DISTRICT COURT OF QUEENSLAND

CITATION:	*Ketchell v RACQ insurance Limited* [2021] QDC 307
PARTIES:	**Robin Ali Richard Ketchell** (Plaintiff) **v** **Hayden Andrew Deacon** (First Defendant) AND **RACQ Insurance Limited** **(ABN 50 009 704 152)** (Second Defendant)
FILE NO:	93 of 2019
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court of Queensland
DELIVERED ON:	16 December 2021
DELIVERED AT:	Townsville
HEARING DATE:	16, 17 and 18 November 2020
JUDGE:	Coker DCJ
ORDER:	**1. Judgment for the plaintiff against the second defendant in the sum of Four Hundred and Seventy-Nine Thousand, Eight Hundred and Eighty-Four Dollars and Seventy Cents ($479,884.70).** **2. Any written submission as to costs claimed by the plaintiff are to be filed and served within 35 days of today and any submission by the second defendant are to be filed and served within 49 days of today.** **3. Unless otherwise requested in writing, any determination as to costs will be conducted in chambers.**
CATCHWORDS:	TORTS – NEGLIGENCE – MOTOR VEHICLE ACCIDENT – where the plaintiff was a patron in attendance at a hotel – where the driver of a motor vehicle lost control of the vehicle crashing into patrons at the hotel – where liability of the driver and third party insurer is admitted – where the

dispute arises as to the extent of the plaintiff's injuries – whether pre-existing conditions are significant in respect of the plaintiff's current health – whether any psychological condition of the plaintiff is attributable to the motor vehicle incident.

DAMAGES – MEASURE OF DAMAGES IN PERSONAL INJURIES – GENERAL PRINCIPLES – assessment of damages pursuant to the Civil Liability Act (2003) – where the extent and assessment of damages is in issue – where damages are assessed in line with the finding of injuries attributable to the motor vehicle incident.

LEGISLATION: *Civil Liability Act* 2003 (Qld), s 51, s 54, s 55, s 61 and s 62

Civil Liability Regulation 2014 (Qld)

Motor Accident Insurance Act 1994 (Qld), s 52

CASES: *Allianz Australia Insurance Ltd v McCarthy* [2012] QCA 312

Ballesteros v Chidlow [2006] QCA 323

Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64

Cootes v Concrete Panels & Ors [2019] QSC 146

Graham v Baker (1961) 106 CLR 340

Jones v Schiffmann (1971) 124 CLR 303

Krobath v Theiss Pty Ltd [2018] QSC 309

Malec v JC Hutton Pty Ltd (1990) 169 CLR 638

Nucifora & Another v AAI [2013] QSC 338

Reardon-Smith v Allianz Australia Insurance Ltd [2007] QCA 211

Walters v McGrath & Anor [2009] QSC 158

COUNSEL: A. Philp QC for the Plaintiff
J. Trevino for the Plaintiff
M. Grant-Taylor QC for the Second Defendant

SOLICITORS: Roati Legal for the Plaintiff
Quinlan Miller Treston for the Second Defendant

Introduction

[1] Robin Ali Richard Ketchell, the plaintiff, was outside the front of the Royal Hotel at 46 Lannercost Street, Ingham on the evening of the 4th April 2014. At about 9.53pm on that day, a Holden motor vehicle, registration number 439TKR, driven

by Hayden Andrew Deacon was travelling along the Bruce Highway toward Ingham.

[2] The driver, Hayden Andrew Deacon, lost control of the vehicle at the T-junction with Lannercost Street and the vehicle left the roadway, became airborne, striking the plaintiff on the ankle, causing him to be spun around onto his back. The plaintiff says that this caused his torso to twist, and that he experienced immediate pain in his thoracic spine, the incident.

[3] The vehicle continued on that path, striking other persons in front of that location and crashing into the Royal Hotel. Several of those other persons suffered serious injuries, as did others in the Holden motor vehicle.

[4] The plaintiff claims that as a consequence of the incident, he suffered a soft tissue injury to his thoracic spine with disc protrusion at approximately the T9 level, with some nerve root irritation and an adjustment disorder with mixed anxiety and depressed mood.

[5] At the time of the incident, a policy of insurance was in existence, in respect to the Holden motor vehicle driven by Hayden Andrew Deacon. RACQ Insurance Ltd, the second Defendant, were the licensed insurers.

[6] Whilst the action is brought by the plaintiff against the driver as the first defendant, and the second defendant as the insurer, as is required pursuant to s 52 *Motor Accident Insurance Act* 1994 (Qld), the first defendant has taken no part in the proceedings. This is because liability for the incident has been admitted by the second defendant by way of letter dated 12 November 2014.

[7] Whilst liability is admitted, the second defendant defends the action upon the basis of there being a dispute as to the nature of any injuries sustained, and the quantum of any loss. Accordingly, assessment of quantum falls upon the court and of most significance, particularly from the perspective of the defendant, is the credibility of the plaintiff.

[8] In written submissions as well as the address at the conclusion of evidence, counsel for the defendant emphasised the unreliability of the plaintiff's evidence, especially in circumstances relating to what the plaintiff reported to various doctors, and to the

occupational therapists who provided reports. After identifying 25 or more 'anomalies' apparently from the evidence, counsel for the defendant submitted that it was, "impossible to put all of these anomalies down to the plaintiff's genuinely mistaken recollection of events."

[9] Further, in counsel for the defendant's written outline of submissions, after detailing those 'anomalies' and emphasising some specific concerns, he concluded with the following:

> "The end result of these numerous revelations, calling into question so pointedly as they do to the plaintiff's honesty, reliability, must mean, it is submitted, that the court will decline to accept any of the plaintiff's evidence in the absence of that evidence being corroborated by other evidence from an acceptable source."

[10] What was emphasised by counsel for the plaintiff, is that the attack on the credibility of the plaintiff is a combination of small matters that they draw to an inordinate and unreasonable high. To use Mr Philp's own words, "it's holding the plaintiff to too high a standard, when you actually analyse what the complaints were about." Thereafter, counsel for the plaintiff addressed numerous matters commencing with the plaintiff's life and situation prior to the incident. He emphasised that what occurred on the evening of 4 April 2014, meant that the plaintiff's "life was about to be overturned."

[11] Such arguments put by both counsel lead obviously to a crucial examination of the plaintiff's evidence. That evidence was taken on 16 November 2020. During evidence-in-chief, the plaintiff was shown his quantum statement, Exhibit 1 and adopted it as true, correct and his evidence to be relied upon. He further identified himself in two closed circuit television images taken at the Royal Hotel. They were identified as the first showing the scene moments before the incident, and the second shows the airborne vehicle crashing into the hotel, and an image identified by the plaintiff of him on the ground.

[12] Finally, in evidence-in-chief, the plaintiff indicated where he suffered pain. He stood and pointed out areas of pain, and I made the following statement to identify, as best as could be done, where he had indicated points of pain. I said:

> "I see that the plaintiff is indicating the left hand side of his middle back through to the chest wall on the left hand side of his front."

[13] That seems to have been adopted by counsel for the plaintiff as an accurate description.

[14] Thereafter, counsel commenced cross-examination and as was emphasised both in written and oral addresses, the plaintiff was taken at length to his attendances with doctors, and the two occupational therapists. The recurring questioning in respect of all those attendances was whether the plaintiff had been truthful in what he told those experts. Subject to some variations in expression, the plaintiff repeatedly answered, "I would've been truthful".

[15] Thereafter, the cross-examination focused on discrepancies in what was told to those persons, as well as the claims made for medical expenses. The plaintiff was specifically taken to the Medicare Notice of Charge or Notice of Past Benefits and generally accepted that the amount claimed was simply an addition that was made of all entries. The cross-examination focused on other difficulties that the plaintiff experienced rather than those relating to the incident.

[16] In respect of those various claims the plaintiff acknowledged, when it was explained to him with some precision, that certain attendances and expenses claimed related to circumstances other than those arising from the incident. His counsel also accepted that, noting a discount in the amount claimed for medical expenses of $1,112.80. To be frank, my impression here, and it recurs in respect of any other concerns with the plaintiff's evidence, is that he relied upon his legal advisers, and certainly in respect of calculations of various expenses, such as medical, pharmaceutical, and the like, simply adopted figures put to him by those advisers. As such they were in no way reflective of any intention to misstate actual and proper claims. His position was detailed in this exchange between he and counsel for the defendant.

> You say that, in respect of your mid-back injury that you've sustained in April of 2014, that you have spent $2064 on analgesics and anti-inflammatory tablets; is that right?---Yeah.
>
> And you say that you've spent an estimate – I should correct, it's an estimate – an estimate of $1376 on heat-relief creams; do you see that there? ---Yeah.
>
> And then you say that you estimate that you spent another $1720 on anti-inflammatory gels; is that right?---Yeah.
>
> Did you keep any receipts?---Not that I'd remember.

> You never kept receipts. When was the last time that you bought any of these things?---Last week.
>
> Did you keep a receipt then?---I don't keep my receipts.
>
> Had you ever been asked to keep receipts?---I just can't remember.
>
> You see, if you'd kept receipts, it'd be a very easy way for everyone to be able to cross-check what you're saying about this expenditure against the documentary evidence that the receipts would provide, wouldn't it? You'd agree with that? Because it's there in black and white?---It is.

[17] Similarly, counsel for the defendant cross-examined the plaintiff at considerable length about what the various doctors and occupational therapists said they had been told. Much of what was put to him, the plaintiff indicated, were not matters that he was able to recall, it being a long time ago, but generally accepted, with some attempts at explanation, what was recorded.

[18] Again, the recurrent theme was that the plaintiff had been untruthful in what he told these persons, and it was emphasised that the 'anomalies', were all favourable to the case that the plaintiff sought to establish. As was submitted for the defendant,

> "…the plaintiff has never been shown to have a mistaken recollection against interest."

And further,

> "In any event, the sheer number of falsities surely attests to their being the product of mendacity rather than examples of innocent mis recollection."

[19] Counsel for the defendant, in seeking to emphasise these matters, focused primarily on what the plaintiff reported were the immediate effects upon his employment with the local council, and specific effects upon his leisure activities, including fishing, as well as Aboriginal and Torres Strait Islander cultural activities.

[20] In his evidence, particularly in cross-examination, the plaintiff accepted that what he told various doctors and Ms Jones, the defendant's occupational therapist, about his employment, may not have been entirely accurate but that he had difficulties recalling what was said. An example of those many exchanges can be seen below.

> Okay. That's fine. Anyway, you told Dr English, the orthopaedic surgeon, on the 25th of June 2015 that at the time of the accident you were working for the council. Did you tell him that?---Would've, yes.

And was that true?---Yes.

Okay. And you told him you'd been working there with the council for three months prior to the accident. Did you tell him that?---I probably did.

Was that true?---At that time, yes.

Mr Ketchell, you only started work with the council on the 11th of March 2014?---Well, once again, I'm bad with dates.

Yeah. But the 11th of March 2014 is only about three weeks before the accident?---I never get my dates right.

I'm sorry. If I could put that to you again. It's – yeah – it's about three weeks before the accident, not three months. And I'm putting to you that you told Dr English that you had been working there for three months, not three weeks, before the accident?---Long day on a plane to Brisbane.

But if you told him it was three months, that was untrue, wasn't it?---I can't remember. I was probably in that much pain, I can't decipher what I was doing.

Because I put to you that you only started with the council in that job as a storeman on the 11th of March 2014; what do you say about that?---If that's my start date, that would be correct.

I'm putting to you that you only started in that job as a storeman with the council on the 11th of March 2014?---Eleventh of March.

I beg your pardon?---Eleventh of March.

I'm putting to you the 11th of March?---As my start date?

Yes?---Yes.

You agree with that?---I agree with that.

Okay. And you told Dr English that after the accident you had been able to continue working for the next four weeks, but that then the job finished. Did you tell Dr English that?---I can't remember that.

If you told him that, was it true?---I - - -

It was not true, because we worked out from your earlier answers that you continued to work until the 17th of July 2014; that's 15 weeks, not four weeks?---Like I said, dates and times don't – that – I've - - -

You see, Mr Ketchell, you told the doctors these things. You told the doctors – Dr English, for example – that you'd started with the council three months before the accident, rather than three weeks, because you

> wanted to give a better impression of your work record; that you had been in a job longer than was, in fact, the case; didn't you?---No.
>
> And you told the doctors and the physio – and the occupational therapists that you only continued working in the job for four weeks, rather than 15 weeks, because you wanted to paint a picture of a more serious injury sustained in April 2014 than was, in fact, the case. That's why you didn't tell the doctors the truth about these things?---I was probably in a lot of pain that day after a long flight. I can't remember.
>
> You told Dr English on the 25th of June that you applied for a permanent job with council; did you tell him that?---Yeah, I did app - - -
>
> Was that true?---I did apply for a fulltime job.
>
> Was that true?---Yes.
>
> But that you did not get the job; did you tell him that?---I did not get that job.
>
> Ye – no, no, no, no. Did you tell him that?---Possibly, yeah.
>
> Did you tell Dr English that you did not get the job, even though you applied for it?---Probably, yes.
>
> Okay. And that was true?---Yes.

[21] There are concerns with the accuracy of what the plaintiff may have told various doctors, but I am far more inclined to the view that such statements arise from looseness and imprecision in answering questions directed to him rather, than any suggestion of contrived answers and a determination to mislead the doctors and occupational therapists.

[22] Similarly, the plaintiff was questioned at length about fishing, as well as cultural activities. In his quantum statement, he indicated what he said were the consequences for him, as a result of the injuries caused by the incident. At paragraph 37 through 46 the following is noted:

> [37] Prior to the accident, I enjoyed boating, fishing, car mechanics and car restoration in my leisure time. Since the accident, I have experienced difficulty with participating in my previous leisure activities due to my ongoing pain and the limitations of my injuries and my enjoyment of these activities has decreased.
>
> [38] I have experienced a significant impact on my social and cultural identity as a result of the accident. Prior to the accident, I had always maintained strong cultural and family ties to my Aboriginal and Torres Strait Islander heritage.

> [39] My mother is of Aboriginal indigenous heritage and I identify as being part of the Ngadjonji tribe. My great, great, great grandfather was King Ng:tja. I am the first male born of my aboriginal bloodline and as such, the leadership of my tribe has been passed onto me. I was given my tribal name, Burrenbun, at the age of 9.
>
> [40] I always had a strong drive to learn about my cultural heritage and traditions. I was actively involved in traditional Aboriginal activities such as hunting, dancing, cooking, setting traps, gathering traditional foods and hunting as a young male.
>
> [41] Since the accident, I have not been able to participate in traditional Aboriginal activities such as hunting and gathering due to my injuries. Since the accident, I have difficulty participating in traditional ceremonies such as weddings, funerals, birthdays and NAIDOC celebrations. Since the accident, I also have difficulty performing traditional dance, due to my injuries.
>
> [42] Prior to the accident, I used to be involved in various meetings and organisations, such as Ngadjonji meetings, regional council meetings and land meetings. Since the accident, I have not been able to attend these meetings as they involve long drives which I am no longer able to tolerate, due to my injuries.
>
> [43] Following the accident, I was not able to travel to Germany to accompany the body of my great, great, great grandfather when his body was returned to Australia in March 2017 and transferred to the Museum of Tropical North Queensland in Townsville, due to my injuries. Another male from my family had to participate in the repatriation which I feel was a cultural shame.
>
> [44] My Great, great, great grandfather's body will remain at the Museum of Tropical Queensland until I can make arrangements to return him to country. However, I have experienced difficulty with travelling to the Tablelands region to meet with the relevant people to discuss the requirements and raise the funding to transport King Ng:tja's remains to Ngadjonji land.
>
> [45] My father is a Torres Strait Islander. Prior to the accident, I would fish, hunt turtles and dugongs and wade through mud and mangroves to catch crabs and collect mussels and oysters and participate in traditional cooking with my father. Since the accident, I have not been able to participate in these traditional Torres Strait Islander activities.
>
> [46] Since the accident, I have experienced feelings of shame, alienation, isolation and depression, due to my difficulties with participating in cultural activities.

[23] In particular, those statements refer to the plaintiff experiencing difficulties with participating in previous leisure activities. This is not a statement to be interpreted

as a total end to such activities but rather a curtailing of those activities and certainly a reduction in his ability to fully appreciate and enjoy such activities.

[24] It is in that context that I struggled with the reliance upon many Facebook entries, acknowledged by the plaintiff as being placed by him. He repeatedly answered questions by the defendant's counsel about entries relating to fishing as situations where he was watching his father, cousin or friends fishing but not participating himself. At one point however, I raised with him an entry on his Facebook page that showed his direct involvement. That entry is as follows:

> HIS HONOUR: That might be a good time to adjourn. I have a question, however, that arises from those entries and it includes the comment that was made in relation to the 9th of July 2015.
>
> MR GRANT-TAYLOR: Yes, your Honour.
>
> HIS HONOUR: It's about the middle. It's about 10 pages back. There's a picture of the grunter, two kilogram grunter at Cardwell jetty, underneath it, someone, called Chris Tozer, said:
>
> > *That would put up a good fight.*
>
> Your response, Mr Ketchell, was:
>
> > *Peeled some line very quickly before I could get a hand on the rod. Had to play him in with the drag set. But I got him.*
>
> ?---I can't deny that, your Honour. Yes, that was one I probably did catch.
>
> You probably did?

[25] He acknowledged that it was he who was fishing and that it was not a situation where he was watching. However, though it may be that the plaintiff actually fished on more occasions than he firstly stated, I am certainly comfortable that the answers given by the plaintiff were not designed to mislead, but rather a result of imprecision in his answers and a difficulty explaining the distinction that he drew between activities he participated in pre and post the incident.

[26] This is best exampled in the following exchange between Mr Grant Taylor and the plaintiff:

> You also told Dr McGuire that day that prior to the accident in April 2014 you had worked on hobby cars, you had gone fishing and boating and you had undertaken traditional fishing with your father?---Yes.
>
> Did you tell Dr McGuire that?---Yes.
>
> Was it true?---Yes.
>
> But then you went on to tell Dr McGuire that you were unable to do these activities at the time you saw Dr McGuire. Did you tell him that?---Yes.
>
> Was that true?---Yes.
>
> What about the fishing?---Is that boating?
>
> No, no, no?---Is that hunting?
>
> Fishing?---Fishing.
>
> Fishing. You've told Dr McGuire that you're unable to do fishing when you saw him in March of 2018. That just wasn't true, was it?---I was with my father.
>
> I beg your pardon?---I was with my father.

[27] I was generally impressed with the plaintiff's evidence. There may have been, as is so often the case, some degree of exaggeration in respect of the consequences for the plaintiff as a result of the incident, but I would accept that evidence, subject to that caveat. Counsel for the plaintiff summed up my assessment of the plaintiff where in written submissions it was put:

> True it is that he did not present as a particularly reliable historian. But the variability in his representations as to when he ceased work at the Council, when he started work there, and the extent to which he drove a car and went fishing from the shore rather than from a boat after the incident is more indicative of an uneducated man prone to a looseness and imprecision in his language rather than a man with a deliberate plan to misrepresent the truth in a calculating fashion for his own gain. Had that been his design, then one would expect that his misrepresentations would share some uniformity. That was certainly not the case. It is submitted that his evidence was devoid of any sign of calculated dishonesty but rather, was redolent with indications that he was attempting to do his inept best to answer truthfully and honestly.

[28] I was reminded by counsel for the plaintiff of the observations of Dr Caniato, when in cross-examination he was asked about the accuracy of the plaintiff's statements and I think most appropriately, the doctor explained his method of reporting what he

was told and also how he uses that reporting. The relevant questions and answers were:

> I want you to assume that that was quite false, at least insofar as fishing is concerned, and that it is in fact the case that since the accident, Mr Ketchell has been a regular fisher. That would be quite inconsistent with the history that you were given?---It would depend how regular, but it would appear inconsistent.
>
> Well, Doctor, why would it depend on regular? You say in your report that he told you that he has not been able to do any fishing. Why would regularity have anything to do with it?---Well, let me clarify. The history is as stated by a claimant. There's no suggestion that it's 100 per cent accurate, and human beings will word things as they do and people will often word things in absolute terms. I try to write my reports as much as possible as to [indistinct] stated by the claimant, but people often say things in a very dramatic way. They'll say, "Look, I never did this," or, "I've never done that," or, "I never go fishing." And often, the reality is not quite. It's actually just a reduction. Nonetheless, in a presenting complaint, I'll present it as it was told to me. I will not try and change it in order to be more appropriate for the courts. And if there are cultural reasons for people's communication, I will still word it exactly as it was told to me. That does not mean in providing my report I've accepted that to be 100 per cent true; it just means that I've accepted that that is what they told me.

[29] Ultimately, I am satisfied with the evidence of the plaintiff and whilst, as I have said, I would find that there is some use of poorly chosen words, there is no basis to suggest or to find that the plaintiff's honesty or reliability is so tarnished as to be wholly unable to be accepted.

[30] Two other lay witnesses were called for the plaintiff. Mr Paul Dimetto and the plaintiff's mother, Vera Florence Ketchell. Mr Dimetto's evidence related to possible income able to be earned in cane haul out work and to be frank, was of little assistance to me in any assessment to be made here. However, I was much assisted by the evidence of Mrs Ketchell, particularly as it related to corroboration of the plaintiff's evidence and how it might be used in any assessment.

[31] She specifically gave evidence regarding her observations of the plaintiff's physical circumstances, but also spoke of her observation as to his mood and demeanour. In evidence-in-chief she said:

> All right. And, Mrs Ketchell, what I would like you to do is to describe any differences you've noticed in your son since the accident from the

> time before the accident?---It's – he's changed a lot. He's not happy, outgoing person that he used to be. He is withdrawn a lot. He's in a – he's fine if he has a couple of friends come and visit him now and again, but when those friends go then he just withdraws and he is not very sociable. He – you know, he'll get angry, upset, because of things that he can't do that he wants to do.
>
> What sort of things are you talking about?---Like, getting up to help his father mow the grass or go fishing. You know, he can only just give a little assistance at times.
>
> All right. And what was he like before the accident?---He was – he was – you know, he was out on the boat and going fishing, and, you know, it all depends on the tides.
>
> And, you know, he would line it up with family and father and go out and do a – you know, go out and get the catch of the day. Yeah.
>
> All right. Would he just catch fish, or were there other - - -?---They used to go throwing cast nets, you know, when the season's right. And that's what I mean. They could throw a cast net, which he can't do now. Get prawns, and his father would go and check the waters to make sure, you know, if there were any squid around. If they do – if there was they'd get squid. Prawns. Throw a few crab pots in along the shoreline off the jetty or out in the boat when they went out.
>
> All right. And can he do any of that now?---No.
>
> All right. Did you notice whether he suffers any pain?---He suffers pain every day.

[32] Mrs Ketchell also gave detailed evidence regarding the differences she observed in the plaintiff's activities at home pre and post incident, as well as commenting upon changes she had noted regarding his involvement in cultural matters. In particular, I noted her evidence regarding the arrangements for the repatriation of the remains of her great, great grandfather. The plaintiff was to be involved in that but indicated that by the time approvals and funding were arranged in 2017, the plaintiff was unable to travel. I would simply note here that such a course is not the action of a man exaggerating his difficulties, physical or psychological, nor was Mrs Ketchell challenged on that matter.

[33] I was impressed by the evidence of Mrs Ketchell. She no doubt supported her son in his claim, but I am quite satisfied that her evidence was honest and reflected exactly what she had seen and heard regarding the plaintiff and his circumstances.

[34] Before turning then to the quantum assessment necessary in this matter, I would note the argument put on the part of the defendant regarding a suggestion that the plaintiff has failed to mitigate his loss. Reliance in that respect is placed upon the report and evidence of occupational therapist, Andrea Leigh Jones. Ms Jones' report is dated 11 September 2015, following an attendance with the plaintiff on 8 September 2015. The defendant argues that Ms Jones' evidence shows that the plaintiff failed to engage in efforts to get him back into the workforce. In her oral evidence-in-chief, the following is noted:

> Ms Jones, after you completed your report of 11 September 2015 - - -?---Yeah.
>
> - - - did you make further efforts to engage with Mr Ketchell professionally?---I did, as part of case management.
>
> Would you tell the court about that please?---Following my initial needs assessment, it's – I submitted a rehab plan in regards to services that I provide, to assist him with the purpose of the referral. And in this case, it was to assist with return to work. So what I did was make phone calls, because obviously location-wise, it's difficult to meet face to face, and I was able to liaise with him and meet with him on a – like I met with him on the 9th of October in Townsville when he visited Townsville. And I did have communication with him throughout October – September and October, and sometime in November.
>
> Yes. And did your engagement with him, or your attempt to engage with him – attempted engagement with him persist beyond November?---I spoke with him on the 1st of December, and following that I was able to speak to him on the 10th of February 2016, and then from that I had no contact despite making multiple phone calls and sending emails.
>
> Had you yourself been successful in, for example, sourcing a host employer, or the possibility of a host employer for Mr Ketchell?---So it was in – it was on the 11th of November that Rob sent me his resume, and I established a meet – like I was able to establish a meeting with Anaconda in Townsville on the 16th of the 11th . That was cancelled by Rob following a phone call from Rob's mother, who called to say she wasn't – she didn't think that he should be working and wasn't – had no accommodation in Townsville. So I was able to speak with Rob that same day and he reported that he was no longer able to work in Townsville. And so that host employment was cancelled and I had a potential host set up for the Cassowary Coast Regional Council on the 15th of February 2016, however, due to no communication that was unable to proceed.
>
> And did you continue to make efforts to liaise with Mr Ketchell through 2016?---I did.

> By those two methods, that is that you told us earlier, attempted telephone calls to what you understood to be his mobile number, and by email to what you understood was his email address?---Correct.
>
> Did you receive any responses to those approaches?---No. Not from, not from that onwards. I did try his home number as well, which at some point was disconnected. I did attempt to call some different numbers because I was just having no success at all. So - - -
>
> And for how long did these efforts continue?---So I have March 2016, two calls. Two in April, a few in July, a few in August. Then there's nothing until October. There's emails [indistinct] through the RACQ. And then it starts back in February, March and April 2017. And then it was – like there's no more communication with RACQ from August 2017.
>
> So over that period from early 2016 to early 2017 did you receive any responses at all from Mr Ketchell to your emails or your phone calls?---So after the 10th of the 2nd, I had no communication.
>
> Did you leave messages on his phone message bank?---I did. I think they were going, they were going straight to [indistinct] they weren't even ringing though. He did say on two occasions, once on the 10th of the 2nd, that his phone was playing up. And on an – I called from a landline. And on another occasion he reported he was having issues with his phone.

[35] Counsel for the defendant says that what is recorded in this exchange shows that the plaintiff, "plainly and staunchly refused to be part of that process."

[36] With respect, I do not agree with that assessment at all. The plaintiff clearly had hopes and expectations for the future, as identified in the cross-examination of Ms Jones. The plaintiff identified additionally for her, prospective employers in Cardwell but there were no opportunities available. In fact, Ms Jones specifically advised the plaintiff in an email that, "I continue to have difficulties finding a host in Cardwell, Ingham or Tully but will continue trying."

[37] This is significant when it is noted that Ms Jones arranged a 'meeting' or 'had a potential host' in Townsville or Innisfail. Both are possibilities for employment, but without any certainty, a significant distance from the plaintiff's home, and without any acknowledgement of the physical and psychological aspects relating to the plaintiff and his circumstances.

[38] I would specifically reject any suggestion that the plaintiff has failed to attempt to mitigate his loss.

Quantum

[39] In light of the comments made in these reasons, I turn then to the assessment of damages. There are two injuries claimed as requiring assessment. Firstly, the thoracic spine injury and secondly, the adjustment disorder.

[40] I am satisfied that there are multiple injuries and that there does need to be an assessment of the dominant injury. Here however, that is not a real issue as all agree that the dominant injury is the thoracic spine injury. I turn therefore to the evidence of the orthopaedic surgeons, Drs Maguire, English and Morgan.

[41] All were given some history by the plaintiff of his circumstances prior to the incident, as well as what he says was the nature of his thoracic injury, though, as has already been discussed, there are limitations inherent in what the plaintiff was able to articulately describe.

[42] In particular, the defendant's experts changed their original assessments of the cause of any thoracic spine injury after considering notes received from Chiropractic Care North Queensland and Bauer Chiropractic Clinic. In counsel for the defendant's written outline, this matter is specifically addressed in paragraphs 23 and 24. They are as follows:

> [23] There cannot be the slightest doubt that, well prior to the April 2014 accident, the plaintiff was already experiencing significant symptoms not only in his lumbar spine but also in his thoracic spine. As the records of Chiropractic Care North Queensland (Exhibit 21) attest, the plaintiff had attended there for treatment on 12.12.08, 24.09.10, 11.11.10, 22.11.10 and 14.02.12. Moreover, having regard to the form (Exhibit 10) completed on 13.02.12 by the plaintiff himself on the occasion of his attendance upon Dr Furse at Bauer Chiropractic Centre, it cannot be doubted that those earlier attendances were for treatment for the plaintiff's thoracic spine. That becomes clear when one has regard to the area circled by the plaintiff on the pain diagram in Exhibit 10 which the plaintiff agreed was in confirmation of the proposition that, on 13 February, 2012, he was "experiencing pain of a severity of four out of 10 in [his] mid back where [he] put that circle". Specifically, in Exhibit 10 the plaintiff, in answer to the question Has this occurred before?, answered "yes".
>
> [24] The consequence of all this is that Dr Maguire's acceptance of the plaintiff's "honesty" about an absence of pre-accident thoracic symptoms is comprehensively repudiated.

[43] Again, I find myself in a position where I do not accept that submission. I note the written submissions in the outline provided for the plaintiff and find that they accord with my own assessment of the situation here. From paragraphs 30 to 43 the following is said, and I would respectfully adopt it as it follows my own reasoning and assessment here:

> [30] Tension exists within the expert evidence as to the nature and causes of the injury. Relying on radiological evidence of pre-existing changes in the lower thoracic and lumbar regions of the plaintiff's spine consistent with Scheuermann's disease, the two orthopaedic surgeons called by the second defendant (Dr English and Dr Morgan) suggest that the plaintiff did no more than permanently aggravate pre-existing degenerative change in the plaintiff's thoracic spine that was already causing the plaintiff symptoms. Dr Maguire, however, was of a different conclusion. In his opinion, the plaintiff suffered a disc protrusion and soft tissue injury at the T9 level of the thoracic spine in the incident causing nerve root irritation and radiating pain around the left side of the plaintiff's chest. In his view, the injury was consistent with the mechanism of injury described by the plaintiff (a twisting of his torso after to contact with the Commodore) and was not related to the pre-existing degenerative changes already present in the plaintiff's spine.
>
> [31] In his first report (10 April 2018), Dr Maguire recorded that the plaintiff complained of severe ongoing pain in the thoracic region between the shoulder blades that came on after the incident and that was new pain he had not previously experienced. The plaintiff also described that he experienced pain like a fractured rib around the rib cage onto the left side. In the course of his report, Dr Maguire reviewed the previous investigations conducted upon the plaintiff. Crucially, in respect of an MRI of the thoracic and lumbar spine conducted on the plaintiff on 13 September 2016, Dr Maguire noted:
>
> > *"Scheuermann's disease, mild degenerative changes in the lumbar spine and a significant disc protrusion which is seen in several images with a left sided paracentral disc protrusion at approximately the T9 level. This is clearly evident on the scan and has not been reported by the radiologist. Certainly it would be consistent with the clinical findings and his history of disc protrusion causing nerve root irritation and radiating pain around the left side of his chest."*
>
> [32] Dr Maguire considered that this finding of disc protrusion at the T9 level was significant and something that had not been noted in the previous reports of the second defendant's experts: That the results of this MRI investigation were not noted in the previous reports of Dr Morgan and Dr English is demonstrably correct. The MRI was undertaken on 13 September 2016. Dr Morgan's first report was prepared on 10 November 2014. Dr English's first report was prepared on 30 June 2015.

[33] Notwithstanding however that the MRI was not available to the second defendant's doctors when they conducted their initial assessment of the plaintiff, at the time of their original reports, both considered, consistent with Dr Maguire's view, that a causal link could be established between the incident and the plaintiff's thoracic injury. In his original report, Dr English considered that the plaintiff had sustained a thoracic spinal injury with ongoing symptoms caused by the incident on 4 April 2014. His then opinion (formed without the benefit of the MRI) was to the effect that the plaintiff had suffered an aggravation of his pre-existing but previously asymptomatic Scheuermann's disease in the incident. In his original report, Dr Morgan opined as follows:

> *"Mr Ketchell gave a positive past history of antecedent lumbar spinal disease. Radiographs described above did demonstrate thoracolumbar Scheuermann's disease. This is a condition that involves anomalous development of the vertebral bodies typically appearing in adolescence and giving rise to pain during that period. It can also be associated with ongoing column discomfort in adulthood. This is likely to be the explanation for his teenage and subsequent symptomatology…..*
>
> *Conversely, he was categoric in his denials of previous problems referable to his thoracic spine. The description of the accident that occurred on the evening of 4 April 2014 may have given rise to some form of torsional injury of his thoracic spine. He has been consistent in his complaints and he continues to note discomfort with thoracic rotation. This is a specific movement localised to that region. In the absence of any evidence to the contrary therefore, it would appear that there is a link between his ongoing symptoms and the accident."*

[34] Significantly, the view of both Dr English and Dr Morgan changed upon provision of information from the second defendant concerning the plaintiff's attendance upon a chiropractor in February 2012.

[35] The second defendant directed both Dr English and Dr Morgan to records of treatment received by the plaintiff at Bauer Chiropractic in February 2012 where it appears that the plaintiff experienced an episode of acute back pain in his lower thoracic spine. Clearly though, those records alone are not sufficient to provide a comprehensive account of the circumstances in which the plaintiff attended upon this chiropractor on what was a single occasion when working as a tyre fitter.

[36] In evidence the plaintiff said about this episode that "the pain [he is] experiencing now is totally different to what [he] was experiencing before" (R1:78, ln 10 – 45).

[37] Dr Nikolai Furse, the chiropractor who provided the plaintiff with treatment on 13 February 2020 [sic 2012] gave evidence that the plaintiff was treated for mid back pain at this consultation but that the

pain complained of by the plaintiff was located more towards the lower segments of the plaintiff's thoracic spine rather than the higher segments at or around T9. It was the T11 and T12 areas that were the most problematic areas in his assessment: these lower segments of the plaintiff's spine were the most symptomatic in terms of stiffness and pain reproduction. It seems clear that the plaintiff was on this singular occasion, some two years before the incident, complaining of pain in a lower location on his spine which was different and distinct from the pain he experienced after the incident at and around the T9 area.

[38] Nonetheless, and notwithstanding the inherent limitations of this evidence about the plaintiff's attendance upon Bauer Chiropractic, both Dr English and Dr Morgan relied on it to conclude that the plaintiff was, contrary to what he disclosed to them, experiencing thoracic pain symptoms prior to the incident. That conclusion was then used to support their respective opinions that the incident caused either a temporary exacerbation of the plaintiff's pre-existing thoracic pain or a permanent aggravation of his existing condition.

[39] The difficulty with this approach as adopted by the second defendant's doctors is two-fold. First, it is an approach that disregards the consistent, clear and comprehensive description of the nature and location of the pain that the plaintiff provided to each of the three experts: he described that the pain was new pain that he had not experienced before and that it was located in the mid back region rather than in the lower thoracic spine as seemed to be the plaintiff's complaint to the chiropractor in February 2012. Second, it ignores the MRI evidence disclosing a disc protrusion at T9, which itself demonstrates a logical connection between the mechanism of injury and the plaintiff's complaints of a new pain in his thoracic spine.

[40] Dr Maguire dealt with these two issues in his second report (19 August 2020), he notes that:

> *"Mr Ketchell has had ongoing problems with his thoracic spine since this point. He experiences muscle spasm on the left side and radicular pain around the anterior aspect of the left chest wall.*
>
> *Mr Ketchell has previously undergone investigations which I have detailed in my previous report. He has undergone a CT scan of the thoracolumbar spine which demonstrates Scheurmann's disease. The highest level of Scheurmann's disease is at T12, however, his pain level is higher than this at approximately T8/T9 level. An MRI scan dated 13.09.2016 was of poor quality, though clearly demonstrates a left paracentral disc protrusion at T9 which would be consistent with the level of his discomfort and the radicular pain he experiences. The report in relation to this does not comment on the disc protrusion and therefore is incorrect. An MRI scan of 16.07.2018 shows a disc abnormality at that level at T9.*

> *Mr Ketchell continues to experience radicular pain as stated in the left chest wall and the left side thoracic region.*
>
> *Mr Ketchell has no past history of any problems in relation to this or pain of this nature. He has previously been diagnosed with a mild scoliosis in his youth and has attended a chiropractor in relation to lumbar problems and lower thoracic problems, though never as high as this level. This is a new pain and he is clearly very descriptive of the pain and the nature of the pain and very honest in his description of his treatment in the past."*

[41] As to his second physical examination of the plaintiff conducted for the purposes of his second report, Dr Maguire noted that the plaintiff continued to suffer ongoing problems with his thoracic spine, experiencing muscular spasm on the left side and radicular pain around the anterior aspect of the left chest wall. Dr Maguire noted *"obvious and very clearly defined thoracic muscle spasm and tenderness in the T7 to T9 area, the left paraspinal area and central areas of the thoracic spine."* He also noted minor unrelated discomfort in the lumbar spine.

[42] Dr Maguire considered that the disc protrusion at T9 was 100% attributable to incident. Dealing specifically with the Bauer Chiropractic records, Dr Maguire observed:

> *"In reference to the records of Bauer Chiropractic, there is an entry from 2012. Mr Ketchell states that he did periodically visit the chiropractor, however the pain which he experiences now is not what he experienced previously and the level and description described in the notes is of a different type of pain and also different site of the pain to what he explains to me at today's review. Additionally, there are other reviews post accident at the Bauer Chiropractic Clinic and these clearly define the level of pain and describe the radicular nature of the pain. This is more confirming the presence of new pathology rather than refuting it."*

[43] It is submitted that Dr Maguire's assessment of the nature and cause of the injury is consistent with the objective facts. It is also an assessment that is persuasive and logical in its reasoning and should be preferred to those made by the second defendant's experts. The plaintiff was clipped by the first defendant's car and suffered a torsional injury to his upper thoracic spine. Immediately after the incident he was complaining of pain in this area. The pain felt like he had been kicked by a horse between the shoulder blades. An MRI performed after the incident shows pathology consistent with the mechanism of injury and the plaintiff's ongoing pain symptoms. Dr Maguire's expert opinion evidence strongly supports a finding that as a direct consequence of the incident, the plaintiff sustained a disc protrusion with soft tissue injury to the thoracic spine at the T9 level with associated ongoing muscle spasm and guarding and radicular pain to the left chest wall and that the injury is not related to any existing degenerative change in the plaintiff's spine.

[44] I found Dr Maguire's evidence quite compelling and would respectfully accept his views over that of Drs English and Morgan. In particular, I am mindful of the fact that Dr Maguire's opportunities to attend with the plaintiff were much more recent in time than the attendances with Drs English and Morgan.

[45] I turn then to the issues arising in respect of any psychological injury sustained by the plaintiff. Counsel for the plaintiff submits that both psychiatric specialists, Drs Caniato and Lovell, find that the plaintiff sustained an adjustment disorder with anxiety and depressed mood as a result of the incident. The plaintiff describes the changes in his personality and lifestyle in his evidence, as well as in his quantum statement.

[46] He says that prior to the incident he was happy in himself, engaged well with others and was physically active. Subsequently, he describes difficulties with sleep, and being disturbed by nightmares about the car accident. He also describes mood swings, feeling sullen and down, flashes of anger and aggression as well as depression about not being able to return to work.

[47] Dr Caniato first saw the plaintiff in March 2018 and after taking his history observed at paragraph 16.6:

> *"Since the injury the claimant has not been able to return to work. He has been left with some residual physical problems. The claimant has always valued his physical integrity, his ability to engage in cultural activities such as fishing and hunting to be very important part of his identity and self-esteem. The loss of these abilities due to his back injury has been a particular psychological stressor for him."*

[48] Dr Caniato noted ongoing psychological symptoms and after detailing those, considered that the plaintiff suffered from a form of an adjustment disorder relating to both the reaction to the initial trauma as well as his physical injury and the associated secondary changes. Ultimately, Dr Caniato diagnosed the plaintiff as suffering from an adjustment disorder with mixed anxiety and depressed mood or alternatively, post-traumatic stress disorder in partial remission. This alternative diagnosis arose as Dr Caniato did not consider that the plaintiff met the full criteria for that condition.

[49] In his first report, Dr Caniato opined that the plaintiff was likely to have ongoing long term psychological symptoms. He further attended with the plaintiff in August

2020 and after further review, noted in his second report that the plaintiff's adjustment disorder is:

> *"chronic and it is likely that many of the effects and changes in his life are so ingrained as to not realistically be amenable to change or treatment".*

[50] Dr Lovell, following his examination of the plaintiff, considered that he met the full criteria for an adjustment disorder with anxiety and depressed mood. He also opined that the condition was causally related to the incident.

[51] Notwithstanding these real similarities, the defendant's position is to say that because of the plaintiff's dishonesty, especially in the reporting to the doctors, the accuracy and reliability of the history is such that the court would decline to make a finding that the plaintiff suffers from any psychiatric disorder at all, let alone one for which the accident in April 2014 could be blamed.

[52] I am not at all inclined to that position. Rather, I am mindful that the plaintiff here is not a sophisticated witness, experiencing some real difficulties in communicating his situation and that the skills of the two psychiatrists is such that proper reliance could be placed on both their assessment of the plaintiff and upon their diagnosis.

[53] In the light of these findings, it is then necessary to assess the plaintiff's future employability, taking into account the impact of the physical and psychological injuries. The physical injuries, as assessed by Dr Maguire, whose diagnosis I accept, is that the prognosis was poor, as the injury was ongoing. Dr Maguire noted that the injuries limited the plaintiff's activities and the level of those activities, both in respect of work and recreation.

[54] As such, Dr Maguire was of the opinion that the plaintiff was precluded from work. A similar view was come to by the occupational therapist, Mr Scalia, who noted in his report that the plaintiff had difficulty walking, sitting, standing, jumping, pushing, pulling, bending, squatting, kneeling and in operation of a computer. Mr Scalia noted that all of those activities aggravated the plaintiff's back pain as did other activities such as heavy lifting and driving.

[55] Mr Scalia provided a detailed outline of his concerns in his report noting as follows:

> "*As a result of the subject accident, Mr Ketchell is no longer suited to working as a storeperson. He is no longer suited to any heavy manual*

work or his previous occupations as a forestry worker, yard hand, fruit picker, process worker, security officer, tyre fitter, forklift driver or haul out driver in a full time capacity. These occupations involve medium to very heavy physical work demands that Mr Ketchell is no longer suited to undertaking because of the effects of injury.

He is not suited to any occupation that involves repetitive bending, prolonged standing, prolonged sitting, heavy lifting, twisting of the body and positions that do not allow for postural variations. He is not suited to operating jolting or jerking machinery or vehicles such as forklift or plant machinery. Mr Ketchell is also reliant on strong pain medication which may preclude him from operating vehicles and machinery. He is not suited to using large or heavy power tools that emit mechanical vibrations. He is not suited to working as a security officer undertaking crowd control or foot patrols. He is unable to safely restrain violent or aggressive persons. If he were to renew his security licence, he would be limited to a sedentary monitoring role as a security guard, though vacancies for this type of work is limited, particularly in regional locations.

Mr Ketchell is now limited to more sedentary occupations in future but has limited further work options. He has limited transferrable skills and formal qualifications. He reported that he has been unsuccessful with his job applications since the subject accident. He expressed interest in working in business administration though there are several factors impacting his prospects for this type of work. He has chronic back pain, no recent or relevant skills for this type of work, increased fatigue, reduced concentration and protracted unemployment. He would likely have difficulty using a computer for prolonged periods because of ongoing back pain and have reduced productivity and efficiency in any future role. He would benefit from completing formal qualifications in business administration to improve his employability. He would likely be considered a less attractive candidate and disadvantaged in an open labour market because of his history of injury, chronic pain and reduced functional capacity. Mr Ketchell also resides in a regional area which further compounded his future employment options.

Mr Ketchell has reduced work capacity as a result of the subject accident. He should be able to manage full time sedentary employment but would be more suited to working reduced hours. He would require frequent postural breaks, an ergonomic workstation and a sympathetic employer in any future role. He may need to reduce his working hours and may benefit from an annual physiotherapy maintenance program to assist with pain management and maintaining gainful employment."

[56] I accept Mr Scalia's opinion in relation to future prospects for the plaintiff, noting particularly his indication that whilst more sedentary work may be open to the plaintiff he has "limited transferable skills and formal qualifications".

[57] As was noted by counsel for the plaintiff,

> [55] Whilst Mr Scalia noted the plaintiff may be *physically* capable of performing sedentary employment, it is clear that his lack of skills, pain symptoms and residence within a regional area, place prohibitive barriers in the way of the plaintiff's ability to find appropriate employment of that nature. Further, those barriers are only strengthened when regard is had to the plaintiff's chronic psychological condition.

[58] In respect of the psychological condition of the plaintiff and its added impact upon the plaintiff's employment opportunities, Dr Caniato noted the likelihood of the combination of physical and psychological symptoms, as well as the lack of transferable skills as indicators of the prospects of returning the work as, "extremely grim". At pages 12 and 13 of his second report, Dr Caniato opined:

> *Future psychological support of treatment of some type is often recommended. It is noted there are complicated cultural factors and psychological support, and culturally appropriate treatment can be difficult. He may well receive such support in differing cultural ways. However, generally speaking, my recommendation is for supportive counselling for an adjustment disorder are usually in the range of monthly psychological treatment with adjustment to injury counselling and pain counselling. Psychiatric assessment every three to six months is appropriate through a psychiatrist, or alternatively through a pain specialist. The aim of treatment in this case is to maintain current functioning and avoid deterioration, rather than particular improvement.*
>
> *...*
>
> *The condition has resulted in significant and ongoing loss of earning capacity. It is noted that in reviewing the occupational therapy assessments and orthopaedic assessments, it is clear that a significant proportion of the impairment is due to the physical injury.*
>
> *The adjustment disorder, however, does further impact on his earning capacity by affecting his confidence, motivation, ability to retrain, ability to interact with people, and to learn new material, both the combination of the physical injury and the psychological injury, has resulted in the claimant not being able to return to work in any capacity. It is likely that he never will return to work."*
>
> *...*
>
> *The condition is likely to impact on his earning capacity for the foreseeable and indefinite future. He has now been out of work for such a long period of time, that the condition has become ingrained and almost certain he will never return to paid employment. To his credit, he has been able to increase his productivity and has been able to do increasing care for his mother*

> ...
>
> *His condition still has some effect on his activities of daily living but there has been some improvement. Most of the residual effect on his activities of daily living is likely to be the back injury.*
>
> ...
>
> *Your client's condition has resulted in marked effect on his ability to participate in activities relevant to this cultural activity. These have remained and become ingrained. There is likely to be a combination of a physical injury and the psychological injury. Now that he has been detached and separated from his cultural identify, it is very difficult for him to be able to return to these sorts of activities, even if his physical injury were to improve.*
>
> ...
>
> *There has been significant loss of his cultural identity that is very specific to him.*
>
> ...
>
> *Prognosis is for ongoing chronic impairment. To his credit, he has improved in a number of areas of his functioning. His residual symptoms are likely to be chronic.*

[59] I am satisfied that the plaintiff is precluded from pursuing employment in any of the areas that he has previously been employed. In that respect, I would adopt the submission made on behalf of the plaintiff in paragraph 58 of the outline of submissions where the following is said:

> [58] The evidence is clear that the plaintiff is precluded from pursuing employment in any of the areas that he previously had found employment in. Given the plaintiff's lack of higher education and office skills, his previous work history and now long-term unemployment, it is also clear that he is not well suited to clerical or sedentary work. Obviously, there would be a need for the plaintiff to engage in a significant level of retraining or education before he would be in a position to obtain such work. But, even then, other barriers to meaningful employment would include his place of residence in a regional location, his chronic pain and of course, his significant and chronic psychological symptoms. The lack of focus, concentration, confidence and motivation that the plaintiff suffers from as a result of his psychological injury present as very real impediments to his ability to meaningfully or successfully engage in any retraining or to hold down employment for any length of time. In light of all of these matters there is force in Dr Caniato's assessment that the plaintiff's likelihood of returning to work is "grim".

[60] I would find in light of all these matters, that the combination of the thoracic injury and the adjustment disorder, along with the other barriers to future employment identified, would mean that the plaintiff has been left with no real employment capacity as a result of the incident.

[61] This is the case, notwithstanding that the plaintiff has suffered from other conditions predating the incident. These included Scheuermann's disease, knee pain for which he was treated operatively in September 2017 and asthma as well as from obesity. However, until the accident in April 2014, the plaintiff continued to work in varying capacities and though it might be suggested that these conditions would have placed some limitations on the plaintiff's future working life expectations, such considerations are speculative at best and there is no evidence to establish the possible future effects of such conditions.

[62] As was conceded by Dr English in cross-examination, any such a suggestion was no more than an estimate. Such considerations are not in my view relevant to the assessment of the quantum of the plaintiff's claim for damages.

Heads of Damage

[63] The *Civil Liability Act* 2003 (Qld) ("the Act") applies to the claim. Section 51 of the Act defines "general damages" as damages for:

(a) pain and suffering; or

(b) loss of amenities of life; or

(c) loss of expectation of life; or

(d) disfigurement.

[64] Pursuant to sections 61 and 62 of the Act, when assessing general damages, a court must make an assessment of the injury scale value (ISV) of the relevant injuries and calculate the damages pursuant to that ISV in accordance with the formulae set out in the Act.

[65] Section 7 of the *Civil Liability Regulation* 2014 (Qld) ("the Regulation") provides the ranges of ISV for particular injuries. The first step in determining an ISV for a particular injury is to identify the appropriate item (injury) in schedule 4 of the

Regulation. The second step in the process is to select the appropriate ISV within the range prescribed for that particular item.

[66] In assessing the ISV, s 10 of schedule 3 of the Regulation provides the extent of whole person impairment ("WPI") is a relevant consideration. Schedule 8 provides that WPI means a percentage estimate of the impact of a permanent impairment caused by the injury on the injured person's overall ability to perform the activities of daily living, other than employment. Schedule 4 allows for consideration to be had to WPI in ascertaining the appropriate ISV within the range prescribed for a particular injury/item.

80. For psychiatric injury, it is necessary to ascertain the psychiatric impairment rating scale rating ("PIRS") by reference to schedule 6 of the Regulation to in turn, relate it to schedule 4 to determine the relevant ISV.

Expert Evidence

[67] It is therefore necessary to assess the appropriate item and ISV values. Unsurprisingly, the plaintiff's and defendant's counsel have submitted quite different positions in respect of the appropriate items and ISV's.

[68] The plaintiff's counsel has submitted the thoracic spine injury is the dominant injury and that item 92 is the appropriate items for calculation. Counsel submitted as follows:

> Thoracic spine injury: Item 92 – Moderate thoracic or lumbar spine injury – fracture, disc prolapse or nerve root compression or damage. The ISV range for item 92 is 5 to 15. The commentary for this item provides that an ISV at or near the top of the range will be appropriate if there is evidence of disc prolapse for which there is radiological evidence. Having regard to Dr Maguire's diagnosis of a soft tissue injury thoracic spine with disc protrusion at approximately T9 level [with] some nerve root irritation, it is submitted that an ISV of 15 is appropriate.

[69] However, the Statement of Claim particularises the actual damages as arising pursuant to item 93, and I am satisfied that this item, properly recognises the nature of the plaintiff's injuries. The commentary in respect of item 93, "moderate thoracic or lumbar spine injury – soft tissues injury" is as follows and accords with the orthopaedic evidence which I accept:

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

[70] I need not say more than that. I reject the defendant's submission that injury should be positioned within item 94.

[71] Both counsel submit that the appropriate item for consideration is item 12 in respect of the psychological injury. Though, again, the ISV's suggested are significantly different. The range is from 2-10 though each counsel submits very differently in respect of how that might be used, noting that the submission on behalf of the plaintiff includes what is said to be a 'complicating factor' noted as '…an adverse psychological reaction to an injury must be treated as a feature of that physical injury,' whilst the defendant's submission is that it falls far short of justifying such an uplift.

[72] Additionally, the plaintiff's submission relates to issues in respect of what is suggested to be the plaintiff's loss of cultural identify and the detrimental impact that that has in the plaintiff's amenities of life. This submission is made pursuant to Section 9, Part 2 of Schedule 3 of the Regulations.

[73] Ultimately, I have come to the view that when all matters are properly considered, that the appropriate ISV is 18 which reflects the sum of $30,780.00 for general damages.

Economic Loss

[74] In making an award of damages for loss of earnings, the maximum award a Court may make is limited by s 54 of the Act to an amount equal to the present value of three times average weekly earnings as published by the Government Statistician per week for each of the weeks of the period of loss of earnings. That maximum is not going to be reached in the present case.

[75] Schedule 2 of the Act defines loss of earnings as relating to both past and future loss in these terms:

*"**loss of earnings** means –*

(a) past economic loss due to loss of earnings or the deprivation of impairment of earning capacity; and

(b) future economic loss due to loss of prospective earnings or the deprivation or impairment of prospective earning capacity"

[76] The Act therefore contemplates that either of the value of the loss of earnings or the value of lost earning capacity is a measure of loss of earnings.

[77] As to the calculation of loss, s 55 of the Act relevantly provides:

"***55 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 used to arrive at the award. ..."

[78] In *Nucifora & Another v AAI* [2013] QSC 338 McMeekin J noted the following in respect of s 55:

[29] It may be doubted that the provision has affected any change to the position at common law. The effect of the section has been considered in Ballesteros v Chidlow, Reardon-Smith v Allianz Australia Insurance Ltd and Allianz Australia Insurance Ltd v McCarthy. The usual principles continue to apply.

[30] At least since Graham v Baker it has been well established that a plaintiff must demonstrate that his or her earning capacity has been diminished by the accident-caused injury and that that diminution 'is or may be productive of financial loss'. Those requirements plainly continue: McCarthy. In determining the 'may be' issue relevant in this case the principles explained in Malec v JC Hutton Pty Ltd apply. There is the 'double exercise in the art of prophesying' involved – what the future would have been if the injury had not occurred and what it is now likely to be. As usual the fact finder must state the factual findings underpinning the award and display the reasoning behind the award sufficiently at least for the parties, and the Court of Appeal if called on,

> *to comprehend the result, although the methodology need not include an explicit statement of a formula: Reardon- Smith. An 'experienced guess' has been held to be a sufficient response to the facts presented: Ballesteros." (footnotes omitted)*

[79] Thereafter, it is submitted on the part of the plaintiff that, at the time of his injury, the plaintiff was employed in a temporary position with the Hinchinbrook Shire Council and whilst it is difficult to be certain, if successful in securing a full time position, he would be likely to earn $750 per week.

[80] If that was not to occur, then counsel for the plaintiff submits that the plaintiff had lucrative employment to fall back on.

[81] This submission relates to the possibility of work as a cane haul out operator and relies upon the evidence of Mr Dametto and the availability of work, as well as the remuneration available. However, the limited information available in respect of the plaintiff's work in that capacity would not support any suggestion of earnings in the vicinity of that suggested by Mr Dametto.

[82] As emphasised for the defendant, the gross and nett earnings for the plaintiff in the years prior to the incident were in no way comparable with the amounts suggested by Dr Dametto.

[83] Ultimately, there is a balance to be met in the attempt to 'prophesy' what the future would have been if the injury had not occurred and what is now likely to be. The plaintiff was employed at the time of the incident, and had hopes to continue from a temporary to a permanent position. He also had other options open including the cane haul out work or a return to security work.

[84] Balanced against that, however, is the limited income earned in preceding years and whether that was in any way attributable to physical or psychological conditions that pre-existed. Relevant to that, however, is that at the time of the incident, he was employed such that, on balance, I would find that a loss of $350 per week is reflective of the plaintiff's loss.

<u>Past Loss</u>

[85] As the plaintiff ceased work with the Hinchinbrook Council on 17 July 2014 and has not returned to work since, a loss of $350 per week over the period until now is

328 weeks or $114,800.00. If discounted for contingencies by 10%, that would leave a figure of $103,320.00.

[86] The loss of past superannuation would also need to be included, which would be calculated at 9.5% of the lost income, which amounts to $11,371.50.

Future loss

[87] The claim for any future loss would need then to be calculated upon the same loss of wages of $350 per week, subject to the 5% discount tables and noting the plaintiff's age at this time of 43 years and considering other possibilities as to effects upon his working life, I would consider that to be 20 years from now. Accordingly, the present loss using the discount tables is $233,100.00. A 10% discount for contingencies, considering the authorise including, *Cootes v Concrete Panels & Ors* [2019] QSC 146, *Krobath v Theiss Pty Ltd* [2018] QSC 309 and *Walters v McGrath & Anor* [2009] QSC 158, would result in a claim of $209,790.00.

Past gratuitous care and services

[88] There is no claim by the plaintiff for past gratuitous care and services, and that is understandable in light of the evidence of both the plaintiff and his mother.

Pecuniary loss regarding inability to practice traditional hunting and fishing

[89] Mrs Vera Ketchell, the plaintiff's mother, gave unchallenged evidence that before the plaintiff was injured, he provided his family with seafood including fish, crabs, squid, prawns, crayfish, and on special occasions, turtle and dugong. This seafood made up a large portion of their meals. After he was injured and could no longer fish, that supply stopped. She said that the family has had to eat a lot of meat in substitution for the seafood. Her unchallenged evidence is that the family now spends $250.00 per fortnight on meat, whereas before the plaintiff's injury, they would only spend about $80.00 per fortnight.

[90] The plaintiff's inability to carry out these activities and therefore, to contribute as he had previously done, has caused a financial disadvantage to him and his family. This is clearly compensable but the inexactness of the evidence about the value of

the loss presents a difficulty with regards to its assessment. However, that does not mean that it should be ignored.

[91] The unchallenged evidence is that the contribution was made and as explained in *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64:

> *"The settled rule, both here and in England, is that mere difficulty in estimating damages does not relieve a court from the responsibility of estimating them as best it can. Indeed, in Jones v Schiffmann Menzies J went so far as to say that the "assessment of damages ... does sometimes, of necessity, involve what is guesswork rather than estimation". Where precise evidence is not available the court must do the best it can do."*

[92] Struggling with the inexactness of the figures, I have assessed a loss under this head of $30 per week. The period from the date of the injury to now is 347 weeks and I therefore assess the loss to now in the amount of $10,410.00. Similarly, using the same period until retirement and applying the 5% discount tables is $19,980.00.

[93] This then results in a pecuniary loss of $30,390.00.

Care

[94] Prior to the incident, the plaintiff was independent, however, he did acknowledge that his mother performed the majority of household tasks including shopping, cooking and cleaning, both before and subsequent to the incident. Since the incident, he has required assistance with the activities of daily living, particularly with heavier domestic tasks, and has received ongoing assistance from his parents.

[95] The plaintiff continues to experience difficulty with daily tasks and continues to require assistance with domestic cleaning tasks, laundry, shopping, meal preparation and yard maintenance. In his supplementary report dated 5 November 2020, Mr Scalia opines that due to his back pain, the plaintiff would benefit from commercial assistance with his domestic tasks because (at page 9):

- The nature and extent of the plaintiff's impairments relating to the incident impacts on his capacity to effectively and consistently manage his domestic situation;

- The provision of domestic services will allow him to regain a quality of life closer to what he experienced prior to injury; and
- It would decrease stress and anxiety by reducing/removing the burden of care from his family.

[96] The submission on the part of the plaintiff is that now, and into the future, he will require commercial assistance with domestic cleaning and yard mowing and maintenance. Counsel for the plaintiff submits that that should be future paid care and assistance to an extent of 2½ hours per week at a rate of $40 per hour for a period of 30 years. However, there is little that assists me in respect of the actual work that would be required in performance of this care and assistance. As such, I am more inclined to the view that a lesser period of assistance than 2½ hours per week for 30 years would be necessary. I assess that 1½ hours per week would be appropriate in dealing with any care and assistance that may be required into the future thus, assessing the weekly loss as $60 per week. Moreover, I am not satisfied that it is a proper exercise of discretion here to fix the necessary timeframe as 30 years but rather, would assess 20 years as the appropriate period for such care and assistance to be provided. Using the 5% tables and the appropriate multiplier of 666 at $60 per week, this amounts to $39,960.00. However, there should again be a discount of 10% for contingencies which leaves the figure which would constitute the care and assistance component at $35,964.00.

Past special damages

[97] The plaintiff claims for expenses already incurred by him for medical expenses, pharmaceutical expenses, rehabilitation expenses and travel expenses. This claim totals $21,179.05, though there is no particularity provided other than the contentious evidence contained in the 'Medicare Notice of Charge'.

[98] The plaintiff in cross-examination acknowledged the inaccuracies in his claim in that respect agreeing that with further particularity provided, many of the claims related to attendances with medical practitioners for treatment not relating to the incident. He also agreed that he had kept no receipts or other records relating to his other claims.

[99] This leads to a concern as to the amount claimed, and how any real assessment could be made as to both past and future, special damages.

[100] That is not to say that I am at all doubting the fact that the expenses have been incurred and will in the future be incurred. They are not matters, as submitted for the defendant, that call into question the honestly and reliability of the plaintiff's evidence but rather, reflect the assessment previously made by me, that the plaintiff is an unsophisticated man who has not previously been adept at record or document keeping, and is now faced with the difficulties that arise from that.

[101] As such, the assessment of special damages is an exact indicator of the situation envisaged in *Commonwealth v Amann Aviation Pty Ltd* (Supra), where the court must simply do the best it can. Accordingly, I assess past special damages as follows:

a)	Medical expenses	$ 6,000.00
b)	Pharmaceutical expenses	$ 3,000.00
c)	Rehabilitation expenses	$ 1,000.00
d)	Travel expenses	$ 2,000.00
	TOTAL	**$ 12,000.00**

Future expenses

[102] Similarly, there will be a continued need for treatment and relief of the pain symptoms into the future. There is however, the unknown that exists in respect of both medications/pharmaceuticals and medical/allied health attendances. Again, doing the best I can, I would assess such future expenses using as a benchmark, 30 years of $22,500.00.

[103] Accordingly, I give judgment for the plaintiff in the sum of $479,884.70.