SUPREME COURT OF QUEENSLAND

CITATION:	*Martin v Andrews & Anor* [2016] QSC 20
PARTIES:	**JOSHUA ALFRED MARTIN** (Plaintiff) **v** **HAMISH LOUIS ANDREWS** (First Defendant) And **AAI LIMITED ABN 48 005 297 807** (Second Defendant)
FILE NO/S:	S684/2013
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	19 February 2016
DELIVERED AT:	Rockhampton
HEARING DATE:	2, 3 February 2016. Last submissions and evidence received 4 February 2016
JUDGE:	McMeekin J
ORDER:	**1. Judgment for the plaintiff in the sum of $1,282,572.10**
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 neck and lower back – where plaintiff alleges ongoing pain due to his injuries – where plaintiff's previous employment was physically demanding – 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)

Adams v Ascot Iron Foundry Pty Ltd (1968) 72 SR (NSW) 120, cited
Allwood v Wilson & Anor [2011] QSC 180, followed
Anodising & Aluminium Finishers v Coleman [2002] 1 Qd R 141; (1999) QCA 467, cited
Bugge v REB Engineering Pty Ltd [1999] 2 Qd R 227; (1998) QSC 185, cited
Coles Supermarkets Australia Pty Ltd v Fardous [2015] NSWCA 82, cited
Fox v Wood (1981) 148 CLR 438; [1981] HCA 41, cited
Hayman v Forbes (1975) 13 SASR 225, cited
Heywood v Commercial Electrical Pty Ltd [2013] QCA 270, cited
Kealley v Jones [1979] 1 NSWLR 723, cited
Liesboch, Dredger v Edison SS [1933] AC 449 (HL), cited
Medlin v State Government Insurance Commission (1995) 182 CLR 1; [1995] HCA 5, cited
National Instruments Pty Ltd v Gilles (1975) 49 ALJR 349, cited
Stauffer v Hanley (Unreported – NSW Court of Appeal – 6 April 1978), cited
Thomas v O'Shea (1989) ATR 80-251, cited

COUNSEL:	G Crow QC and D Cormack for the plaintiff
	W Campbell for the defendants
SOLICITORS:	Hall Payne Lawyers for the plaintiff
	Quinlan Miller & Treston for the defendants

[1] **McMeekin J:** The plaintiff, Joshua Alfred Martin, claims damages for personal injuries suffered on 1 July 2011 in a motor vehicle accident. Liability is admitted. I am required to assess damages.

The Injuries & Issues

[2] It is not in issue that in the accident Mr Martin suffered soft tissue injuries to his neck and lower back. Mr Martin says that he suffers ongoing discomfort and pain sufficient to disable him from significant manual labour, a feature of his life till the time of the subject accident.

[3] An MRI examination carried out on 3 November 2011 demonstrated a disc extrusion at L5/S1 level with "minor effacement of the thecal sac."[1] Dr Halliday, an orthopaedic surgeon who examined Mr Martin for the purpose of preparing a medico legal report for the defendant, thought that discal injury should be attributed to the accident.[2]

[1] Ex 2 section 3 p 3-3
[2] Ex 2 section 1 p 1-14; T2-76/13

[4] The defendant contends that the injuries have resolved without significant impairment.[3] The submission necessarily requires a finding that Mr Martin, consciously or unconsciously, is maximising his problems.

[5] The principal focus of the dispute centred on economic loss. The crucial issue in the case is whether Mr Martin has, by reason of the accident caused injuries, lost the capacity to perform the more arduous duties associated with his employment over the decades as an electrician.

Applicable Legislation

[6] 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. Mr Crow QC for the plaintiff submitted that I should follow my own decision and Mr Campbell for the second defendant did not demur from that approach. So far as I am aware my views in *Allwood* have not been disapproved and so I will adopt that approach here.

The Plaintiff - Pre Accident Qualifications and Employment

[7] Mr Martin was born on the 22 November 1971. He was therefore 39 years of age when injured and is now aged 44 years. Mr Martin is a qualified electrical fitter/ mechanic/linesman with expertise in high voltage work.

[8] Mr Martin completed his apprenticeship at a coal mine. He was trained in both open cut and underground electrical fitting. He has since had wide experience which has included domestic, industrial, substantial commercial construction, mining and marine work. He seems to have been in reasonably constant employment pre-accident save for a ten month period in 2009-2010. His résumé makes reference to some 20 or more employers over a 20 year period – many being short term contracts. In between contracts he worked on the family farm.

[9] The ten month hiatus came about when Mr Martin resigned a secure position on the promise of work that did not come to pass. He sought to upgrade his qualifications to fit him to work on high voltage power lines. His aim was to set up his own business. He met with set-backs. There are only a few trainers in Queensland and his designated trainer had a heart attack - at an inopportune time for Mr Martin. This overcome, he undertook the training, qualified and did set up his own business. He commenced in September 2010. He was injured 10 months later. The business was successful. He grossed over $111,000 in the eight month period before the subject accident with a net profit before tax of a little over $83,000.[4] That period included the disastrous floods of January 2011 which disrupted many business including Mr Martin's.

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[3] See para 4 of the Further Amended Defence and para 8 of the Amended Statement of Claim

[4] The period in which Agricultural Electrical Services Pty Ltd operated – see Ex 1 p 3 para 4

[10] Previous supervisors spoke well of him.[5]

[11] The general picture that I have is that Mr Martin was a well-qualified electrical fitter with a specialist qualification not generally held who had for over 20 years enjoyed consistent employment. The work was physically demanding.[6] There is nothing in his past to suggest that he was anything but hard working, diligent and respected by his peers. He was in good health with only one prior attendance on a physiotherapist for a lower back complaint, four years before the subject accident, which he could not recall by the time of trial.

The Accident & Subsequent Treatment

[12] The motor vehicle accident involved a rear end collision at some speed causing the stationary vehicle which Mr Martin was driving, a Land Rover, to be shunted forward and collide with the car in front. The accident occurred on the Peak Downs Highway north of Clermont. The Land Rover was written off.

[13] Mr Martin attended the Clermont Hospital within a couple of hours of the accident complaining, according to the note, of "sore neck and back."[7] He was not admitted. An examiner in the emergency department recorded "neck and back states feels stiff."[8] The examining doctor recorded a complaint of left sided neck pain. His evidence was that he was, at that time, "sore all over." He returned to camp, his father attended the next day and took him home to Dululu. The pain worsened. He developed difficulties with passing urine. That problem was addressed at the Mt Morgan hospital on 4 July with the insertion of a catheter. Mr Campbell informed me in his submissions that the Mt Morgan hospital records include a reference to a complaint of numbness down the back of the legs and pain when trying to lift the legs when lying down. I could not locate such a record.

[14] He was referred then to the Rockhampton Base Hospital where he was admitted for observations overnight. The records read: "Coming from Dululu with jarring injury to back yesterday. Now cannot pass urine."[9]

[15] The difficulties with passing urine resolved. Its cause was never elucidated but, given the temporal correlation, plainly enough was the result of the forces to which Mr Martin was subjected in the accident.

[16] Subsequently Mr Martin attended on his general practitioner. At the first attendance on 1 August 2011 a Dr Clark recorded "back and neck pain persists, able to walk, limited with unable to work by pain …noted aches in low back and neck with minor different

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[5] See the evidence of Mr Breuer (T1-83-84) and Ms Creedy (T2-79)
[6] For a full description of the high voltage testing work see the report of Ms Coles at Ex 2 section 1 p 1-68-69
[7] Ex 2 section 2 p 2-14
[8] Ex 2 section 2 p 2-16
[9] Ex 2 section 2 p 2-1

sensation [not pain] down right leg to calf."[10] Mr Martin again attended on the general practitioner in September and October. The doctor then requested an MRI examination presumably because of concern about continuing symptoms.

[17] Mr Martin had physiotherapy treatment on several occasions. He ceased that treatment as he could not afford to continue it.

[18] The physiotherapy and general practitioner notes suggest that there was initial improvement as one might expect. The practitioner's notes show that on 11 January 2012 Dr Clark thought that Mr Martin was ready to attempt a return to part time duties. At that stage Dr Clark recorded that Mr Martin reported: "back pain and neck pain easing now usually 2-3/10, at times 6/10 when sitting prolonged periods." He had a full range of movement in the neck and back.[11]

[19] There appears to have been a subsequent deterioration. On 8 February 2012 Dr Clark recorded: "bend over in yard to pick up debris and flare low back pain fri a week ago."[12] The range of movement was said to be "limited by pain." While the pain eased, according to the notes, there remained significant problems. On 21 February Dr Clark recorded "back pain and into r post leg to thigh." He noted that Mr Martin was doing some "limited exercises." Dr Clark completed a certificate on that date for income insurance claim purposes in which he certified that Mr Martin could undertake duties that involved "light lifting and electrical work."[13]

[20] Since then general practitioners have certified that Mr Martin has complained of ongoing pain and in their respective opinions Mr Martin remained unfit to carry out his previous work and unfit for heavy physical work: see notes of Dr Clark of 27 June 2012,[14] Dr Harding of 11 November 2013,[15] and Dr Taylor of 9 January 2014.[16]

[21] Similar opinions have been expressed by all the experts engaged to express opinions in the medico-legal context save for a Ms White, an occupational therapist. I will return to the issue.

Post-Accident Employment

[22] It is evident that things have not gone well for Mr Martin since he sustained the subject injuries.

[23] Mr Martin has not returned to any employment. After reaching the view that he would not recover sufficiently to re-enter the workforce as an electrician he thought to make a living from the family farm at Dululu. That did not work out. He thought of starting a business with his son in the electrical field using his skill and knowledge and his son's

[10] Ex 2 section 2 p 2-29
[11] Ex 2 section 2 p 2-30
[12] Ex 2 section 2 p 2-31
[13] Ex 2 section 4 p 4-11
[14] Ex 2 section 2 p 2-31
[15] Ex 2 section 4 p 4-12
[16] Ex 2 section 4 p 4-13

labour. Mr Martin's son was subsequently injured severely in an accident and was for a period in a coma. So that plan too came to nothing. Mr Martin has registered with various bodies in the hope of finding work but has not been successful.[17] He has pursued advertisements and the like.[18] There is no evidence that he has been offered an appropriate position and rejected it. He has made enquiries about re-training. He is yet to commence any course of study. He has been unable to afford to pay tuition fees. He now has in mind a degree in Science. He might teach if he qualifies.

[24] Mr Martin has had access to some income. He had monies saved from his business (about $40,000), he received monies by way of income protection payments (a little over $30,000), he applied for and received a pay out of his accumulated superannuation on the grounds of severe financial hardship (around $34,000) all of which he says went to the ANZ Bank in payment of debts, and he eventually went on to Centrelink payments.

[25] Insurance monies he received from the written off Land Rover went to discharge debts owing on his and his parents' vehicles. He was unable to afford a motor vehicle and eventually obtained one with a loan from his grandmother. For a significant period he had no vehicle. The family farm was sold at the mortgagee's insistence and over his strong opposition. He considered that to be his home. He had invested substantial monies in the farm and those monies were lost. He says that he was unable to undertake necessary work on the farm because of the subject injuries and, at least in part because of that, the debts became overwhelming. He still owes some $8,000 to the Australian Taxation Office, a debt related to his previous business. Since the sale of the farm he has effectively broken off communication with his parents and brother.

[26] He has followed a nomadic life often living in caravan parks sleeping rough using a swag. I have not listed all of Mr Martin's travails. They have included eviction because of poverty and robbery whilst living in a men's shelter.[19]

[27] Surveillance video taken on the week-end before trial shows him setting up camp, his abode being a small tent, with a tarpaulin tied by rope over an aged, adjacent Kingswood. When asked the usual identifying questions at the commencement of his evidence he said that he had no fixed address.

My Assessment of Mr Martin

[28] Mr Martin gave his evidence in a very direct manner. I detected no effort to dodge any issue or avoid answering directly. He was impressive.

[29] I made several possibly relevant observations of him. His neck movements were stiff – and became more so over time. At one point I asked him a question which required him to turn to face me. He could not have been expecting a question from that quarter

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[17] Ex 1 para 13
[18] Ex 1 para 14

and appeared to respond instinctively – he turned his whole body and not his head and neck to address me. He sat for lengthy periods. As time went on he sat more on one buttock so as to favour one side. He stood on three occasions, each time when his standing would have little impact on the flow of the questioning. On each occasion he stood for perhaps 20 seconds or so and then sat again. On each occasion he had been sitting for about an hour. His facial expression became more and more drawn and his brow furrowed the longer he spent in the witness box. He seemed to be in pain. This, of course, is all consistent with his complaints.

[30] I turn to consider the defendant's arguments.

The Defendants' Arguments

[31] The defendant advances these principal arguments:

(a) I should have serious reservations about accepting Mr Martin's testimony;

(b) There was a lack of any recorded complaint at an early stage after the subject accident of any problem within the low back area, and the symptoms when eventually complained of were not terribly severe;

(c) That over the ensuing months the physiotherapy and general practitioner records suggest there was an improvement consistent with an apparent recovery;

(d) An occupational therapist, Ms White, opined (in a report dated 18 August 2015) that Mr Martin was capable of a full range of duties;

(e) That the therapist's opinion was supported by a surveillance video, taken only a few days before Mr Martin gave evidence, showing Mr Martin moving apparently quite freely;

(f) That Mr Martin effectively gave up trying to get back to work and decided that the present claim would suffice to pay out his debts and save the family farm;

(g) That apart from lack of motivation the reason for not returning to work was a lack of a motor vehicle and that came about by reason of Mr Martin's impecuniosity, for which the defendant cannot be held liable (citing *Liesboch, Dredger v Edison SS*[20]), or alternatively results from a failure to mitigate his loss by applying his own funds to obtaining a motor vehicle.

[32] I should record that Mr Campbell in his final submissions expressly disclaimed any argument that Mr Martin was carrying out "some serious fraud". I consider that he was wise to make that concession. It would require cogent evidence to persuade me that a man such as Mr Martin – a hard-working, well qualified and successful tradesman, respected by those who knew him – would set out to deceive lawyers, several medical experts and a court in the hope of an award of a necessarily unknown amount and that

[19] See the report of Ms Coles at Ex 2 section 1 p 1-65-66; the adoption of the accuracy of that report at Ex 1 para 8

in order to do so he decided to lead the life that he has, and to give up so much that he enjoyed and valued. There was no such cogent evidence.

Lack of Early Complaint and Apparent Recovery

[33] In my view there is nothing in the defendant's submissions that the early complaints recorded in the hospital notes in some way impact on Mr Martin's credibility and his claim of having suffered a back injury.

[34] There is a complaint recorded at the Clermont hospital on the very first attendance and within hours of the accident, presumably by the receiving nurse, of back pain. That the treating doctor made no reference to it may simply mean that the neck symptoms were of more significance to Mr Martin at that time. As well, as Dr Campbell observed, the release of high levels of cortisone and adrenalin upon the occurrence of sudden trauma can mask injuries for days.[21] There have been consistent complaints since then of back symptoms. Those complaints included a report of altered sensation down the back of the thigh.

[35] Those complaints were sufficiently serious four months later to have Dr Clark request an MRI scan. That scan showed an injury to a disc. Dr Halliday, an experienced orthopaedic surgeon, thought the appearance an abnormality and consistent with accident caused trauma. Dr Campbell reported that the appearances on the MRI were normal for a 40 year old. The appearances are reported by the radiologist as including disc herniation with impingement on exiting nerve roots. That does not strike me as normal. Dr Campbell's opinion was not explored with either of the surgeons in evidence. It would need some explanation for me to accept it and reject Dr Halliday's opinion.

[36] In my view the records are entirely consistent with what one might expect and in no way impact on Mr Martin's credibility, quite to the contrary.

[37] While there was a reporting of improvement those reports only went so far. At no stage was there a report of a cessation of symptoms. Twice there was a report of a flare up in symptoms following activity of a relatively mild nature – following the use of a chainsaw in September 2011 and after picking up debris in February 2012. These seemingly relatively innocuous incidents (bearing in mind that Mr Martin regularly used a chainsaw in his work prior to the accident) suggest a significant vulnerability. There was no suggestion that they were not honestly reported.

The Surveillance Video

[38] The most cogent evidence that called Mr Martin's credibility into question was the video taken on the weekend before trial. The video shows Mr Martin at his campsite. He bends, squats and moves apparently quite freely. His neck movements were

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[20] [1933] AC 449 (HL)
[21] T2-27/35

certainly freer than he displayed in the courtroom. At one point he lay on the ground and looked under a vehicle for a short period. Nothing that Mr Martin did while under surveillance required any great effort. It was noteworthy that on several occasions he walked a relatively short distance to an amenities block and took a walking stick with him, albeit he did not appear to place his weight significantly on the aid.

[39] In re-examination it was elicited that for much of the time when Mr Martin was not visible – and he was hidden from view for extended periods – he was lying down in his tent and resting.

[40] To the extent that there was a discrepancy between the movements on the video and his movements in the courtroom I think it is explained by the enforced need to sit for prolonged periods, his inability to have a break and rest up, and his reaction to the pressure of concentrating for an extended period when giving evidence.

[41] Mr Crow of Queens Counsel submitted, accurately I think, that there was no activity shown on the surveillance video that Mr Martin had ever claimed he could not do – and his activities had been examined by the various experts on six different occasions.

[42] Had Mr Martin attempted anything strenuous when under surveillance and had there been no apparent effect on him then that would cause serious doubts about his credibility. But the evidence did not go so far. The report by Mr Martin that his pain levels were typically at a 9/10 level is not borne out by the surveillance. He appears to move quite freely albeit when doing very little. So I can well understand Dr Campbell moderating his assessment of the percentage impairment from 7% to 5% after watching the DVD. But the surveillance established little else.

Ms White's Opinions

[43] The defendant strongly advanced Ms White as having assessed Mr Martin accurately. It is true that Ms White's evidence supports the defendant's submissions. But can her opinions be accepted?

[44] There are several difficulties in the way of accepting her views. The first is that she is at odds with every other expert. The second is that, to a degree, her opinions were illogical. The third is that she seems to have formed her views without a detailed knowledge of the physical demands that Mr Martin's previous employment entailed, an essential pre-requisite, I would have thought, to an opinion that he could carry out that work.

[45] On any view that work involved significant physical effort, long hours of driving, awkward lifting, almost inevitably twisting and lifting, the repetitive lifting of reasonably heavy weights of up to 20kgs, and the ability to carry reasonably heavy equipment sometimes hundreds of meters over rough terrain. A certain agility would have been necessary to climb poles and a certain endurance to hang from harnesses for extended periods.

[46] Four experts gave oral evidence: Dr Campbell a neurosurgeon, Dr Halliday an orthopaedic surgeon, Ms Coles an occupational therapist of 40 years' experience and Ms White. Ms White thought that Mr Martin could work without restriction. The other experts, while differing in some respects, each effectively said that Mr Martin could not perform the duties involved in his pre-accident employment.

[47] Dr Campbell saw Mr Martin on 14 April 2012 and 19 August 2015. He said that in his opinion Mr Martin had difficulties with "driving, sitting, sudden movements and lifting". Return to duties of a physical nature would "place him at risk of further injury."[22] He thought it unlikely that Mr Martin could return to his trade.[23]

[48] Dr Halliday saw Mr Martin on 2 July 2012. He expressed the opinion that Mr Martin could return to work as an electrician[24] but he clearly had in mind something very different to the sort of work that Mr Martin had done through his life. He seemed to expressly accept that point in cross examination.[25] In his report Dr Halliday said:

> "He is fit for a graduated return to work. While he may have difficulties with extreme heavy lifting and heavy physical activity, it is likely that his cervical injury will not in any way interfere with him returning to his pre-injury work. His lumbar spine injury may cause difficulties with heavier physical activities. Alternating sitting and standing, and avoiding heavy lifting or lifting and twisting, are likely to improve his work prospects."[26]

[49] Mr Martin's description of his work activities as involving long hours of driving on rough roads or across country, frequent lifting, sometimes heavy and often awkwardly, seems to be contraindicated if Dr Halliday's views be accepted.

[50] Under cross examination Dr Halliday accepted that the work of a domestic electrician, if it involved getting into difficult spaces with crouching and the like for prolonged periods – which the evidence indicates is part of daily life for such an electrician – "may aggravate his lower back symptoms."[27] He accepted that the lifting of air-conditioning units too might prove difficult, if heavy. I am not clear on what sort of electrician Dr Halliday had in mind in asserting that Mr Martin could return to his trade.

[51] Ms Coles saw Mr Martin on 19 October 2012 and 12 January 2016. She said:

> "11. Mr Martin's present status is such that he would be unlikely to return to his trade in any reasonably productive capacity as a contractor. It is also unlikely that he would obtain and thereafter maintain himself in other work for which he might be suited by background experience.

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[22] Ex 2 section 1 p 1-5 para 4; and see his supplementary report at Ex 2 section 1 p 1-40 para 2
[23] Ex 2 section 1 p 1-40 para 2
[24] Ex 2 section 1 p 1-15
[25] T2-76/30-35
[26] Ex 2 section 1 p 1-17 para 12
[27] T2-77/25

> 12. Mr Martin could be expected to be at a disadvantage seeking work in competition with able-bodied job applicants on full and frank disclosure of his history of injury and associated deficits.
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> 13. He would be precluded from share farming on a reliable basis.
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> 14. Although Mr Martin is not totally unable to engage in any occupational endeavour, his prospects for participating in any realistically remunerative endeavour are low."[28]

[52] Ms Cole repeated those opinions after the second attendance.[29]

[53] The defendant argues that these opinions merely reflect Mr Martin's self-report and it is true that the experts were required, to a degree, to rely on Mr Martin's self-reporting of difficulties. But each was very experienced and no-one, other than Ms White, found any discrepancies in his presentation. And my view was that Mr Martin was quite an impressive individual.

[54] So Ms White was alone in her opinions. That is not fatal of course – witnesses are to be weighed not counted – but I found it difficult to follow Ms White's logic. Ms White argued that because Mr Martin could perform her tests without apparent difficulty then he was fit for any occupation he had previously followed. I acknowledge that she emphasised that no one test was conclusive and that an overall assessment was undertaken but her views were fundamentally founded on her tests.

[55] Her report was that she had Mr Martin undertake various lifting tasks starting with an empty box weighing 5kgs and working up to a weight of 20kgs. There were four such lifts for each of the three tests. She observed grimacing or there were expressions of pain at that level of 20kgs and she ceased her tests. She thought that Mr Martin was not holding the box in the usual way for someone with chronic back pain – too far out from his body – and that would significantly increase the strain on his neck and back. She concluded that if Mr Martin could lift in that way he was capable of undertaking heavy tasks as defined in the Dictionary of Occupational Titles published by the US Department of Labour. That definition refers to frequent lifting (defined as up to 30% of the working day) of weights up to 23kgs or occasional lifting of weights up to 45kgs.

[56] Ms White also based her opinion on the "minimal evidence" of any change in posture, or stance or any sign consistent with Mr Martin having difficulties. She said that she would expect there to be more such signs in a person with "chronic back pain and … for someone who is reporting four years history of … right lower limb pain" over the three hour testing period.[30]

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[28] Ex 2 section 1 p 1-35
[29] Ex 2 section 1 p 1-74
[30] See T2-51/25-35

[57] With respect, the lifting of a weight on four occasions, the weight ranging from 5 to 20kgs, with a report of an apparent increase in painful symptoms at the high end simply does not lead to the conclusion that the individual can lift a greater weight repetitively throughout a working day, even if the lifting was comfortably handled. The tests undertaken were hardly strenuous. Ms Coles pointed out the limitations of the testing.[31] Given that some people are stoical, some not, some expressive and some not, little can be drawn from the response to these tests. Indeed the fact that there was no apparent attempt to overstate any difficulties says something about the genuineness of effort.

[58] The conclusion also ignores Mr Martin's unchallenged claim that much of the lifting he was required to undertake (whether as a high voltage tester or in the other fields in which he had experience) was when adopting less than ideal postures. In other words if Ms White attributes the onset of painful symptoms (which she says Mr Martin appeared to exhibit through grimacing or the like when lifting a 20kg weight) to the manner of lifting, I cannot follow the reasoning that leads to the conclusion that such tasks can be undertaken repetitively in occupations where awkward lifting is commonplace. Alternatively it might be said that Ms White is asserting that she does not accept that there was such an onset of symptoms. I am not sure that is her claim but, if it is, her testing does not demonstrate that she is in any position to say that.

[59] I am not prepared to accept Ms White's views.

Lack of Motivation

[60] The defendant's assertion that Mr Martin lacked the motivation to obtain alternative employment within his capabilities is unsupported by any evidence. In fact the evidence is very much the other way.

[61] It is plain that Mr Martin valued the family farm. He stood to lose a substantial investment if it was sold up by the Bank. The defendant's argument is that he let that sale occur despite having the means to stop it by returning to his well-paid work which he apparently had enjoyed. It would appear that the sale of the farm led to a disruption of the family[32] and the loss by Mr Martin of hundreds of thousands of dollars.[33] I find it very difficult to accept that he would have stood by and let this occur had he the ability to stop it.

[62] Mr Martin's evidence was that in 2012 and following, he attempted to obtain employment by many and varied means. He was unsuccessful in his attempts. There was no cross-examination of him suggesting that this was not true or to establish that he was pursuing inappropriate work or not accepting work that he should have. By late 2012 he made his first application to a university in the hope of undertaking a degree to retrain himself. He was criticised for the courses he chose but there was no evidence

[31] Ex 2 section 1 p 1-76
[32] T2-10/5
[33] T2-7/45

that he had no prospects of employment had he qualified in any of his areas of interest. He claimed that there were areas of employment opening up around the country. I accept that was his belief. It was not shown to be wrong or unreasonably held.

Impecuniosity and Mitigation

[63] The leading text on the assessment of damages for personal injury concludes that the *Liesbosch*[34] principle has no, or very limited, application in the personal injury field.[35] The decision of the High Court in *Fox v Wood*[36] had that effect. The approach taken there by Gibbs CJ (Aickin and Wilson JJ agreeing) was to distinguish between what was a natural and foreseeable consequence of the injuries and a special loss due to the financial embarrassment of the injured plaintiff. An inability to fund the purchase of a vehicle (particularly one of the quality necessary to carry out the high voltage testing work) would be an every-day consequence of impairing someone's earning capacity. Two members of the Court expressly held that where it is the defendant who has rendered the plaintiff impecunious the principle does not apply: *Fox v Wood* per Brennan J (446) and Murphy J (442). That is what has happened here. Had Mr Martin retained his excellent earning capacity unimpaired after the subject accident he would have had no difficulty financing a new vehicle.

[64] In any case the submission is based on a premise that I do not accept, namely that it was the lack of a vehicle that resulted in Mr Martin not obtaining employment. While the lack of a vehicle was no doubt an impediment Mr Martin was never in the physical condition to take up employment, at least of the type he had followed all his life. Nor was it shown that there was any offer of employment made to him that he was forced to decline because of a lack of a vehicle.

[65] As to a failure to mitigate, it was not demonstrated that the choices Mr Martin made were unreasonable. It seems evident that he faced a very difficult time in the year following the subject accident. For seven months he was without income and dependent on his savings.[37] He had no way of knowing when, if ever, he would be put in funds. Once in fairly modest funds he did not know what lay ahead. He had significant debts. The argument is, effectively, that at a time when he was well short of being fully recovered he should have put everything he possessed (and what that amount was is unknown) into purchasing a motor vehicle sufficient to equip him to obtain unidentified employment. The defendant bears the onus of proof in establishing a failure to mitigate loss. The evidence comes nowhere near showing such a failure.

[66] With those general observations on the principal arguments I turn to the various heads of loss.

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[34] [1933] AC 449 (HL)
[35] Luntz, *Assessment of Damages for Personal Injury and Death* (4th edn) p209 para 2.7.9
[36] (1981) 148 CLR 438

Pain & Suffering

[67] The assessment must be made in accord with the Injury Scale Values (ISVs) set out in the *Civil Liability Regulation* 2003.

[68] In summary I consider that Mr Martin has troubling symptoms but that his perception of them is greater than their objective impact on him. I think that his day to day life is not one of never ending pain but rather that he is wary of attempting too much because of his experience of the symptoms that he may suffer. Thus he tends to avoid activities involving any significant stressor. That is not to deny that he has flare-ups of pain from time to time.

[69] While Mr Martin may experience some level of pain with activity, I doubt that he is in constant pain or that his pain is at a level of nine out of ten as was suggested. To a degree then I accept the defendant's submission that there is some overstatement of symptoms, at least objectively considered. Nonetheless it seemed to me that when under stress – for example in the court room context – he was genuinely distressed and in pain. I am inclined to think that this reflects Mr Martin's now long experience of pain, his concern about the litigation and more generally concern about his future rather than any deliberate intention to mislead.

[70] I accept that Mr Martin becomes sore doing more difficult or awkward tasks, tasks that get him into the wrong position for too long or where he fails to take care of how he positions himself or when he lifts too great a weight. He may need occasional medication or treatment but as the defendant points out he has not had any significant treatment for a very long time.

[71] The experts were agreed as to the impairment assessment of 5% for the back injury, albeit they approached the problem from differing premises. They differed as to the injury to the cervical spine – 3% from Dr Campbell and 0% from Dr Halliday. It puts the impairment too low to say it is nil but Dr Halliday I think is right to point out that the 3% which is allowed under the AMA Guidelines for pain is a maximum and I do not accept that the maximum reflects Mr Martin's usual or typical state.

[72] The plaintiff contends for an ISV of 19 and a consequent assessment of $29,000. The submission assumes the back injury falls within Item 92 (moderate thoracic or lumbar spine injury—fracture, disc prolapse or nerve root compression or damage) of Schedule 4 to the Regulations and allowing an uplift of 25% for the cervical spine injury which it is submitted should be assessed under Item 88 (moderate cervical spine injury – soft tissue injury).

[73] The defendant contends for an ISV of 10 based on an ISV of 8 for the back injury with an uplift for the cervical spine injury. The submission assumes that Items 93 (moderate

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[37] Ex 16 – the first insurance payment received 31 January 2012, the second a month later, the third three months later

thoracic or lumbar spine injury—soft tissue injury) and 89 (minor cervical spine injury) apply. I accept the defendant's submissions.

[74] Quite simply the back injury does not fall within the description of injury to which Item 92 applies. Conversely it seems to fall squarely into the descriptor in Item 93:

> "**Comment:**
>
> The injury will cause moderate permanent impairment, for which there is objective evidence, of the … 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."

[75] Given the impairment assessment of 5% it is difficult to justify an ISV at the top of the range, despite the radiological evidence supporting the plaintiff. I am conscious that the extent of whole person impairment is an important consideration "but not the only consideration affecting the assessment of an ISV": Sch 3 s 10 of the Regulations. Nor do I lose sight of the fact that the overriding purpose of the ISVs prescribed is to reflect the level of adverse impact of the injury on the injured person (Schedule 3 s 2(2)). But I am persuaded by the surveillance video and the doctors' comments that the impact of the permanent impairment caused by the injury on Mr Martin's overall ability to perform activities of daily living is not substantial.

[76] Thus I accept that Item 93 is appropriate and I assess an ISV of 8. That is the dominant injury as defined.

[77] The comments in Item 88 are in the same terms as for Item 93 save it refers to the cervical spine rather than the thoracic or lumbar spine. In my view Item 88 does not apply as there is no objective evidence of moderate permanent impairment and the whole person impairment is closer to nil than 8%.

[78] Item 89 (ISV range of 0-4) provides: "An ISV at or near the top of the range will be appropriate if the injury, despite improvement, causes headaches and some ongoing pain." I accept that there is some ongoing pain despite improvement. An ISV of 4 is appropriate.

[79] There is inevitably some overlap in these assessments. In my view the "maximum dominant ISV" (ie 10) is adequate to reflect the adverse impact of these injuries.[38]

[80] General damages are assessed at $13,350.[39]

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[38] See Schedule 3 s 3 and 4 of the Regulations

[39] See s 62 of the Act, schedule 6A s 3(b) of the Regulations

Past Economic Loss

[81] The plaintiff claims $496,388.90. The defendant contends for $68,000.

[82] The plaintiff's case assumes the continuation of the well paid contracting work from the date of the accident to now.

[83] Mr Martin, as I have said, was in well paid employment as a contractor at the time he was injured. His income after expenses and income tax was in the order of $2,000 per week. Before he became a self-employed contractor he enjoyed a substantial income as an employed electrician. In 2007-2008 he earned, net after tax, approximately $71,000. In 2008-2009 and on the same basis he earned $72,000. There was the 10 month hiatus I spoke of in 2009-10 but he continued to earn at the same rate for the four months he was in employment.

[84] It is evident that Mr Martin enjoyed the contracting work. He had shown considerable determination to obtain the skills and qualifications necessary to perform the work. It was not in dispute that he had specialised skills. There was a reference to there being only seven qualified high voltage testers in the State. I am satisfied that but for his injuries Mr Martin would have pursued the contracting work so long as it was available. Even if such work became unavailable, and there is reason to think that it would not have continued given the loss of the contract by the head contractor, Electrix, in June 2013, he was well qualified and had the ability to obtain work earning amounts comparable to his earnings as an employee, so long as he was motivated.

[85] To arrive at its allowance of $68,000 the defendant contends that there should be a finding that Mr Martin should have returned to his pre-accident work on 12 January 2012. It allows $2,000 per week from the accident to that date (a period of 28 weeks and an amount of $56,000). The defendant allows a further $1,000 net per week for 12 weeks "by which time it is submitted plf should and could have returned to discharging his full time pre-MVA working duties at a sufficient level to perform his contract with Electrix."[40]

[86] There are several assumptions underlying these submissions. The first is that there was a contract for Mr Martin to return to on 12 January 2012 at the pre-accident rates. Presumably someone else had taken over the work in the seven months he had been away. The only evidence on the point was from a Ms Creedy which I mention below. The highest it can be put is that there was a chance that work would be available sometime in January/February.

[87] The second assumption is that despite not being able to carry out the work on a full time basis (implicit in the allowance of the $1,000 for the first 12 weeks) the contractor, Electrix, would have been content to accept him back on that part time basis. The third is that Mr Martin was fit enough to return to his pre-accident contracting work on 12 January 2012, even on a part time basis.

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[40] Mr Campbell's submission (Ex 14) para 4

[88] There was simply no evidence on the second assumption and no acceptable evidence to support the third.

[89] As to the first two points, a Ms Creedy was called. She worked for Electrix, the head contractor. She was asked the following question and gave the following answer:

> "Now, if Mr Martin once he got over the effects of his accident, I want you to assume, say, in January or February [meaning 2012] asked for his old position back with Electrix, do you know whether or not he would probably have been given his previous contract? --- I dare say my boss would've because Josh had specialised skills … that took a while to be trained up in."[41]

[90] No question was addressed to the very different issue of whether Mr Martin would have been accepted back if the best that he could do would be to work part time, which assumption underlies the submission. Nor was any question asked about his prospects of regaining his contract if he could not do the full range of duties for the part time that he hypothetically was to work for the first 12 weeks. Mr Martin's description of his work indicated that it was he, with his specialised skills, that had to carry out the work, not an unskilled offsider.

[91] The more fundamental point is whether Mr Martin was ever fit to resume his full range of duties. The date of 12 January 2012 referred to in the defendant's submission was selected on the assumption that on the previous day the GP, Dr Clark, for the first time cleared Mr Martin to return to work. The evidence is by no means so clear. Dr Clark was not called. His records were in evidence. His entry for 11 January 2012 reads: "Management: start work 4 hrs a day 5 days a week in usual job now." However Dr Clark also completed a certificate on 8 February 2012 in which he certified, after recording that he had seen Mr Martin on 10 January and 8 February, that Mr Martin "will be unfit for work from 10 January 2012 to 18 April 2012 inclusive." I have already mentioned that there is a reference to a flaring up of symptoms a week before 8 February when Mr Martin was picking up debris. The inference I draw is that in the light of that event Dr Clark reconsidered his earlier view.

[92] As well Dr Clark provided a certificate to an insurance company in relation to a claim Mr Martin had made under an income protection policy that Mr Martin was "partially disabled" from working in his "usual occupation" for the period 21 February to 20 April 2012 and that he could perform "light lifting and electrical work" for 15 to 20 hours per week. He further said that Mr Martin would be "unable to recommence his usual duties at present, although, is fit to resume some limited duties."[42]

[93] There is no evidence that Mr Martin thereafter ever recovered full function. Dr Campbell saw him in April 2012, Dr Halliday in July 2012 and Ms Coles in November 2012. He was re-assessed by Dr Campbell (August 2015) and Ms Coles (January 2016) and found to be in much the same condition as in 2012. I have previously mentioned

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[41] T2 -79/5

[42] Ex 2 section 4 p 4-11

the certificates issued by other general practitioners. As already discussed each expressed the opinion that Mr Martin could not perform the full range of duties that he described were involved in his work.

[94] I am satisfied that Mr Martin could not return to his pre-accident employment either in January 2012 or at any time since. I am satisfied that he has not been fit to work in any of the occupations that he followed in the 20 years before the subject accident. All involved significant manual labour including lifting or moving (eg heavy cables) reasonably heavy weights and often when adopting awkward postures.

[95] The defendant sought to show that Mr Martin could return to his full duties but failed in that attempt. Here it is not that Mr Martin does not have some residual capacity to earn an income. The witnesses that he called, Dr Campbell and Ms Coles, support the view that a capacity remains. Mr Martin says, and he is not really contradicted, that he attempted to exercise that capacity and failed and then thought his best chance to return to employment was to retrain.

[96] What then are the principles that apply to the assessment? In *Thomas v O'Shea* (1989) ATR 80-251 at p 68,701 Malcolm CJ and Wallace J held (with Kennedy J agreeing):

> "The question remaining is what was the appellant's residual earning capacity, if any. This was clearly a case where, as the learned trial Judge found, the appellant had lost the earning capacity he had before the accident. The legal onus of proof of loss of earning capacity rests, of course, on the plaintiff, but once the plaintiff has proved that he has lost his pre-accident earning capacity and has been unable to find alternative employment, or that his condition has prevented him finding alternative employment, an evidentiary burden is cast on the defendant to show what alternative employment opportunities were open, including the state of the labour market and the likely earnings: *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649 at p 657 per Barwick CJ; *Van Velzen v Wagener* (1975) 10 SASR 549 at p 550 per Bray CJ; and *Linsell v Robson* [1976] 1 NSWLR 789 at pp 253–254 per Hutley JA; and at pp 254–255 per Glass JA. In *Baird v Roberts* [1977] 2 NSWLR 389 it was held that a defendant who seeks to show that the plaintiff can still do "light work" or follow a "sedentary" occupation must adduce evidence that the plaintiff is able to do such work and to obtain it and what the earnings from it would be. The Full Court in Victoria has taken the same approach: *Vandeloo v Waltons Ltd* [1976] VR 77."

[97] To the extent that *O'Shea* supports the proposition that in the absence of the sort of evidence there discussed a defendant will be unable to have damages assessed on the basis that the plaintiff has a residual earning capacity, it has been expressly disapproved in Queensland: see *Bugge v REB Engineering Pty Ltd*[43] per Chesterman J (as his Honour then was) approved in *Anodising & Aluminium Finishers v Coleman.*[44] Those cases show that there is no "mechanistic approach" such that a failure to lead evidence of the kind discussed in *O'Shea* has the effect that the defendant is precluded

[43] [1999] 2 Qd R 227
[44] [2002] 1 Qd R 141

from arguing for some residual capacity. Rather the residual capacity must be assessed on the evidence, taken as a whole.

[98] But where the defendant does not seek to demonstrate the potential alternative employment opportunities open to an injured plaintiff, and what income those opportunities might bring, there seems little justification for significantly discounting the award on the basis of what the plaintiff ought to have done or ought to have achieved.[45] If the defendant's real point is that the plaintiff has not done all that he reasonably could to mitigate his loss then it is clear where the onus lies. In my view the defendant did not discharge that onus. There was no evidence that anyone would be prepared to employ Mr Martin as an electrician with the limitations that Ms Coles spoke of. There was no attempt made to show what alternative employment opportunities were open, assuming the loss of the pre-existing earning capacity and those continuing limitations identified by Ms Coles, and the likely earnings that might result from the exercise of that limited capacity.

[99] The significant discounting factors seem to me to be the possibility of Mr Martin losing his contract because of some competitor say underbidding, the prospect that Electrix would lose the head contract (which did occur in June 2013) and Mr Martin not proving attractive to the new contractor or having to accept a lesser gross rate,[46] and Mr Martin suffering some non-compensable disabling injury or illness (which does not seem to have been a serious risk).

[100] An odd feature of the evidence is that neither side saw fit to call evidence from the company that won the contract from Electrix. Whether that company had its own contractors or employees and, if it employed contractors, what rate it has paid them remain unknown. Mr Martin's employment by Electrix, if uninjured, was reasonably certain then only until 30 June 2013. I do not know of any principle of continuity such that it ought to be assumed in the absence of evidence that his contract would have been renewed by the incoming company and on the same terms, particularly where, as here, that incoming company has apparently underbid the outgoing one.

[101] To arrive at the figure advanced for the plaintiff Mr Crow of Queens Counsel, who appeared for the plaintiff, adopted a net weekly loss of $2071.74 for the 239.5 weeks since the subject accident, reflecting the high voltage testing contract rates the plaintiff enjoyed. He points out in his submission that in the opinion of the accountant called, Mr Ferris, legitimate use of the corporate structure and the changing tax scales meant that the adjusted net weekly loss was about $2,229.[47] Hence there is a built in discount, for part of the period, of nearly $160 per week from the greatest possible loss. I also note that even if, on the day after the subject accident, Mr Martin had been driven back

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[45] As to the onus see the observations of Walsh JA in *Adams v Ascot Iron Foundry Pty Ltd* (1968) 72 SR (NSW) 120 at 139 approved by McHugh J in *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 22

[46] See Ms Creedy's evidence at T2-78/43 – 79/2

[47] See Ex 3 and 4; T1-89/20 – 90/35

to earning the income he enjoyed as an employee his loss would be in the order of $330,000.[48]

[102] To allow for the discounting factors I have mentioned and any non-deductible expenses in achieving the income proposed I will allow $400,000 under this head of loss.

Future Economic Loss

[103] For the future the plaintiff seeks $1,139,513.40. The defendant argues for a global allowance of $50,000.

[104] Mr Campbell submitted that there should be a "modest global sum to recognise the now 44 year old plaintiff's only moderate soft tissue lumbar injury and its potential impact on his future employment capacity in only the heaviest aspects of his previous fields of work." While I accept that Mr Martin has only "a moderate soft tissue lumbar injury" the difficulty with the submission is that it does not meet the problem that absent the ability to carry out the heavier aspects of his usual work the evidence indicates that the plaintiff was not employable in that work at all – there is no mid-point where Mr Martin can earn most but not all his previous income because he can do some but not all of the duties involved. The argument really is that Mr Martin should somehow work despite his pain and should bear the risk of worsening his condition[49] involved in taking on the more arduous duties. In my view that is hardly reasonable.

[105] The plaintiff's approach was to argue that but for the accident Mr Martin would have earned a net income of $2,229 net per week until age 70 years; that he should be compensated for a complete loss of earnings until he retrains; that the retraining will take six years; and that once trained it ought to be assumed that he will have a residual capacity to earn in the order of $750 per week net as a teacher. There was no evidence of the rates of pay of a teacher.

[106] As to the extent that a judge is entitled to use his or her own knowledge of wage rates or resort to statistical tables the authorities are conflicting: see *Hayman v Forbes* (1975) 13 SASR 225; *National Instruments Pty Ltd v Gilles* (1975) 49 ALJR 349; *Kealley v Jones* [1979] 1 NSWLR 723 at 732-5 per Moffitt P; *Stauffer v Hanley* (Unreported – NSW Court of Appeal – 6 April 1978). The Court of Appeal in New South Wales has recently accepted that the absence of evidence on rates of pay was not fatal so that "[d]epending on the circumstances, the want of specific evidence on aspects of a damages claim does not prevent the court doing the best it can to address the plaintiff's loss": *Coles Supermarkets Australia Pty Ltd v Fardous* [2015] NSWCA 82 at [36] per Macfarlan JA. I will proceed on that basis.

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[48] Assuming the pre-contract income of $1,384 x 239.5wks. See the evidence of Mr Hall (T2-13/40) and Mr Breuer (T1-84/40) as to the potentially higher incomes

[49] Dr Campbell's opinion – see [47] above

[107] 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.

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

[109] I have largely detailed the relevant findings. The essential assumptions under which I proceed are:

(a) Mr Martin has lost the capacity to perform work that involves placing any significant demands on his low back;

(b) I accept the evidence of Ms Coles as to the effects of the injuries on his capacity to earn income as an electrician. Practically those restrictions mean that he cannot perform the range of duties that are expected in the occupations he has followed;

(c) While Mr Martin would have preferred to remain self-employed the continuation of the high voltage testing work was not certain – and may have come to an end in June 2013;

(d) Had he not been injured Mr Martin had reasonably good prospects of retaining employment in the higher paid work that he had followed for 20 years before his accident. He had specialist qualifications, long experience in differing fields, and a good reputation. However that was not certain – the many redundancies throughout the mining industry in recent years, which is well known throughout the Central Queensland area, are testament to the uncertainties. Mr Hall's evidence suggests that well qualified and experienced electricians were in a better position than most.[50]

(e) Mr Hall spoke of seven day rosters as customary in the mining industry.[51] Working such shifts and usually in more remote locations is not necessarily a life Mr Martin would have followed until retirement despite the good incomes available. He expressly said that was a life he did not wish to follow;[52]

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[50] T2-14/15
[51] T2-13/40
[52] Ex 1 para 5

(f) The net weekly income Mr Martin could expect to earn assuming a return to the mining industry would be at least in the order of $1,800;[53]

(g) The fact that the work involved in these high paid occupations was arduous suggests that it was unlikely that Mr Martin would have necessarily wished to pursue that work to age 70 years as the plaintiff's submission assumes. That was a most unlikely future.

(h) Mr Martin has a residual earning capacity in his injured state. While he is suited to more sedentary forms of employment he has no experience in such occupations. As well Mr Martin will have difficulties persuading employers to engage him with his history of injury and incapacity;

(i) Once back in the work force and with some work hardening Mr Martin should be able to cope with full time duties. I do not find there has been any conscious exaggeration but expect that with the cessation of litigation, and the lessening of financial pressures that this award will bring, Mr Martin is likely to cope better with his condition;

(j) One possible future is that he will retrain, obtain a degree and work as a teacher but that is far from certain.

[110] There are many imponderables. I will allow $750,000 under this head of loss. The amount reflects a loss of around $1,800 net per week over 16 years, to take Mr Martin to age 60, discounted on the 5% tables and then discounted by 25-30% to allow for residual earning capacity, the uncertainties of maintaining substantial earnings either as a high voltage tester or in the mining industry, and the prospect of Mr Martin not wishing to maintain constant employment in more arduous work. By age 60 I assume that Mr Martin was more likely, if uninjured, to pursue sedentary work of a type that is within his residual capacities. In saying that I do not mean to assert that I have assumed those precise assumptions underlie the award. Rather my approach is that a substantial amount is warranted and this award best reflects the many variables.

[111] Some might think that the modest impairment of 5% seems out of keeping with the findings as to the consequent very significant economic loss. That comes about because of three things. The first is the substantial earning capacity enjoyed by Mr Martin before he was injured. The second is that "impairment" does not equate to "disability" ie the actual impact of the condition on the individual.[54] The third is that under the Act, for the purposes of assessment of the "whole person impairment" ("WPI") in relation to an injury, which is used to determine the ISV, the impact on employment is specifically excluded: the dictionary defines WPI as an estimate "… expressed as a percentage, of the impact of a permanent impairment caused by the injury on the injured person's overall ability to perform activities of daily living other than employment."

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[53] Mr Breuer at T1-84/35-40; and see the evidence of Mr Hall: $160,000 (about $2,100 net pw) to $220,000 (about $2,735 net pw): T2-13/40

[54] See Dr Halliday: T2-75/5

Loss of Superannuation

[112] Had Mr Martin remained self-employed then he would not be entitled to superannuation over and above the contractual rates received for his work. While it is likely that he would have wished to remain self-employed as a high voltage tester the decision may have been taken out of his hands by others.

[113] I will allow $17,000 for past loss of superannuation.[55] Consistently with my approach in assessing past economic loss I assume that Mr Martin would have remained a high voltage tester until 30 June 2013 and that thereafter he would have sought and obtained employment. To an extent the assumptions underlying the assessment of past economic loss is interlinked with this head of loss – if one assumed a continuation of the self-employed status more would be allowed under the past economic loss head but none under this head.

[114] The allowance for future loss is primarily based on the income to be expected as an employee in the mining industry. Again the loss under this head is inter linked with the future economic loss allowed.

[115] There is a dispute as to the appropriate rate. The plaintiff claims 11.33% and the defendant asserts that 9.5% is the rate entrenched until 2021. Mr Crow referred in his submissions to several decisions in which the 11.33% rate was adopted. Those decisions were based on the then legislation that had the superannuation guarantee levy increasing over time from 9% in 2012 to 12% by 2019. 11.33% was adopted as a working average: see *Heywood v Commercial Electrical Pty Ltd* [2013] QCA 270 at [56] per Muir JA.

[116] However the legislation has changed since *Heywood* was decided. Under the *Superannuation Guarantee (Administration) Act* 1992 (Cth), s 19 presently provides that employers are required to pay superannuation benefits at a rate of 9.5% until the year starting on 1 July 2021, as Mr Campbell submitted, and thereafter as follows:

(i) For the year starting on 1 July 2021 10%;

(iii) For the year starting on 1 July 2022 10.5%;

(iv) For the year starting on 1 July 2023 11%;

(v) For the year starting on 1 July 2024 11.5%;

(vi) For the year starting on 1 July 2025 12%.

[117] I calculate an average of 10.15% to 2032 (the 16 year period I have adopted for the future loss assessment). This approach gives an air of precision to an exercise that is anything but precise. I will allow $76,100.

[55] Adopting a rate of 9.25%

Retraining Costs

[118] The plaintiff claims $26,751 for the tuition fees involved in obtaining a degree in Science and the necessary diploma to equip him for a life as a teacher. The defendant argues that no amount should be allowed, the costs being too remote and the course to be followed being unlikely to lead to remunerative employment.

[119] No evidence was led touching on Mr Martin's aptitude for tertiary study, the likelihood of him obtaining a degree in Science, the employment opportunities available for those with such a qualification to obtain work as a teacher, particularly bearing in mind that Mr Martin will, by the time he hypothetically qualifies, be aged 50 years, or the prospective income.

[120] From the defendant's perspective there is little point to retraining Mr Martin. There are many occupations that Mr Martin could follow that would return him an income that, over the prospective period of loss, would for damages purposes have much the same result as delaying for six years and then allowing a greater income that he might then achieve because he is better qualified.

[121] It is a matter for Mr Martin as to whether he retrains. I do not think it reasonable to visit the costs on the defendant.

Future Special Damages

[122] The plaintiff claims $2,000 for prospective costs of medication and treatment. The defendant says that no amount should be allowed given the lack of treatment for many years.

[123] The future that I assume will be quite different to the life that Mr Martin has led for the last several years. I assume that Mr Martin will be returning to work. He will have initial difficulties coping. He is likely to have aggravations of his back and neck symptoms from time to time. I expect there to be a modest need for occasional medications. The amount suggested is not unreasonable given that prospective change in circumstance.

Special Damages

[124] Special damages (including interest) are agreed in the sum of $2,723.80.

Summary

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

Pain, suffering and loss of amenities of life	$13,350.00
Past economic loss	$400,000.00
Interest on past economic loss[56]	$21,398.30
Future loss of earning capacity	$750,000.00
Loss of superannuation	$93,100.00
Future expenses	$2,000.00
Special damages	$2,723.80
Total Damages	**$1,282,572.10**

Orders

[126] There will be judgment for the plaintiff in the sum of $1,282,572.10

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

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[56] $324,167.55 x 1.435% x 4.6 yrs – I have deducted the payments made under an income protection policy (see Ex 16: $30,321) and the monies received from Centrelink (estimated at $45,511.45) as submitted by Mr Crow and adopted the interest rate that meets the definition of "appropriate rate" in s 60 of the *Civil Liability Act* 2003 (Qld)