# DISTRICT COURT OF QUEENSLAND

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| CITATION: | *Seiffert v Chadwick and TAC* [2021] QDC 8 |
| PARTIES: | **BEAU RICHARD SEIFFERT**<br>(plaintiff)<br>**v**<br>**JOSHUA BURTON CHADWICK**<br>(first defendant)<br>**and**<br>**TRANSPORT ACCIDENT COMMISSION (ABN 22 033 947 623)**<br>(second defendant) |
| FILE NO: | D146 of 2019 |
| DIVISION: | Civil |
| PROCEEDING: | Trial |
| ORIGINATING COURT: | Maroochydore District Court |
| DELIVERED ON: | 22 January 2021 |
| DELIVERED AT: | Maroochydore District Court |
| HEARING DATE: | 17 August 2020 |
| JUDGE: | Long SC, DCJ |
| ORDER: | **Judgment for the plaintiff in the sum of $456,640.30.** |
| CATCHWORDS: | PERSONAL INJURIES – CAUSATION – SECTION 11 OF THE *CIVIL LIABILITY ACT* 2003 (QLD) – ASSESSMENT OF DAMAGES – Where negligence was admitted by the second defendant – Whether and to what extent the plaintiff sustained any injury from the collision – Whether the consequences of such injury extend to loss of earning capacity – Assessing an appropriate measure of the plaintiff's loss from the evidence |
| LEGISLATION: | *Civil Liability Act* 2003 (Qld), ss 11, 60, 61, 62<br>*Civil Liability Regulation* 2014 (Qld), Sch 3, Sch 4, Sch 7 |
| CASES: | *Peebles v WorkCover Queensland* [2020] QSC 106<br>*Souz v CC Pty Ltd* [2018] QSC 36<br>*Strong v Woolworths Ltd* (2012) 246 CLR 182 |

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| COUNSEL: | M.Grant-Taylor QC for the plaintiff |
| | G.C.O'Driscoll for the second defendant |
| SOLICITORS: | VBR Lawyers for the plaintiff |
| | Quinlan Miller & Treston for the second defendant |

**Introduction**

[1] The plaintiff's claim is for damages for personal injury sustained in a motor vehicle collision which occurred on 7 October 2016.

[2] The negligence of the first defendant, as the cause of that collision, is not in issue. It is admitted in the pleadings that at about 8:30am on 7 October 2016, the first defendant drove a Toyota Camry motor vehicle into the rear of the Toyota Yaris, in which the plaintiff was the driver. The Toyota Yaris was in a stationary position on Razorback Road, Montville facing west, immediately to the east of the intersection with Main Street.

[3] However, the claims of the plaintiff as to the consequences of this event are in issue. For the plaintiff they are pleaded as encompassing:

(a) an injury to the cervical spine; and

(b) injury to the left shoulder girdle.

The plaintiff further pleads, as consequences of those injuries, that:

(a) it was necessary for him to seek and receive medical treatment;

(b) he took analgesic medication to relieve his pain;

(c) he underwent physiotherapy and was treated with therapeutic massages;

(d) his sleep has been markedly diminished and disturbed;

(e) his capacity to participate in many of his former activities, including weight training at the gym and long distance driving, has been diminished and impaired or lost altogether; and

(f) he has suffered a permanent impairment of function of the whole person.

His claim encompasses damages for pain, suffering and loss of amenities, past and future loss of earning capacity and incurred and expected future expenses.

[4] The second defendant pleads that the plaintiff either did not sustain any injury as a consequence of the collision or only such as was minor and transitory and long since resolved. More particularly, it is pleaded that:

(a) the plaintiff's allegations are untrue;

(b) he only attended a general practitioner after reporting the accident to police and consulting a solicitor;

(c) it has not been necessary for the plaintiff to seek and receive medical treatment or take medications;

(d) the plaintiff has not suffered any incapacity to perform his former activities or activities of daily living; and

(e) the plaintiff has not suffered a permanent impairment.

Most particularly, the extent of any consequence to the earning capacity of the plaintiff is in dispute.

[5] The plaintiff was born on 2 October 1983. Accordingly, he was aged 33 at the time of the collision and was approaching his 37th birthday, at trial.

[6] The collision occurred when the plaintiff and his partner had travelled to the Sunshine Coast Hinterland, to spend time together to celebrate his birthday and when he was driving his partner's vehicle, with her as a passenger, after they had checked out of their accommodation and obtained coffees and had come to a complete stop at an intersection with the main road in Montville. The collision involved the impact of the vehicle driven by the first defendant, to the rear of that

vehicle and with sufficient force to "shunt" them "into the main road of Montville".[1]

[7] The plaintiff gave evidence of a lengthy history of work in the construction industry, particularly in labouring and crane operation tasks. Prior to the accident, he had obtained a role with Multiplex (described as a large international company involved in high-rise construction work) and he had completed two projects doing high-rise construction in Brisbane. He was also a union delegate. Before that, he had been employed by other companies and for around 11 years, had been "doing fly-in, fly-out work, a lot of mobile crane-hire work around town, in both Perth and Brisbane". He explained that he had finished his fly-in, fly-out work, in applying for the Multiplex position and that his work was of a heavy nature, involving "operating the personnel hoist up and down the building … forklift duties unloading trucks at different times; a lot of concrete barrow pushing; any sort of labouring duties", as the main components of his role and that he was involved in "any industrial or safety-related issues that occurred on site". And also that the tower crane work which he did "when he moved into the city", particularly involved the obligation of significant effort in vertical climbing by ladder.[2]

[8] The accident occurred on a Friday morning and the plaintiff described the development of the following physical symptoms, that night:

> "It was like a burning sensation up through the – my neck. It was painful at the time, but I just put it down to what I assumed was whiplash, without knowing the medical stuff, but it was a burning sensation that ran up through my neck, and I had a horrible night's sleep that night."[3]

After obtaining "rubdowns" from his partner over the weekend, he attended work on Monday 10 October 2016 and described pushing through the pain he experienced. He further described his concern to not "rock the boat so to speak" in what he perceived to be a transient industry and a context that projects were then winding down in Brisbane. He said he was concerned at the prospect of loss of employment but described that as the weeks went past "it just didn't dissipate… the throbbing and the heat stayed continuous", with some temporary relief from

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1 T1-9.24 – 1-10.10
2 T1-7.46 – 1-9.12
3 T1-11.4-7.

massage but that "it would flare straight back up, and then, at times, depending on the level of how much I was doing, it would get worse".[4] Prior to the accident he was content with having obtained the position with Multiplex (after being with another company for five years and being engaged in the fly-in, fly-out work) and that he intended to continue there.

[9] Prior to seeing Dr Russell and being referred to physiotherapy he had continued to seek relief by way of massage and he produced some receipts in relation to obtaining massages from 1 November 2016 to September 2017.[5]

[10] After then describing how his symptoms would flare up with the heavy nature of the work which he might be required to do and even with the twisting and turning in his seat when operating a forklift in order to comply with safety checking and repetitively opening and closing sliding gates on the man hoist, he described taking an opportunity which presented in August of 2017, to obtain a permanent position with the CFMEU. He described that he had to "create that opportunity … in a sense" by becoming more active with his union delegate role and that he jumped at the opportunity when the person in line ahead of him knocked it back, which he described as not uncommon because "it is a significant reduction in salary".[6]

[11] After describing such a reduction in salary, the plaintiff then described from his own knowledge, including more recently as a union organiser, that if he had not taken the union position he would have likely continued with Multiplex, like the other workers funnelling into the Queen's Wharf project and enjoying what he understands to be the more generous wages and entitlements available in that work. That was led as a foundation for his evidence in answer to the question why he didn't go and work at Queen's Wharf now:

> "Because to do that would mean I've got to go and do a job that I know is going to aggravate my injuries sustained from the vehicle accident."[7]

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4 T1-12. 6-7.
5 Exhibit 1.
6 T1-14.6.
7 T1-16. 28-30.

**The primary issue**

[12] It is in this context that the primary issue to be determined relates to the application of the principles in s 11 of the *Civil Liability Act* 2003 ("CLA"). Although the submission for the second defendant makes reference to both of the elements set out in s 11(1) of the CLA, the ultimate submission is directed at the application of s 11(1)(a), in terms that "the Plaintiff has not proven factual causation in accordance with the Act and damages apart from general damages are not compensable". It may be observed that it is not otherwise contended nor apparent, in the circumstances, that it would be other than appropriate "for the scope of liability of the person in breach to extend to the harm so caused".

[13] Accordingly, the principle to be applied is that:

> "(1) a decision that a breach of duty caused particular harm comprises the following elements:
> (a) the breach of duty was a necessary condition of the occurrence of the harm."

As is correctly noted, by reference to the discussion in *Peebles v WorkCover Queensland*,[8] it has been recognised that this "factual causation" element is a statutory statement of the "but for" test of causation and "a necessary condition requires proof that the defendant's negligence was a necessary condition of the occurrence of the particular harm, and that a necessary condition is a condition that must be present for the occurrence of the harm". Further and as noted to be observed by the majority in *Strong v Woolworths Ltd*:[9]

> "However, there may be more than one set of conditions necessary for the occurrence of particular harm and it follows that a defendant's negligent act or omission which is necessary to complete a set of conditions that are jointly sufficient to account for the occurrence of the harm will meet the test of factual causation within [the section]. In such a case, the defendant's conduct may be described as contributing to the occurrence of the harm."

[14] The second defendant rightly recognises that:

> "The plaintiff states that following the subject accident he struggled with the labouring duties which comprised a large percentage of his work day. These duties included forklift driving whereby he needed to rotate his neck to do shoulder checks, overhead neck

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8 [2020] QSC 106 at [30]-[36] albeit in reference to analogous provisions in the *Workers Compensation and Rehabilitation Act* 2003.

9 (2012) 246 CLR 182, at [20].

> extensions, lifting of materials, pushing and pulling wheelbarrows full of sand and concrete, sustained overhead work to drill or fix items and pushing and pulling steel gates for the hoist track elevator. He tried to persist in his work by taking pain relief medication because he thought that this symptoms would improve over time. When he realised his symptoms were not significantly improving, he discontinued with being a crane operator and completely changed his job/role to something much lighter but still construction industry related."[10]

[15] It is also correctly recognised that this involves assessment of the credibility of the plaintiff's evidence and ultimately the determination of probabilities. And in the context of reference to the discussion and collection of authorities as to the importance of consideration of all of the evidence including more contemporary records, in *Souz v CC Pty Ltd*,[11] particular attention is drawn to the following circumstances:

(a) That the following record of the plaintiff's account as to his motivations for leaving his job at Multiplex to take the position as union organiser, as recorded by the occupational therapist, Ms Stephenson, indicates "that the neck pain was not a factor":

> "Mr Seiffert reported that he persisted with his duties for a year and took a lot of medication as he wanted to persist with this area of work and get away from fly in fly out work. He stated that he has high pain tolerance. He thought that his condition would improve over time but it failed to do so. He sought alternative work.
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> He stated that he became more active with the Union doing after hours work and attending meetings etc. He stated that when an opportunity for a position became available he was offered this work. He stated that he was highly motivated to take this position, he was keen to avoid the construction work that he had previously been doing. He stated that he was unaware that the role would be a civil role and would involve significant travel rather than working in the CBD area as many other people did. He was given this role because of his fly in fly out experience."[12]

(b) That there is contended inconsistency with, or contradiction of the evidence of the plaintiff, that his symptoms were a motivating factor in his change of job, in the following resignation email sent on 8 August 2017:

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10 Second Defendant's Written Submissions, filed 7/9/20, at [4].
11 [2018] QSC 36, at [97].
12 Report of Ms Stephenson, dated 19/3/19, at p 26 [2]-[3].

> "Hi Jess,
>
> As I have recently been offered a new position to further my career I wish to put forward my resignation as a site delegate with Multiplex effective immediately. It's been a privilege and a great experience to work as short a time as it is on multiple projects in Brisbane. I hope Multiplex continues to build successful projects in Queensland and offer great working conditions for all the workers on their projects.
>
> It's been an awesome experience and I hope the relationship with Multiplex and CFMEU continues well into the future."

(c) The absence of the plaintiff seeking medical or allied health assistance, prior to that change of job.

(d) His continued attendance at gym sessions, three or four times per week.

[16] In the course of his evidence, the plaintiff confirmed his truthful engagement with both an orthopaedic surgeon, Dr Wallace, and an occupational therapist, Ms Stephenson, for assessment of his situation.

[17] Dr Wallace examined the plaintiff on 18 February 2019 and diagnosed chronic musculoligamentous injury of the soft tissue supporting structure of the plaintiff's cervical spine, which on the basis of the history provided to him, was attributed to the acceleration/deceleration forces experienced in the collision on 7 October 2016. In his report dated 19 February 2019, Dr Wallace opined that the plaintiff:

(a) has reached maximum medical improvement or a stable and stationery position, in respect of his injury and assessed his permanent impairment according to the AMA5 guidelines as a 7 percent whole person impairment;

(b) would not be able to return to heavy work or work in construction in the future, but should be able to continue in a supervisory or sedentary capacity such as in his work as a union official; and

(c) may require ongoing physiotherapy (up to five sessions per year) and intermittent medication to assist with broken sleep for the foreseeable future.

[18] Under cross-examination, Dr Wallace effectively confirmed that his opinions were not affected by the considerations that:

(a) whilst he did not detect muscle spasm or guarding (as indicators of frankness of experience of pain) he did detect an abnormal presentation in terms of asymmetry of motion in the cervical spine;[13]

(b) he had noted that the plaintiff had not consulted a GP until about 18 months after his accident,[14] and that the plaintiff had modified his weight training to accommodate his symptoms;[15] and

(c) MRI imaging and examination of the plaintiff had excluded any neurological compromise of the cervical spine.[16]

Otherwise, Dr Wallace confirmed that his opinion as to chronicity of the plaintiff's symptoms was based "almost entirely upon the subjective complaints of pain of [the plaintiff]".[17] And he conceded the whole of person assessment he made under the AMA guidelines did not necessarily "correlate to functional incapacity" and that of the range provided under DRE2, he had ascribed 2 percent impairment because of effect on leisure time pursuits having regard to the modifications to the plaintiff's gym activities.[18]

[19] The plaintiff also relies upon views expressed by the occupational therapist, Ms Stephenson, as a consequence of her assessment conducted on 18 March 2019. In particular, that the plaintiff "is no longer suited to working in the construction industry in hands-on construction tasks", in that "he is no longer able to sustain the heavy lifting, overhead work, pushing and pulling required in this area of occupation" and unsuited for return to work in crane operation, in that he "would have difficulty now with the neck extension postures to look overhead frequently to operate cranes and rigging".[19]

[20] In cross-examination, Ms Stephenson confirmed that the plaintiff had informed her that:

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13 T1-33.25-41.
14 T1-34.10-15.
15 T1-34.29 – T1-35.2.
16 T1-35.5 – T1-36.6.
17 T1-36.8-12.
18 T1-36.33 – T1-37.6.
19 Exhibit 7, Report of Ms Stephenson, dated 19/3/19, at p 30 [2].

(a) when she saw him he had reduced his gym attendance to "four days a week as opposed to six or seven days a week and was doing a modified program";[20] and

(b) he did not take a day off work from the date of the accident to 4 August 2017 and nor did he see a general practitioner in that period,[21] noting that it was on 4 August 2017 when the plaintiff began working as a union organiser.

When pressed as to the latter considerations being, in her experience, inconsistent with the plaintiff's subjective description of pain levels, Ms Stephenson responded by indicating that there were "many factors which come into this", including:

> "… on the second point there about the GP, I often do see people who, you know, delay going because they, you know, believe that their pain is – you know, will settle down over time, and it's only when it becomes chronic and they look back and realise, you know, 'this isn't really going away and maybe I need to do something about it…'"[22]

[21] For the second defendant, reliance is placed upon the opinions of another orthopaedic surgeon, Dr Fraser, expressed subsequently to his examination of the plaintiff conducted on 10 April 2019, that:

(a) "In the motor vehicle accident, [the plaintiff] has sustained a strain of the supporting soft tissue structures on the left side of his neck and left trapezius area";[23]

(b) There was no discrepancy present between the symptoms/injuries reported and the clinical findings;[24] and

(c) "His continuing symptoms will not affect his ability to continue his current work or any other employment and/or day to day functioning" but "may impact upon his enjoyment of weight training and track motor cycle riding".[25]

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20 T1-39.30-32.
21 T1-20.18-30.
22 T1-40.14-30.
23 Exhibit 7, Report of Dr Fraser, dated 10/4/19, at p 39 [5].
24 Ibid at [6].
25 Ibid at [8].

As to an assessment of permanent impairment pursuant to the AMA5 guidelines, Dr Fraser said:

> "There is no quantifiable impairment of bodily function.
>
> Any injuries to the cervical spine is a DRE Category 1 entity. DRE Category 1 entities do not give rise to any quantifiable impairment of bodily function. I have referred to table 15-5 Chapter 15 AMA5 in reaching this decision. A range of percentages is not available.
>
> There are no non-verifiable radicular symptoms. There is no asymmetric motion. There is no evidence of [sic] any radiographic evidence of any structural injury. There is no loss of motion segment integrity to indicate that the injury to the cervical spine is anything more than DRE Category 1 entity.
>
> The measured range of motion in the left shoulder is the same as the measured range of motion in the right shoulder. There is no quantifiable impairment of bodily function with respect to the left shoulder. I have referred to figure 16-40, 43, 46 Chapter 16 AMA5. In conclusion I am further of the opinion that the injury suffered could not be expected to give rise to any incapacity with respect to the usual requirements of day to day living and house hold chores. No further treatment is indicated."[26]

[22] Such reliance is directed at the contention that:

> "The critical question of course is whether or not the transition into union rep was forced by the accident in question or as he has told some of the doctors he wanted to get out of FIFO and this was just the natural progression".[27]

[23] As has been noted above and in respect of the FIFO issue, in submissions to this Court particular attention is drawn to a passage in Ms Stevenson's report.[28] However and as pointed out by the plaintiff, it was his commencement of work with Multiplex which achieved his desired move away from fly in, fly out work and the passage relied upon is not inconsistent with his evidence that he was referring to his work with Multiplex as both the work "he wanted to persist with" until the realisation of the effects of his injury motivated him toward his union employment, in the sense that such effects made him "keen to avoid the construction work that he had previously been doing".[29]

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26 Ibid at p 40, [10] (as corrected by the conference note, exhibit 6, and his evidence at T1-47.35 – T1-49.7).

27 Second Defendant's Written Submissions, filed 7/9/20, at [19].

28 See para [15(a)], above

29 Plaintiff's Written Submissions, filed 17/8/20, at [10]; Plaintiff's Supplementary Written Submissions, filed 19/8/20, at [4]; also see T1-23.27 – T1-24.45 and T1-30.1 – T1-31.21.

[24] As has been noted, the question as to factual causation pursuant to s 11(1)(a) of the CLA, requires consideration as to whether the breach of duty was a necessary occurrence of the harm. Here that devolves to the question as to whether the plaintiff's evidence is accepted as to his ongoing symptomology as a consequence of his injuries sustained in the collision on 7 October 2016, being a necessary condition of his decision to seek employment other than in the performance of active construction work and therefore the occurrence of harm in the form of loss of earning capacity. More particularly, that this occurred because, as he described in respect of those ongoing symptoms:

> "It's that same burning and knotted neck and left – left-hand shoulder. From the physiotherapy reports that I've had repeatedly, there's just a continuous knot that continues to form after I get any dry needling or massage or any of the treatments that get done. It's just a continuous pain that I feel in that area, and it's persistent. It doesn't go away. It just gets worse or back to being painful, and it just varies on the task that I do each day."[30]

[25] The plaintiff's evidence, as it is supported by the evidence by Dr Wallace and Ms Stephenson, should be accepted in this regard. He impressed as a frank witness without any indication of tendency to embellish or overstate the situation. Moreover, the content of his Multiplex resignation email is not to be regarded as significantly attenuating his credibility in this regard. As he acceptably explained, that was his "email on the way out to thank everybody for their time" and "[t]o say that I was furthering my next opportunity…that was me being nice, and that was my separation from Multiplex…"[31] As is submitted for him, there was no necessity to refer to his injury and nor is there in any expression of interest, here or elsewhere, in respect of involvement in union activities or in seeking to take advantage of the opportunity to further his career in that respect, any inconsistency with a finding that a precipitant for seeking and taking such a less remunerative position lay in his injuries and related symptomology and the impediment this presented to his continuing with Multiplex or any active construction work.

[26] Further, and in the context of the nature of his identified injuries, the plaintiff also acceptably explained that it was not his "inclination to go to a GP"[32] and that he

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30 T1-18.19-24.
31 T1-23.1-4.
32 T1-21.35-7.

had been attempting to manage his pain with medication in an expectation that "it was going to go away".[33] Neither is there any contradiction of the acceptability of the plaintiff's evidence to be found in his continuing attention to gym work, with modification due to his injuries.

[27] To the extent that there is contradiction of the plaintiff's evidence or that of Dr Wallace and Ms Stephenson, in the evidence of Dr Fraser, the latter evidence is not to be preferred. As contended for the plaintiff, the acceptability of Dr Fraser's evidence is substantially attenuated by the emphasis which is evidenced by the conference note (Exhibit 6) and in noting specific disagreement with the opinion of Dr Wallace as to the inability of the plaintiff to return to heavy manual work or construction work, upon the following considerations:

> "That is inconsistent with the plaintiff's proven capacity to work for almost 2 years in the construction industry and I note that he did not attend to his GP for treatment to assist if he was having problems."

As has been noted, the plaintiff has provided acceptable explanation as to his non-attendance upon a GP and as to how he struggled to continue with his heavy work whilst looking for another opportunity. And significantly, there is the error that this was over "almost two years", when it was only 10 months before the plaintiff had not only sought but secured the union position and left Multiplex.

[28] Also and curiously, there is also in the conference note reference to the following:

> "From an orthopaedic perspective, soft-tissue injuries are stable and stationary before 18 months to 2 years and there is no reason, nor event that would prompt a sudden increase in symptomology claimed."

As pointed out for the plaintiff there is no suggestion of any "sudden increase in symptomology claimed" and it was not suggested to the plaintiff that he had ever so claimed. But the difficulty is in understanding how this notation came to be in this conference note and more importantly, whether any such observation played any part in the opinions expressed by Dr Fraser. When cross-examined as to this aspect of the note, his evidence was that he must have been asked a question along those lines for the observation to appear but that he did not have "any idea" nor

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[33] T1-20. 35 – T1-21.42.

indication from the plaintiff that there had been any such sudden increase in symptomology.

[29] Importantly, in the assessment of Dr Fraser's evidence, it should be noted that it concluded as follows:

> "All right. So, Doctor, you have conceded, I think, that because pain is subjective, one simply cannot say one way or the other whether this man is experiencing the levels of pain of which he complains; is that correct?---He – I'm unable to say that what he's – was – what he's feeling, no. That's correct.
>
> And if it is the case that he is experiencing the levels of pain at which he complains, it would be an entirely reasonable decision on his part, would it not, to seek to cease his involvement in the heavy construction industry work in which he was involved as at the date of accident and look for a less physically demanding employment role, would it not?---Well, that's a matter for him. I'm – I'm unable to say what level of pain he was experiencing and how it affected his employment in the period of time between the accident and when he left his employment."[34]

[30] Accordingly it is appropriate to find, in accordance with s 11(1) of the CLA, that the plaintiff has proven that the first defendant's breach of duty was a necessary condition of the occurrence of the harm for which he claims, including loss of earning capacity and that it is appropriate for the scope of the liability of the first defendant to extend to the harm so caused.

**Assessment of damages**

[31] The remaining or secondary issues, relate to the assessment of damages and will be dealt with under the following respective headings.

General damages

[32] The difference in the submissions of the parties is that for the second defendant and based upon Dr Fraser's assessment that there had been no quantifiable impairment of bodily function, the contention is for an ISV of 6. However and based on the preferred evidence of Dr Wallace and his assessment pursuant to

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34 T1-51.8-19.

AMA 5, of a whole person impairment of 7 percent, the plaintiff contends for an ISV of 10.

[33] As required by s 61 of the CLA, in the assessment of general damages for injury, the court must assess an Injury Scale Value ("ISV") under the rules provided in the *Civil Liability Regulation* 2014 ("CLR"). Pursuant to s 62 of the CLA, the assessment of an ISV will allow a reference to an appropriate amount of general damages. An ISV is to be derived by reference to Schedule 4 of the CLR, noting matters relevantly set out in Schedule 3 and to which "the court may or must have regard". For example, pursuant to s 10 of the CLR:

> "The extent of whole person impairment is an important consideration but not the only consideration affecting the assessment of an ISV."

[34] Otherwise the court must identify an injury or dominant injury or type of injury, by reference to Schedule 4 and the range of ISV provided for such injury, to reflect the level of adverse impact of the injury (see s 2 of Schedule 3). Here and by reference to Schedule 4, it is common ground that the appropriate reference is to item 88: "moderate cervical spine injury – soft tissue injury", which provides an ISV range of 5 to 10. Pursuant to s 8 of Schedule 3, the court must have regard to the following:

> "**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."

Further and despite the pleading for the plaintiff of there being both neck and left shoulder girdle injuries, it is notable that Dr Wallace's opinion is expressed in terms of diagnosis of "a soft tissue injury to the supporting structure of the cervical spine". It is to such injury that he ascribes a 7 percent whole person impairment.

[35] In the circumstances, an appropriate assessment of ISV, pursuant to Item 88, is 9 percent. By reference to Schedule 7 of the *CLR* (Table 7, Item 2), this may be converted to a general damages calculation of $14,040. Pursuant to s 60(1)(a) of the *CLA*, no interest may be ordered for an award of general damages.

Past economic loss

[36] It will be convenient to proceed, as the submissions of the parties have, upon the basis of assessing past loss to the date of trial: 17 August 2020 and the future component thereafter. As to the broader issues and as already noted, the plaintiff has satisfied s 11 of the CLA in proof of causation of economic loss due to his injury precipitating his change to less remunerative employment. However and given the evidence as to the plaintiff's desire to move away from the more remunerative fly in fly out work he had done before securing his position with Multiplex, it should be accepted that it would be inappropriate to take into account that earlier and more remunerative employment in the calculation of the plaintiff's economic loss.

[37] Accordingly, it is then a matter of assessing the difference in the plaintiff's earnings, as between his work for Multiplex and as a union representative. Also and as agreed between the parties, it will be necessary to take into account an agreed benefit of $150/week by way of provision of a fully maintained vehicle in conjunction with his present union work.

[38] However and surprisingly, having regard to this simplification of the parameters, there remains some considerable difference in the calculations provided in the submissions of the parties. It has to be observed that an essential problem in discerning the basis for the departure in the calculations is in the paucity of detail as to the derivation of the figures in the submissions of the second defendant. On the other hand the approach for the plaintiff is set out with sufficient clarity in reference to the evidence, to enable acceptance of it as an appropriate measure of the plaintiff's loss.

[39] Accordingly and having regard to those calculations provided in the Supplementary Outline of Submissions,[35] the plaintiff will be awarded an amount of $77,348.00 for past economic loss.

Interest on Past Economic Loss

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35 Filed 19/8/20, at [6]-[15].

[40] For similar reasons and noting that they were expressly directed at the application of s 60 of the *Civil Liability Act* 2003, the submission for the plaintiff is accepted,[36] in that interest on the past economic loss is allowed in the amount of $493.97, calculated at 0.21% on $77,348.00 for 1,110 days from 5 August 2017 to 18 August 2020.

Past Loss of Employer Contributions to Superannuation

[41] The agreed rate for allowance for loss of past employer contributions to superannuation is 9.5%, which yields an amount of $7,348.00.

Future Impairment of Earning Capacity

[42] There is common ground in the submissions of the parties that subject to a reduction of 15% for contingencies, the calculation of the plaintiff's future economic loss should be upon the basis of extrapolation of his net loss of income as at the date of trial, to a retirement age of 67 years. Once again adopting the plaintiff's calculations as an appropriate representation of the evidence and his loss,[37] the starting point is a net loss (allowing for the ongoing benefit of the motor vehicle) of $442.68 per week. Discounted at 5% over 30 years to age 67 and reduced by 15%, the rounded figure is $309,300.

Future Loss of Employer Contributions to Superannuation

[43] The plaintiff's loss in respect of future employer contributions to superannuation is agreed to be calculated at the rate of 11.75%. Accordingly the amount to be allowed is $309,300 x 11.75% = $36,343.

Special Damages

[44] The submissions of the parties refer to an agreed figure for future expenses. However the plaintiff refers to an amount of $7,500,[38] whereas for the second defendant the reference is to an amount of $5,000. However the amount of $7,500

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36 Plaintiff's Supplementary Written Submissions, filed 19/8/20, at [16].
37 See Plaintiff's Supplementary Written Submissions, filed 19/8/20.
38 Plaintiff's Written Submissions, filed 17/8/20, at [26].

is also consistent with the oral submission made by the plaintiff's counsel as to the agreed figure, on 17 August 2020. Moreover, that submission was made without any demur or correction from the second defendant and will be accepted as an appropriate assessment of such loss, particularly having regard to the period over which the incurrence of such loss may be expected.

[45] Otherwise, there is agreement that amounts of $873.45 in respect of the Medicare Australia Charge and $556.20 in respect of NIB Health Fund refund, are to be allowed.

[46] The plaintiff has further claimed an amount of $5,314.80 for out of pocket expenses as set out in his Statement of Loss and Damage, dated 13 November 2019, which was tendered by counsel for the second defendant and admitted, it was said by consent, as Exhibit 8.[39] Largely consistently with the particularisation in that document, the plaintiff claims as follows:

| | |
|---|---|
| Therapeutic Massage | $1,200.00 |
| Physiotherapy Gap Fees | $430.80 |
| Contoured Pillow | $65.00 |
| Support Mattress | $2,500.00 |
| Pharmaceutical Expenses | $952.00 |
| Travelling Expenses | $167.00 |
| Total | $5,314.80 |

[47] Despite there being little attention in the evidence to these claims, the written submissions for the second defendant contends for an award of $2,573.74, on the following somewhat unexplained basis:

> "32. The Medicare Australia charge is proven at $873.45 and private health refund of $556. Out-of-pocket expenses are claimed at $544.29 being therapeutic massage. It is respectfully submitted that that component should be allowed, not the contoured pillow: a pillow needs to be purchased in any event and it will be the differential cost between a contoured pillow and a normal pillow. There is no evidence with respect to that.
>
> 33. There is no evidence with respect to the support mattresses nor proof of the pharmaceutical expenses. The Defendants conceded an allowance of $500 for pharmaceutical expenses and $100 for travelling expenses, giving a total sum for $2,573.74."[40]

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39 T1-52.10-20.

40 Second Defendant's Written Submissions, filed 7/9/20.

[48] Whilst it is for the plaintiff to prove his claim, here there has been the tender of the statement of loss and damage, in which there is a degree of itemisation or particularisation of these claims. Moreover, the plaintiff's claims appear to be consistent with the context of the absence, at trial, of there being any clearly identified issue apart from the establishment of a causal link for the support mattress and the amount claimed for the pillow.[41] Further, the report of Dr Wallace coupled with the oral evidence of the plaintiff, supports the requirement for regular analgesic medication. There is also evidence of receipts for therapeutic massage totalling $367.00, but those were tendered on the basis of proof of such massages being obtained prior to and through to the plaintiff's change of employment on 4 August 2017 and therefore not in proof of all such massages. It may also be accepted that some travel was involved in obtaining such massages and the claim in that respect appears to be relatively modest. The claim for the contoured pillow is not difficult to relate to the plaintiff's injury and may easily be seen as justifiable in terms of replacement of an existing pillow by a more suitable one because of his injury.

[49] In these circumstances and save for the issue of causative need for the support mattress, the plaintiff's claims should be allowed. The issue in respect of the mattress was flagged at trial[42] and the plaintiff has not proven the causative link nor the expenditure for this claim and it is not allowed.

[50] Accordingly, out of pocket expenses will be allowed in the amount of $2,814.80. Interest is also allowed on that amount in the sum of $22.88, calculated at 0.21% per annum on $2,814.80 over 1,411 days between 7 October 2016 and 18 August 2020.

**Summary**

[51] Accordingly and in summary, an appropriate assessment of the plaintiff's damages is:

| **Head of Claim** | **Amount** |
|---|---|
| General damages for pain, suffering and loss of amenities | $ 14,040.00 |
| Past economic loss | $ 77,348.00 |
| Interest on past economic loss | $ 493.97 |

41 See T1-59.20-28.
42 T1-29.15-28.

| | |
|---|---|
| Past loss of employer contributions to superannuation | $ 7,348.00 |
| Future economic loss and impairment of earning capacity | $309,300.00 |
| Future loss of employer contributions to superannuation | $ 36,343.00 |
| Future expenses otherwise | $ 7,500.00 |
| Medicare Australia charge | $ 873.45 |
| NIB Health refund | $ 556.20 |
| Out of pocket expenses | $ 2,814.80 |
| Interest on out of pocket expenses | $ 22.88 |
| **Total** | $456,640.30 |

[52] The order of the Court is that there be judgment for the plaintiff in the sum of $456,640.30.