estimate as to what are the chances that a particular thing … would have happened and reflect those chances, whether they are more or less than even, in the amount of damages" which I award: per Lord Diplock in *Mallett v McMonagle*[24] cited by Brennan CJ and Dawson J in *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 at 640.

[57] The relevant factors seem to me to be:

(a) Mr Vowles suffered injuries in the subject accident that reasonably kept him away from employment. He diligently pursued treatment options suggested;

(b) Mr Vowles has improved over time. He was not fit in 2010 to return to work. He ought to have been pursuing work by early 2011;

(c) Mr Vowles had the difficulty of the history of disabling injury to both neck and back which it should be assumed astute employers would know of. Enquiries of past history are now routine. It must be assumed that he would respond honestly. This is a significant impediment to him obtaining employment;

(d) Assuming a sufficient level of fitness does not mean an immediate return to high paying work. The probable course he could realistically follow would be to obtain work that was not so demanding as full scale industrial contracting work to demonstrate his fitness and to gain confidence;

(e) Given these factors, it was a possibility only that Mr Vowles would have been able to obtain higher paid employment before now in his injured state;

(f) The only evidence of the wage levels of "ordinary" electricians is the award wage which is not so different to his present wage;[25]

(g) Had he not been injured it would be wrong to assume full time employment at the high rates of pay. The nature of the industry is that there are down times between jobs, and given that there are periods when the worker must be away from home the probabilities are that constant employment would not be pursued;

(h) Mr Vowles earned about $1480 net per week prior to the accident. There have been higher paying jobs since but it does not necessarily follow that Mr Vowles would have obtained that employment or would have wanted to do so without some down time as others have plainly done;

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24 [1970] AC 166 at 176

25 The occupational therapist reported the wages as falling in the sixth decile – Ex 2 at p 27

(i) While Mr Vowles had a prospect of obtaining the high paying work on the Mongolian contract it was not certain and would have depended on many things, not least being his availability when the project came up, as well as the employer's impression of his suitability compared with other candidates.

[58] I assess damages at $170,000. It is a global assessment, but to the extent that I have been guided by earnings rates, I note that the pre-accident earning rate applied over the period since July 2010 with an allowance for down time and some expenses less the actual earnings, which I take to be $21,371, roughly comes to this amount. To any complaint that this approach takes no account of the significant increase in wages over the last few years there are at least two answers. The evidence demonstrates that significantly more leisure time might be taken than I have assumed. And if one party must bear the consequences of uncertainty brought about by the plaintiff's failure to exercise his capacity to pursue and obtain higher paying work had he been so minded, then it seems just that it be the plaintiff.

[59] I will allow interest on $58,000 to bring into account the admitted receipt of income insurance payments.[26] I allow $4,228.

Future Economic Loss

[60] The considerations relevant to the future claim are much the same as for the past. The only additional matters that I would mention are:

(a) Mr Vowles should be compensated for the restriction on his earning capacity that was likely to be productive of financial loss say to age 60;

(b) Had he obtained work at the higher level of wages applicable to more demanding work then he had the risk of suffering an aggravation of his symptoms and hence losing confidence in himself and the confidence of his employers;

(c) There is the prospect that he would be more guarded in his approach to duties and hence less efficient and less attractive as an employee;

(d) He has worked as a leading hand. His peers have achieved supervisory level. He would have had that chance had he returned to work. Mr Bailey spoke highly of his abilities. Experienced men are apparently relatively scarce. There are positions available at supervisory levels that do not require manual labour. If he achieved such a position then he would be as well remunerated as he would be working "on the tools". Having said that, it must be acknowledged that his chances of achieving supervisory positions are reduced;

(e) Given the very demanding nature of the work, and the need to work in uncongenial circumstances and often far from home base, with time, Mr Vowles would not necessarily have sought to pursue that work through to retirement age, assuming he had not had the subject injury, but would have sought more sedentary and less well remunerated employment;

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[26] The proper approach to payments made pursuant to an insurance policy was not debated and is not straight forward: *Assessment of Damages for Personal Injuries & Death* (4th edn) Harold Luntz at p 431 and the authorities there discussed. This approach avoids potential over compensation.

(f) While his single status frees him now to travel and seek well paid work it also means he has no obligation to provide and support others and so removes one of the incentives that is often claimed to drive workers to keep at the demanding work. What his position might be over 26 years cannot be known;

(g) Wage rates for industrial electricians have increased substantially – in the order of 40% - in the few years since the plaintiff's accident. A significant component of an industrial electrician's well paid work comes from the mining industry. It is notorious that there is a boom in Australia for all work associated with the mining industry. Whether that will continue cannot be known. The prospect that it might not continue cannot be ignored.

[61] In my view the plaintiff has had a step down in his employability. He is now more vulnerable than he otherwise would have been. I assess that he has lost some 15% of his pre-accident earning capacity. Mr Crow SC contended that Mr Vowles had a capacity to earn $2,100 net per week if unimpaired. That was less than the best rates of pay that have been available in recent times. Adopting that figure as the sustainable capacity over 26 years to age 60, I assess a loss of $315 per week and round the resulting calculation, after applying the 5% discount multiplier, to $250,000. While my assumptions already have a built in allowance for adverse contingencies, given the factors that I have mentioned in (e), (f) and (g) above I consider that there ought to be some further discounting. I discount the assessment by about 15%.

[62] I allow $215,000 for this head of loss.

Superannuation

[63] My approach to the past and future assessment has made no allowance for industry superannuation. That is assessed at 9% of the amounts allowed - $15,300 and $19,350 respectively.

Miscellaneous Future Expenses

[64] The defendant concedes an award of $4,000 and the plaintiff claims $9,180.

[65] Neither submission was based on the findings that I have made. My assumption of a return to hard manual work will bring with it the prospect of aggravations and a consequent need for medications, attendances on general practitioners from time to time for prescriptions and perhaps occasional physiotherapy and the like. I assess damages at $10,000.

Summary

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

Pain, suffering and loss of amenities of life	$11,000.00
Past economic loss	$170,000.00
Interest on past economic loss	$4,228.00
Loss of Superannuation Benefits (past)	$15,300.00

Future loss of earning capacity	$215,000.00
Loss of Superannuation Benefits (future)	$19,350.00
Miscellaneous future expenses	$10,000.00
Special damages	$5,432.00
Interest on special damages[27]	$440.00
Total Damages	**$450,750.00**

Orders

[67] There will be judgment for the plaintiff in the sum of $450,750.

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

[27] In accordance with the plaintiff's schedule Ex 19