SUPREME COURT OF QUEENSLAND

CITATION:	*Bell v Mastermyne Pty Ltd* [2008] QSC 331
PARTIES:	**SIMON ANTHONY BELL** (plaintiff) **v** **MASTERMYNE PTY LTD** ACN 069 346 247 (defendant)
FILE NO/S:	Rockhampton 463 of 2001
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	18 December 2008
DELIVERED AT:	Rockhampton
HEARING DATE:	9 and 10 December 2008
JUDGE:	McMeekin J
ORDERS:	**1. There will be judgment for the plaintiff in the sum of $551,233.27.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – damages for loss of future earning capacity assessed on the basis that plaintiff had limited work in the mining industry before the accident – where the plaintiff's injury was an aggravation of pre-existing condition - whether the plaintiff would have otherwise continued working in the mining industry *WorkCover Queensland Act* 1996 (Qld), s 315 *Calvert v Mayne Nickless Ltd* [2005] QCA 263, followed *Hopkins v WorkCover Queensland* [2004] QCA 155, followed *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638; [1990] HCA 20, followed *Najdovski v Crnojlovic* [2008] NSWCA 175, distinguished *Purkess v Crittenden* (1965) 114 CLR 164 at 168, followed *Smith v Topp & Anor* [2003] QCA 397, followed *Wright v Thomas Borthwick & Sons (Australia) Pty Ltd* [2008] QSC 86, cited
COUNSEL:	M Grant-Taylor SC for the plaintiff

B Harrison for the defendant

SOLICITORS: Shine Lawyers for the plaintiff

Swanwick Murray Roche Lawyers for the defendant

[1] **McMEEKIN J:** Mr Bell seeks damages for a back injury suffered in the course of his employment with the defendant on 27 September 1998. Mr Bell was then aged 26 years.[1] Liability is not in issue.

Issues

[2] The significant issues agitated were:

(a) The credibility and reliability of the plaintiff's evidence;

(b) The significance of pre-accident symptoms of back pain;

(c) The likely impact of pre-existing degeneration in the spine;

(d) The extent of the plaintiff's pre-accident earnings;

(e) The likelihood of the plaintiff obtaining and maintaining employment in the mining industry; and

(f) The extent of the plaintiff's residual earning capacity.

Circumstances of the injury

[3] Mr Bell was manhandling heavy cables when he experienced a sharp pain in his left buttock and the back of his upper left leg.[2] Dr Boys adds further detail. He recorded a history given to him in May 2001 of Mr Bell 'kneeling and lying on [a] conveyor' when Mr Bell attempted to lift a cable and its connecting plug, a weight of approximately 40 to 50 kilograms. [3]

Nature of injury

[4] The orthopaedic surgeons are agreed that Mr Bell has suffered an internal derangement of the L5/S1 intervertebral disc. This has occurred in the presence of pre-existing degenerative change in the lumbar spine.

Treatment

[5] The plaintiff had initial treatment from a chiropractor, then a general practitioner, eventually saw a specialist orthopaedic surgeon in January 1999 in Brisbane and was referred to a physiotherapist before returning to his home at Bilpin, NSW. He there attended on a general practitioner who referred him to an orthopaedic surgeon, Dr Bentivoglio. He was prescribed anti-inflammatory and pain relieving medication. He eventually underwent an epidural with hydrocortisone and local anaesthetic injection. These treatments were unsuccessful. In June 2002 he underwent a pain management course at the Penrith Hospital. The course apparently assisted him in coping with his painful symptoms.[4] He continues to take medication.

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1 Born 29 December 1971

2 Exhibit 1 para 49.

3 Exhibit 53. See also Exhibit 63 at "Notes to Question 49"

4 Exhibit 1 para 73

Assessment of the plaintiff

[6] The plaintiff's credit was strongly attacked. The principal basis of the attack was the plaintiff's lodgement of false income tax returns and his failure to disclose to the defendant, until the day before trial, what he claimed to be his true income.

[7] The plaintiff gave evidence that in the four years prior to the subject accident he had received cash in the hand for work that he performed that was not declared to the Australian Tax Office. He estimated that in the financial year ended 30 June 1995 he received approximately $10,000, a similar sum in the following year, and that in the 1997 year he received approximately $15,000. In the financial year ended 30 June 1998 he claims that he earned approximately $5,000 not declared.

[8] Mr Harrison of counsel, who appeared for the defendant, submitted that I should not accept the plaintiff's estimates of the cash that he earned. He submitted that the plaintiff had a strong motivation to maximise the cash that he was supposed to have earned and not declared so as to make his pre-accident earning capacity look more impressive. The income disclosed in his income tax returns was at a very modest level. He pointed too to the complete lack of any detail as to how the sums said to have been earned were calculated. Mr Bell said in his evidence that there was a basis to the amounts estimated but he was unable to recall what figure was assumed over what period.[5] He claimed that he and his solicitors had carried out the exercise 18 months before, which was contrary to the clear implication in Mr Grant-Taylor's questions that the disclosure had been made to his solicitors only two days prior to trial.[6]

[9] The fraud went beyond the Australian Tax Office. Mr Bell swore to the accuracy of a Notice of Claim for Damages form lodged to commence this claim on 27 June 2000. The document misstates the pre-accident income by not revealing these cash amounts.[7] Mr Bell accepted that he was aware of the importance of the accuracy of his earnings history to the defendant.[8] He persisted in the lie in a later Statement of Loss and Damage of 16 March 2006,[9] and at a settlement conference held on 16 May 2007,[10] and in a supplementary statement dated 4 July 2008.[11] Interestingly he claimed to have discovered the "missing income" "only after going back through [his] work records and diaries" at about the time of and before the settlement conference.[12] The failure then to correct the record for the defendant's benefit was a deliberate decision. No records were produced.

[10] Further, Mr Harrison pointed out that what little independent evidence there is does not seem to support the plaintiff.

[11] For example a resumé that had been prepared for the purpose of assisting the plaintiff to obtain work in mines in Central Queensland referred to the plaintiff working for a firm 'DB Pavement' only in 1996-97.[13] In his statement the plaintiff

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5 T1-30/30 -31/10

6 T1-9/35; 1-17/10; 1-31/5. I mean no criticism of Mr Grant-Taylor. He was plainly unaware of any earlier disclosure, if indeed there was any.

7 Exhibit 63

8 T1-16/55-17/5

9 Exhibit 64 and the cross examination at T1-16-18

10 T1-18/10; 1-29/20

11 Exhibit 3

12 T1-18/5

13 See attachment SAB 4 to Exhibit 1 at p 31 of the exhibits.

claimed that he worked for DB Pavement in the 1994-95 year.[14] There is no good reason why the plaintiff would have minimised his work history when applying for employment.

[12] Another example concerns the plaintiff's evidence of his involvement with a company, Modern Image Pty Ltd as a "gopher". The plaintiff's statement records that at the end of 1994 he commenced a business venture with a school friend trading under the name of Modern Image Pty Ltd. A third partner was involved. The plaintiff contributed $25,000 as start-up capital, he having obtained that sum after applying for and obtaining a personal loan in that amount. He records that sales were 'quite good' in the period between January and June 1995. Sales were said to be 'reasonably good' in the following financial year, yet further capital was required. The plaintiff records that he borrowed $5,000 from his grandmother to supply that capital. He alleges that he was actively involved in the business in the 1996 year. By late 1996 he says it became obvious to him that his partners were not accurately accounting to him for monies earned by the business. As a result he sought to be released from the business and he assigned his partnership to an unnamed and now unknown third party. The debt relating to his capital investment, however, was not assigned and remained his responsibility. This occurred at the end of 1996.

[13] There are a number of features of this account which are distinctly odd. To walk away from a $30,000 investment without complaint or attempted recourse against men that you claim are cheating you, and in which you had invested years of effort, if true, says something about the plaintiff's attitudes and character. An inability to name the person to whom the business was assigned is distinctly odd. Further, one might expect that with so significant an investment the plaintiff would be able to produce documentation supporting his account. None is produced. One might expect there to be some reflection of his business activities in his personal income tax return. All that is shown is that in the 1995 return he was paid wages by Modern Image Pty Ltd of $3,038 with tax deducted of $492.50. No claim is made for any deduction by way of interest or indeed any statement that the plaintiff was involved in such a business venture as a principal. There is no good reason why Mr Bell would not claim interest if properly deductible. On the plaintiff's account his involvement in this business continued throughout the 1996 and into the 1997 financial years yet there is no reference to any income from the business or any reference to any interest expenses being deducted. While I accept that there was such a business I am very dubious as to how busy it kept the plaintiff.

[14] As well Mr Bell's description of his mining work was not accurate. He had travelled to Central Queensland with the purpose of obtaining well paid work in the mines. He had difficulty obtaining work at first but eventually secured occasional work on 14 July 1998. He had work thereafter with three different employers before suffering his injury a little over two months later on 27 September. Mr Bell claimed that the defendant was his preferred employer. His statement tendered says: "As time went by, it became more and more difficult to juggle shifts I was being offered by these three employers. I recall I would attempt to make the shifts offered by Mastermyne a priority… I recall that over time I was receiving comparatively more work from Mastermyne to the extent that some weeks were full time….I also felt the fact that I was given consistent and increasing work over a period of three

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[14] See para 5 of Exhibit 1.

months was an indication I was going reasonably well."[15] Examination of the pay slips from Mastermyne[16] does not bear out these claims. The hours worked were as follows:

- Week ending 26 July 1998 – 37 hours
- Week ending 20 September 1998 – 40 hours
- Week ending 27 September 1998 – 24 hours
- Week ending 4 October 1998 – 9 hours
- Week ending 11 October 1998 – 52.5 hours

[15] Thus if one takes 40 hours per week as a full time week then Mr Bell had one almost full week of work with Mastermyne in July no work at all then for seven weeks through August and for the first two weeks of September, before obtaining one and one- half week's work before injury. There is then one days work and again a full week's work. On any view that is hardly "consistent and increasing work over three months".

[16] I have concerns too about apparent discrepancies in the evidence presented concerning his symptoms which I detail below.

[17] Mr Bell admitted dishonesty in his dealings with the Australian Tax Office. He persisted in that dishonesty in his dealings with the defendant. Combined with this are the unsatisfactory aspects of his evidence I have mentioned. These matters cause me to have considerable reservations about acceptance of the plaintiff's evidence where it is not independently supported.

[18] Mr Grant-Taylor of senior counsel who appeared for the plaintiff submitted that despite the inevitable concerns about the plaintiff's credit, that should have no impact on the assessment of the issues in the case. That is so, Mr Grant-Taylor submitted, because no issue relevant to the assessment turned on issues of credit.

[19] With respect, that is not right. The assessment of damages for personal injury depends to a very large extent on a plaintiff's honest reporting - of his or her symptoms; of their impact on the plaintiff's life; of pre-existing problems; of the genuineness of effort to regain employment after injury; and of their capacity to maintain employment. These are all difficult issues for a defendant to thoroughly investigate and test. In truth no-one knows what level of pain an individual experiences and what impact that pain has on any particular plaintiff's capacity to maintain their activities. Here it is known that the plaintiff was prepared to be dishonest for his financial advantage. In my view that permeates every aspect of the case.

[20] Quite apart from issues of credit and reliability it appeared to me that the plaintiff was remarkably apathetic. His evidence was given in a monotone. He displayed not the slightest interest in attempting to recall how it was that he had arrived at his assessment of the cash monies he had earned – something I would have thought that he would have put a deal of thought into before entering the witness box. Similarly his acceptance of the performance of his previous solicitors over a period of three

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15 Ex 1 paras 47-48

16 Ex 1 Attachment SAB 15

years – where the solicitor refused to take over 70 telephone calls – demonstrates the same apathy.[17]

[21] That this is not a product of the subject injury[18] is evidenced by his attitude to the business venture he described, where $30,000 of his and his relatives' money was lost. To simply assign his interest in the business and walk away without any attempt at redress is in accord with this attitude. It is evident too in the time it took Mr Bell to pursue the career path suggested to him by his friend Mr Christie – several months seem to have gone by with Mr Bell in very modest circumstances before he eventually determined to move to Central Queensland.

[22] This attitude is relevant to the assessment of economic loss and particularly to his attempts at re-employment following the subject injury. Despite the passage of 10 years Mr Bell failed to secure any employment at all. Mr Bell claimed that "hundreds" of phone calls were made[19] but without any attempt at an alternative approach despite the demonstrable and predictable lack of success of this approach.

Pre-accident symptoms

[23] Radiographs of the lumbo-sacral spine taken on 12 October 1998 showed established narrowing of the L5/S1 disc space which, according to Dr Boys, reflected 'long-standing pre-existing pathology at this level'.[20] The significance of this degeneration was the subject of some debate in the evidence.

[24] Before turning to that debate it is necessary to examine the symptoms of back pain prior to the subject accident. The plaintiff says that there were two such episodes. The first occurred in early 1996. He says he had some soreness in his lower back on both sides following 'some heavy days of work operating a chainsaw'. Other evidence suggests that he was pruning trees. His recollection is that he had 'a couple of sessions of physiotherapy' and the pain resolved within a couple of weeks.[21]

[25] The second episode occurred near the end of 1997. His recollection of the event, according to his statement, is somewhat vague. He states: 'I seem to recall this followed an incident where I was lifting a heavy table at work'. He attended upon a physiotherapist who performed massage treatment which reduced some of the soreness but left the plaintiff with an ongoing 'niggle' which he found to be an annoyance. He attended upon an osteopath in or about March 1997 whose treatment proved successful. The plaintiff said that there was complete resolution of symptoms 'within about two weeks'.[22] As to the speed of recovery I note that the plaintiff had earlier given a different version – that he had "fully recovered very quickly after it [ie the injury] occurred".[23] Evidently in the meantime the defendant had discovered medical records of ongoing treatment that presented the true picture. The plaintiff says that he had no further symptoms of back pain between March 1998 and the work incident on 27 September 1998.

[26] The significance of these earlier incidents of back pain was in issue. Mr Grant-Taylor contended that there was nothing to show that they were other than simple

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17 Exhibit 67 para 11

18 I note the evidence of Ms Cox that Mr Bell had no drive or energy in the early period after the incident – T1-91/35 (wrongly numbered as 2-91)

19 T1-49/25

20 Exhibit 54 at p 1.

21 Exhibit 1 at para 67.

22 Exhibit 1 at para 68.

23 Exhibit 63 "notes to Question 59".

muscular strains and unrelated to the degenerate back. He pointed[24] to the opinion of Dr Gillett where he notes that the plaintiff had "a musculature back problem in 1997".[25] It is evident however that Dr Gillett had the wrong history at that time. He notes that the plaintiff was injured "reaching above his head", had "muscle pain", and took "two to three weeks to recover". All that is wrong. As well he was unaware at that stage that there had been two episodes of back problems.[26]

[27] There are four features of the evidence against the proposition that the plaintiff had simple muscle problems. The first is that simple muscular strains tend to settle within six weeks.[27] Here Mr Bell seems to have had symptoms continuing for a period of about 10 weeks before they eventually settled.[28] Dr Gillett said, after he was given a more detailed account, that the history "was very supportive of existing pathology".[29] Dr Boys expressed a similar opinion.[30]

[28] Secondly the established degenerative change which would have been present at the time of these events is known to give rise to episodic mechanical lower back pain.[31]

[29] Thirdly, the events described do not seem to be particularly out of the ordinary – pruning trees with a chainsaw and lifting a table. The plaintiff has not volunteered any information to suggest that the postures he was required to adopt or the weights that he was required to cope with were particularly demanding. It would have been in his interests to do so. Only he knows the true situation. I assume that nothing that he said would have helped his cause.

[30] Fourthly, it is hardly common place for a 25 year old man to have required treatment for two back complaints in two years.

[31] In my view the probabilities favour the view that these early incidents of back pain suffered when the plaintiff was only aged 24 and 25 years are indicative of a developing problem in the plaintiff's lower back.

Impact of degeneration

[32] The extent of the degenerative changes evident in Mr Bell's spine was unusual in one so young. Dr Gillett thought that about 20 per cent of the population might show radiological changes of degeneration in their 20's. Twenty per cent of the population, however, would not necessarily have symptoms. [32]

[33] Dr Boys expressed the opinion that whilst it was difficult to be precise he considered that Mr Bell would 'probably be having problems that would limit him doing a lot of heavy lifting by about 40 years of age'.[33] Whilst Dr Boys conceded that there was a degree of speculation involved his opinion involved an exercise of

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24 Exhibit 71 at para 9
25 Exhibit 4 at p 3
26 T2-32/50
27 Dr Gillett: T2-37/15; Dr Boys: T2-46/10
28 The claimed settling of symptoms depends entirely on Mr Bell's account. Whilst I am wary of accepting his assertion it seems unlikely, given his character, that he would have travelled to Central Queensland to pursue mining work with an ongoing problem in his back.
29 T2-34/20
30 Exhibit 55
31 For example see the opinion of Dr Boys – Exhibit 54 at p 2.
32 T2-34/50.
33 Exhibit 55. See too the opinion of Dr Gillett at Exhibit 69 p2

judgment based on the expert's knowledge of the natural history of such conditions and their impact on individuals.[34]

[34] Both orthopaedic surgeons agreed, assuming that the subject incident had not occurred, that Mr Bell would not necessarily have suffered a discal protrusion in the course of his life. Plainly enough he was at risk of such a protrusion. He had a much more significant risk of suffering mechanical back pain from time to time, especially if he attempted to carry out heavy manual work.

[35] Plainly, Mr Bell's vulnerability to back problems, especially should he engage in heavy manual work, is relevant to the assessment of damages. Whilst the plaintiff bears the overall burden of proof it is well established that an evidential onus comes on to the defendant on this issue: see *Watts v Rake* (1960) 108 CLR 158; *Purkess v Crittenden* (1965) 114 CLR 164 at 168; *Hopkins v WorkCover Queensland* [2003] QSC 257 and on appeal [2004] QCA 155; *Smith v Topp & Anor* [2003] QCA 397 at [38]. Those cases stand for the proposition that where proof as to the pre-existing condition and its likely future effects are necessarily unobtainable the Court must assess the probability that an event would have occurred or might occur and adjust damages accordingly to reflect that degree of probability.[35]

[36] Where the orthopaedic surgeons concede, as they must in cases of spinal degeneration with only modest pre-accident symptoms, that there is a chance the plaintiff might go through his whole life without significant problems, it seems to me that the necessary proof as to the likely future effects of the established pre-existing condition is necessarily unobtainable. I must assess the prospect of the degenerative condition interfering with the plaintiff's earning capacity and adjust the damages accordingly.

Crohn's disease

[37] In August 2005 the plaintiff was diagnosed as having Crohn's disease. He was admitted to Tweed Hospital with severe abdominal pain in that month. The disease is a chronic condition causing inflammation of the gastro-intestinal tract. It may lead to complications if not treated adequately. There is no cure. The aetiology is unknown. Despite treatment, recurrences of severe symptoms can occur. Mr Bell has had one such recurrence.

[38] A gastroenterologist, Dr Abdool, was called. He saw Mr Bell on 1 November 2005. In his opinion Mr Bell would not have been able to work, performing heavy work, from August 2005 and when he saw him on 1 November 2005. There were recurrence of problems in early 2006 and Dr Abdool was of the opinion again that Mr Bell could not have undertaken heavy work through February to May 2006.[36]

[39] Even if compliant with his medication and treatment, the plaintiff is vulnerable to a recurrence of the symptoms of the Crohn's disease. The possibility of a recurrence remains lifelong. Dr Abdool estimated the possibility of a recurrence at 10 per cent.[37]

Pre-accident employment history

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34 T5-45/20.

35 See particularly *Hopkins v WorkCover Queensland* [2004] QCA 155 per Mackenzie J at [34]; *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 at 643.

36 Exhibit 61.

37 T2-41/25.

[40] The plaintiff's income tax returns suggest a poor work history prior to the accident. Mr Harrison has performed an analysis of the tax returns and produced the following table:

Description	**1994/95** **$**	**1995/96** **$**	**1996/97** **$**	**1997/98** **$**
Taxable income	$12,507	$3,679	$14,526	$6,390
Tax deducted	$3,626	$581	$3,537	$639
Net	$8,881	$3,098	$10,989	$5,751
Average net per week	$170.79	$59.58	$211.33	$110.59

[41] As I have described, the plaintiff contends that he earned substantial monies by way of cash in the hand which he did not declare in his income tax returns. He claimed that he was 'incredibly busy' through these years whilst working both in an employed and self-employed capacity as well as working in his mother's business for which he did not receive a wage. His statement reads: 'If the sun was shining, I was working'.[38]

[42] The inability of the plaintiff to explain how it was that he arrived at the figures that he proffered and the vagueness of his evidence in the description of the detail of the work that he claims to have performed causes me to doubt that his earnings were as significant as he now maintains.

[43] As Mr Harrison submitted, the plaintiff had good reason to exaggerate the level of his cash earnings. Nonetheless it seems to me unlikely that the plaintiff would have made up a story of undeclared cash earnings unless there was some truth to it. However, I very much doubt that the plaintiff has any idea what amount he in fact earned. I note that the plaintiff says that between February 1997 and his departure for Central Queensland in early 1998 he assisted his mother in her business on an average of three to four days per week for which he did not receive a wage. I note that the plaintiff says that his mother looked after him 'financially in the form of payment of certain of my bills and giving me accommodation'.[39] This is some 9 years after he commenced in the work force. This reinforces me in my view that the plaintiff was not in receipt of any significant income over and above that shown in his income tax returns. I will assume that his earnings were modestly above those shown in the income tax returns.

[44] There is another feature of his work history that is relevant. As Mr Harrison pointed out, the plaintiff had not enjoyed any great longevity in any one employment in his 10 year working history prior to the subject accident. His longest period of employment appeared to be the first position that he obtained on leaving school where he worked as a groundsman at a golf club for about 12 months.[40]

[45] In summary, in the 10 years after leaving school the plaintiff had not obtained any qualifications that had enabled him to maintain consistent employment, had not persisted in any one employment save for the groundsman's job for as long as 12

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38 Exhibit 1 at para 19.

39 Exhibit 1 at para 18.

40 T1-39/50-40/30

months, had obtained sporadic employment mainly in labouring fields and had earned only a modest income.

Employment in the mining industry

[46] In early 1998 the plaintiff decided, along with his de facto partner, Ms Samantha Cox, to travel to Blackwater in Central Queensland to see if he could obtain work in the mining industry. He understood from his good friend, Mr Mark Christie, an electrical engineer, that there were opportunities in the region and that workers were well paid. Ms Cox operated a mobile massage business at the time and she anticipated that the combination of the heavy labouring involved in the work at the mines along with the excellent incomes that miners received would provide a good environment for such a business.

[47] Before moving to Blackwater the plaintiff attempted to obtain employment by telephoning mines and subcontractors in the region. His recollection is that he was asked about his experience in mining and 'received a fairly short response when I advised that I did not have any relevant experience'. He sent his resumé on three or four occasions but this did not lead to any further contacts. He says that it 'became obvious to me that I had very little chance of obtaining employment in the region without physically being there'.[41] Despite travelling to Blackwater in early 1998 Mr Bell did not obtain any employment until 14 July of that year. He applied for work with a variety of employers but was unsuccessful. He undertook the general induction program for both underground and surface operations at a coalmine and successfully completed a course of instruction in spontaneous combustion and a practical fire extinguisher training course. Statements of attainment in respect of the induction courses were obtained by him on 1 May 1998. He says that he expended about $1,500 in obtaining those qualifications. Mr Bell obtained a generic induction passport on 9 June 1998.

[48] Mr Bell says that in the meantime he obtained general labouring work, generally for cash in the hand. He nominates only one such employer, a local farmer whom he cannot identify, who he says kept him busy 'for a number of weeks'.[42] Apart from that he appears to have earned about $5,400 from performing some refurbishment work at the Capricorn Hotel and carpentry-type work for the Blackwater Hospital.

[49] As I have mentioned, Mr Bell worked for three employers connected with the mining industry – they were Mastermyne Pty Ltd, Quality Coating and Colrok. The 1998//99 return[43] shows that the following incomes were earned from the respective employers:

Mastermyne	Gross $4,726	Net $3,214
Quality Coating	Gross $1,228	Net $939
Colrok	Gross $4,222	Net $2,432
Total	$10,176	Net $6,585

[50] Assuming employment over a 12 week period from 14 July to 9 October 2008 produces a net weekly average of $584.75.

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41 Exhibit 1 at para 28.

42 Exhibit 1 at para 34.

43 The return is attachment SAB 11 to Exhibit 1.

[51] Thus by 9 October 1998 when the plaintiff finally ceased work he had yet to obtain work with a mine operator and was obtaining sporadic work with contractors associated with the mines. Given that pay records show that the plaintiff did earn as much as $947 net per week[44] then the net weekly average suggests that the plaintiff worked about one half of the time over the 12 week period of employment.

Maintaining Employment in the Mines

[52] The assessment of past economic loss depends crucially upon assessment of the probabilities of the plaintiff obtaining and maintaining employment in the mining industry. The analysis set out above shows that he had not obtained full time or even regular employment by the time he was injured. Was he likely to do so?

[53] There is no doubt that work has become increasingly available in the mining industry over the last 10 years. That is evidenced by the report of Mr Johansen.[45] He expressed the opinion that employees in their mid-20's through to their mid-30's were the most sought after workers in the industry. In his view there had been 'strong demand' for employees and contractors and Mr Bell had good transferable skills that could have been used in a number of areas within the mining industry. That opinion was based on the resumé prepared by Mr Bell in 1997-98. The view I take of Mr Bell's capacities is that they are probably more limited than his account would have it.

[54] The real issue, however, is not whether employment was available provided a worker persisted and was prepared to carry out the 'very hard work' involved in the mining industry[46] but rather whether the plaintiff was such an individual.

[55] In favour of the finding that the damages ought to be assessed on the assumption that the plaintiff would have maintained employment in the mining industry, is his preparedness to leave the life that he was accustomed to and travel to Blackwater with his de facto partner thereby disrupting her massage business that they say was reasonably successful. As well the plaintiff expended his own time, money and energy in obtaining appropriate qualifications to equip him to obtain employment. He was successful in getting work, albeit that it took him some several months from when he arrived in the area and albeit that the work was then sporadic.

[56] In my view however the probabilities are against such a finding. Firstly, apart from the employment he had in his first year after leaving school, the plaintiff had not maintained himself in any one employment for so long as 12 months.

[57] Secondly, his earnings record was extremely modest and probably better described as poor.

[58] Thirdly, he was not work-hardened. Attending to the daily and weekly grind of working is a habit and I am not at all confident the plaintiff had that habit in 1998.

[59] Fourthly, hard manual labour is not for everybody. The fact that the plaintiff had survived some six weeks of such work over a 12 week period does not establish that he was capable of maintaining such employment in the longer period.

[60] Further, as Mr Harrison submits, the plaintiff had demonstrated a capacity to pursue qualifications in the past but yet not followed them up with employment or

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44 Attachment SAB 14 to Exhibit 1.

45 Exhibit 34.

46 That is the plaintiff's description – see T1-10/25.

sustained employment. His resumé from 1997-98 speaks of having a Class 3A driver's licence, a forklift and overhead crane licence, as well as having completed courses in small business management and permaculture/planning and construction. These qualifications had minimal relevance to the work that he performed pre-accident. A road paved with good intentions unfulfilled is an unlikely path to permanent employment in very hard labouring work.

[61] Whilst the plaintiff maintained that he had no difficulty with that very hard work, no evidence was led from any person familiar with his performance over the 12 week period that he attempted to obtain work within the industry describing how it is that the plaintiff performed.

[62] Further, it is evident from his own experience that jobs were not so easy to come by in 1998. There is no direct evidence that he had any prospect of obtaining full-time work with a contractor let alone a mine employer.

[63] In weighing up the probabilities it is necessary also to bring into account the plaintiff's degenerate back condition. Given that the plaintiff had suffered months of symptoms following the movement of a table in, so far as is known, unremarkable circumstances and given the state of his degenerate spine, the probabilities seem to me to strongly favour the prospect that he was likely to have what Dr Boys described as 'mechanical back pain' from time to time, even if it was not so debilitating as to preclude labouring work entirely. The harder the work and the longer that he persisted with it the more likely he was to suffer problems.

[64] Finally my own assessment of the plaintiff, doing the best I can, is that he was not endowed with any great drive and energy. The glimpses that I have into his past are uninspiring.

[65] I have no great confidence that the plaintiff would have persisted with the mining work any more than he had persisted in any other work to that stage of his life. The probabilities seem to me to favour the view that the plaintiff would have found the work uncongenial in time.

[66] The task here is to assess the plaintiff's earning capacity upon a false hypothesis, namely that the plaintiff had not been tortiously injured. That requires that I make an estimate as to the chances of the plaintiff persisting, obtaining then maintaining employment in the mining industry over the more than 10 years that have elapsed since the subject injury*: Malec v JC Hutton Pty Ltd* [1990] HCA 20; (1990) 169 CLR 638.

[67] I would rate the plaintiff's prospects of obtaining and maintaining employment in the mining industry at no better than 10 per cent.

Residual earning capacity

[68] All witnesses are agreed that Mr Bell is precluded from employment in medium to heavy labouring and the like occupations which would include work as an underground or surface miner.

[69] It is a striking feature of the case that the plaintiff does not contend that he does not have a residual earning capacity. He says that he has made 'hundreds' of telephone calls to prospective employers. Presumably he held the view that he had the physical capacity to perform whatever employment was involved. In not one of those approaches does he contend that he was knocked back because of his back condition.

[70] The expert evidence is consistent too in recognising that Mr Bell has a residual earning capacity. This was evident to Dr Boys in May 2001 when, after acknowledging that the lower back condition 'would preclude labouring employment' he said that the condition 'would not preclude alternative sedentary employment with sensible restrictions placed upon bending and lifting activities.'[47] Dr Gillett spoke of a need for 'retraining to a light sedentary occupation with the ability to change position on a frequent basis'.[48] The thrust of Ms Stevenson's report of 2 June 2006 seems to be that she acknowledges a residual earning capacity[49] but does not identify any particular field. Rather she reports those areas in which Mr Bell may have an interest. I note that she records that Mr Bell claimed to have 'reasonable office skills'.[50]

[71] I found Mr Cameron Fraser's evidence helpful. He works in the field of rehabilitation and has substantial experience in placing persons in employment who have been injured and who have been chronically unemployed. He opined that Mr Bell was capable of work of a sedentary and light nature and suggested employment in the areas of clerical, sales and service occupations. Mr Fraser reported that Mr Bell would be physically capable of full time work as a water inspector, an occupation that the plaintiff said he was interested in, and that the gross average weekly full time income for such a person is $1,228.[51]

[72] The plaintiff has not exercised this residual earning capacity in the 10 years since the accident. I am satisfied that he has had that capacity at least since he saw Dr Boys in June 2001.

[73] The principal reason why the plaintiff has not obtained employment is that he has not gone about obtaining employment in any meaningful way. I have detailed above the plaintiff's experiences in attempting to obtain work in the mines. He learnt then, if indeed it is not an obvious fact, that merely telephoning an employer and informing them that he lacked experience was not a productive way of attempting to obtain work.[52] Despite that experience the only thing that the plaintiff has done since his injury is to telephone employers. They each seem to have learnt in the course of the call that the plaintiff lacks experience for whatever job was involved. No evidence was led as to the attempts made, if any, to stress any strengths that the plaintiff may have had.

[74] Mr Bell admitted in the course of his cross-examination that he had not made so much as one written application to an employer, that he had not prepared any fresh resumé since 1998, that he had not presented himself at any place of employment or to any employer seeking work. So far as the evidence shows the plaintiff has not gathered referees to support any employment application. He has not travelled to any place where there might be greater opportunity of employment, something that he was prepared to do pre-accident. Apparently the township in which he lives has some 1,000 people and is about 45 minutes drive from Tweed Heads.

[75] Mr Grant-Taylor quite properly points to the courses undertaken by Mr Bell since his injury and the short stints of work he has had with friends in about 2002 as some evidence of an interest in obtaining employment. He obtained TAFE qualifications

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47 Exhibit 53.
48 Exhibit 4 at p 6.
49 She said that there were "lots and lots of options": T1-68/34
50 Exhibit 7 at p 14.
51 Exhibit 56 at p 6.
52 See Mr Fraser's comment at T2-20/1-5

in computers (July 2001) a certificate in Aquaculture Practice (December 2002) and completed a gambling services course with Jupiters Casino (June 2005). The utility of the latter two courses might be doubted. Mr Bell was told at an early stage of the Aquaculture course that he probably couldn't handle the physical aspects of such a business and that he would need $200,000 to set it up, money that he did not have.[53] The gaming services course was undertaken to equip Mr Bell with the capacity to work as a bar manager – an occupation that I would have thought was obviously very demanding for a person with a bad back, which he came to realise.[54]

[76] In October 2007 he attended at an interview and assessment with 'OnQ', a business specialising in the assisting of people with disabilities to find work. Because of problems in his relationship with Ms Cox, Mr Bell abandoned his involvement in OnQ early this year. His statement records that he intends to re-establish contact with OnQ at the conclusion of the litigation.[55]

[77] It is evident that the birth of the plaintiff's son effectively brought his job seeking to an end. Jack was born on 12 August 2005. Whilst both the plaintiff and Ms Cox maintain that had Mr Bell found work, alternative arrangements would have been made, it is evident that Mr Bell has decided that the care of Jack is his primary concern. Whilst I very much doubt that his efforts to obtain employment ever reached any great heights I am confident that those efforts eased off once his son was born. That was clearly the impression that the plaintiff gave to Ms Stephenson.[56]

[78] One does not need Mr Fraser's expertise to appreciate that the plaintiff's 'presentation at interview, his attitude, his education and vocational experience, his training and references would be most influential in relation to his capacity to secure and maintain employment in the future'.[57] A mere telephone call gives an employer no opportunity to assess the individual. Lack of experience is far from an insurmountable barrier.[58]

[79] As Mr Fraser observed, motivation is of significance in the obtaining of employment and my assessment is that Mr Bell lacks that motivation. I accept Mr Fraser's evidence that persons with similar injuries, and more severe injuries than Mr Bell and with similar education and occupational characteristics have been successfully placed in sedentary light employment.[59]

[80] If Mr Bell presented himself to employers over the telephone with similar manner to that in which he gave evidence, then it is little wonder that he has not obtained employment.

[81] In my view the plaintiff's disinclination to take the basic steps to make himself appear as a worthwhile potential employee have led to him gaining no employment whatsoever over 10 years.

[82] I turn then to assess each head of loss.

The Symptoms Suffered

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53 Exhibit 1 paras 105- 107
54 Exhibit 1 para 127
55 Exhibit 1 at para 131.
56 Exhibit 7 at p 15; T1-67/20
57 T2-15/50.
58 Mr Fraser at T2-19/40-50
59 T2-17/20-30.

[83] Dr Boys recorded the symptoms in May 2001 as constant left side and lower back discomfort exacerbated by bending and twisting activities. Increasing discomfort was reported if the plaintiff sat for longer than 20 to 30 minutes, stood for more than 30 minutes or walked for periods greater than one hour. He described variable discomfort extending to the left posterior thigh with occasional parasthesia of the left great toe.

[84] In July 2006 Dr Gillett recorded the current symptoms as follows:

> 'He has lower back pain and pain to the buttocks. He has leg pain to the back of the left thigh towards the knee but usually not beyond. On occasions he gets numbness in the big toe at times. The exacerbations are associated with the leg pain but they have reduced in frequency. They now occur once every few weeks lasting a few days. He has back pain which is constant and aggravated by the exacerbation (sic) and aggravated by bending, lifting and twisting. Sitting and standing for a length of time causes increasing symptoms. Driving is a problem and he is better in an automatic vehicle. Sleep is affected when he has exacerbation. ... Sexual function is limited by pain and position and also diminished drive.'[60]

[85] These descriptions of the severity of the exacerbations and their frequency as given to Dr Gillett are somewhat at odds with the version given in the plaintiff's statement. There the frequency of the exacerbations is said to be on "at least a weekly basis".[61]

[86] The statement seems inconsistent too with the history of improvement that Dr Gillett recorded in July 2006 that 'over the years the exacerbation of pain and severe pain have reduced and over the last 12 months and he been [sic] diligent with a spinal exercise regime which has helped reduce the frequency of his exacerbation.'

[87] That there should be improvement over time is expected - from the plaintiff simply learning what he can or cannot do, from his attendance at the pain clinic where coping techniques are taught, and from the studies that Dr Downes speaks of: "I also believe that Mr Bell's chances of getting better over the next 12 months from a statistical point of view, are very good…. We know from studies done, that over a two year period the majority of patients resolve to become quite comfortable and can cope with an altered life style quite successfully."[62]

[88] An improvement is consistent too with the claim made for past pharmaceutical expenses where it is said that the plaintiff initially purchased 'approximately five packets per month ... until approximately 2003. At that point the plaintiff's requirements for medication decreased due to him developing an ability to better deal with his physical limitations. Since that point in time the plaintiff has decreased his medication to approximately one pack per month'.[63]

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60 Exhibit 4.

61 Exhibit 1 para 76

62 Exhibit 68 Attachment KDD 50 at p3 tendered by the plaintiff on another point. See also the experience of the GP Dr Quinn that the prognosis is generally good – Exhibit 68 Attachment KDD 40 at p2

63 See Exhibit 1 SAB 28 at p 153 of Exhibit 1 (or p 110 of the attachments).

[89] How that description and claim sits with the plaintiff's assertion of at least weekly bouts of severe exacerbations and the claim made in his statement that Mr Bell uses up to 8 panadeine forte tablets on a "bad" day[64] are nowhere explained.

[90] The plaintiff contends in his statement that if he stands or sits in the position 'for any length of time greater than about half an hour' he can feel his pain levels rising and that 'at these times I change position, stretch or lie on the floor which tends to provide me with some relief'.[65] I should record that the plaintiff sat for considerably longer than half an hour in the witness box, showed no evident outward sign of discomfort, and appeared to concentrate without difficulty on the questions that he was asked to address.[66]

[91] Finally I note that the plaintiff's account of his difficulties in sleeping as contained in his statement, where he awakes with pain "almost every night", seems at odds with the description given to Dr Gillett.[67]

General damages

[92] Radiological evidence supports the presence of a prolapsed disc. The defendant accepts that the prolapse occurred in the incident the subject of the proceedings. I have mentioned the symptoms that the plaintiff has reported.

[93] I am quite certain that Mr Bell is no spinal cripple. He has limitations one would expect from a prolapsed disc. I suspect that he has learnt to live with them. Given the numerous discrepancies in his account I am not satisfied that the exacerbations that he might suffer are anywhere near as frequent or severe as his statement suggests.

[94] I accept that there would have been a significant level of initial pain and discomfort that probably eased over time. Occasional episodes of exacerbations are likely. It would be consistent with such a condition that the plaintiff's interests in golf and fishing would be interfered with. He has lost the capacity to perform labouring work. Counsel were agreed that the appropriate award of damages under this head was $50,000. That accords with my own view of an appropriate level of damages for a reasonably significant back injury and assessments made by others in recent times.[68]

Past economic loss

[95] Mr Grant-Taylor has carried out an exercise to attempt a calculation of the probable past earnings assuming that the plaintiff did maintain himself in employment within the mining industry. That exercise results in a figure, after tax, of nearly $500,000.[69] The artificiality of the exercise needs to be recognised. Mr Grant-Taylor took as his starting point the income that the plaintiff had in fact earned in the 1998-99 year of $10,176 gross, pointed out that that had been earned in a period of only 101 days (from 1 July to 9 October 1998 – which ignores the fact that the plaintiff had been seeking such work in the six months prior) and then, extrapolating out those earnings to a full financial year, arrived at a starting point of $36,775. He

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64 Exhibit 1 para 79

65 Exhibit 1 para 76.

66 The plaintiff asserted that he had some discomfort just before the lunch break – T1-62/50

67 See Exhibit 1 para 78 and see [84] above

68 E.g. see my decision in *Wright v Thomas Borthwick & Sons (Australia) Pty Ltd* [2008] QSC 86*; Clement v Backo & Anor* [2006] QSC 129 per Dutney J.

69 Exhibit 71 at paras 23-37.

then assumed a roughly similar income for the succeeding year and then increased the assumed gross income by $5,000 per annum through to 2004 and then by $10,000 thereafter, arriving at a figure of $104,000 for the 2008-09 year which accorded with the evidence of Mr Johanson.[70] No evidence was led of any comparable employee to demonstrate that the assumed increments reflect reality. I comment that the onus of proof lies upon the plaintiff to establish his loss, that the exercise is little more than speculation, and in the absence of better proof some further discounting would be appropriate.

[96] I note that Mr Johanson seemed generally to agree with the cross-examination that rates of pay had increased more particularly in the last five years. He spoke of 'huge growth' in that time.[71]

[97] If Mr Bell had maintained employment within the mining industry then he would have earned something more in the order of $450,000 (reducing Mr Grant-Taylor's calculations by about 10 per cent to allow for their imprecision). 10 per cent of that figure results in a loss of $45,000.

[98] Had Mr Bell not maintained employment in the mines then he probably would have earned an income of around $550 net per week when employed on average over the period. That allows for roughly a doubling of his pre-accident income (ignoring mining income) over the 10 year period and for probable periods of unemployment. Assuming that base Mr Bell would have earned about $291,500 by now. Allowing 90 per cent of that figure results in a loss of $262,350. Combined with the $45,000 figure results in a potential earnings loss of $307,350.

[99] From this sum there must be discounts made for the impact of the Crohn's disease, the possibility of his pre-existing spinal condition interfering with his work capacity and his residual earning capacity that he has not exercised. I discount the foregoing figure by 35 per cent and arrive at an award of past economic loss of $200,000.

Interest on past economic loss

[100] There must be brought into account the payments received from WorkCover Queensland of $33,500.30[72] and the Centrelink payments received estimated at $80,700.[73] The parties are agreed that the legislation requires that interest be allowed at a rate of five per cent per annum.[74]

[101] I will allow $43,758.

Past loss of superannuation contributions

[102] Counsel are agreed that the loss under this head should be calculated at eight per cent of the award for past economic loss. I will allow the sum of $16,000.

Future impairment of earning capacity

[103] Mr Grant-Taylor submitted that the plaintiff's loss should be assessed by assuming the income that he could expect from a permanent position in the mining industry of $1,435.37 net per week, apply that figure over the five per cent discount tables for a

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70 Exhibit 34 at p 6.
71 T1-75/50.
72 Exhibit 41; s 318(3) *WorkCover Queensland Act* 1996.
73 Attachment SAB 23 to Exhibit 1 together with an estimate of $7,000 for payments received since 26.11.07.
74 Section 318(5) *WorkCover Queensland Act* 1996.

period of 28 years (x 796.6) to take the plaintiff to age 65, and then discount the result by 30 per cent to allow for all contingencies, resulting in an award of $800,000.

[104] In my view this would grossly over-compensate the plaintiff. As I have indicated, in my view, the prospects of the plaintiff obtaining and maintaining employment in the longer term in the mining industry were small. His capacity to cope with the very hard work required of him in the mines or his capacity to live in a mining town such as Blackwater over the longer term was quite untested by the time of his injury.

[105] As well there must be significant discount for the pre-existing degeneration. It was at least a realistic possibility that his capacity to continue in heavy manual labour would have been significantly compromised at some stage in his life and possibly by the age of 40. The prospect of such limitation emerging was at least as likely and, in my view, more likely, than the plaintiff maintaining himself in hard manual labour to age 65.

[106] Quite apart from such limitation the plaintiff had the prospect of recurring episodes of mechanical back pain consistent with his degenerative condition.

[107] Further, the plaintiff was at risk of a recurrence of his Crohn's disease which, as the past history shows, has the capacity to disable him for weeks and months at a time.

[108] Finally, the plaintiff has a residual earning capacity.

[109] The plaintiff bears the onus of proving his loss. His approach to the case is to contend that his maintainable earning capacity, uninjured, is that reflected by the income that a miner can earn. I reject that as a sound basis. The plaintiff has proved no other basis. The plaintiff's pre-accident work performance suggests that I should be conservative in my approach.

[110] The plaintiff's residual earning capacity is not inconsiderable. Whilst he is undoubtedly limited in the range of occupations that he can pursue, as Mr Fraser has described, nonetheless occupations such as a water inspector carries remuneration of $1,228 gross or $945 net per week.

[111] The Australian Bureau of Statistics has published the average weekly earnings for a full time adult male as $1,145.10 for the August 2008 quarter.[75] That equates to a net income of $888 per week. I will adopt that as a reflection of the plaintiff's maintainable earning capacity uninjured and before discounting for contingencies and residual capacity.

[112] In my view there ought to be a 70 per cent discount of that sum to allow for the discounting factors that I have discussed, including Mr Bell's residual earning capacity. In my estimation the plaintiff has lost about one-half of his earning capacity. I note that a discount of about 35% was applied in *Hopkins* and *Topp*. In my estimation the discount here for the degenerative condition and the usual contingencies should be greater.

[113] The discount applied to $888 results in a loss of $266 per week which, when taken over 28 years, yields a figure of $212,000.

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[75] Australian Bureau of Statistics 1345.0 – key national indicators.

Future loss of employers' contributions to superannuation

[114] Mr Harrison contends that I should apply nine per cent of the amount allowed for the future economic loss component as reflecting this head of loss. That is in accord with the practice that has been followed in this Court for many years now.

[115] Mr Grant-Taylor has drawn my attention to the decision of the New South Wales Court of Appeal in *Najdovski v Crnojlovic* [2008] NSWCA 175. There, by majority, (Allsop P and Basten JA, Windeyer J dissenting) it was held that this head of loss should be calculated at 11 per cent, not 9 per cent, of the award for impairment of earning capacity.

[116] I intend to follow the usual practice here in Queensland. Firstly, I would be slow to depart from the established practice here in this State without good reason. Secondly, and it may be of no great relevance, the decision of *Najdovski* concerned the construction and application of s 15C of the *Civil Liability Act* (NSW). There is no comparable provision governing the assessment of this head of loss in the *WorkCover Queensland Act* 1996. Thirdly, Basten JA in his reasons acknowledged that it had been generally assumed in NSW that in the calculation of superannuation loss the relevant percentage figure to use was that specified in the *Superannuation Guarantee (Administration) Act* 1992 (Cth) which has been nine per cent now for many years. He justifies the adoption of 11 per cent in the sentence: 'For ease of calculation, and because damages are assessed by reference to earnings net of tax, the calculation is sometimes undertaken on the basis of 11 per cent of net earnings.'[76] Windeyer J's dissent was brief. He said: 'I do not understand the authority upon which it is said that calculation is sometimes undertaken on the basis of 11 per cent of net earnings.' He noted that in a recent decision the calculation had adopted the rate of nine per cent.[77] Thus there is no demonstration in that decision of why it is that 11 per cent of net earnings is a fairer calculation of this head of loss.

[117] It was long ago recognised that an accurate calculation of this head of loss involved considerations of assumed income and capital growth of a superannuation fund and the impact of concessional rates of taxation.[78] To avoid complicated calculations the rule of thumb of using nine per cent was adopted. The reasoning in *Najdovski* does not explain why that rule of thumb, long accepted in this jurisdiction, is erroneous.

[118] I will allow $19,080 under this head of loss.

Past care and services

[119] The plaintiff's entitlement to damages under this head of loss is governed by s 315 of the *WorkCover Queensland Act* 1996 which provides:

> 'A court cannot award damages for the value of services of any kind –
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> (a) that have been, or are to be, provided by another person to a worker; and

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[76] See para [53] and [82].

[77] See para [105].

[78] See *Jongen v CSR Ltd* (1992) Aust Torts Reports 81-192; *Cremona v Roads and Traffic Authority* [2001] NSWCA 338.

(b) that are 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.'

[120] It is conceded by Mr Grant-Taylor that the amount set out in the schedule tendered[79] cannot be allowed by reason of the effect of s 315. He contends for an amount of $7,334 reflecting the care providing by Mark and Jan Christie, Margaret Tadrosse and the plaintiff's mother, Mrs Anne Bell.

[121] Mr Grant-Taylor contends that the services claimed were provided by persons who were not ordinarily members of the family of 'the worker' and hence the requirement in paragraph (b) of s 315 is not met. The requirements of s 315, he submits, are conjunctive and so if one of those requirements is not met then the plaintiff can recover damages. His argument is supported by decisions of this Court: *Calvert v Mayne Nickless Ltd* [2004] QSC 449 per Wilson J at [90] – [95] affirmed on appeal at [2005] QCA 263 at [103] – [105] per Jerrard JA.

[122] I am satisfied that the assistance claimed is not excluded by s 315 of the *WorkCover Queensland Act*.

[123] Sufficient evidence was led to support the fact that services to some extent were needed and rendered. The significant difficulty that I have with the claim is in being satisfied that there was a need to the extent claimed, particularly in respect of the services provided by Mr and Mrs Christie. It is said that the plaintiff required assistance with cooking, cleaning, assistance with mobility and laundry. Whilst I would accept that in the early stages of his condition the plaintiff might well have had difficulties with such matters, I have real difficulty in accepting that he would have required four hours' assistance each day, as claimed. His evidence was to the effect that he was laid up and not capable of much activity at that time. If so he would have needed very little by way of assistance.

[124] The rates claimed are agreed to be as those set out in the amended statement of claim. I will allow the sum of $5,235 under this head of loss.[80]

Future paid care and services

[125] Mr Harrison submits on behalf of the defendant that there is no demonstrated need for future paid services. I agree with that submission.

[126] The matter is complicated by my concerns as to the plaintiff's reporting of his symptoms. I am quite satisfied that the plaintiff is capable of ordinary domestic tasks such as cooking, cleaning, performing his own laundry and grocery shopping.

Future expenses

[127] A claim is made for $25,122 based on the items set out in the schedule attached to Exhibit 1[81] and subject to the concessions made by Mr Grant-Taylor in his written submission.[82]

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79 Exhibit 66.

80 I have essentially halved the claim made for the assistance provided by the Christies and allowed the balance.

81 See Attachment SAB 29 to Exhibit 1.

82 Exhibit 71 at paras 50 to 56.

[128] The principal component of the claim is the sum of $16,660 based on an assumption of an attendance on a physiotherapist every fortnight for the next 20 years. There is no evidence to justify such a claim. Rather, occasional attendances may be of benefit.

[129] Because of the Crohn's disease the plaintiff is required to attend on his general practitioner regularly for reviews. Any damages then can only be in respect of any additional visits that occasional exacerbations might require. It can be accepted that there will be a need for medication at least from time to time. The doubts that I entertain about the level of the plaintiff's symptoms make it difficult to make any precise assessment.

[130] Mr Harrison concedes that an amount of $15,000 ought to be allowed and I will adopt that figure as reflecting a reasonable global sum.

Future retraining expenses

[131] Mr Harrison concedes an amount of $10,000 for expenses that will be incurred with bodies such as 'OnQ'. As I follow Mr Grant-Taylor's submission no amount was claimed by him for this component but given the concession I will allow it.

Special damages

[132] Mr Harrison concedes the amount of special damages claimed by the plaintiff in the sum of $9,947.58.

[133] It was agreed that the special damages met by WorkCover are in the sum of $4,801.50, and that the *Fox v Wood* component is $7,989.85.

Summary

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

Pain Suffering and loss of amenities of life	$50,000.00
Past economic Loss	$200,000.00
Interest on Past Loss	$43,758.00
Past loss of Superannuation Benefits	$16,000.00
Future Economic Loss	$212,000.00
Future Loss of Superannuation benefits	$19,080.00
Past Gratuitous Services	$5,235.00
Future Retraining Costs	$10,000.00
Future Recurring Medical Expenses	$15,000.00
Fox v Wood	$7,989.85
Special damages	$14,749.08
Interest (agreed)	$3,713.00
Total Damages	$597,524.93
Less WorkCover refund	$46,291.66

Net Damages	$551,233.27

Orders

[135] There will be judgment for the plaintiff in the sum of $551,233.27.

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