SUPREME COURT OF QUEENSLAND

CITATION:	*Tindale v Mayne Nickless Ltd* [2002] QSC 124
PARTIES:	**WAYNE GEOFFREY TINDALE** (plaintiff) v **MAYNE NICKLESS LTD** ACN 004 073 410 (defendant)
FILE NO/S:	656 of 2000
DIVISION:	Trial
PROCEEDING:	Application for Damages
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	24 May 2002
DELIVERED AT:	Townsville
HEARING DATE:	10 May 2002
JUDGE:	Cullinane J
ORDER:	**Judgment for the Plaintiff against the Defendant in the sum of $257,726.99 with costs to be assessed.**
CATCHWORDS:	NEGLIGENCE – BREACH OF DUTY – BREACH OF STATUTORY DUTY – DAMAGES – where Plaintiff lifted parcel causing injury to spine – whether the Defendant liable under s. 28 of the *Workplace Health and Safety Act* 1995 – whether Plaintiff refused permission to leave workplace due to injuries – whether Defendant liable under s. 312 of the *WorkCover Queensland Act* 1996
COUNSEL:	M. Drew for the plaintiff M. O'Sullivan for the defendant
SOLICITORS:	Connolly Suthers for the plaintiff Hunt and Hunt for the defendant

[1] This action was heard over some six days. The Plaintiff claims damages against the Defendant, his former employer, for negligence, breach of duty and breach of statutory duty.

[2] The Plaintiff was born on 30 September 1971. He is married and he and his wife have three children.

[3] He left school at age 16 having completed Grade 10. He does not hold any trade or professional qualifications of any kind.

[4] I will refer to his work history when dealing with the issue of damages.

[5] The action concerns two incidents which the Plaintiff says occurred on 3 August 1998 in the course of his employment. The first occurred on the morning of that date and the second on the late afternoon.

[6] The Defendant accepts that the first incident occurred but denies the second.

[7] The Plaintiff was employed as a delivery truck driver.

[8] He had suffered some injuries to his back at work prior to the date that I am concerned with. These are dealt with in Exhibit 1. He has no recollection of some of these and has obtained the details from the Defendant's personnel file. It is apparent, as will be mentioned later, that he already had degenerative changes in his lower spine prior to 3 August.

[9] On that day which was a Monday he was required to drive a Pantechnicon and deliver various goods to various places around Townsville. Photographs of the back of the Pantechnicon are in evidence. It would seem clear that the floor of the Pantechnicon was uneven as a result of wear and thus did not provide a secure base upon which to stack the items. The Plaintiff was required to deliver items to a number of different places and these items included cartons of various sizes, some clothing which was carried hanging in the back of the Pantechnicon and various other items. The Plaintiff described the manner in which the van was loaded with those items to be delivered first at the rear of the truck and those to be delivered last towards the front.

[10] The Plaintiff says that when he arrived at one of the centres and opened the back doors he found that there were cartons all over the back of the truck. They had fallen "everywhere". The Plaintiff got into the back of the truck and picked up a number of cartons and was in the process of picking another when he experienced the onset of pain in his lower back.

[11] The Plaintiff gave evidence that the points at which it was possible to tie a rope which would secure the items, in this case, the cartons - which were of various sizes and stacked at various levels - to the side of the Pantechnicon were insufficient in number and inadequate in location to properly secure all of them and that some of them were therefore at risk of falling and did fall. The Plaintiff says that he had complained about the inadequacies generally of the manner in which loads were secured both in relation to the absence of adequate rope and the absence of adequate points at which to tie the loads so as to secure them. Some of the problem as I understand his evidence was because the varying heights of the stacks of carton meant that in some instances the points at which they might be secured did not correspond with an available point. The Plaintiff initially gave evidence that there were only two horizontal bars but on the resumed hearing and apparently after an

inspection of the vehicle concerned had been made acknowledged that there were three. He said however that the problem was not significantly altered by this fact.

[12] Other witnesses who spoke of this work did not suggest there were particular problems with items falling because they were not able to be adequately secured but acknowledged that it is something that could occur. There was evidence from Mr O'Sullivan, who has expertise in ergonomics and safety matters and who gave evidence of methods of attachment in the case of trucks carrying goods which are in common use and which would provide an adequate means of securing the items concerned. Mr Hacker who was called on behalf of the Defendant gave some evidence that suggested that these methods of attachment might not be entirely suitable for the sort of items carried by the Defendant but I accept Mr O'Sullivan's evidence that there were means available which might have prevented these items from falling.

[13] It is of course not sufficient to enable the Plaintiff to succeed to show that there was a tendency for items to fall which might have been avoided by the provision of adequate means of securing them. Where items fell it was necessary for them to be picked up but the fact that the Plaintiff was or might be required to lift such items could not in itself give rise to a cause of action. Lifting was an integral part of the work that he was doing.

[14] The carton which he was lifting was of an approximate weight of some 15 kilograms. Such a weight should not pose any risk of injury to a normal spine if lifted correctly. As the evidence ultimately demonstrated, the Plaintiff's back was already degenerate and it may be that such a weight did pose a risk of injury to the Plaintiff but the degenerate condition of the Plaintiff's back was not something which the Defendant knew or ought to have known of on the evidence.

[15] The Plaintiff had just before lifting the parcel concerned lifted parcels of somewhat greater weight. The Plaintiff attempted to lift the carton in question by standing with his foot on a carton which was in front of the carton to be lifted and placing one hand against the wall. He lifted the carton with the other hand. Thus he had to bend over the parcel upon which he placed his foot and in doing so exposed his spine to a considerably greater risk of damage than would have been the case if he had stood closer to the parcel and lifted it. The Plaintiff acknowledges that he had been given instructions as to the proper method of lifting a load. He accepted that he had been instructed that he should stand as close as possible to the load with his feet together and that he should keep his back straight and bend his knees whilst lifting. He says he did not think about the matter when he lifted on this occasion. There is nothing in the evidence to suggest that the parcel upon which he placed his foot could not have been simply moved out of the way prior to the lifting occurring.

[16] The claim was framed in negligence, breach of duty and breach of statutory duty. The latter claim was based upon s. 28 of the *Workplace Health and Safety Act* 1995. The breach of this section gives rise to a cause of action in damages. See *Schiliro v Peppercorn Childcare Centres Pty Ltd (No. 2)* (2001) 1 QdR 518.

[17] The difficulty facing the Plaintiff is that on the evidence the Plaintiff had been properly instructed as to the way in which to lift the parcel, a parcel which would

not have posed any risk to the Plaintiff (assuming a normal spine) had it been lifted in accordance with those instructions.

[18] The Plaintiff was at one time inclined to argue that the Defendant had failed to ensure that the instructions which had been given to the Plaintiff were being complied with.

[19] There was no evidence which would support such a finding. In any case it seems to me that such a claim is met by the provisions of s. 313 of the *WorkCover Queensland Act* 1996 as amended:

"An employer is not liable for damages to a claimant because the employer failed to guard against breach by the worker of the employer's instructions".

[20] Some argument was advanced based upon a suggested conflict with the provisions of s. 28 of the *Workplace Health and Safety Act* 1995. This of course is an earlier Act. In any case, it seems to me that the clear language of s. 313 must be taken as precluding a cause of action based upon a failure to ensure that instructions had been complied with whether that failure is said to constitute either a breach of the duty of the employer at common law or a breach of statutory duty.

[21] The Plaintiff has not established a right to recover in respect of this incident.

[22] The Plaintiff says that he experienced pain as a result of lifting the carton and I accept his evidence about this, and accept that he continued to suffer pain in his lower back throughout the day. He completed his deliveries and went home for lunch as was normally the case.

[23] He says that on his return he spoke to his superior, one Dupain (who was the leading hand). He says that he told him that he had hurt his back and asked if he could go home. The Plaintiff says that Dupain told him that the Defendant was short handed and asked whether the Plaintiff could come in that afternoon to perform the usual tasks to be carried out later in the day. These involved loading trucks for various destinations to which goods had to be taken. Goods were transferred by a conveyor to various trucks into the backs of which they were pushed by means of rollers.

[24] The Plaintiff performed his usual tasks (which involved driving the truck to various places around Townsville) in the first part of the afternoon and on his return, because he was still experiencing pain, says that he told Dupain that his back was quite sore and asked if he could go home at that time. He says that Dupain told him that there were not enough people to load the trucks and that he was to remain until all of the freight had been run down the conveyor belt.

[25] The Plaintiff says that when he was going to the dock area where the work was to be carried out he saw two workmates, Powell and Ross and that they asked him what was wrong. He had a conversation with them in which he told them that his back had been hurt and that "Brian" - Dupain - "said I couldn't go home". He says that they told him to go and see Dupain and tell him that because of his back he had to go home. He says that he saw Dupain again in front of the freight office, inside the building where the loading was apparently to be carried out and again told him

that he needed to go home because of his sore back and that Dupain told him that there were not enough men to cope and that he had to work up on the dock.

[26] The Plaintiff says that faced with this refusal he went and performed the work which in his case involved the loading of the vehicle which was to transport goods to Mackay.

[27] According to the Plaintiff there were amongst the items coming down the conveyor to be pushed onto that vehicle a number of tyres. These were four-wheel drive tyres and had to pushed across the roller by him into the back of the truck. He says that some congestion developed and it was necessary for him to stack the tyres on the ground behind him. He did this by taking hold of the tyres, turning around and putting them behind him. The tyres weighed approximately 20 kilograms. On his evidence he had stacked something like two piles with four tyres to each pile and was in the process of stacking the third when he felt the onset of acutely increased pain in his lower back extending into his legs. He says that he spoke to Dupain and told him that he had to leave. Dupain took the Plaintiff's place. The Plaintiff says that at this time he had difficulty walking away from the area where he had been working.

[28] Dupain denies ever having been spoken to by the Plaintiff on that day about a sore back and denies that he told the Plaintiff that he had to continue working or that he took the Plaintiff's place following the Plaintiff's complaint of acutely increased symptoms.

[29] There was evidence of some bad blood between Dupain and the Plaintiff.

[30] Both Ross and Powell gave evidence. There are differences in their accounts and between the accounts of each and that of the Plaintiff. This is not surprising in my view as the events occurred about four years ago and neither Ross and Powell had been asked to recall them until some years later.

[31] Ross and Powell were working on the same truck at the conveyor belt. As I have said the Plaintiff said he spoke to both of them. Each of them gave evidence that he spoke to the Plaintiff. Powell did not know how close Ross was to him when he spoke to the Plaintiff. Ross thought that Powell was a little distance away in the truck when he spoke to the Plaintiff. Each says that in effect they told the Plaintiff to repeat his complaint.

[32] Powell did not see where the Plaintiff went after he left them. Ross said that he saw him go away and speak to Dupain at the Mackay truck. As I have said the Plaintiff said he saw Dupain in front of the freight shop which on my understanding is in a different area. It was the Plaintiff's evidence that Dupain took over his (the Plaintiff's) work on the Mackay truck after he suffered the onset of acute symptoms and could not continue.

[33] Both Ross and Powell saw the Plaintiff working after this. Both gave evidence of having spoken to him after the first conversation. Neither claim that they saw the Plaintiff suffering increased symptoms or leaving but Powell says that the Plaintiff was not there when the work finished. Ross does not recall the Plaintiff leaving early.

[34] The Defendant contended that the evidence of Ross and Powell should be rejected as untruthful and considerable reliance was placed upon the differences in the accounts that I have referred to.

[35] However my impression of both Powell and Ross was that each was telling the truth about a conversation that they had been party to with the Plaintiff on an occasion after each had noticed the Plaintiff appeared to be in some pain.

[36] I think it is likely that both were present when such a conversation took place and that both spoke to the Plaintiff. I also accept that both saw him leave after that conversation and that Ross saw him speak to Dupain. Each saw the Plaintiff continuing to work after this.

[37] I do not regard the differences that I have referred to as suggestive of a false account or as casting doubt upon the veracity of either Ross or Powell or both. I think that these differences are understandable given the time that had elapsed and the circumstances in which the conversation took place whilst both were engaged in the operation of loading trucks in a place where many people were present.

[38] The statements by the Plaintiff that he had a sore back and the statements that he subsequently made to each of them after the conversation to which I have referred are inadmissible as hearsay and I put them out of account. However evidence of the conversation between the Plaintiff and the two men at the time he came to the dock (whilst not evidence of the truth of what he said about Dupain's refusal to allow him to leave) is it seems to me admissible as is the evidence that during the conversation on that subject he was urged to repeat the complaint, the Plaintiff left and was seen by Ross to speak to Dupain. This evidence taken with the further evidence that both then saw him continuing to work is evidence in my view of conduct which is admissible and from which the inference that the Plaintiff spoke to Dupain and that Dupain refused to allow him to leave is open. I think that it is the reasonable inference to draw.

[39] Much emphasis was placed by the Defendant upon what is said to have been a failure by the Plaintiff to refer to the onset of the acute symptoms whilst stacking the tyres when he completed a workers' compensation form a few days later and also when he saw Dr Hickey on the following day 4 August 1998. The Plaintiff in each case referred only to the incident involving the lifting of the cartons in the Pantechnicon. At one time the Defendant suggested the Plaintiff had not told Dr Guazzo (a neurosurgeon to whom Dr Hickey referred him) when he first saw him about the incident in the late afternoon. However I am satisfied from Dr Guazzo's evidence that he did tell Dr Guazzo of the onset of increased symptoms in the afternoon. It also seems to me that the reference in Dr Guazzo's notes to "tyres", (the precise context of which Dr Guazzo cannot now recall), is probably the result of a reference by the Plaintiff to the type of work he was doing when he suffered the increased symptoms in the afternoon.

[40] My impression of the Plaintiff was of a relatively unsophisticated man with a limited education. He is not unintelligent but struck me as a rather passive person. I do not overlook the fact that he had been appointed to a position as workplace health and safety officer at the Defendant's premises although I do not regard this as a matter of any great significance in the assessment of his credit.

[41] I accept that many if not most people could be expected to have made a reference to the incident in the late afternoon whilst stacking the tyres when giving an account of what had caused his injury when speaking to his general practitioner or when completing the workers' compensation form. However I do not find it surprising that the Plaintiff considered the cause of his problems to have been the incident in the Pantechnicon which caused the pain from which he thereafter suffered and which was significantly exacerbated late that afternoon resulting in his leaving work. I do not regard the fact that he described things in this way on the occasions that I have referred to as warranting the conclusion that he has fabricated the incident involving the stacking of the tyres.

[42] My impression of the Plaintiff was that he was a truthful witness in relation to this matter. I reject the evidence of Dupain denying that he had any conversation with the Plaintiff about a sore back or that he refused to allow him to leave.

[43] Two allegations are made against the Defendant in relation to this activity. Firstly it is said that the lifting of the tyres and the placing of them on the ground behind him in the way the Plaintiff says he did involved a foreseeable risk of injury in accordance with accepted standards even to somebody with a healthy spine. Mr O'Sullivan gave evidence about this and it was not challenged. He also gave evidence as to the manner in which the Plaintiff ought to have been instructed to remove the tyres from the conveyor for the purposes of stacking them on the ground. There was also no challenge to his evidence in this regard. The Plaintiff says that he had never been given any instructions as to what he should do in carrying out this type of work.

[44] In response to some questions in cross-examination by counsel for the Defendant the Plaintiff agreed that he had kept his back straight as he lifted the tyres and turned and placed them behind him. He had earlier given evidence of twisting of his body as he did so and it seems to me that it is inevitable that there must have been some degree of twisting as he performed this task to move the tyres from the conveyor to a point behind him where they were being stacked. Dr Tuffley who was called by the Defendant thought that it was likely that there would be some twisting at the hips and probably some in the spine.

[45] I am satisfied that this work involved a foreseeable risk of injury and that the Defendant ought reasonably to have instructed the Plaintiff as to the proper manner in which it ought to have been carried out and that as a result of the failure to do so the Plaintiff sustained injury to the spine. As a result the Defendant was guilty of a breach of the duty to which it owed to the Plaintiff and also a breach of the statutory duty to which s. 28(1) of the *Workplace Health and Safety Act* 1995 gives rise.

[46] The second respect in which the Defendant is said to be guilty of a breach of duty or breach of statutory duty in relation to this matter is in requiring the Plaintiff to perform this work when it was known to Dupain that the Plaintiff was suffering painful symptoms in his lower back.

[47] It was in my view plainly foreseeable that a person engaging in the operations in which the Plaintiff was engaged would, or might, suffer further damage to his back if required to carry out the type of work he was required to do at a time when he was experiencing painful symptoms there. This was not the subject of any serious

contest and if evidence was necessary on this subject there was evidence from Mr O'Sullivan.

[48] Section 312 of the *WorkCover Act 1996* provides as follows:

"***Liability of employers and workers***

312.(1) *In deciding whether a claimant is entitled to recover damages not reduced on account of contributory negligence, or at all, all courts must have regard to whether the claimant has proved such of the following matters as are relevant to the claim –*

(a) that the employer had made no genuine and reasonable attempt to put in place an appropriate system of work to guard the worker against injury arising out of events that were reasonably readily foreseeable;

(b) that the actual and direct event giving rise to the worker's injury was actually foreseen or reasonably readily foreseeable by the employer;

(c) that the worker did not know and had no reasonable means of knowing that the actual and direct event giving rise to the injury might happen;

(d) that the injury sustained by the worker did not arise out of a relevant failure of the worker to inform the employer of the possibility of the event giving rise to the injury happening, in circumstances in which the employer neither knew nor reasonably had the means of knowing of the possibility;

(e) that the worker did everything reasonably possible to avoid sustaining the injury;

(f) that the event giving rise to the worker's injury was not solely as a result of inattention, momentary or otherwise, on the worker's part;

(g) that the injury sustained by the worker did not arise out of a relevant failure of the worker to use all the protective clothing and equipment provided, or provided for, by the employer and in the way instructed by the employer;

(h) that the worker did not relevantly fail to inform the employer of any unsafe plant or equipment as soon as practicable after the worker's discovery and relevant knowledge of the unsafe nature of the plant or equipment;

(i) that the worker did not inappropriately interfere with or misuse or fail to use anything provided that was designed to reduce the worker's exposure to risk of injury.

(2) *If the claimant relies exclusively on a failure by the employer to provide a safe system of work and fails to prove the matter mentioned in subsection (1)(a), the court must dismiss the claim.*

(3) *If the claimant fails to prove the matter mentioned in subsection (1)(b), the court must dismiss the claim.*

(4) *If the claimant fails to prove any of the matters mentioned in subsection (1)(c) to (i), the court must –*

(a) dismiss the claim; or

(b) reduce the claimant's damages on the basis that the worker substantially contributed to the worker's injury.

(5) *In deciding whether a worker has been guilty of completely causative or contributory negligence, the court is not confined to a consideration of and reliance on the matters mentioned in subsection (1)(c) to (i)".*

[49] The Plaintiff has the onus of satisfying the requirements of s. 312(a) and (b) as pre-conditions (where applicable) to a cause of action and I am satisfied that he has done so here insofar as the provisions are applicable to each of the bases on which he has succeeded.

[50] So far as s. 312(1)(c) to (i) inclusive are concerned the effect of the provision is that if a Plaintiff fails to prove or disprove any of those matters the Court is obliged either to dismiss the claim or to reduce damages on the basis that the employee substantially contributed to his injury.

[51] Section 314 also provides for circumstances in which a finding of contributory negligence is to be made. So far as s. 312 is concerned the Defendant placed reliance upon s. 312(1)(c) and (e). The Plaintiff, according to counsel for the Defendant, ought simply to have left his workplace when suffering painful symptoms and it is said that his failure to do so brings into operation those provisions. Effectively it is said that the Plaintiff should have defied Dupain and left if Dupain had refused to allow him to leave.

[52] I find it very difficult to accept this proposition. In *McLean v Tedman* (1984) 155 CLR 306 the High Court, in a somewhat different context, spoke of the "power of the employer to prescribe, warn, command and enforce obedience to his commands". It is hardly necessary to point out the consequences which might flow to an employee who defies his employer's directions. In this case the Plaintiff spoke of a possible reprimand and it is I think unrealistic to expect that an employee whom one would expect values his employment would take such a course where he had been expressly refused permission. Some reliance was placed upon an opinion expressed by Ross and what Powell said he had done on occasions. I do not regard that evidence however as in any way supportive of the claim that the Plaintiff acted unreasonably in not defying Dupain. I have the impression that Powell and Ross

were somewhat more robust characters than the Plaintiff but do not think that in any case the evidence supports the conclusion that the Plaintiff acted unreasonably in not defying Dupain.

[53] So far as s. 312(1)(e) of the Act is concerned the evidence satisfies me that the Plaintiff did everything reasonably possible to avoid sustaining the injury in the sense that, as I have said, his failure to simply walk off should not be regarded as a failure to take a course reasonably open to an employee in his situation. So far as s. 312(1)(c) is concerned it may well be that the Plaintiff would have realised that by continuing to work he ran the risk of some further injury but I do not think that should be regarded as a consideration "relevant to the claim" as required by s. 312 in a case where permission had been expressly refused. I think that the provision should be regarded as applicable to the situation where an employee who knows of a risk runs the risk in the sense of courting it. To apply it in the current circumstances in my view would be to give it an unjust operation and if a finding could be made on such a basis against the Plaintiff it would seem to also justify a finding against an employee who drew an employer's attention to a risk associated with the work and was injured following the failure by the employer to do anything about it or even before there was adequate time for the Defendant to do so.

[54] Section 312 has since been repealed. I agree, with respect, with the remarks of Dutney J. in *Martin v Mackay City Council* (2001) QLC 433 in which he spoke of the artificiality of assessing contribution based upon a failure to prove or disprove one or more of the matters to which the section provides.

[55] If I am wrong in my interpretation of s. 312 then I would regard an appropriate contribution to be made against the Plaintiff in this case as no greater than five per cent.

[56] I turn now to the question of damages.

[57] As I have said the Plaintiff is now 30 years old. He has no qualifications and left school at age 16. He worked for the Defendant from 1993 until the time of this accident. Prior to that he had worked for some five years as a concreter.

[58] An MRI taken following the accident at Dr Guazzo's request revealed significant spinal pathology at L4-5 and L5 S1. At the former level there was a central focal disc protrusion and at the latter there was a large central lateral protrusion. Because his sciatica was in the right leg, Dr Guazzo ascribed the cause of that to the L4-5 central disc prolapse.

[59] It is common ground amongst the medical specialists who saw him (Dr Lewis, an orthopaedic surgeon who was called by the Plaintiff, Dr Guazzo, a neurosurgeon called by the Defendant and Drs Laister and Tuffley, both orthopaedic surgeons called by the Defendant) that the Plaintiff had pre-existing degenerative changes in his spine.

[60] Whilst disc protrusions can exist without producing symptoms (and I accept that the Plaintiff was symptom free at the time of the accident) it is likely that one or both of the disc herniations developed on 3 August 1998.

[61] I accept Dr Lewis's opinion that it is likely that some tearing of a disc occurred in the incident on the morning of 3 August and that this was more extensively damaged in the incident later on that day. I also accept the evidence of Dr Lewis that it is most likely that the tear would have remedied itself had the Plaintiff rested and that he would have had no further problems as a result of that incident. That is, his condition would have returned to what it was prior to the damage being done.

[62] Both Dr Lewis and Dr Tuffley expressed the view (which I accept) that in the ordinary course of events the Plaintiff would have been unable to continue truck driving past the age of 45. His damages, so far as economic loss is concerned, therefore fall to be assessed by reference to the heads of past loss and future loss up until that time.

[63] The Plaintiff returned to work on light duties on 13 October 1998. Dr Guazzo had recommended this limitation. The Plaintiff had also been assessed by an occupational therapist on behalf of WorkCover.

[64] In December 1998 he was transferred to an associated company working full time and transporting items of 20 kilograms or less.

[65] The Plaintiff says that shortly afterwards he commenced to work which involved driving to Ayr and picking up what he described as bank bags and transferring them to Townsville. He says that he experienced considerable pain and informed the officer at WorkCover with whom he was dealing of this. However no change took place in his tasks and in February 1999 he says that he was transferred onto a truck run which involved carrying considerably heavier items which increased his back pain until it reached the point where he said he had to go off on workers' compensation on 11 March. He remained on compensation until 26 May. During this time he received a notice of assessment from WorkCover and an offer of lump sum compensation which he rejected.

[66] He resigned on 26 May 1999. At this time his entitlements to workers' compensation payments had ceased and he said that he was not able to perform the duties which were allocated to him.

[67] It was some time after this and as a result of advice he had been given by Dr Guazzo that he approached CRS Australia for the purposes of undergoing a rehabilitation program with a view to obtaining suitable work.

[68] It seems that the Plaintiff had the obligation ultimately to meet the costs of this and it appears from the evidence of Miss Hemmett who was the officer in charge of the Plaintiff's program that he expressed concern about these costs as the program continued.

[69] In the course of the program he underwent certain therapy and wore a lumbar support. He undertook a computer training course and with the assistance of CRS Australia applied for a substantial number of jobs unsuccessfully.

[70] He says that he became somewhat discouraged by the manner in which the program progressed believing he was not getting anywhere. He left the program in February

2001. During the time that he was on the program he obtained work for short periods. This work was in the nature of stocktaking work.

[71] The Plaintiff's wife works at a daycare centre and the Plaintiff obtained some part time work there. This occurred in October 2000 and he is still working there and intends to continue to do so.

[72] Miss Hemmett said in evidence that the Plaintiff in her view appeared to lack some motivation in attending to the requirements of the course and when he obtained the work with the daycare centre informed her that the position which he had obtained suited the family's needs and he was content with that position.

[73] It is common ground that the Plaintiff is not able to return to the sort of work that he previously did and that he is unfit for heavy physical work generally.

[74] As I have said the Plaintiff works for two days a week at a daycare centre where he is engaged in supervisory tasks. He also spends some time at the Netball Association's grounds and he receives some income for tasks that he performs there. He is described as a canteen convenor. It seems he spends two nights a week there and on one of those evenings he works behind the counter serving food. This appears on a video. He also does shopping for the purposes of the association's canteen one day each week.

[75] Dr Guazzo and Dr Tuffley think that the Plaintiff is capable of full time work of a sedentary or light nature. Dr Tuffley is of the view that he is capable of performing the work of a courier provided that it did not involve weights greater than a particular range for a certain time each day, something which seems to be taken from a United States Department of Labour publication. Dr Lewis had a somewhat more pessimistic view of the Plaintiff's residual earning capacity in his report. He says that he is not capable of returning to the work of a courier driver or any work of a driver involving the lifting of any significant weights or which would involve his getting in and out of trucks on a constant basis.

[76] Dr Lewis pointed out the Plaintiff had attempted to do the work of a courier since the accident and found that he was unable to do so.

[77] A video was tendered in evidence. Each of the doctors had seen this and each indicated that having seen it, each adhered to his previous views. I watched the video. In most of the activities in which the Plaintiff engages on the video, he appears to be moving freely although there are times when a limp is visible. The Plaintiff limped whilst in court. The activities are not particularly strenuous and did not persist over very significant periods.

[78] Miss Williams, an occupational therapist has prepared a very extensive report. She addressed the Plaintiff's suitability for a variety of tasks including that of a courier. She thought that his employability was limited to part-time light work. However I think this matter largely turns upon the medical evidence.

[79] There is evidence that the Plaintiff was motivated to return to work as soon as possible. Mr. Cunningham a physiotherapist , gave evidence to this effect but on the other hand, Miss Hemmett was of the view that at least during part of the time

she was responsible for supervising his rehabilitation program he exhibited some lack of enthusiasm. The Plaintiff says that he considered that those with whom he dealt at the CRS were somewhat unrealistic in some of the positions which they were encouraging him to apply for. He said that he believed that he could not carry out those tasks having regard to his experience when he returned to work. He was also, it would seem, concerned about the expense associated with prolongation of the rehabilitation course.

[80] It is I think, also clear that the Plaintiff found a situation which suits him, both in terms of the tasks which he performs and his family arrangements and needs.

[81] I am satisfied that the Plaintiff is capable of doing more than he currently does. I accept that he would be capable of some full time work of a light or sedentary nature but do not accept that courier work would be within his capacity on a full time basis. Largely I accept Dr. Guazzo's assessment of his capacity. He cannot perform heavy work or work that requires regular lifting of significant weights or bending or twisting. I accept Dr. Lewis's opinion on the specific issue of his capacity for perform courier work and am satisfied that he cannot do this. It seems to me that even if Dr Tuffley's assessment were to be accepted, the rather specific requirements of the work which the Plaintiff in his view is capable of carrying out would, I apprehend, not be readily available or at any rate, the Plaintiff would be a rather unattractive proposition to an employer when compared to other fully able competitors.

[82] I do not regard the Plaintiff as a malingerer and accept that he has suffered a good deal of pain from his back, particularly after his return to work when he was required to perform the tasks which he describes in his quantum statement. However, on my assessment he is capable of doing a good deal more than he does at present.

[83] The Plaintiff suffers a good deal of pain and discomfort and there have been significant limitations imposed upon his activities and pursuits. I do not regard what I saw in the video as inconsistent with the complaints which he makes, although as I have indicated, he appeared to be moving at times more freely than he was in court.

[84] In the assessment of the various heads of damages there must be taken into account the pre-existing disability and the fact that the Plaintiff would in any case have had symptoms from the increasingly degenerative spine and would not have been able to continue in the work he was doing at the time of the accident once he reached 45.

[85] I assess the Plaintiff's general damages in the sum of $30,000.

[86] So far as lost income is concerned the Plaintiff received a net income of $685 per week and there is evidence that Powell, who can be regarded as working in a comparable position, now earns some $753 per week net. The Plaintiff takes as a starting point, based upon these figures, a sum of $137,000 for past economic loss. From this a figure of about $30,000 is deducted representing the income that the Plaintiff has received since that time. However, in my view, this would overstate the Plaintiff's true loss of earnings in view of what I have found about his residual earning capacity. Miss Hemmett gave evidence of his failure to undertake the

various activities which were expected of him during the rehabilitation program and his significant dilatoriness in registering at the employment agencies. For at least a significant part of the time between when he commenced with CRS and the present he should be regarded as not having taken adequate steps to exercise his full earning capacity. The Plaintiff has in the period since he first approached CRS, earned a little over $16,000 net. This is over a period of three years. It is impossible to approach the calculation of past economic loss on the basis of any precise mathematical calculations. Some allowance should be made for contingencies including a small allowance for the risk that the injury he sustained on the morning of 3 August may not have healed. I think making due allowance for the income which the Plaintiff ought reasonably to have earned during this time, an award of $65,000 would be reasonable.

[87] The Plaintiff has received by way of income substitution, a total of $20,832. I allow interest at five per cent for 3.7 years on $44,168 producing a figure of $8,171.00. I allow past loss of superannuation on the sum of $65,000 at the rate of seven per cent which produces a figure of $4,550.

[88] In assessing the Plaintiff's future loss of earnings it will be necessary apart from allowing for the residual earning capacity to which I have already referred to make some allowance for general contingencies and vicissitudes. It must however be borne in mind that the Plaintiff is a man without any skills or qualifications and thus the loss of the capacity to engage in work of a heavier nature and of the more physical type from which he is excluded is likely to impact more severely upon his capacity to earn an income and be more productive of economic loss to him than would be the case with many other members of the community. Nonetheless the remains capable of engaging in a wide range of employment. I assess the Plaintiff's weekly loss of income at some $250. The present value of such a loss over the next 15 years is $137,601.

[89] I allow loss of future superannuation at nine per cent on this sum producing an amount of $12,384.

[90] The Plaintiff makes claims for past and future *Griffiths v Kerkemeyer* damages.

[91] Section 315 of the *WorkCover Queensland Act* 1996 substantially limits the right to claim damages under this head.

*"**Gratuitous Services***

***315.** A court can not award damages for the value of services of any kind--*

(a) that have been, or are to be, provided by another person to a worker; and

(b) that the services of a kind that have been, or are to be, or ordinarily would be, provided to the worker by a member of the worker's family or household; and

(c) for which the worker is not, and would ordinarily not be, liable to pay".

[92] it seems to me that the only amount which is clearly recoverable is the sum of $449.70 for past pool maintenance expenses.

[93] There is a claim for future pool maintenance in the sum of $10 **per week**. This substantially exceeds the amount claimed up until the present which reflects an amount of about $121 per year. I allow a figure of $2,000 for future pool maintenance.

[94] The Plaintiff is entitled to recover special damages in the sum of $3,048.50 representing amounts refundable to WorkCover and $3,875.05 under the *Fox v Wood* principle. There is a refund to CRS of $3,076.40.

[95] There are claims for past medication, and travelling expenses which appear in Exhibit 1. These amounts appear to have been projected forward from December (when Exhibit 1 was tendered) and are not respectively $686.00 and $137.20 and I allow these amounts. There is a claim for $835 for medical expenses in respect of which he has not recovered the whole benefit from Medicare and I allow this sum.

[96] There is a claim for interest in the sum of $178.93 in respect of past special damages which I allow. The Plaintiff will have to pay an increased amount for his medication (pain killers which are prescribed by Dr Hickey) and the amount which is claimed for the future is some $5 per week for 15 years producing a figure of $2,775. Travelling and medical expenses are claimed for the future. He will undoubtedly require ongoing medication and will have to obtain prescriptions for this. The total amount claimed is in excess of $7,000. I think that discounts have to be applied to this figure as the Plaintiff in any case during this time would have been likely to have suffered increasingly painful symptoms. I make allowance for the possibility of surgery in the future and allow under all of these heads, the sum of $5,000.

[97] The total of these sums is $276,992.87. From this has to be deducted the amount paid by WorkCover, a total of $19,265.89.

[98] There will be judgment for the Plaintiff against the Defendant in the sum of $257,726.99 with costs to be assessed.