SUPREME COURT OF QUEENSLAND

CITATION:	*Heywood v Commercial Electrical Pty Ltd* [2013] QSC 52
PARTIES:	**MITCHELL DWIGHT HEYWOOD** (plaintiff) **v** **COMMERCIAL ELECTRICAL PTY LTD** **(ACN 124 997 771)** (defendant)
FILE NO:	BS 5102 of 2011
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	8-10 October 2012
JUDGE:	Martin J
ORDER:	**Action dismissed**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – REASONABLE FORESEEABILITY OF DAMAGE – PARTICULAR CASE – AS BETWEEN EMPLOYER AND EMPLOYEE – where the plaintiff was employed by the defendant as an apprentice electrician – where plaintiff required to use a system involving metal framing to protect electrical cabling – where plaintiff cut a piece of framing as required by his employer – where the plaintiff left a piece of the scrap metal near a ladder used by the plaintiff – where the plaintiff knew that the scrap metal was sharp – where the plaintiff subsequently punctured his elbow on the scrap metal – where the plaintiff suffered injury as a result – whether the defendant breached its duty of care owed to the plaintiff at common law TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – GENERALLY- where the defendant implemented a system whereby scrap metal was used to cover electrical cabling – where expert reports adduced with respect to whether system implemented by the defendant met standards under the *Electrical Safety Act* 2002 – whether the duty of care owed by the defendant under the *Electrical Safety Act* 2002 was discharged by the

defendant having implemented the system

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – RE-EMPLOYMENT OF WORKER – where the plaintiff is 28 years old – where the plaintiff suffered 100% division in ulnar nerve in left elbow – where the plaintiff is right handed – where injury expected to improve – where plaintiff still experiences occasions of numbness and reduced grip strength – where the plaintiff indicated a desire to work as an electrician in the mining industry – where injury will impact future employment to some degree – where no evidence adduced to suggest actual future economic loss – whether the plaintiff has demonstrated the loss resulting from any diminution in earning capacity

Electrical Safety Act 2002 (Qld)

Hegarty v Queensland Ambulance Service [2007] QCA 366, considered
Lusk v Sapwell [2011] QCA 59, considered
Finn v The Roman Catholic Trust Corporation for the Diocese of Townsville [1997] 1 Qd R 29, cited
Rasic v Cruz [2001] NSWCA 66, considered
Thompson v Woolworths (Queensland) Pty Ltd (2005) 221 CLR 234, considered
Hunter v New Fishing Australia Pty Ltd [2009] QSC 229, cited
Hughes v Tucaby Engineering Pty Ltd [2011] QSC 256, applied
Medlin v State Government Insurance Commission (1995) 182 CLR 1, applied

COUNSEL: A G Munt for the plaintiff
G C O'Driscoll with D Schneidewin for the defendant

SOLICITORS: Collas Moro Ross Solicitors for the plaintiff
MVM Legal for the defendant

[1] On 17 October 2008 the plaintiff was employed as an apprentice electrician with the defendant. He claims that he injured his elbow when he descended from his ladder and bumped the sharp edge of some U-shaped framing. Both liability and quantum are in issue.

Background

[2] The plaintiff was the defendant's employee. He commenced employment with the defendant on 30 June 2008. At the time of the incident, he had completed a three month probationary period but had not officially commenced as a first year apprentice electrician.

[3] The defendant is a company that mainly performs commercial electrical work. The plaintiff was working at a high rise apartment building known as "Frangipani" in Palm Beach where the defendant had a contract to perform, among other things, the installation of electrical cables.

[4] At the time of the incident, the defendant had completed "roughing in", which involved installing all the electrical cables in the building in preparation for completion. The apartments in the Frangipani complex had a concrete level between each floor which formed the roof of the unit below and the floor of the unit above. Roughing in entailed using a gas-operated hammer device known as a Hilti tool to put a nail into the concrete ceiling which would hold the electrical cables to the ceiling.

[5] U-shaped framing was attached to the concrete ceiling for the positioning of walls. Due to an apparent misunderstanding regarding the sheeting of the walls, some damage had been done to the electrical cables on the lower floors of Frangipani. Relevantly, the cables were being forced up against the sharp section of the U-shaped framing which could have led to the steel frame becoming live, creating the risk of electrocution.

[6] Mr Keith Menz, an electrical subcontractor working at the Frangipani complex, devised a method of protecting the sharp edges of the U-shaped framing. It involved shortening other pieces of U-shaped framing to an appropriate length, turning it upside down and fastening it over the framing attached to the roof, creating a soft edge along which the cables could run. These pieces of scrap metal had the same sharp edges as the framing already attached to the ceiling.

[7] The director of the defendant, Mr Trent Ridings, adopted that method of protecting the sharp edges of the framing attached to the ceilings. The plaintiff says Mr Ridings had demonstrated this technique to him prior to the day of the incident.

The incident

[8] There is no dispute as to the mechanism of the injury. On the day of the incident, the plaintiff was working on the fifth floor of the premises covering sharp edges of the U-shaped framing as described above. He located a scrap piece of U-shaped framing on the floor and placed it on his gang box (a tool box), the top of which was approximately 110 cms above ground level. He cut a piece off the framing to form the required sleeve, leaving the remainder on the gang box for later use. He ascended the ladder and positioned the sleeve into place. The plaintiff descended the ladder and, when he stepped off the last rung, his elbow came into contact with the scrap piece of framing.

[9] The plaintiff says that when he stepped off the ladder he swung around to his left. Mr Menz was working in the same area as the plaintiff and witnessed the plaintiff coming down the ladder. He says he saw the plaintiff step back when he came off the ladder and puncture his elbow.

[10] The plaintiff described the incident in this way:

> "I wasn't really thinking about the U shaped steel. It was on top of the gang box, I guess, but I was more just thinking about the job at hand … I made my way up the ladder, put the bit that I'd cut off

> over, made sure that it was snug, and then, …, as I was walking back down the ladder, I was already thinking about the next job I had to do, because we were always under the pump, and as I got to the last rung of the ladder, I stepped off and swung around to my left and that's when the bit of steel went into my elbow."

[11] The plaintiff says he immediately experienced excruciating pain in his elbow. After waiting to see if the pain would abate, Mr Menz took him to a local doctor who advised him to go to the emergency department at Robina Hospital. At that stage he says he could not feel his hand or move any of his fingers. The plaintiff underwent surgery on 20 October 2008 to repair his left ulnar nerve.

The plaintiff's case on liability

[12] It was submitted on the plaintiff's behalf that this was a clear case of a system that failed to make adequate provision for mere inattention or inadvertence on the part of a very inexperienced worker. There was, it was said, a failure to instruct and to supervise. In oral submissions it was also put that the crux of the case was that the defendant had failed to consider other, safer methods of protecting the cabling. More particularly, it was contended that the defendant had failed to instruct:

(a) the plaintiff to place the sharp end of the U-shaped section down so that the sharp edge was not protruding, and

(b) the plaintiff to look before he stepped backwards off a ladder so as to check where a hazard might be.

[13] The plaintiff argued that the incident could have been avoided entirely had the defendant:

(a) elected to use one of the commercially available products designed specifically for the task, or

(b) identified the risk of injury which the sharp U-shaped channel presented to someone with the level of experience of Mr Heywood, and

(i) warned the plaintiff of the risk of injury which the sharp edge presented to him, or

(ii) instructed the plaintiff that the U-shaped channel be placed so that the sharp edges were facing down, or

(iii) instructed the plaintiff that the U-shaped channel was at all times to be placed away from work areas, or

(iv) Mr Menz, as he was working in the immediate vicinity, could have told the plaintiff to move the U-shaped channel away.

The defendant's case on liability

[14] The defendant contends that its only obligation is to take reasonable care and not to protect the employee from all perils. In order to take reasonable care an employee does not have to avoid all risks by all reasonably affordable means.

[15] In addition, the defendant pleads that, if it was negligent, then there was contributory negligence by the plaintiff.

Consideration of liability

[16] The evidence was clear that the plaintiff understood and appreciated the risk that exists when handling sharp objects in the workplace. He accepted that care needed to be taken in handling such objects and in working with or around such objects. The piece of U-shaped channel that cut the plaintiff's elbow had been created by the plaintiff when he cut it to size and he knew that it was sharp at all material times.

[17] The system which was created for the protection of the electrical cabling was one developed by the subcontractor which was then adopted by the defendant. Expert evidence was adduced by each party with respect to the means by which the dangers associated with the sharp edges of the U-shaped channel could be reduced or completely obviated. For the plaintiff, evidence was given by Mr Phillip Byard.

[18] Objections were taken by Mr O'Driscoll to the admissibility of the reports sought to be tendered by the plaintiff. The first report (November 2011) and the second report (March 2012) were the subject of objection. Following argument, I admitted part of the first report from page 9, line 22 to its conclusion and the second report in its entirety. As a result, those reports provide evidence about products which the authors of the reports say are alternative methods of protecting cables from sharp edges.

[19] The defendant called evidence from Mr Derek Green. He provided two reports – November 2011 and April 2012. His reports were directed to the requirement to comply with the *Electrical Safety Act* 2002 and associated standards. I am satisfied that his expertise qualified him to express opinions about the extent to which proposed means of protecting the cables advanced for the plaintiff would or would not comply with the relevant standards.

[20] He expressed the following opinions:

(a) That the method used by the defendant to protect the sharp edges of the top plate complied with the requirements of the *Electrical Safety Act* and the relevant standards,

(b) The alternatives proposed by Mr Byard in particular, the use of spiral binding or rubber edge protection, would not comply with the requirements of the Australian Standards.

[21] The reports by Mr Green exhibited a practical understanding of the problems which would be encountered in the situation which gave rise to Mr Heywood's injury. They also exhibited an understanding of the relevant statutory requirements and the requirements of Australian Standards. The reports by Mr Byard do not deal with

the issue of those standards and appear to have been misguided to the extent that is apparent from the first part of the November 2011 report where the engineer purported to analyse the accident. I prefer the opinion of Mr Green and I am satisfied that his evidence establishes that the means used by the defendant were both appropriate and would satisfy the requirements of the standards and the statute. It follows, then, that the alternative systems proposed by the plaintiff were systems which would not have been appropriate in these circumstances. The duty which the employer owed under the *Electrical Safety Act* was discharged by its implementation of the system used by the plaintiff.

[22] I turn to the issue of whether the risk of injury was reasonably foreseeable and, in doing so, bear in mind the observations of Keane JA (as his Honour then was) in *Hegarty v Queensland Ambulance Service*[1]:

> "[49] In *New South Wales v Fahy*, Gummow and Hayne JJ recently emphasised that what an employer acting reasonably must do by way of care for an employee is an issue which 'requires looking forward to identify what a reasonable employer **would** have done, not backward to identify what would have avoided the injury.' One must not lose sight of the important reasons for circumspection on the part of an employer which may reasonably forestall intervention in relation to the mental health of an employee. These considerations are easily lost from sight once an adverse outcome for the employee has resulted. It is necessary to resist the inclination retrospectively to find fault by devising chains of causation involving risks which were not reasonably regarded as significant before a particular event has occurred. In *Rosenberg v Percival*, Gleeson CJ said:
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> > 'In the way in which litigation proceeds, the conduct of the parties is seen through the prism of hindsight. A foreseeable risk has eventuated, and harm has resulted. The particular risk becomes the focus of attention. But at the time of the allegedly tortious conduct, there may have been no reason to single it out from a number of adverse contingencies, or to attach to it the significance it later assumed. Recent judgments in this Court have drawn attention to the danger of a failure, after the event, to take account of the context, before or at the time of the event, in which a contingency was to be evaluation (see, eg, *Jones v Bartlett* (2000) 205 CLR 166 at 176; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 263, 291-292. This danger may be of particular significance where the alleged breach of duty of care is a failure to warn about the possible risks associated with a course of action, where there were, at the time, strong reasons in favour of pursuing the course of action.'"

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1 [2007] QCA 366.

[23] To similar effect are the observations by Muir JA in *Lusk v Sapwell*[2] where his Honour said:

> "[17] The appellants argued that the primary judge approached the assessment of liability with an inappropriate and impermissible use of the benefit of hindsight. In that regard, they placed reliance on the following passage from the reasons of Hayne J in *Vairy v Wyong Shire Council*:
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> > '[124] Again, because the inquiry is prospective, it would be wrong to focus exclusively upon the particular way in which the accident that has happened came about. In an action in which a plaintiff claims damages for personal injury it is inevitable that much attention will be directed to investigating how the plaintiff came to be injured. The results of those investigations may be of particular importance in considering questions of contributory negligence. But the apparent precision of investigations into what happened to the particular plaintiff must not be permitted to obscure the nature of the questions that are presented in connection with the inquiry into breach of duty. In particular, the examination of the causes of an accident that *has* happened cannot be equate with the examination that is to be undertaken when asking whether there was a breach of a duty of care which was a cause of the plaintiff's injuries. The inquiry into the causes of an accident is wholly retrospective. It seeks to identify what happened and why. The inquiry into breach, although made after the accident, must attempt to answer what response a reasonable person, confronted with a foreseeable risk of injury, would have made to that risk. And one of the possible answers to that inquiry must be "nothing".'
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> [18] Hayne J, in explaining why the enquiry as to whether a duty of care had been breached was prospective and not confined to the circumstances of the plaintiff's accident, said:
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> > '[125] There are fundamental reasons why the inquiry cannot be confined to where the accident happened or how it happened. Chief among them is the prospective nature of the inquiry to be made about response to a foreseeable risk.
> >
> > *Look forward or look back?*
> >
> > [126] When a plaintiff sues for damages alleging personal injury has been caused by the defendant's negligence, the inquiry about breach of duty must

[2] [2011] QCA 59.

attempt to identify the reasonable person's response to foresight of the risk of occurrence of the injury which the plaintiff suffered. That inquiry must attempt, after the event, to judge what the reasonable person *would* have done to avoid what is now known to have occurred. Although that judgment must be made after the event it must seek to identify what the response would have been by a person looking forward at the prospect of the risk of injury.

[127] There may be more than one place where this risk of injury may come to pass. Because the inquiry is prospective there is no basis for assuming in such a case that the only risk to be considered is the risk that an injury will occur at one of the several, perhaps many, places where it could occur. *Romeo* was just such a case and so is this. In both cases there were many places to which the public had access and of which the Commission (in *Romeo*) and the Council (in this case) had the care, control and management. In *Romeo*, there were many places where a person could fall off a cliff; here, there were many places where a person could dive into water that was too shallow. Because the inquiry is prospective, all these possibilities must be considered. And it is only by looking *forward* from a time before the accident that due weight can be given to what Mason J referred to in *Shirt* as "consideration of the magnitude of the risk and the degree of the probability of its occurrence". It is only by looking *forward* that due account can be taken of "the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have".

[128] If, instead of looking forward, the so-called *Shirt* calculus is undertaken looking back on what is known to have happened, the tort of negligence becomes separated because, in every case where the cost of taking alleviating action at the particular place where the plaintiff was injured is markedly less than the consequences of a risk coming to pass, it is well nigh inevitable that the defendant would be found to have acted without reasonable care if alleviating action was not taken. And this would be so no matter how diffuse the risk was – diffuse in the sense that its occurrence was improbable or, as in *Romeo*, diffuse in the sense that the place or places where it may come to pass could not be confined within reasonable bounds.' (References omitted)."

[24] The plaintiff always knew that he was handling a sharp object. He gave evidence that he knew the consequences of handling sharp objects and that care needed to be taken. As he cut the U-shaped channel himself, there was no requirement for the employer to tell him it was sharp. So much was obvious from his own work. The plaintiff created the hazard himself by placing an object which he knew to be dangerously sharp with the sharp edge exposed on the toolbox close to the ladder he was using. The plaintiff conceded that he knew of the problem and that it was dangerous. He knew where the sharp object was before he ascended the ladder and he knew it was in a position which would be close to the point at which he would eventually step off the ladder after he descended it.

[25] As I have already observed it is not an employer's obligation to safeguard an employee from all perils. See, for example, *Finn v The Roman Catholic Trust Corporation for the Diocese of Townsville*[3].

[26] The duty imposed on employers is one to take reasonable care. It is not a duty to avoid all risks by all reasonably affordable means. In *Rasic v Cruz*[4], Fitzgerald AJA said (at 42) that:

> "... a duty of care is not a general duty to protect careless people from the consequences of their own carelessness. The test of reasonable care is not whether the safety of the shop could be improved".

[27] To similar effect are the statements by a unanimous High Court in *Thompson v Woolworths (Queensland) Pty Ltd*[5] where the following appears:

> "[35] When a person is required to take reasonable care to avoid a risk of harm to another, the weight to be given to an expectation that the other will exercise reasonable care for his or her own safety is a matter of factual judgment. It may depend upon the circumstances of the case. ...
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> [36] The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response. ...
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> [37] The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any one of them is likely to vary according to circumstances. In the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration."

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3 [1997] 1 Qd R 29 at 41.
4 [2001] NSWCA 66.
5 (2005) 221 CLR 234.

[28] The factors that I have referred to above concerning the actions of the plaintiff and the knowledge he possessed at the time demonstrate to me that it has not been established that the defendant breached its duty to the plaintiff. It was not a difficult task, the plaintiff knew how to do the task, and the injury came about through the actions of the plaintiff.

[29] It follows, then, that the plaintiff must fail. I will, though, assess damages.

Damages

[30] The plaintiff is now 28 years old. He was 24 years of age at the date of the accident. He had suffered injuries during his childhood. These were to his neck (in pre-school), left knee (Year 8), right knee (Year 11) which required arthroscopic treatment, and to his left shoulder.

[31] Notwithstanding the injuries referred to above the plaintiff was not prevented from participating in school sporting activities and represented his school at a high level in football, cricket and other sports.

[32] On the day of the incident, the plaintiff struck the posterior aspect of his left elbow against the U-shaped steel. He described feeling a severe pain and instant numbness to the fingers and blood was running from the wound. He was taken to hospital and it was found that he had suffered a 100% division of the ulnar nerve. The nerve was transposed anteriorly to the medial epicondyle and was repaired using the operating microscope. Fibres regenerate across a repair site. The nerve regenerates at approximately a millimetre a day and improvements can be observed after ulnar nerve repairs for up to 18 months after an injury.

[33] Following surgery his arm was in a sling for about four weeks. He attended a hand therapy course and continued to wear a sling to protect his arm. He experiences numbness in the fingers of his left hand and the discomfort is aggravated by exposure to vibrating equipment. Other problems include: difficulty using heavy power tools, a knock to his left elbow results in a "pins and needles" sensation, difficulty spreading the fingers of his left hand, and reduced grip strength. All these occur, of course, to his left arm and hand – the plaintiff is right-handed.

[34] Dr Robinson was of the opinion that the plaintiff is at no higher risk of osteoarthritis or other degenerative changes as a result of the accident and that he is unlikely to benefit from further surgical or non-surgical treatment to the left arm.

[35] After taking into account a 28% Impairment of Upper Extremity Function which converts to a 17% Impairment of Whole Person Function and a 3% Impairment of Whole Person Function due to scarring from the surgical procedure, Dr Robinson concluded that the plaintiff had 19% Impairment of Whole Person Function. This was not challenged.

[36] When Dr Robinson was being cross-examined he was shown photographs on a Facebook site of the plaintiff. Those photographs disclosed activities and actions that are not unusual for young men and were relied upon by the defendant to: demonstrate a lack of self consciousness about the scars on his arm and that he had sufficient strength in his left arm. More particularly, with respect to photographs showing the plaintiff picking up his girlfriend and swinging her around Dr Robinson

was not concerned by them because he was of the view that the photographs depicted someone using arms rather than hands to lift a person. He was generally of the view that the photographs did not disclose any inconsistency with the plaintiff's reported condition. It would also be fair to note that the photographs are inconsistent with the plaintiff experiencing immediate pain when lifting and manipulating a live weight of about 60 kilograms.

[37] I was referred by Mr Munt to *Hunter v New Fishing Australia Pty Ltd* [2009] QSC 229 in support of an award of general damages of $85,000. That case is of no assistance as general damages had been agreed. I prefer to rely upon *Hughes v Tucaby Engineering Pty Ltd* [2011] QSC 256 as providing a better indication of the appropriate area for general damages. For **General Damages** I award $50,000.

[38] His capacity to undertake physical activity was also the subject of Dr Robinson's evidence. He spoke of occupational restrictions, and in his oral evidence said that pinched nerve fibre leads to a reduction in the number of muscle fibres being able to be used. As a result, on a "simple one-off test" the plaintiff would "probably have a fairly good lifting capacity, but his ability to do it repeatedly, he will fatigue very, very rapidly compared to an uninjured person or his uninjured side".

[39] Dr Robinson expected that the plaintiff would need an "accommodating employer" who would allow him to complete tasks in a longer time frame than uninjured employees.

[40] A report was received from an occupational therapist, Ms Dent, of March 2011. She performed a functional capacity evaluation and came to the conclusion that the plaintiff did not have any restrictions with respect to these physical tasks: sitting, standing, walking, balancing and reaching overhead.

[41] The plaintiff's claim for future economic loss was based largely on an expressed intention to work in the mining industry. He had already worked as a drillers' offsider in the mining industry for 16 months prior to commencing as an electrical apprentice.

[42] Ms Dent's report identified a number of matters which would work against the plaintiff if he was to attempt to undertake underground electrical work in the mines. These were all associated with his injury and had included difficulty with lifting and carrying heavy tools, operating vibrating machinery, gripping and grasping objects with his left hand, and so on. This was all consistent with Dr Robinson's evidence.

[43] The plaintiff called evidence from Mr Benjamin Bird, a friend of the plaintiff for many years. He has worked as an electrician in the mines over the last two and a half years. He described work involving heavy lifting and carrying of tools of engine parts which, on Ms Dent's analysis, would create difficulties for the plaintiff.

[44] In cross-examination the plaintiff agreed that he had worked for a number of electrical firms after his injury. He ceased employment at one because the firm lost work and at another because he felt he had been victimised over his wanting to take leave at a particular time. Apart from some appointments with specialists he did not lose any time at work as a result of this injury.

[45] The plaintiff's claim for future economic loss is advanced in two ways. First, on the basis that his injury will prevent him from pursuing employment in a large range of occupational areas which would otherwise be available to a qualified electrician. Secondly, he will not be able to gain employment in the mining industry as an electrician. Extraordinarily, these are claimed cumulatively and not as alternatives.

[46] With respect to the first claim, the plaintiff asserts that he has suffered a diminution of earning capacity equivalent to at least 33% of his pre-injury capacity. I am not aware of any expert evidence to support that assessment. It is appropriate to proceed on the following basis. The plaintiff will be disadvantaged in the employment market because his injury will:

(a) make him slower at some tasks than other workers,
(b) have to be disclosed to prospective employers, and
(c) make him vulnerable to further injury and, thus, reduce his employability.

[47] The second claim is even more problematic. Both Dr Robinson and Ms Dent acknowledged that he will have trouble with heavy equipment. But the evidence about the work available for electricians in the mining industry was limited. Mr Bird could describe what he did as an electrician on a mine site but no one was called who could give a more extensive overview of the type of work which might be undertaken, where it might be and the possible duration of such work. Ms Dent gave evidence that she had found over 15 advertisements for mining electricians between 1 March and 27 March 2011. But that does not allow a consideration of the type of work available and the plaintiff's capacity or lack of capacity for such work. Further, the plaintiff declined the defendant's invitation to take part in an independent examination to test his capacity to work in the mining industry.

[48] The plaintiff has established a diminution of earning capacity; he has not demonstrated with any degree of precision the loss that is a result of that diminution.[6] Given his age – 28 – and the impairment which he has suffered, and after taking into account the usual contingencies and discounts an appropriate assessment for **future loss of earning capacity** is $150,000. To that should be added an award for **lost superannuation** at the rate of 9% pa – $13,500.

[49] The full list of damages is:

General damages	50,000.00[7]
Past Economic Loss (agreed)	15,000.00
Interest on PEL – nil due to receipt of statutory benefits	
Past loss of superannuation	1, 350.00
Future loss of earning capacity	150,000.00
Future loss of superannuation	13,500.00
Past special damages (agreed)	11,000.00

6 *Medlin v State Government Insurance Commission* (1995) 182 CLR 1
7 This figure (originally $100,000) was corrected pursuant to UCPR 388

Future special damages	3,500.00
Fox v Wood	1,370.00
Sub-total	295,720.00
LESS WorkCover refund	92,565.00
TOTAL	153,155.00[8]

Order

[50] Action dismissed.

[8] This figure (originally $203,155) was corrected pursuant to UCPR 388.