SUPREME COURT OF QUEENSLAND

CITATION:	*Little v McCarthy & Anor* [2014] QSC 274
PARTIES:	**REECE RAYMOND LITTLE** (First Plaintiff) **And** **KAITLIN MAREE CRUST** (Second Plaintiff) **v** **KALEM JOESEPH MCCARTHY** (First Defendant) **And** **ALLIANZ AUSTRALIA INSURANCE LIMITED** **ABN 15 000 122 850** (Second Defendant)
FILE NO/S:	S28/2014
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	12 November 2014
DELIVERED AT:	Rockhampton
HEARING DATE:	7, 8 and 9 October 2014
JUDGE:	McMeekin J
ORDER:	**1. Judgment for the plaintiff in the sum of $254,560.42**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – where liability admitted – where plaintiff was injured in a motor vehicle accident – where plaintiff suffered soft tissue damage to his lower back – where plaintiff alleges ongoing pain due to his injuries – where plaintiff is not medicated for his injuries - where plaintiff is employed by his father's company - where plaintiff works excessive hours as a qualified trades person – whether the pain is at the level described by the plaintiff - whether the

plaintiff has suffered loss of earning capacity – whether the plaintiff requires ongoing therapy for his injuries

Civil Liability Act 2003 (Qld)

Civil Liability Regulation 2003 (Qld)

Allwood v Wilson & Anor [2011] QSC 180 cited
Graham v Baker (1961) 106 CLR 340; [1961] HCA 48 cited
Malec v JC Hutton Pty Ltd (1990) 169 CLR 638; [1990] HCA 20 applied
Medlin v State Government Insurance Commission (1995) 182 CLR 1; [1995] HCA 5 cited
Paul v Rendell (1981) ALR 469 cited
Societe d'Avances Commerciales (Societe Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana") [1924] 20 LI L Rep 140 cited
Van Gervan v Fenton (1992) 175 CLR 327; [1992] HCA 54 cited

COUNSEL:	GF Crow QC and Ms M Willey for the plaintiff
	AM Arnold for the defendants
SOLICITORS:	Maurice Blackburn Lawyers for the plaintiff
	McInnes Wilson Lawyers for the defendants

[1] **McMeekin J:** The first plaintiff, Reece Raymond Little, claims damages for personal injuries suffered on the 26th February 2012 in a motor vehicle accident. Liability is admitted. I am required to assess damages. The claim made by the second plaintiff, Kaitlin Maree Crust, has been settled.

The Legislation

[2] The assessment is governed by the provisions of the *Civil Liability Act* 2003 (Qld) ("the Act") and the *Civil Liability Regulation* 2003 (Qld) ("the *Regulation*"). I have set out my view as to how these provisions should be applied in *Allwood v Wilson & Anor* [2011] QSC 180. I will not repeat myself. So far as I am aware that approach has not been the subject of criticism by any appellate court and is in conformity with the approach of other trial judges. I will adopt that approach here.

The Plaintiff

[3] Mr Little was born on the 5th April 1985. He was 26 years of age when injured and is now aged 29 years. He is an auto electrician by trade.

The Injuries

[4] It is not in issue that Mr Little has suffered soft tissue injuries to his chest, neck and lower back.

[5] Mr Little's only ongoing complaint is of damage to the soft tissues of his lumbar spine area. Early symptoms of pain in the chest (from the seat belt) and neck areas have resolved – the former in a day or two and the latter over a few months at most.

The Accident

[6] The motor vehicle accident involved a rear end collision at high speed causing the vehicle in which Mr Little was travelling to collide with the car in front. Mr Little was a rear seat passenger and seat belted. The accident occurred while Mr Little and his partner were heading to the airport at Brisbane to fly to Rockhampton. They made their flight. Mr Little sought treatment at the Base Hospital once he arrived in Rockhampton.

Post Accident Employment

[7] After the accident Mr Little continued to work. He had no time off, save perhaps for an afternoon or two to obtain physiotherapy, and indeed worked longer hours than usual in the first two weeks after the accident. He worked for the family company, Chrisway Maintenance Service Pty Ltd, as an auto electrician. He was paid as a leading hand.

[8] In August 2013 his partner lost her employment and left Blackwater, where they had lived until then, and moved to live and work in Mackay. He followed, resigning his position with the family company. After some months seeking employment[1] Mr Little obtained work with the Southern Cross Group as a field service technician. While he had some earlier offers of employment he was keen to obtain employment with a company of this type as he thought that it gave him access to a permanent position at a mine, which he coveted.

[9] The plaintiff lasted only three weeks with the Southern Cross Group. Essentially he was working on large machinery and that work was heavier than he was used to, three to four times heavier,[2] the hours were longer and he had no assistance and no breaks during the day, for example for lunch or "smoko." He left of his own accord. He found the work, and the work load, too demanding. His evidence in chief was:

> "It didn't work out for you at Southern Cross?---No. I couldn't handle the heavy duty work – bigger machines that I wasn't used to working on. They were just too much for my work. Heavy – the starter motors are a lot heavier and the alternators, the compressors – everything was a lot heavier and I was just constantly – my back was just constantly sore pretty much throughout the whole day every day and I was doing extra hours than I supposed to do – originally told I was going to do and – yeah."[3]

[10] That reference to "doing extra hours than I [was] supposed to do" suggests that Mr Little's difficulty at Southern Cross Group was not solely to do with his back. In cross examination this exchange occurred:

> "…And one of your complaints about Southern Cross employment is that you all of a sudden, out of the blue, had to work extended hours?---Yes, sir.

---

1 I note that this does not really fit with the history given to Mr Hoey (Exhibit 8 at para [3]) but Mr Little's account was not challenged (eg see T1-21/6 and Ex 2 para 35) and so I accept it.

2 T1-68/18

3 T1-21/9-15

> That's – yeah. You say, "Oh, look, I was working 40-something hours a week, and then, all of a sudden, I had to jump to 55," or something?---Yes, sir.
>
> And you're saying that that was one of the reasons that you had to give Southern Cross away, it's just these long hours?---And the fact I had nobody working with me, and the fact that I'd – we only ever got a smoko; we didn't get no lunch, so that adds to the day. And it was just a way more stressful job with the - - -
>
> Oh, way more stressful?---With the heavy earthmoving.[4]

[11] Again in cross examination:

> "And if – was this the first time in your career that you've been actually busy as far as work was concerned?---I was definitely a lot busier than I'm used to. I didn't realise how actual flat out they are there but it was definitely – definitely busy but it was more so the heavier work that I struggled with which therefore led to mistakes.
>
> And, Mr Little, when you resigned you resigned because you just could not cope with the tasks that were – that is not physically cope – you could no [*sic* not?] mentally cope with the tasks that were given you. That's right, isn't it?---By the end of it I was just physically and mentally done. I – because – it was because of the physicality of it – that's what made me stressed out and then I, basically, broke down and because I'd made a couple of mistakes that I never would usually do and I basically broke down and said I – me back just can't handle it."[5]

[12] One matter of note is the evidence concerning the mistakes the plaintiff alluded to. In cross examination:

> "…well, there were a number of problems, weren't there, in you completing work. That's right, you've admitted to those?---Yes, sir.
>
> Yes. And these included drilling a hole through an air conditioning condenser; that's right?---Yes, sir.
>
> Drilling a hole through a hydraulic tank?---Yes, sir.
>
> And drilling a hole through the fuel tank of a forklift?---Yes, sir.
>
> I see. So in the last one you were drilling into something where there could be fuel fumes?---Yes, sir.
>
> Basic, simple errors. That's right, isn't it?---Yes, sir.[6]

[13] The plaintiff's supervisor at Southern Cross Group, Mr Ben Davison, said that these were very basic mistakes, ones that he might expect from a "very early on apprentice".[7] Mr Little's explanation was:

---

4 T1-54/18-30
5 T1-70/23-35
6 T1-70/8-22
7 T2-90/10

> "And did you make some errors working there?---I did make a few errors. I was – because I was spending a lot of time not doing work – like stretching my back – and I had to try and catch up on jobs and because I was trying to make a good name at the company I'd had to sort of speed my work up and as a result I made a few silly errors that I don't usually make at Chrisway."[8]

[14] After resigning from the Southern Cross Group Mr Little then returned to employment at his father's company where he has remained. His father decided to set up a new business for him involving a mobile van carrying out repairs and servicing in the Yeppoon district. There is no clear evidence of the hours worked or the amount of work performed. Mr Christopher Little says that the business is not profitable and if the plaintiff were not his son he would not employ him.

The Dispute

[15] Mr Little seeks an enormous sum of money by way of damages – just over $1,000,000. The defendants contend that his proper assessment should be quite modest - a little over $60,000. The contest is principally over economic loss.

[16] The reason for that discrepancy in the submissions of the parties is that Mr Little's case has none of the usual features one associates with a million dollar personal injuries' claim.

The Defendants' Arguments

[17] On the day of the subject accident the examining doctor at the Base Hospital noted nil tenderness in the lower back area.

[18] In the week following the accident Mr Little worked longer than he says he usually did – 49 hours and then 50.5 hours the next week, hardly consistent with a significant and disabling back condition. Indeed the wage records, which are far from complete, show that Mr Little has worked hours in excess of a 48 hour week,[9] the standard he says applied before the subject accident, on thirteen occasions. He usually worked 40 hours or more.

[19] There is very little in the way of objective evidence of any injury. One examiner has, on one occasion, seen a muscle spasm in the lumbar area, and that was by an occupational therapist.[10] Dr Pincus, a respected and experienced orthopedic surgeon, assessed a 0% level of whole person impairment. Dr Pincus examined the plaintiff in the three week period in which he was working for the Southern Cross Group when, given the work load, one might expect some exacerbation of symptoms.

[20] On one occasion Mr Little was given a referral for a CT scan of his lumbar spine,[11] which he says causes him all his trouble, but decided not to go ahead with it. That seems to reflect a peculiar indifference to his problems, if they are as great as claimed. It follows too that there is no radiological evidence of any problem in the area.

---

8 T1- 10/15-20

9 See the summary forming part of Exhibit 25

10 See Exhibit 8 at para [17]

11 27th February 2013 – see Exhibit 11 at page 6

[21] Mr Little has never seen a specialist for treatment purposes. Indeed he has rarely seen a general practitioner. Three attendances on general practitioners are claimed in the two years and eight months since the subject accident.[12]

[22] The strongest pain killer Mr Little ever takes, on his account, is over the counter pain relievers such as Nurofen Plus which he says he takes every day and has done for most of the last two and a half years. However he cannot produce a receipt for the purchase of even one packet. He spoke to solicitors about claiming damages within a few weeks of the accident and was presumably told at some point, and a wise solicitor would offer such advice at an early stage, that proof of outgoings would be required.

[23] Mr Little has essentially maintained full employment in a reasonably demanding occupation, albeit with his father's company. As mentioned, on the one occasion he left that employment he sought and obtained work in the mining services sector involving larger machines and heavier, more demanding work. He was well aware of how heavy the machinery was and so the likely demands of that work.[13] That suggests a belief in his ability to cope with whatever symptoms he had.

[24] When, on his case, Mr Little was performing the most demanding work he has done, that with Southern Cross Group that I have described - a position involving over 50 hours work per week with no respite during the working day or assistance and on heavy machinery - he sought no treatment from chiropractors or physiotherapists, the treatment providers that he had favoured, and led two examiners retained by the defendants for medico-legal purposes who saw him in the middle of that working period to believe that he would be maintaining his employment.

[25] Those examiners were an orthopaedic surgeon, Dr Pincus, and an occupational therapist, Mr Zietek. They each saw Mr Little on 25 September 2013, a few days before he ended his employment with Southern Cross Group. Dr Pincus' report of their conversation is completely at odds with the picture that Mr Little painted: "He currently has a new job for Southern Cross. He has been there 2½ weeks. He is working as an auto electrician about 52 hours a week. He is able to do all his current duties. The current job is a very heavy job and he plans to stay there and may go back to lighter work at some stage in the future."[14] The account given to Mr Zietek indicates only symptoms of soreness at the end of the working day, which hardly indicates a need to cease the employment.[15]

[26] When performing that work his then immediate supervisor, Mr Davison, made no observation of him having any physical difficulties in carrying out the work. He was not told of any such difficulties. His evidence: "I saw when I saw him working there was – he was just like any other normal person working to a full capacity that I would expect somebody to be able to do."[16]

[27] That observation is consistent with the physical examination carried out by Dr Pincus which was completely normal.[17] So was Mr Zietek's examination save for a report of pain at the "end range of flexion and extension".[18]

---

12 See Exhibit 2 Schedule "B" at page 9
13 T1-69/44
14 Exhibit 15 at page 2 para 3.5
15 Exhibit 14 at page 3 para 9b
16 T2-89/37
17 Exhibit 15 at page 3 para 5

[28] Witnesses were not called whom you might expect to be called – for example more of his fellow work mates and his de facto partner. The two work mates called, Halsey and Robertson, were particularly inappropriate, one being a school boy who attended on only one day a week and one extra day every second week and so who was not likely to know what was normal conduct or in a position to provide anything like a complete picture; and the other a man who worked in a different section of the workplace and who in any case provided at best only minimal support for the plaintiff.

[29] Treatment, even from physiotherapists and chiropractors, was not sought at all for long periods when supposedly demanding work was performed.

[30] The evidence suggested that Mr Little's failure to maintain his employment outside the family company was not due to any problem with his back but reflected more his pre-existing character and mental and coping abilities such that he had no capacity to cope with work at commercial pace and outside the family company.

[31] Claims were made in the Statement of Claim as to lost income that were plainly wrong and never explained perhaps suggesting a deliberate misleading of the lawyers.

[32] As a result of these various matters the defendants submitted that I should reject the plaintiff's basic contention that he is unable to perform significant aspects of his work as an auto electrician. The principal submission is that I should not accept that there is in fact an injury of any great consequence.

Should I Accept the Plaintiff?

[33] While a strong attack was mounted on Mr Little that he was exaggerating his symptoms I am satisfied, for the reasons I will set out in a moment, that he has a continuing problem in the lower back area that is of some significance.

[34] That does not mean that there was not a deal of force in the defendants' various arguments; however against them are the following.

[35] There was no attack on the mechanism of injury – effectively a double collision front and back with the oncoming motor vehicle, which struck the rear of the vehicle in which the plaintiff was travelling, speeding at 90 kph. There was no evidence disputing the plaintiff's claim that significant force was involved - force it would seem that was quite capable of causing the injury complained of.

[36] Despite the submission based on the "nil tenderness" recorded on the day of the accident there plainly was a note of a complaint of lumbar problems to the triage nurse that day.

[37] I am conscious that not too much weight can be given to demeanour. As Atkin LJ observed in *Societe d'Avances Commerciales (Societe Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana")* [1924] 20 LI L Rep 140 at 152 "an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour".[19] But Mr

---

18 Exhibit 14 at page 4 para 15

19 And similar views continue to be held: *Camden v McKenzie* [2007] QCA 136; [2008] 1 Qd R 39 at [34] per Keane JA; *New South Wales v Hunt* [2014] NSWCA 47 at [56] per Leeming JA (with whom Barrett JA and Tobias AJA agreed)

Little seemed fundamentally honest. Any assessment of him is not helped in that he was neither sophisticated nor articulate.

[38] That impression of honesty was greatly strengthened by his approach to the case. If he intended to exaggerate for gain why admit the chest and neck problems resolved? Why tell the examining specialists that he hoped to maintain demanding work? Why not obtain a CT scan? Why not seek excessive treatment rather than relatively limited treatment?

[39] There are difficulties in accepting all that Mr Christopher Little (the plaintiff's father) said but he did provide some considerable support for his son. While some allowance should be made for natural love and affection clouding his views he seemed to me to be endeavouring to be as accurate as he could be.

[40] While not compelling there was some evidence to back up Mr Little's claims to have difficulties – the work mates Halsey and Robertson clearly provided support for the argument that Mr Little was restricted in his capacities at work, at least to some degree, because of an apparent back condition. Criticisms were legitimately made of each witness. Halsey was not articulate and, like Robertson, seemed to struggle with when it was that his observations were made. But it was no part of the defendants' case that Mr Little had any pre-existing problems of significance. Robertson was only 17 when he made his observations and an inexperienced school boy then. But each gave some independent support for the account that Mr Little struggled at work, at least at times.

[41] There was ongoing treatment consistent with ongoing problems albeit from chiropractors and physiotherapists: 2012 – five visits; 2013 – 16 visits; 2014 – 19 visits. On occasions that treatment coincided with or came shortly after the longer hours worked.[20] There was no evidence of anything like this pattern before the subject accident.[21]

[42] While a small point, Mr Little's claim to have purchased a back support from his physiotherapist was not challenged. Mr Halsey's evidence supported his use of this device.

[43] My overall impression then was that Mr Little does have some problems.

[44] There are two troubling discrepancies. One is that Mr Little seems to have been far more active and need significantly less treatment in the first several months after sustaining his injury than he has required in later years. The second is that it is very difficult to accept that Mr Little had disabling symptoms given that he was able to carry out the work that he did for Southern Cross Group without apparent complaint, observation by his supervisor of any difficulty, or treatment.

[45] The answer to the first point is not in Dr Campbell's evidence, as was submitted, which was to the effect that it takes some six months before the real difficulties become known. He said:

---

[20] Compare attendances on 28/2/12, 2/3/12 and 16/3/12 with CQ Physio Group and the hours worked in the weeks ending 4/3 and 11/3. Similarly see the attendances on 19/7/12; 13/12/12; 1/2/13; 22/2/13. Attendances on Spark Chiropractic commenced not long after the employment at Southern Cross Group.

[21] Cf. para 15 of Ex 2 – two attendances on CQ Physio in 2008

> "So I think in the – in the first month or two after an injury you get a variety of responses to the injury. Some people are afraid of losing their job, or they want to just get on with things and – and see how they're going to go. And I think – I think the real extent of the injury can often come out two or three months later or – or six months later whether they - where they just realise they can't go on any further. But I think his response to that injury is – would be a normal response to any injured person who has a high work ethic."[22]

[46] I took his answer to mean that it takes some people time to workout what they can and cannot cope with in terms of continuous performance of their duties. He did not say, and I am reasonably confident that he did not mean, that over time he expected increasing exacerbations of symptoms and with lesser levels of aggravation.

[47] My conclusion is that Mr Little has troubling symptoms but that his perception of them is greater than their objective impact on him. They come against him from time to time. I doubt that he is in constant pain or that his pain is at anything like a level of eight out of ten as was suggested. The lack of any ongoing objective sign is significant.

[48] A claim that he was largely unable to carry out his work is not made out – there is no prospect that Mr Little could have thought for a moment that he could work for a company such as the Southern Cross Group if he was as disabled as Mr Robertson's evidence would imply. I suspect that Mr Little was emphasising the training aspect of his role and letting the youngster do some of the work that explains the evidence and the young man's impressions.

[49] That lack of support from the work mates tended to undermine the assumptions made by the occupational therapist, Mr Hoey.[23]

[50] Nor could Mr Little have lasted for three weeks doing that heavy work at Southern Cross Group that he described, and doing so without exhibiting any sign that his supervisor detected, if he was so disabled. His lack of treatment in that period and his statements to the practitioners he saw for reporting purposes in that period plainly show that he was coping to a significant degree.

[51] There is much force in the argument that if Mr Little really needed constant assistance throughout the day, as Mr Robertson said, then every employee at the company would know of that. Only one was called and Mr Halsey came nowhere near supporting that notion. My interpretation of Mr Halsey's evidence is that Mr Little needed occasional assistance both before and after his accident, much like anybody else, but that there were times when his back was a problem for him.

[52] To a degree I accept the defendants' submission that there is some over statement of symptoms. I am inclined to think that this reflects Mr Little's concern about the litigation and his future rather than any deliberate intention to mislead.

[53] Assessment is complicated further because it is evident that Mr Christopher Little is an affectionate father and I am sure indulgent to a degree. That means that the plaintiff is under no pressure to perform and he has been given somewhat of a sinecure at the moment.

---

22 T2-34/30-38

23 For example see Ex 8 at para 4

[54] I think that the true picture is that Mr Little becomes sore doing some of the more difficult tasks, tasks that gets him into the wrong position for too long or where he fails to take care of how he positions himself. This is an occasional problem not a constant one. His performance at Southern Cross Group is instructive. He may need occasional medication or treatment but I doubt that he needs as much treatment as he is now having. No medical evidence is led to show that continual attendances on chiropractors or physiotherapists are beneficial to him.

Employability

[55] The principal issue fought was that of the effect of the injury on earning capacity.

[56] That involves the art of double prophesying – what would have happened uninjured and what will happen in his injured state.[24]

[57] The imprecision in a case like this is self evident. In reaching a view as to hypothetical future events, I am required to assess the degree of probability that the event might occur (or might have occurred) and adjust the award of damages to reflect the degree of probability: *Malec v JC Hutton Pty Ltd.*[25]

[58] I am satisfied that Mr Little does have some problems and that those problems are likely to be more acute the heavier the work that he does. Whether they would be of such significance as to prevent him doing the work as opposed to making it an uncomfortable proposition is another matter. He may have days where he is restricted or where he is not entirely comfortable. I think that Dr Pincus summed up the position best with this answer:

> "If … he finds the – the work too painful to do, then it would be sensible for him to stop it, but I don't think he's doing himself any harm."[26]

[59] In saying that I am quite conscious of the evidence from an experienced auto electrician, Mr Hinz, as to the range of duties of an auto electrician and of their physical difficulty.[27] But Mr Little, I am sure, did this full range of duties most of the time before leaving to go to Mackay, and did that full range of duties on very heavy equipment alone and unassisted with few breaks for three weeks with Southern Cross Group.

[60] I doubt that these restrictions would have any significant impact on Mr Little's employability in a normal workshop. I accept the opinion of the occupational therapist Mr Zietak that Mr Little is physically capable of doing this work.

[61] I acknowledge the force of Mr Hoey's opinion that a perception of future problems, whatever be the actuality, is sufficient to put off prospective employers.[28] I am conscious too of the evidence that Mr Hinz gave of his reluctance to employ someone with various restrictions[29] but I do not accept the premise he was asked to adopt in fact applies.

---

24 *Paul v Rendell* (1981) ALR 469 at 471 per Lord Diplock

25 (1990) 169 CLR 638

26 T2-84/5-10. Incidentally, I do not accept the premise of the question put: "Assuming … he was suffering from muscle spasms in his lumbar spine about twice a day…"

27 T2-44 and 2-45

28 Exhibit 8 at [26]

29 T2-47/10-15

[62] The sinecure I mentioned may not last. But the fact that Mr Little is not working to full capacity at the moment does not mean that he is not capable of much more and indeed I am confident that Mr Little is quite capable of a full time role as an auto electrician in an ordinary workshop.

[63] I am persuaded that the more demanding role expected of him working on mine equipment is probably beyond him but not solely because of symptoms of pain in his back.

[64] The difficult question is the impact this injury has had on any ambition of doing the heavier work on mine sites and so earning the large incomes available there. There are several issues:

(a) Did Mr Little in fact have that ambition given that he had made no effort to obtain such a position over the years?

(b) If he had that ambition what was the likelihood of getting such a position?

(c) If he obtained such a position what was the prospect, irrespective of injury, of Mr Little maintaining that employment? That is, would Mr Little be motivated to persist with more demanding work?

(d) What difference would any accident caused restriction make to Mr Little's expected earnings over the years? That is the crucial issue of whether the "diminution of … earning capacity is or may be productive of financial loss"[30]

Ambition

[65] There is no good reason not to accept that Mr Little had a dream of quitting his father's company one day and seeking work in the mines. Most sons have no wish to spend their lives under their father and in his shadow.

[66] As well, given that the incomes available at the mines is in the order of double the income available elsewhere it would be strange if a young person with appropriate qualifications accustomed to living in a regional area did not try and get employment at the mines, at least to see if they were prepared to cope with the life. The plaintiff's older brother had done so and while he had the different qualifications of a diesel fitter there is no reason to think that the motivations would be any different – if anything his older brother's success would be a likely spur.

[67] It is true, as the defendants submit, that Mr Little had done nothing to advance that dream by the time of the subject accident and it was probably only the move by his partner that triggered the application to Southern Cross Group. There is nothing to show that without that move he would not have simply stayed on at Blackwater. But that did occur and it was the trigger to look more widely for employment opportunities and that would have been so assuming that the subject injuries had not occurred.

[68] Mr Little's claim that the Southern Cross Group opened up access to potentially 60 mines in the Bowen Basin area[31] was not challenged. Getting employment there provides some considerable basis for accepting his claim of having an interest in pursuing such work.

---

30 *Graham v Baker* [1961] HCA 48 ; (1961) 106 CLR 340, 347

31 T1-67/30

[69] So I am content to accept that the plaintiff would have pursued what chances came up of getting employment at a mine site.

Prospects

[70] Against that ambition there is little in the way of concrete evidence that Mr Little would have succeeded in attaining his dream. He had taken the first step of getting a position in the field with Southern Cross Group. But that is not the same as a position at a mine.

[71] While establishment of the proposition that, uninjured, he would have obtained a position with a mine involves proof of a hypothetical proposition, and so there are always going to be difficulties in proof, there was no evidence lead of matters often proved in similar cases – such as the number of positions available for auto electricians whether at the time of trial or at any time before trial, the number of potential applicants for those positions and, apart from the father's opinion of his competence (that he was the best auto electrical apprentice he had work for him),[32] or how the plaintiff was likely to measure up against the potential competition. The three basic mistakes in three weeks with the Southern Cross Group tended fairly strongly against his father's assessment being a valid one.

[72] As well there was some evidence against the plaintiff achieving his ambition.

[73] The evidence was that the demand for auto electricians was a great deal less than for diesel fitters. The plaintiff said so.[33] Mr Hinz spoke of only one auto electrician being employed at the mine with which he was familiar.[34] The plaintiff spoke of how difficult it was to get jobs when he went to Mackay.[35] He meant with companies like the Southern Cross Group but there was no reason to think the highly sought after jobs with the mining companies would not have been even more difficult to obtain. Mr Little (Snr) employed only one auto electrician in his company out of 15 skilled trades people, those being mechanics or fitters.[36]

[74] It seems that auto electricians are in the nature of specialists called in to do tasks that are beyond the diesel fitters.[37] If there are only a few such positions at each mine then they are very likely to be highly sought after for the same reason the plaintiff was seeking that employment.

[75] One issue unaddressed by the evidence is the effect on the prospects of tradesmen gaining employment in the mining industry given the recent and significant downturn. Prices for our commodities have now plummeted and mines are closing. Mr Little (Snr) said it was the worst that he has experienced in 17 years in business.[38] What impact this is having on the demand for tradesmen was not explored. Presumably those who have jobs would be careful about giving them up in such an environment.

---

32 T1-82/17; and see T1-83/15.
33 T1-72/35
34 T2-47/34
35 T1-70/45
36 T1-86/33
37 T2-50/40 – Mr Bryce Little
38 T1-85/30

[76] The plaintiff's approach was to point out that there was a steady leak of tradesmen to the mine sites over the years, including the plaintiff's own brother. As I have said his brother was a diesel fitter. No one equated demand for diesel fitters with demand for auto electricians.

[77] Mr Little (Snr) gave evidence that he had lost several hundred tradesmen to the mines over the 17 years he had been in business, including the two auto electricians that preceded his employment of the plaintiff. But that evidence says nothing about the demand for auto electricians at mine sites in the time that the plaintiff has been interested and in the future. What evidence there was says that the experience of the several hundred was irrelevant. The plaintiff said: "In Blackwater, there's – for my job, auto-electrical, there was just no jobs going. Over those last two years when I was sort of looking at getting out of Chrisway, there was no – there was just no auto-elecy work out there. All – all the work was taken, basically."[39]

[78] I conclude that there was little guidance at all in the evidence to enable me to assess Mr Little's realistic prospects of getting employment. There are obviously positions and they must become available from time to time, and there is competition for them, but little more can be said.

Persistence

[79] Also against the plaintiff was his actual performance with Southern Cross Group.

[80] His evidence suggested that the length of the hours, the lack of opportunity for breaks and the lack of assistance were all significant issues. While each of those can be said to have become manifest because of problems with painful symptoms it seemed evident that this was an entirely new experience for Mr Little and one that he did not enjoy.

[81] There was a deal of force in the defendant's submission that the evidence of the quite significant errors – three of the same type in three weeks – says a great deal about Mr Little's capacity to cope. It is at least surprising that an experienced tradesman would make even one of those errors let alone three. And it is quite evident that the plaintiff found the pace of work much greater than he had expected.

[82] Mr Crow of Queens Counsel who appeared with Ms Willey for the plaintiff argued that all this can be explained by an increase in symptoms of back pain. The plaintiff certainly endeavored to relate all his difficulties to symptoms of pain in the lower back.

[83] The difficulty with an uncritical acceptance of that submission is the absence of evidence of any seeking of treatment or of any observation from Mr Davison, the supervisor, of any apparent difficulty.

[84] While I accept the probability of there being an increase in symptoms in this period they could not have been so marked given these two points.

[85] The highest that I think the case can be reasonably put is that without the symptoms in his lower back the plaintiff probably would have persisted significantly longer and may have coped better but his abilities were being tested to a degree he had not previously experienced and it is an unknown factor as to how he would have coped if uninjured.

---

39 T1-67/25

Impact on Earnings

[86] The issue here is how relevant it is that there is some level of restriction in Mr Little's physical abilities.

[87] I note that Mr Little (Snr), who qualified as a diesel fitter, has a management role in his business and has had for the last ten years – he worked "on the tools" for about seven years before giving that away. He is now 54 years old. So, since his mid forties, Mr Little (Snr) has not needed to be a manual worker.

[88] There is some evidence that Mr Little had the necessary skills to manage a business. His father made him a leading hand in the family business when quite young and his father thought that he had performed well in that role. To a degree he then assisted in a supervisory role.

[89] The father's history and Mr Little's burgeoning supervisory skills suggests that at some point any physical restriction might well have become irrelevant to Mr Little's earning capacity.

[90] As well Mr Little made plain that he did not see a future at a mine site for the whole of his life as the most likely one for him. His evidence was:

> "Like, we wanted to earn a lot of money first, get comfortable, like, over a probably 10 year, 15 year period and then – and then eventually I wanted to start my own thing not run off what I'm doing at the moment which is I'm using my Dad's company – all I'm doing is running another aspect of it, running another chain of it. I wanted to go out in the mines for at least 10/15 years, get up a good earning, then come back but start my own business, not under the Chrisway label …"[40]

[91] I am conscious that what a young man says he wants and what a young man does is not necessarily the same thing. And there are many imponderables. What amount of money one finds satisfactory, when that level might be achieved, how attractive other options are that might come up, and the timing of opportunities, are all relevant and are all unknowable. And, as Mr Little's experience to date suggests, the demands and wishes of one's partner in life can have a bearing on one's employment opportunities.

[92] In summary it seems more likely than not that if uninjured over time Mr Little would have seen a managerial role as congenial and his physical abilities as largely irrelevant to his earning capacity. A whole working life "on the tools" was not in my view his most likely future.

[93] With those observations I turn to assess the damages.

The Assessment – General Damages

[94] There are multiple injuries. The dominant injury is plainly the injury to the lower back.

[95] The defendants submitted that an ISV of between 0 and 4 was appropriate arguing that Item 94 of the Regulations was applicable. The difficulty with that submission is that Item 94 assumes "the injury will substantially reach maximum medical improvement,

---

[40] T1-73/15

with only minor symptoms, within about 18 months after the injury is caused". I am satisfied that the plaintiff's symptoms are more than minor and continuing and likely to continue at much the present level.

[96] The plaintiff contended for an ISV of 10 arguing that Item 93 of the Regulations was applicable. Item 93, which provides for a range of ISV from 5 to 10, includes the following comment:

> **Comment**
> The injury will cause moderate permanent impairment, for which there is objective evidence, of the thoracic or lumbar spine.
> **Comment about appropriate level of ISV**
> An ISV of not more than 10 will be appropriate if there is whole person impairment of 8% caused by a soft tissue injury for which there is no radiological evidence.

[97] Despite the plaintiff's evidence of multiple daily spasms the only objective evidence independent of him is the one sighting of a muscle spasm, a sighting not made by a medical practitioner. Nonetheless I accept it was seen and that Mr Hoey has sufficient experience to be relied on to report accurately.

[98] The specialists disagreed as to the whole person impairment. Dr Pincus assessed a 0% level and Dr Campbell a 6% level. The implication of the comment in Item 93 is that an ISV of 10 would be appropriate for an 8% impairment assessment. On any view the impairment here is not at that level.

[99] The AMA Guides on which these assessments are based requires a 0% assessment where there is no limit on the "performance of the common activities of daily living". While work performance is excluded from the assessment I can well understand Dr Pincus' views given that the plaintiff told him he was working 50 hours a week in a demanding occupation and not intending to retire from it, at least in the foreseeable future. Any impact on daily activities would have seemed negligible.

[100] Nonetheless there is an impact on daily activities – the plaintiff has given up some of his sporting and leisure interests and complains of some interference with his sleep. The plaintiff is still quite young and so is likely to bear the symptoms for over 50 years.

[101] Ignoring the other injuries I assess an ISV of 6.

[102] Item 89 (minor neck injury with an ISV of 0 to 4) and Item 39.2 (minor chest injury ISV 0 to 4) are each applicable. The ISV in each case is minimal. Allowing for these injuries I assess an overall ISV of 7.

[103] I assess the general damages at $9,000.[41]

Past Economic Loss

[104] The plaintiff claimed $22,286. The defendant submitted that no particular amount of loss was proved.

[105] The plaintiff argued for three categories of loss:

---

41 See s 62 of the Act, s 8 of the Regulations and cl 3 of Schedule 7

(a) A complete loss of wages for three weeks while unemployed after ceasing with the Southern Cross Group - $4,506; and
(b) The difference between the wages after returning to the family company after ceasing with the Southern Cross Group and the wage at Southern Cross Group - $17,780; or alternatively
(c) A loss of overtime when working for the family company calculated as a loss of three hours overtime on average - $16,902.

[106] I accept that the loss in (a) is made out - I am satisfied that the aggravation of symptoms was a factor in the giving up of the plaintiff's employment with the Southern Cross Group and without that he probably would have stayed on, at least for a period. The reasoning here is akin to that in *Medlin v State Government Insurance Commission*[42] where Deane, Dawson, Toohey and Gaudron JJ said of the premature retirement of the plaintiff there from his employment:

> "The necessary causation between a defendant's negligence and the termination of a plaintiff's employment, in the sense that the termination of the employment is the product of an accident-caused loss of earning capacity, can exist notwithstanding the fact that the immediate trigger of the termination of the employment was the plaintiff's own decision to retire prematurely. If, for example, it appears that a plaintiff's decision to retire prematurely would not have been made were it not for the fact that the effect of accident-caused injuries is that continuation in employment would subject him or her to constant pain and serious risk of further injury, it may well be that common sense dictates the conclusion that the plaintiff's decision to retire prematurely was a natural step in a chain of causation which suffices to designate, for the purposes of the law of negligence, the termination of the employment as a product of those injuries."[43]

[107] The plaintiff was then unemployed for three weeks. It is not suggested that he did not act reasonably in returning to his father's company.

[108] I am not persuaded that the loss in (b) has occurred. Principally I am not persuaded that, uninjured, Mr Little would have remained with the Southern Cross Group for the entire period since cessation of his employment there on September 30th 2013. He may have but that is not certain.

[109] I accept that it is appropriate to allow some amount but it is more in the nature of assessing the chance that Mr Little would have enjoyed a greater income had he not been injured. The difference in wage levels is in the order of $300 to $400 per week net.

[110] It is not irrelevant that on 24 November 2013 Mr Little was involved in a high speed collision with a bull on the highway and suffered some form of neck injury. This prompted continued attendances on a chiropractor. I detail those attendances later. It appears that continued symptoms of neck discomfort, to a degree, were reported up until May 2014.[44]

[111] I assess a global loss of $10,000 for the period from 30th September 2013 until now.

---

42 (1995) 182 CLR 1; [1995] HCA 5.
43 *Ibid* at [13].
44 See Exhibit 10

[112] To a degree there is an overlap in the claims set out in (b) and (c) as was implicit in the submission. But I observe that the difficulty with the claim in (c) is that it is not established that Mr Little consistently worked three hours over time before the subject accident. For some reason the documentary evidence of the hours worked pre accident was not produced. And, as Mr Arnold demonstrated,[45] the weekly pay sheets that were produced did not support that claim. Nor am I persuaded that Mr Little reduced his overtime significantly because of the accident caused injuries.

[113] Indeed the correlation between hours worked and hours paid for is not entirely plain – I had the impression that Mr Little's father was not overly concerned whether his son was productive or not. But underlying the claim is the notion that Mr Little could have worked significantly longer hours than he did had he wished. That was not shown. Whatever the workload prior to February 2012 does not prove the same work was available in 2013-14. As I have said Mr Little (Snr) spoke of the worst downturn that he had experienced.

[114] The total loss allowed under this head is $14,506.

Future Economic Loss

[115] The plaintiff claims $834,000 – a loss of $1,000 net per week over 31 years to age 60 discounted on the 5% tables.

[116] The defendants allowed $50,000 as a global assessment.

[117] The assumptions underlying the plaintiff's claim are not made out. Those assumptions include that but for the injury the plaintiff would have sought and maintained employment in hard and demanding work, and at a mine site, to age 60.

[118] I agree with the defendants' approach that a global assessment is necessary. However the difficulty for the defendants' argument from that point is that once it is conceded that the plaintiff has some level of restriction because of his lower back problems then it is difficult, in the light of the evidence of the demanding nature of the work and the high wages potentially available, to restrict the damages as it is asserted they should be.

[119] Section 55 of the Act is relevant and 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.
> (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.
> (4) The limitation mentioned in section 54(2) applies to an award of damages under this section.

---

[45] Comparing the pay slip for the week after the accident (page 6 of Exhibit 16) with a claimed "standard" pay slip (page 17 of Exhibit 16)

[120] The limitation mentioned in ss 54(2) is not relevant here. I am appropriately satisfied as required by s 55(2).

[121] Much of my reasoning has already been set out. There are many imponderables. The economic conditions are extremely uncertain. There is no guarantee that the plaintiff would have ever obtained a job at a mine site. Even if he managed to do so there is the fact that Mr Little had not displayed a capacity to perform hard demanding work for any extended period. That does not mean that he did not have that capacity but it is unproven. On the other hand if he had obtained such employment and maintained it even for a modest period of years his loss would be significant.

[122] The plaintiff argued that his minimum loss was reflected by comparing his wage at present with his wage when at the Southern Cross Group – a difference of $333 net per week. But that again assumes two things that are not certain – continuity of employment with Southern Cross Group, or an equivalent employer, if uninjured and a willingness to do the demanding work required over an extended period.

[123] As well, as discussed earlier, I think that the probabilities are that the plaintiff would not have relied on his physical capacities for the whole of his working life. But he may have.

[124] Making the best estimation I can I allow the sum of $200,000 under this head of loss. To the extent that there is any arithmetic involved I observe that a loss of $333 over 15 years would result in an assessment of about $185,000 and, while there are discounting factors, in my judgment something more needs to be allowed for the chance of a loss over the 20 to 30 years thereafter, a chance which, in my estimation, outweighs the prospect that Mr Little may not have pursued a career in harder work.

Future Paid Assistance

[125] The claim here is for the future cost of cleaning, mowing and gardening assistance. The plaintiff's partner has met such costs to date. 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*.[46]

[126] The difficulty with the claim is that here there is no medical evidence or indeed much lay evidence to support it. Mr Hoey's opinion[47] lacked any basis as I do not accept that Mr Little has any significant restriction in performing such tasks. I note Mr Zietek's assessment,[48] to the effect that Mr Little is capable of performing these tasks, which I accept.

[127] Mr Little did say that he did less around the home but that is not at all the same as establishing that there is a reasonable need, brought about by the accident caused injuries, to employ third parties to do normal domestic and gardening chores. The tasks Mr Little in fact performed at his workplaces would seem considerably more demanding.

[128] I make no allowance under this head of loss.

---

46 (1992) 175 CLR 327

47 The opinion is at Exhibit 8 para [28] and as to some of Mr Hoey's assumptions see Exhibit 8 para [7]

48 Exhibit 14 at page 4 para 14b

Future Expenses

[129] The plaintiff claims $25,020 for physiotherapy treatments and medication. The defendant submits that $3,500 is appropriate.

[130] The plaintiff's submission assumes that the current level of expenditure is required and will be required for the rest of his life. I do not accept either premise.

[131] There is support in the medical evidence for some assistance at times of exacerbations. As mentioned an odd feature of the plaintiff's case is that his need for treatment has become much more marked in more recent times when it seems he is doing much less at work. The plaintiff needed only five visits to physiotherapists and chiropractors in 2012 when one would expect his problems to be at their most acute and when, on his own case, he worked longer hours because of the demands on the family business even when he did not feel capable. Yet Mr Little needed 19 visits in 2014 when, again on his own case, he worked less hours and in lighter work.

[132] The start of the dramatic increase in the attendances on a chiropractor coincides with the collision with a bull on 24 November 2013. Thereafter the visits were rarely less than monthly and sometimes weekly. Prior to that accident there had been no visits on any treatment provider for nearly nine months. No medical evidence was led to explain that dramatically increased need. No attempt was made by the defendants to show any causal connection with the later accident but the onus of proof does not shift - the plaintiff needs to show that the expense incurred was both causally related and a reasonable one for the defendants to meet. That was not done.

[133] Again a global sum is appropriate. No one can say what degree and frequency of exacerbations Mr Little will have.

[134] I will allow $5,000.

Special Damages

[135] Mr Little claims $3,877 being the costs incurred for attendances principally on physiotherapists and chiropractors. Mr Little also claims the costs of travel ($500) and medication ($675) which are each estimates.

[136] The defendants allow $536 after allowing for $721 already met by the insurer. I am not sure how the amount of $536 is calculated.

[137] Again the odd feature mentioned above is relevant.

[138] A plaintiff has the onus of proving that the expenses incurred are reasonable and related to the subject accident. The medical evidence supports some attendances but only for exacerbations. I am not persuaded that Mr Little had exacerbations to the extent that the attendances would suggest. His many attendances might provide him with some comfort of mind but I am not persuaded that it should be at the defendants' cost.

[139] While again a global estimate, and perhaps not strictly special damage, I allow $2,000.

Summary

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

Pain, suffering and loss of amenities of life	$9,000.00
Past economic loss	$14,506.00
Interest on past economic loss[49]	$658.14
Loss of Superannuation - Past[50]	$1,305.54
Future loss of earning capacity	$200,000.00
Loss of Superannuation - Future[51]	$22,000.00
Future paid assistance	$0.00
Future expenses	$5,000.00
Special damages	$2,000.00
Interest on special damages[52]	$90.74
Total Damages	**$254,560.42**

Orders

[141] There will be judgment for the plaintiff in the sum of $254,560.42

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

---

49 $14,506 x 1.745% x 2.6 yrs – the interest rate is one-half of the rate that my research indicates corresponds with the "appropriate rate" as defined in s 60 of the *Civil Liability Act* 2003 (Qld): "the rate for 10 year Treasury bonds published by the Reserve Bank of Australia under 'Capital Market Yields—Government Bonds—Daily—F2' as at the beginning of the quarter in which the award of interest is made".

50 See s 56 *Civil Liability Act* 2003 (Qld) - at 9%

51 *Ibid* but at 11%

52 I have allowed interest on $2000 at 1.745% over 2.6 years