SUPREME COURT OF QUEENSLAND

CITATION:	*McAndrew v AAI Limited* [2013] QSC 290
PARTIES:	**TROY ROBERT McANDREW** (plaintiff) **v** **AAI LIMITED** **ABN 48 005 297 807** (defendant)
FILE NO/S:	Rockhampton 254 of 2012
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	25 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	24, 25, 26 September 2013. Final submissions received 23 October 2013
JUDGE:	McMeekin J
ORDER:	**Judgment for the plaintiff in the sum of $1,420,209.60**
CATCHWORDS:	TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – where the plaintiff was injured in a motor vehicle accident – where liability is admitted – whether there should be an apportionment for contributory negligence DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT - MEASURE OF DAMAGES – PERSONAL INJURIES – where damages are assessed under the *Civil Liability Act 2003* (Qld) – where past and future economic loss are assessed – where the plaintiff's capacity to perform work is adversely affected - where degeneration from the injury is to be taken into consideration - where gratuitous care and domestic assistance assessed – where appropriate home modifications discussed - whether the extent of such modifications are necessary – whether costs for future surgery should be allowed *Civil Liability Act 2003* (Qld) *Civil Liability Regulation 2003* (Qld) *Civil Proceedings Act* 2011

Evidence Act 1977

Turner v Bulletin Newspaper Co Pty Ltd (1974) 3 ALR 491

Uniform Civil Procedure Rules 1999

Alldridge v Mulcahey (1950) 81 CLR 337 cited

Allianz Australia Insurance Limited v Swainson [2011] QCA 136 cited

Allwood v Wilson & Anor [2011] QSC 180 cited

Balnaves v Smith & Anor [2012] QSC 192 cited

Batchelor v Burke (1981) 148 CLR 448 cited

Bradburn v Great Western Railway Co (1874) LR 10 Exch 1 cited

CSR Ltd v Eddy (2005) 226 CLR 1 cited

Cullen v Trappell (1980) 146 CLR 1 cited

Gamser v Nominal Defendant (1977) 13 ALR 387 cited

Griffin v Lee Brown [2000] QSC 299 cited

Griffiths v Kerkemeyer (1977) 139 CLR 161 cited

Heywood v Commercial Electrical Pty Ltd [2013] QCA 270 cited

Johns v Cosgrove 27 MVR 110 cited

Munzer v Johnston & Anor [2009] QCA 190 cited

National Insurance Co of New Zealand Ltd v Espagne (1961) 105 CLR 569 cited

Re Mann and Inspector-General in Bankruptcy [2001] AATA 821 cited

Redding v Lee (1983) 151 CLR 117 cited

Sharman v Evans (1977) 138 CLR 563 cited

Shaw v Menzies and Anor [2011] QCA 197 cited

Skelton v Collins (1966) 115 CLR 94 cited

State of New South Wales v Davies (1998) 43 NSWLR 182 cited

Van Gervan v Fenton (1992) 175 CLR 327 cited

Wann v Fire and All Risks Insurance Company Ltd [1990] 2 Qd R 596 cited

Wilson v McLeay (1961) 106 CLR 523 applied

Wolgast v Connolly's News & Anor [2008] QSC 97 followed

Wynn v NSW Insurance Ministerial Corporation (1995) 184 CLR 485 cited

COUNSEL:	Mr GC O'Driscoll for the Plaintiff
	Mr GF Crow QC with him Mr Arnold for the Defendant
SOLICITORS:	Murphy Schmidt for the Plaintiff
	Jensen McConaghy for the Defendant

[1] **MCMEEKIN J:** Troy Robert McAndrew claims a little over three million dollars in damages for negligence. He suffered serious personal injuries when a motor cycle operated by the defendant's insured collided with him as he walked across Hospital Rd, Emerald at about 2.50 am on 20 December 2008.

[2] There are two broad issues. First should there be an apportionment, the defendant conceding negligence in the operation of the motor cycle? Secondly, what is a proper assessment of damages? My responses are that an apportionment is not appropriate and the damages should be assessed at $1,576,728.66.

The Plaintiff

[3] Mr McAndrew was born on 6 October 1975 and is now aged 38 years. He was 33 years when injured.

[4] Immediately prior to this accident Mr McAndrew was in secure, well paid employment in the mining industry. He was fit and included in his pastimes boxing and rugby league.

[5] There was an attack on Mr McAndrew's credit. I reject that attack. He impressed me as an honest witness doing his best to recall accurately what he could. He was certainly a stoical individual. If anything, he underplayed what is conceded to be a very serious injury.

[6] The attack was based principally on Mr McAndrew's claim to have only patchy memory of the events of the evening. It was suggested there was no cause for that save convenience. Given that the focus of the questioning was on how many alcoholic drinks that Mr McAndrew had enjoyed over several hours, that the precise number was probably never of any great moment to him, that he was suddenly struck by a motor cycle apparently travelling at high speed, suffered very serious and painful injuries and received pain relieving drugs of some sort shortly thereafter with a long period of

hospitalisation and convalescence there seems to me to be a number of possible reasons why he may not have recoverable memories of those aspects of the events of the evening that interested counsel for the insurer.

[7] As well, his relatively vague estimates of the number of drinks he consumed is more or less consistent with his habits, in respect of which there was consistent evidence. Those habits, habits he did not stray from often,[1] included rarely drinking to excess[2] and regularly drinking water through the night.[3]

[8] I note also that Mr McAndrew's de facto, Ms Hoch, said that he had told her that he did not remember a lot from that night.[4] So the defendant would have it that either Mr McAndrew is lying to his long time partner about this life changing event or she is lying to the court about his alleged lack of memory. Ms Hoch did not impress at all as someone likely to lie. This is to add improbability to improbability.

A Pleading Point

[9] A pleading point was taken against the defendant. Given the view I take of the evidence it is unnecessary to express any opinion. However where there is a non-admission accompanied by an explanation for the non-admission,[5] and where the facts not admitted appear in the pleading as particulars of allegations of negligence it is unwise, to say the least, to assume the facts are deemed admitted.

[10] The general rule is that there is no obligation to plead to particulars: *Turner v Bulletin Newspaper Co Pty Ltd* (1974) 3 ALR 491. It follows that facts particularised are not admitted if not pleaded to. The distinction between particulars and material facts can be elusive but nonetheless it is, in general, poor pleading practice to respond to particulars.

The Accident

[11] Mr McAndrew and some friends had gone out on the night in question. They had drunk alcohol. The amount was not precisely established. They were heading home at the time of the accident. It was in the early hours of the morning. It seems that there was little traffic.

[12] They were in a maxi taxi. The taxi went to turn right off Hospital Road and into Harris Street. That did not suit Mr McAndrew and his friend, Mr McDonald, as they lived in the other direction. He or his friend called out to the taxi driver to stop. The taxi was then in the right turning lane of Hospital Rd. The driver did stop in the turning lane.

[13] Mr McAndrew alighted through the side cargo door. He spoke to the front seat passenger briefly, then turned and commenced to cross the road. His friend Mr McDonald had preceded him out of the taxi and gone ahead of him across the road.

[14] The motor cycle came from Mr McAndrew's left as he crossed the road. It was travelling north. Hospital Rd is straight for several hundreds of metres to the south of Mr McAndrew's position. There were overhead street lights along that stretch of road. There was no impediment to vision along the road. The motor cycle struck Mr McAndrew. He was then still on the bitumen surface of the road. The motor cycle

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1 T2-48/8
2 T2-47/25; 2-51/15; and Mr McDonald: T2-60/20
3 T2-48/23; Mr McDonald: T2-60/9
4 T1-63/20
5 See r166(5) *Uniform Civil Procedure Rules* 1999

continued along Hospital Rd for about 160 metres after striking Mr McAndrew and struck a tree. The rider died as a result of injuries sustained.

[15] Mr McAndrew has no memory of what happened. The evidence of what occurred comes from his friend, Mr McDonald, and a young lady, Ms Shae Boag, who was walking along the eastern footpath of Hospital Rd at the time approximately opposite the location of the accident. She was with friends. She had had no alcohol to drink that evening. Given that the parties both accept that she was sober and independent of the plaintiff and given that there was no challenge to her evidence her account deserves weight. It was:

> "Now, did you hear something, firstly, on the evening in question?---Yeah. We heard the bike.
>
> Okay. And do you have any familiarity with motorbikes at all yourself?---Like, I've been on a motorbike before. I know what it sounds like.
>
> And what did you hear on this evening?---The motorbike revving its engine really loudly, like, speeding up really quickly.
>
> And where – you were at that spot when you heard that?---Yeah, just about.
>
> Where you stationary or were you walking towards that spot?---We were all walking towards Harris Street and then when I heard the motorbike, I turned around to see so I probably would have stopped.
>
> Okay. So when you turned around to see, what did you observe?---A motorbike coming out from behind the palm trees.
>
> Okay. And what happened then?---He was going really fast and he hit the pedestrian.
>
> Okay. And when you say that it was going really fast, what led you to come to that conclusion, what was it about the motorcycle that made you think it was really fast?---The really loud noise and the fact that it took him seconds to get from behind the trees to past, like, he'd hit the person and then gone.
> Now, did you know that a person was walking across the road at that stage?---I don't think I saw them before then.
>
> Did you see the motorbike hit the pedestrian?---Yes.
>
> And what was the pedestrian doing just before the motorcyclist hit him?---He had his arms out or up, like, he was trying to, sort of, I'm here kind of thing, like - - -
>
> Would you repeat that? He was – had his arms up and - - -?---Yeah. Like he was trying to, like, show that he was there, like, trying to move and show them, like, he'd seen the bike and, sort of gone, I'm here.
>
> HIS HONOUR: So you're indicating he's putting his hands up, palms up raised?---Yeah.
>
> "Here I am." All right.

MR O'DRISCOLL: And when he was doing that action and raising the palms up as if to say, "Here I am," was he moving forward, backwards, or staying still?---He was moving towards the other side of the road, like, towards the footpath. Well, there's not footpath there but - - -

But when he put his hands up to say - - -?---He was, like - - -

- - - you thought, "Where I am - - -"?--- - - -jumping back. It was like he was jumping back.

Then he went back?---Yeah."

HIS HONOUR: But you say jump back?---Well, it was like he was, like, jumping back.

MR O'DRISCOLL: And what did it appear to you he was trying to do?---Get out of the way and show the motorbike rider that he was there."[6]

[16] In cross examination Ms Boag agreed that there was little traffic around at the time[7] and said in response to a question that she was able to perceive the motor cycle for a period of time: "Yeah. A really short period of time".[8]

[17] The taxi driver out of whose cab the men alighted immediately before the accident, a Mr Collins, did not see the motor cycle approach.[9] His evidence was that he was 20 metres down Harris Street when he heard "a large thud" which he thought was the sound of motor vehicles colliding. The thud was probably the sound of the impact of the motor cycle with the tree but possibly of the motor cycle with Mr McAndrew.

[18] Mr McDonald did not see the motor cycle approach either. His account was as follows (Troy being the plaintiff):

"So you were travelling down Hospital Road?---Yep.

What happened after that?---Cab driver pulled into the turn lane to go right into – what is it - - -

Harris Street?---Harris Street, yep. That's the one. I called out and said just let us off here because he was going the wrong direction to where me and Troy want to go. And Troy said yeah, yeah, this'll do. So that's – some words, I don't know the exact words but words to that effect. And I opened the door and got out and - - -

And, at the stage you yelled out, how fast was the cab going in the turning lane?---No, the cab was pulled up.

And when you opened the door to get out of the cab, was the cab stationary or in motion?---Stationary.

So who got out of the cab first?---I did.

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6 T2-85/20-86/35
7 T2-86/47- 87/1
8 T2-87/32
9 T1-68/45-69/11

> Where were you seated in the cab?---Just behind the – probably would have been the middle of the – between the driver and the passage belt in the seat behind, sort of thing.
>
> And where was Troy?---He was somewhere behind me.
>
> So you got out first?---Yep.
>
> And what did you do?---Not sure if I looked up the road or not, I can't be totally honest. But I wouldn't – I wouldn't just jump out on the road, like, in front of anything or – just habit, I suppose, you just look, see if anything's coming. Proceeded to walk across the road, sort of glanced over to see where Troy was and make sure he got out the cab, I'm not sure where he was, noticed he was talking to Aaron in the front seat, Aaron Hornery was in the driver's seat – passenger seat, up the front next to the driver, noticed he was there and as I, sort of, kept on walking, I must have – something must have caught my eye or heard something or something and I sort of turned around and by the time I turned around I just heard this … sort of thing and, yeah, Troy was hit.
>
> Did you see the contact between the motorcycle and Troy?---No, I just seen Troy falling on the ground."[10]

[19] Where the transcript reads "I just heard this … sort of thing", the ellipsis substitutes the sound Mr McDonald described and that he said he had heard. My best translation of what he said was "chung". He meant to indicate a sound of a motor cycle passing at high speed. That evidence was not consistent with his prior account[11] given on the morning of the accident and may be a reconstruction.

[20] The precise location where Mr McAndrew ended up is not established. Mr McDonald said in his statement, given later in the morning, that Mr McAndrew was "in the middle of the road" after he fell to the ground.[12] That is not particularly instructive. In evidence he said he recalled Mr McAndrew lying on the road in the lane nearest to the right turning lane that the taxi had just quit.[13] That is the only evidence that I have of where Mr McAndrew came to rest. If accurate, and it may not be given the greater precision than in the more contemporaneous statement, it suggests, but does not establish, that Mr McAndrew had not moved far when struck.

[21] Where precisely on the road surface Mr McAndrew was when he was struck is not established. I cannot see that I can draw an inference that he simply turned and stepped into the path of the motor cycle.

The Defendant's Case

[22] The defendant's submission[14] is that there should be an apportionment of responsibility because the plaintiff:

(a) alighted from the taxi in an unsafe position on the road surface;
(b) failed to immediately move to a safe position but stopped to chat to his friend in the front seat of the taxi;
(c) failed to "heed the presence of the loud revving motor cycle";

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10 T2-61/7-45
11 Ex 217 para 8
12 Ex 217 para 10
13 T2-62/20 – 63/10
14 Ex 220 para 2.22

(d) despite the unimpeded view down Hospital Rd failed to see the motor cycle;
(e) was intoxicated and heavily affected by alcohol.

Where Was the Motor cycle?

[23] I observe that the first four submissions assume that the motor cycle could have been seen or heard by the plaintiff, had he been reasonably attentive, at the point when he turned from the taxi to cross the road. The final submission assumes a significant level of intoxication. In my view there are difficulties with each of those assumptions.

[24] The chief difficulty that I have with the defendant's submissions is that the location of the motor cycle is unknown until it was virtually on the plaintiff. No other vehicle is shown to be anywhere in the vicinity at the time and so no other traffic had any potential relevance to the plaintiff's assessment of the safety of effecting a crossing.

[25] The defendant assumes that immediately before the accident the motor cycle was being driven for seven hundred metres along the straight section of Hospital Rd with its headlight on and with the engine revving loudly. But there is no evidence of that.

[26] Ms Boag became aware of the loud revving of the motor cycle when it was plainly only seconds away from colliding with the plaintiff and travelling "very fast".

[27] Ms Boag said that her first sighting of the motor cycle was as it was "coming out from behind the palm trees". No attempt was made to demonstrate what she meant by that. The photographs of the scene indicate a line of palm trees along the centre median strip the last of which is at the start of the turning lane – perhaps 40 metres from the approximate place where Mr McAndrew crossed the road.[15]

[28] So where the motor vehicle was as Mr McAndrew started his crossing of the road is not clear at all, where it came from is unknown, and for how long its headlight was illuminated and motor revving loudly before that point in time is unknown. If Ms Boag was reasonably attentive then it was not long. The established facts are as consistent with the motor cyclist having moved from off the road surface onto the road not far south of where it was first noticed by Ms Boag (and so not far south of Mr McAndrew's position) and then turned on his headlight and accelerated rapidly as any other scenario. The lack of any observation by the taxi driver of the approach of the motor cycle and the location of the motor cycle when Ms Boag first saw it are each consistent with that analysis. So is Mr McDonald's failure to see the motor cycle coming, although on his own assessment he was not sober.

[29] It is against that background that the submissions must be judged.

[30] The defendant urged that had the plaintiff been as sober as Ms Boag then he would "most certainly" have heard the motor cycle and would have been able to see it as it was driven along Hospital Rd.[16] That assumes that the plaintiff did not hear or see the motor cycle at about the time Ms Boag did. That assumption is not justified. Ms Boag's evidence makes clear that the plaintiff had turned to look at the motor cycle before it reached him. She thought that he jumped back as it approached very rapidly. That he did not jump the right way to avoid being hit is a different submission and one not advanced. The defendant does not demonstrate that the plaintiff fell below the standard of reasonable care expected in reacting to a sudden emergency created by the

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15 See Ex 211 photos 1 and 2
16 Ex 220 para 2.11

motor cycle rider's negligence merely by showing that another course of action may have saved him.

[31] In my view, in the absence of evidence that the motor cycle was there to be seen or heard in time for a reasonable pedestrian to take evasive action the defendant cannot criticise the plaintiff's conduct, the onus of proof on the issue being, of course, on the defendant. That is sufficient to dispose of the third and fourth submissions that the plaintiff unreasonably failed to see or hear the motor cycle.

[32] That still leaves the first two submissions about which I should say a little more.

[33] If the first submission is intended to be an argument that without more it is negligent to alight from a taxi in the right turning lane of the road then in my view it is wrong.

[34] It was around 2.30am on a road in a small provincial town. There is no evidence of there being any traffic on the road at the time the men alighted from the taxi. The only possible danger that could arise was from traffic. Until there was a reason to think traffic was approaching there was nothing unreasonable about the plaintiff's conduct. There is no evidence that there was anything in sight.

[35] It was perfectly safe to get out of the taxi at that place at that time.

[36] Nor is there anything inherently dangerous in moving to the side of the vehicle when located in the right turning lane. Again the activity only becomes dangerous if a vehicle approaches. Even then it may not be dangerous as all would depend on where on the road surface the approaching vehicle was travelling and what a reasonable person would perceive and expect.

[37] The unspoken assumption behind these submissions is that it is inherently unsafe for pedestrians to be on the trafficable surface of the road way. That is not the law. A pedestrian has every right to walk on the road surface if he wishes. In doing so he must exercise ordinary care and prudence but he does not do so at his peril: *Alldridge v Mulcahey*[17] per McTiernan J.

[38] The cases that were cited[18] in support of the propositions advanced by the defendant involved factual situations which cried out for the pedestrians to take care. In each case the injured plaintiff was in a location where, acting reasonably, he had to know that traffic was approaching and that he was at risk.

[39] So I am not persuaded that the defendant can show a lack of proper lookout or other default in the plaintiff's conduct. The defendant's primary argument was that the plaintiff was intoxicated and I turn now to that point.

Intoxication

[40] The submissions involving intoxication involve different considerations. If intoxicated as the *Civil Liability Act* 2003 ("the CLA") defines it then contributory negligence is assumed[19] and the onus shifts to the plaintiff to show, relevantly in this case, that his intoxication "did not contribute to the breach of duty"[20] and not for the defendant to show anything beyond the intoxication.

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17 [1950] HCA 31 at [31]; (1950) 81 CLR 337 at 345

18 *Johns v Cosgrove* 27 MVR 110; *Griffin v Lee Brown* [2000] QSC 299; *Allianz Australia Insurance Limited v Swainson* [2011] QCA 136

19 Section 47(2) *Civil Liability Act* 2003

20 Section 47(3)(a) *Civil Liability Act* 2003

[41] In my view the defendant fails at the threshold. I am not persuaded that the plaintiff was intoxicated as the CLA defines the concept. That definition is: "that the person is under the influence of alcohol or a drug to the extent that the person's capacity to exercise proper care and skill is impaired".[21]

[42] The defendant faces a number of evidentiary problems. There is no precise evidence of the quantity of alcohol consumed. No blood alcohol analysis was performed on the plaintiff, or at least none proved. No expert evidence was called to show that if the plaintiff had consumed the quantity, albeit vague, suggested by the evidence over the hours in question that there would be any necessary effect on his capacity to "exercise proper care and skill". These are serious deficiencies in the evidence. Effectively I am asked to draw inferences from the defendant's characterisation of the plaintiff's behaviour, but that characterisation and the consequent inferences are open to considerable doubt.

[43] First as to the quantity of alcohol consumed. Mr McAndrew spoke principally from knowledge of his usual habits. He believes that he would have had a few beers at home – perhaps Hahn Lights – on this occasion between 7.30pm and 10pm. He and his friends then went to the Maraboon Tavern. He was then drinking beer – probably "Gold"[22] - and perhaps rum and dry.[23] He was not in a shout with Mr McDonald at least for some time.[24] Mr McAndrew apparently told the investigating police, again perhaps speaking of his habits, that he "probably" had four or five beers at the tavern and three or four rums at the Emerald Hotel.[25] If Mr McDonald's evidence is right then the plaintiff started drinking rums earlier at the tavern. I note that Mr McDonald seemed far from certain in his recollections. What is clear is that Mr McDonald was not keeping an eye on Mr McAndrew's drinking and cannot really comment with any degree of accuracy.

[44] They left the tavern when it shut at 12 or 12.30am and went to the Emerald Hotel, arriving there at about 1 am. They left there perhaps at about 2.30am.

[45] Comparisons were sought to be made to Mr McDonald and his estimates of his drinking. While that attempt was understandable there are several problems with the comparison and drawing any inference. Mr McDonald started drinking some hours before the plaintiff. When they were together it is not at all clear that they went drink for drink. Evidence of the plaintiff's habits were to the effect that he did not always keep up with a shout, would put his drink to one side, or simply sit out rounds.[26] There was no reliable evidence of what he did precisely on the night in question but there is no warrant to assume that he acted contrary to his usual habits.

[46] And what evidence there is does not suggest a very high level of consumption by Mr McDonald. He said that he had no intention of getting too drunk as he had a long drive ahead on the next morning. While he estimated that he had some six stubbies or cans of beer, none at full strength, up to 10pm then more beers and about six rum and cokes, that was over about a nine and half hour period.[27] I refer to the statement taken a few hours after the event acknowledging that there are some differences in that account to the evidence given years later. Consistently with that assessment Mr McDonald told

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21 See Schedule 2 to the CLA

22 T2-51/37

23 On Mr McDonald's account – T2-57/11

24 T2-57/15; 2-58/1-5

25 T2-43/8 – "apparently" because the plaintiff could not recall what he said and the transcript or statement that I assume exists was not tendered. Strictly the allegations are not evidence at all.

26 T2-59/30 – 60/15

27 See Ex 217 para 3; T2-56 -58

the investigating police officer that he had spent about $70 over the previous evening on alcohol.[28]

[47] My earlier reference to the characterisation of the plaintiff's conduct was intended as a reference to the arguments that the defendant put at the forefront of its case, namely the account that Mr McDonald gave in his statement of seeing the plaintiff on the roadway and at first thinking that he was "mucking around" and deliberately lying there.[29] The argument was that this demonstrated how drunk the two men were. I am not sure if the argument was that Mr McDonald thought that the plaintiff was so far affected that he would foolishly lie down on a major roadway or that Mr McDonald was so far affected as to make that mistake and they should be assumed to be in the same condition, or both.

[48] The first construction assumes that Mr McDonald's observations and his assessment is a reliable one. The second construction assumes two things – that the men are in the same condition and that only alcohol can explain Mr McDonald's mistaken understanding of what had happened. There are difficulties with each of those various assumptions.

[49] As to the first, there is a logical fallacy in arguing that Mr McAndrew's state of insobriety is established by Mr McDonald's observations and understanding. If Mr McDonald was in a highly intoxicated state (the defendant's primary argument) his observations and understanding are hardly reliable. If he was not so heavily intoxicated as to impact on his capacities significantly so that his assessment can be taken as reliable then, given that Mr McAndrew's capacities were probably even less affected, there is no warrant for assuming that Mr McAndrew was "under the influence of alcohol or a drug to the extent that [his] capacity to exercise proper care and skill [was] impaired."

[50] As to the second, as explained previously, there is no reason to assume that the men were in the same condition. The evidence suggests that Mr McDonald had consumed a deal more alcohol than the plaintiff. In any case Mr McDonald's befuddlement is understandable. Mr McDonald did not see the motor cycle prior to impact so it was initially inexplicable to him how his friend came to be on the road surface. His search for an explanation does not bespeak insobriety, necessarily at least.

[51] The only direct evidence of the affect of alcohol on Mr McAndrew is Mr McDonald's statement that he was "laughing" and "telling stories".[30] Neither condition indicates necessarily a state of intoxication sufficiently severe as to impact on one's capacity to exercise proper care and skill when crossing a road. And other indications are against the conclusion. The taxi driver did not report any raucous behaviour by the plaintiff. When he quit the taxi the plaintiff went to the window of the car apparently to discuss payment of the fare with his friend – an indication that he was functioning well enough. The ambulance officer who attended at the scene said there were no signs of alcohol consumption that he observed in either the plaintiff or his friend.

[52] Against this the defendant puts the hospital record with its note: "Troy was under influence of alcohol after drinking with friends."[31] The note was tendered under the business record provisions of the *Evidence Act* 1977. Its author is unknown, the source of information unrecorded and unknown, and the basis for the opinion expressed –

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28 Ex 217 para 4
29 Ex 217 para 9
30 T2-64/7 & 34
31 Ex 219 p7

whether it be that of the author or of an informant – not revealed. It can have little weight in the circumstances.

[53] While I am not prepared to take judicial knowledge of the accretion and excretion rates of alcohol I am prepared to act on the basis that there are such things, and importantly here, that the body does excrete alcohol over time. So to prove the consumption of alcohol over a long period of hours to the level shown here does not avail the defendant - what evidence there is does not prove that the plaintiff's level of consumption was sufficient for there to be a necessary impact on the faculties of perception and reaction.

[54] In my view contributory negligence is not made out.

QUANTUM

[55] It is not disputed that Mr McAndrew suffered severe injuries in the accident. His injuries were:

(a) right haemathorax;

(b) right antero-lateral chest wall haematoma;

(c) fracture first right rib;

(d) right sterno-clavicular dislocation;

(e) right sub-clavian artery loss;

(f) right axillary artery loss;

(g) right midshaft fracture radius and ulna;

(h) right brachial plexus injury;

(i) soft tissue injury anterior tibia;

(j) abrasion left eyebrow;

(k) soft tissue injury cervical spine;

(l) surgical scarring from brachial plexus repair – right axilla and neck; right upper limb; right chest wall; right calf; left calf;

(m) dental injuries; and

(n) burns to right fingers.

The Civil Liability Act

[56] The assessment is governed by the provisions of the CLA and the *Civil Liability Regulation 2003* ("the *Regulation*").

[57] I have set out my understanding of the relevant provisions and the approach I am required to take to the assessment of damages under the CLA in a number of decisions[32] and I will not repeat those observations save that importantly here:

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[32] See for example *Munzer v Johnstone & Anor* [2008] QSC 162 at [5]-[14]*; Allwood v Wilson & Anor* [2011] QSC 180 at [19]-[24]

> "This case concerns multiple injuries. In such a case it is necessary to determine the dominant injury as it is defined[33], have regard to the range of ISVs applicable to that injury and determine where in the range of ISVs provided for that injury it should fall, and determine whether the maximum ISV in that range ("the maximum dominant ISV") adequately reflects the adverse impact of all the injuries.[34] If the maximum dominant ISV is not sufficient then the ISV may be higher but not more than 100 and only rarely more than 25% above the maximum dominant ISV selected.[35],[36]

General Damages

[58] The parties are agreed that the dominant injury is the right brachial plexus injury. The defendant concedes that an ISV of 65 – at the very top of the range – should be assessed. As the agreement between the parties reflects, a severe brachial plexus injury falls within item 121 of Schedule 4 to the Regulation and the whole person impairment here assessed by the surgeons in the order of 60% or a little more will justify an ISV at or near the top of the range. The description in the comment that the injury should be one "leaving the injured person little better off than if the whole arm had been lost" applies here.

[59] Where the parties differ is whether any uplift is appropriate.

[60] The plaintiff contends for an uplift of 75 percent. If adopted that would result in an ISV of 100, and an assessment of damages at the maximum allowable under the scheme of $250,000.[37] Consideration of cases where damages at that level are contemplated suggests that the submission is misguided and wrong.

[61] Schedule 4 to the Regulations in item 1 of part 1 (dealing with quadriplegia), which is the item in the Schedule which permits an assessment of an ISV of 100, advises that "an ISV at or near the top of the range will be appropriate only if the injured person has assisted ventilation, full insight, extreme physical limitation and gross impairment of ability to communicate."

[62] That description can be compared to the plaintiff's condition. He has a severely disabled right arm. Whilst he had a number of other injuries the impact on him of those injuries has been relatively slight. He has extensive scarring but the majority of that seems clearly to be associated with his severe upper limb injury[38] and so already catered for in the maximum ISV for an extreme upper limb injury. The plaintiff can enjoy, if that is the right word, 8 kilometre runs, can lift weights, can drive an automatic vehicle, has held down employment after the subject accident for years, is articulate, intelligent with a sense of humour and an ongoing and evidently satisfying relationship with his long term de facto partner. He plainly comes nowhere near the level of disability and impairment that an ISV of 100 recognises.

[63] I set out below the various injuries and my assessment of the appropriate ISV applicable.

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33 See Sch 7 of the *Regulation*

34 Sch 3 s 3 and s 4

35 Sch 3 s 4

36 *Munzer* at [10]

37 see s 62 of the CLA and s 1(n) of Schedule 6A to the Regulation. As to the maximum ISV permissible see s 4(3)(a) of Schedule 3 to the Regulation.

38 See the comment in Item 155 regarding scarring. I have reduced the ISV for scarring in my table as a result.

Injury	Item in Schedule 4 and Descriptor	ISV Range	ISV
Right Haemathorax	39 – Minor Chest Injury	0 – 10	7
Right Anterolateral Chest Wall Haematoma			
Fracture Right First Rib			
Right sternoclavicular Dislocation	121 – Extreme Upper Limb Injury	36 – 65	65
Right Subclavian Artery Loss			
Right Axillary Artery Loss			
Right Midshaft Fracture Radius and Ulna			
Right Brachial Plexus Injury			
Soft Tissue Injury Anterior Tibia	136 – Minor lower limb injury	0 – 10	3
Abrasion Left Eyebrow	22 – Minor facial scarring	0 – 5	1
Soft tissue injury cervical spine	89 – Minor cervical injury	0 – 4	2
Surgical Scarring from Brachial Plexus Repair – Right Axilla and Neck; Right Upper Limb; Right Chest Wall; Right Calf; Left Calf	155 – Scarring to parts of the body other than the face	0 – 25	3
Dental Injuries	18.1 – Loss of or serious damage to	6 – 10	8

	more than 3 teeth		
Burns to Right Finger	120 – Minor Hand injury	0 – 5	2

[64] I acknowledge that the plaintiff has significant pain and will have pain for the rest of his life, has a lifelong need for medication, has undergone and will undergo surgery in the future, and through the proposed surgery he may achieve some improvement in function but that will only be relatively small and is uncertain. But all this is encompassed in the ISV assessment of 65.

[65] Having said that it is difficult to see how scarring to areas of the body remote from the injured upper limb and injuries to teeth, neck and leg can involve any great overlap with the upper limb injuries. The combined ISVs for these various non dominant injuries total 26 suggesting a not inconsiderable impact. Given that the ISV of 65 is justified by the upper limb injury alone and its associated effects, or very nearly so, in my judgment these non dominant injuries are deserving of some extra recognition. I may have regard to other matters to the extent they are relevant in a particular case.[39] While I acknowledge that any decision is somewhat arbitrary it seems to me that a modest increase is justified. The difficulty is that the Schedule makes plain that ISVs above 65 reflect a very serious level of incapacity – serious brain damage[40] and paraplegia[41] being among them. I propose increasing the ISV to 70 to reflect the effect of these various injuries.

[66] I therefore assess general damages at $150,800.[42]

Past Economic Loss

[67] While the plaintiff was plainly severely injured, and has been left with a severe disability, he has been able to get back to work, albeit in a different capacity, and has managed to achieve an income, at least in cash terms, considerably better than his pre-accident income. As a result the defendant contends for an assessment of damages under this head of only $27,133 – a remarkably low figure for one earning a salary of $2,574 per week before tax pre-accident and who was unable to return to work for about 18 months after sustaining injury. The plaintiff contends for an assessment of $176,711.

[68] For many years prior to the subject accident the plaintiff had been a coal miner employed by BHP Coal Pty Ltd. As I have mentioned that employment was both secure and well paid.

[69] Following the accident he was eventually considered fit enough to return to employment but his employer considered him to be a safety risk on a mine site. The plaintiff, to his great credit, then pursued other avenues of employment and eventually obtained employment in June 2010 as a safety consultant with Salva Resources Pty Ltd ("Salva Resources").

[70] Because of his peculiar skill set Mr McAndrew was a valuable employee to Salva Resources. He had studied to become an open cut examiner and had qualified in

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39 s 9 of Schedule 3 to the *Regulation*

40 See Item 6 of Schedule 4 to the *Regulation*

41 See Item 2 of Schedule 4 to the *Regulation*

42 See section 1(l) of Schedule 6A to the *Regulations*

that role and had worked for his pre-accident employer in that role. He is also qualified to be a Senior Site Executive (referred to in the evidence as an SSE) and has filled that role with his post-accident employer.

[71] Obviously the parties have been unable to agree on the approach that should be taken to the assessment of past economic loss. The difficulty has been the assessment of the value of certain fringe benefits which the plaintiff enjoyed in his pre-accident employment.

[72] For the purposes of the discussion the parties made submissions on a particular pay advice (52/2007), it being typical of the approach to deductions and payments throughout. I will adopt the same approach.

[73] Under the plaintiff's employment contract with BHP Coal he was entitled to salary sacrifice to obtain assistance with his home mortgage and to obtain a motor vehicle fully maintained and serviced.[43] To enjoy the benefits the plaintiff sacrificed $260 of his salary to obtain the housing benefit and $436.80 of his salary to obtain a novated lease on the motor vehicle. These were weekly payments. To the extent that these benefits were subject to fringe benefits tax (FBT) the employment conditions provided that the benefits were to be cost neutral to BHP Coal. Thus the plaintiff had monies deducted from his salary in order to reimburse his employer for the FBT impact on the employer. The amounts so deducted were $122.42 in relation to the housing benefit and $104.06 in relation to the lease. The employer reimbursed the salary sacrifice of $260 for the housing benefit.

[74] The plaintiff called an accountant, Mr Ponsonby to explain the net effect of these benefits. In my view Mr Ponsonby's evidence did not assist at all. He took, as I understood him, the total of the amounts recorded by the employer as the non-taxable gross of $1,183.28 (as shown on payslip 52/2007) as reflecting the benefit to the plaintiff of these arrangements. That figure was arrived at by adding together the amounts deducted from the salary (ie $260, $436.80, $122.42 and $104.06) plus the amount of $260 reimbursed to the plaintiff for the salary sacrifice for the housing benefit.

[75] That figure plainly does not reflect the benefit to the plaintiff. That approach assumes that the amounts that the plaintiff paid to his employer in order to protect his employer from the impact of FBT are a benefit to the plaintiff. They plainly are not. The payments reduce the income that he receives. They are the cost of obtaining whatever advantage there is in the arrangements.

[76] That approach also assumes that the cost of the novated lease of $436.80 per week reflects the true value of the cost of the benefit to the plaintiff of having a car fully maintained and serviced. It may or it may not but no evidence was led to show that it does.

[77] The plaintiff in his supplementary submissions cites *Re Mann and Inspector-General in Bankruptcy* [2001] AATA 821 as supporting the approach adopted by Mr Ponsonby. That case has nothing to do with the assessment of the net benefit to an injured plaintiff of his pre-accident salary package. The issue there was the proportion of a bankrupt's income that was to be apportioned to the bankrupt's estate. The FBT paid by the employer was held to be irrelevant as the plaintiff's income was not thereby reduced. Any FBT paid by the employer is similarly

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[43] See Ex 158 at cl 37.1 and 37.3

irrelevant here. What is relevant is that the plaintiff is the one who, effectively, pays the tax. That does reduce the plaintiff's income.

[78] My task is to put the plaintiff, as near as damages can do so, into the same position he would have been in had the tortious act not occurred.[44] It is the comparison of his net position after tax[45] that is all important to that assessment. There is no doubt that the benefits of his salary package must be recognised. The question is how?

[79] The defendant submits this approach: adopt the net amount of cash in fact received of $1,106.98 and add to that the value of the benefits, the defendant submitting that a fair assessment would be $260 for the housing benefit and $300 for the benefit of the car. That approach results in a notional net benefit to the plaintiff from his income earning activities pre accident of $1,667 per week.

[80] The difficulty with that approach is that there is no evidence to justify the $300 per week supposed benefit to the plaintiff of the novated lease arrangement.

[81] It also assumes that the way in which the plaintiff chose to spend his income in some way impacts on the value of the income to him. In fact the Court is unconcerned with how it is that the plaintiff spent his income. The only relevance of the benefits is the tax effect of these arrangements.

[82] It seems to me that a fairer approach is to take the plaintiff's salary, deduct the income tax paid in the usual way, and deduct the FBT reimbursement cost of obtaining the "benefits" not caring whether they are in fact benefits or fairly valued in the salary arrangements.

[83] On that approach the plaintiff's net weekly income, at least at the date of injury, was $2010 – the gross salary of $2,574.21 less the tax in fact paid of $337 and less the FBT reimbursement costs of $122.42 and $104.06. That rate of pay applied until 26 April 2009.

[84] The Enterprise Bargaining Agreement under which the plaintiff was employed by BHP Coal provided for regular increases in salary over time. The defendant's approach ignores this fact. I can see no reason in principle why it should be ignored. Neither party has done the exercise of informing me of the income tax applicable to the increased wage. I will do my own assessment, with the errors that experience suggests are inevitable that that will involve.

[85] My adjustment of the plaintiff's salary increased over time is as follows[46] with the relevant periods that the salary applied and the potential net income:

Year	Net Weekly	Weeks	Income
2008/09	$2,010	18.14	$36,461
2009/10	$2,120	52.14	$110,536
2010/11	$2,197	52.14	$114,551
2011/12	$2,008[47]	68.85[48]	$138,250

44 *Skelton v Collins* (1966) 115 CLR 94 at 128 per Windeyer J

45 *Cullen v Trappell* (1980) 146 CLR 1; s60 *Civil Proceedings Act* 2011

46 To arrive at these figures I have adopted the taxable income and total gross weekly income figures in Schedule 5 of Mr Ponsonby's report (Ex 41 p G41) and applied the relevant tax rates.

47 The fall in income occurs because the housing benefit was not available for the 2011/12 period and following

2012/13	$2,026	50.14[49]	$101,583
Total			**$501,381.00**

[86] The plaintiff has earned $386,283.[50] I assess his loss at $115,000.

[87] In arriving at this figure I do not overlook the arguments about the travel costs that the plaintiff would have incurred – he had moved to Brisbane as Ms Hoch wanted and on the assumption of maintaining employment at the mines he had to bear the costs of flying back to the mine site for each period of work. That cost could have been substantial. I have no doubt that the expenditure was one that was an outgoing that was "necessary for the realization of [Mr McAndrew's earning] capacity and which would have been incurred had his capacity been unaffected" and so it is, in principle, required to be brought into account: *Sharman v Evans*.[51]

[88] The plaintiff argued that the decision in *Wynn v NSW Insurance Ministerial Corporation*[52] precluded that expense being brought to account but that is clearly wrong. The judgments in *Wynn* expressly recognise the continuing authority of the decision in *Sharman* and the need to bring into account expenses necessarily incurred to realize earning capacity. *Wynn* establishes that the costs of domestic assistance, and particularly child care expenses, are not one such expense, at least in the circumstances of that case.

[89] The plaintiff seeks to get around this by arguing that the expense is not one of travelling from home to work and return but rather an expense of a private nature involving the plaintiff visiting his girlfriend. If that was an accurate characterisation the submission would be plainly right. But the plaintiff gives the Brisbane address as his place of residence, and it plainly is, and would have been if there had been no injury.[53] That Ms Hoch happens to live there, and that she was the one determined to live in Brisbane, does not alter the nature of the expense.

[90] The answer to the defendant's point is that the plaintiff was in a position to increase his earnings by doing an extra shift to cover the increased cost of air travel and to minimise the cost by booking well ahead, his shifts being known long in advance. It was his intention to do so and no evidence was led to show that his assertion that he could do so was wrong.

Interest

[91] Any award of interest is governed by s 60 of the CLA. The parties are agreed the appropriate present rate is 1.91%.

[92] The defendant contends that the plaintiff is not entitled to interest by reason of the receipt by the plaintiff of benefits under an income protection policy taken out by the plaintiff's Union. Those benefits totalled $74,429.[54]

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48 The adjustment to salary occurred on 25/10/12
49 From 26/10/12 to date
50 Quantum statement at para 185
51 (1977) 138 CLR 563 at 577
52 (1995) 184 CLR 485
53 T1-29/47 – 30/5; 2-31/5
54 See Ex 209 paras 186-189

[93] Initially the plaintiff conceded that this was the correct approach but in the course of addresses, when I raised my doubts about the correct principle, asked for and obtained leave to further research the issue. In his supplementary submissions the plaintiff has argued that the benefits should be ignored. The plaintiff has drawn my attention to the decision of Fryberg J in *Wolgast v Connolly's News & Anor*[55] where his Honour took that course but in respect of a disability benefit.

[94] It is well accepted that such benefits are to be ignored in the assessment of damages for lost earnings: *National Insurance Co of New Zealand Ltd v Espagne*[56]; *Bradburn v Great Western Railway Co*[57]; *Redding v Lee*[58]. It is not quite so clear that they should be ignored in calculating interest. Interest is in the nature of a discretionary award of damages to compensate the plaintiff for being kept out of his money. The discretionary nature of the award is clear from the terms in which the power to award interest is described - presently found in s 58(3) of the *Civil Proceedings Act* which provides:

> "(3) The court may order that there be included in the amount for which judgment is given interest at the rate the court considers appropriate for all or part of the amount and for all or part of the period between the date when the cause of action arose and the date of judgment."

[95] The difficulty is in the concept that the plaintiff has been kept out of his money. The insurance payments are intended to replace the earnings lost, at least to a degree. Mr McAndrew would not have received the payments but for the accident the subject of the claim. Far from being kept out of his money he has received a windfall in a sense – if I allow damages in full he receives his lost earnings twice-over to the extent of the insurance payments. Nonetheless the factors that have been seen as important in the determination of the correct approach to such collateral benefits justify ignoring the payment here, as Fryberg J pointed out in *Wolgast*:

> "In my judgment the principles discussed in *Espagne* apply with equal force to an award of interest on damages for loss of earning capacity. The plaintiff has been kept out of money to which he was entitled. Why should he not have interest on that money? There is no suggestion that the disability benefit was paid as part of a legislative scheme "to provide compensation to take the place of the earnings lost by a worker as a result of an injury"; the benefit is "conferred upon [the plaintiff] with the intention that he may retain [it] even if he enforces his right to damages."[59] In this respect the case is distinguishable from *Batchelor v Burke*, from which those expressions are taken. It is in my judgment analogous to the authority relied upon by counsel for Mr Wolgast, *State of New South Wales v Davies*.[60],[61]

[96] I propose to follow the approach taken by Fryberg J. There is no suggestion that the insurance payment was to relieve the tortfeasor of his responsibility in damages. I assess interest at $10,400.

Future Economic Loss

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55 [2008] QSC 97
56 (1961) 105 CLR 569.
57 (1874) LR 10 Exch 1
58 (1983) 151 CLR 117 at p 138
59 *Batchelor v Burke* (1981) 148 CLR 448 at p 454
60 (1998) 43 NSWLR 182
61 At [51]

[97] Salva Resources consults to the mining industry. Its fortunes are tied to the fortunes of that industry. With the current downturn in that industry Salva Resources is struggling to win contracts. As a result Salva Resources has been reducing its workforce steadily in recent times. Mr McAndrew's income depends to a large degree on the contracts that Salva Resources wins. Persons with skills not so different to Mr McAndrew have been put off. Because of a contract with a third party Mr McAndrew's employment is secure for the moment but only until January 2014.[62] Unless Salva Resources can win contracts in the meantime it is probable that Mr McAndrew will lose his employment then.

[98] Mr McAndrew has through his diligence and fortitude found a niche for himself. He has the skills and experience to be a Site Senior Executive, a role that he can fulfil despite his disabilities. He is undertaking further study to attempt to even better qualify himself for that role[63] with an end in view that he may obtain a permanent position with a mining company. However he is plainly at a disadvantage to able bodied competitors. Ms Aitkens thought that Mr McAndrew was only suited to occupations with sedentary to light physical demands and even then restricted – he is slower and so less efficient.

[99] The plaintiff prospects of obtaining and maintaining employment will always be problematic. He has significant physical limitations. He cannot do manual labour, that is any lifting, and indeed he cannot drive a manual vehicle. Most mine sites have vehicles with manual transmission. His former employer took the view that he should not be allowed on the mine site because he cannot maintain three point contact when climbing ladders and the like – it is common that there is a need to climb ladders because of a need to access large machinery. Future surgery may improve his abilities and while it is reasonable that he undertake that surgery he has only a chance of an improvement.

[100] Given the attitude to his continued employment taken by the management at his pre-accident employment, where one would expect a degree of sympathy for him, it seems unlikely that Mr McAndrew will be successful in obtaining further employment in sites where BHP Coal have an interest.

[101] Even if that attitude is not reflected in other employers it is nonetheless a significant issue as BHP Coal has interests in about one fifth of the mine sites in Queensland. Even under the employment of Salva Resources Mr McAndrew is not permitted to work on BHP sites, if only to avoid potential objections.

[102] How then to assess the loss? Section 55 of the CLA is relevant:

> "**When earnings can not be precisely calculated**
> (1) This section applies if a court is considering making an award of damages for loss of earnings that are unable to be precisely calculated by reference to a defined weekly loss.
> (2) The court may only award damages if it is satisfied that the person has suffered or will suffer loss having regard to the person's age, work history, actual loss of earnings, any permanent impairment and any other relevant matters.

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62 See Ex 209 para 194

63 See Ex 209 para 60

> (3) If the court awards damages, the court must state the assumptions on which the award is based and the methodology it used to arrive at the award.
> (4) The limitation mentioned in section 54(2) applies to an award of damages under this section."

[103] The limitation mentioned in section 54(2) is not here relevant.

[104] The defendant concedes there is a significant impact on earning capacity and submits that a global assessment of $450,000 is appropriate noting that equates to a weekly loss of $640 per week over 22 years, taking the plaintiff to age 60. That suggests a 30% loss of earning capacity, roughly. The plaintiff seeks an award of $1,401,141.68. That assumes a complete loss of the plaintiff's earning capacity taken through to age 67 with a 15% discount for contingencies.

[105] The plaintiff's approach is plainly unrealistic. The plaintiff has demonstrated a very significant earning capacity over the past few years. The major impediment to the plaintiff obtaining and maintaining employment is his inability to perform most manual tasks. But his skills go well beyond that of a mere manual worker. If he achieves his ambition of obtaining a Senior Site Executive position or Mine Manager role he will not lose any income.

[106] In my view the defendant's approach is much more in accord with the plaintiff's probable future. It is true that there is the prospect of a significant loss in the immediate future and a loss that probably would not have occurred if the plaintiff had remained in his pre-accident permanent position. Not that it must be assumed that his position there was not without risk also. And the plaintiff wishes to undergo surgery which will take him out of the workforce for a period.

[107] The double prophesying required here, at least in predicting the future in the disabled reality, is more complex than usual. The proposed surgery may improve the plaintiff both in terms of his pain levels and functionality, although I assume any possible improvement will be modest. The plaintiff may achieve his aim of obtaining a manual license which may have some small impact on his employability. The mining industry may have an upturn. Salva Resources may win sufficient contracts to keep the plaintiff on.[64] The present attitude of the management at mines controlled by BHP may change if the plaintiff proves over a long period that he is not a significantly increased safety risk.

[108] A broad brush approach is necessary. That seems to me to accord with authority: see the cases discussed in *Balnaves v Smith* & Anor[65].

[109] I assess the loss of earning capacity as about 40% of the pre-accident capacity and assess the damages under this head at $600,000.[66] In doing so I am conscious of the statutory injunction to explain my reasons and the long ago expressed view that such assessments should not be merely intuitive.[67] While the amount that I allow is obviously a very substantial sum, Mr McAndrew, before his injury, had very well paid and reasonably secure employment with prospects of promotion and he is now severely disadvantaged, effectively being a one armed man dependent to a much greater degree on the vagaries of the mining industry, with greatly limited range of

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64 See Mr Lesque's evidence at T2-81/15
65 [2012] QSC 192 at [151] and following per Byrne SJA
66 $2026 x 40% x 783 and rounded down for contigengencies
67 *Gamser v Nominal Defendant* (1977) 13 ALR 387 at 391 per Stephen J

occupations open, and needing good luck in obtaining and retaining employment at anything like his pre-accident level of income.

Loss of Superannuation Entitlements

[110] The parties are agreed that the loss of superannuation benefits in respect of the past be assessed at 9% of the amount awarded and in respect of the future at 11.33% of the amount awarded.[68]

[111] I will therefore allow $10,350 for the past and $67,980 for the future.

Care and Assistance

[112] Substantial claims are made pursuant to the principles explained in *Griffiths v Kerkemeyer*[69] and *Van Gervan v Fenton*.[70] The assessment is governed by s 59 of the CLA. The defendant concedes that the statutory threshold of 6 hours per week care for a period of 6 weeks is met.

[113] No contemporaneous record of the care in fact rendered to the plaintiff was kept and the evidence does not really descend into the detail of how much time was spent undertaking these particular tasks. The difficulty that these considerations present when it comes to assessing damages has been commented on in the past: see *Shaw v Menzies and Anor* [2011] QCA 197.

[114] The plaintiff seeks an amount of $76,370 and the defendant concedes an amount of $36,680. The parties have not agreed on the appropriate rate that should be applied to the hours of care proved. The plaintiff relies upon the hourly rates proffered by one Vanessa Aitkens, an occupational therapist who provided reports. The defendant contends for a flat rate of $27 per hour.

[115] Ms Aitkens has taken the Australian Bureau of Statistics seasonally adjusted Queensland full time adult persons ordinary time rate as providing the appropriate measure. No authority is cited for the proposition that that rate is appropriate for the valuing of past care. The plaintiff's submission that there was no cross-examination of Ms Aitkens on the point really takes the matter no where. The defendant offers no explanation for why the appropriate rate for care would be $27 per hour. So far as I can see there is no evidence to support the figure.

[116] The applicable principle was described in *CSR Ltd v Eddy*[71] [2005] HCA 64 where Gleeson CJ, Gummow and Heydon JJ said:

> " …….in a claim for personal injury the plaintiff was entitled to recover an amount equivalent to the commercial cost of nursing and domestic services which had been provided in the past and would be provided in the future by the family or friends of the plaintiff"[72]

and

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68 See *Heywood v Commercial Electrical Pty Ltd* [2013] QCA 270 at [57] per Muir JA

69 (1977) 139 CLR 161.

70 (1992) 175 CLR 327.

71 (2005) 226 CLR 1

72 At [6]

> "……..the true basis of the claim was the need of the plaintiff for the services; that the plaintiff did not have to show that the need was or might be productive of a financial loss; and that the plaintiff's damages were not to be determined by reference to the actual cost to the plaintiff of having the services provided or by reference to the income forgone by the provider, but by reference to the cost of providing those services generally in the market."[73]

[117] This then presents the problem of what hourly rate to adopt in the absence of evidence going to the true cost. The plaintiff made reference to the approach of the Court of Appeal in *Shaw v Menzies* [2011] QCA 197 but there the Court had the advantage of evidence from an occupational therapist as to the commercial rates that carers charged. This is a question of fact and is not resolved by reference to evidence in other cases.

[118] In the absence of evidence one argument may be that even though it is plain there was a loss I must assess that loss at nil.[74] However it seems to me that the proper course, and certainly the one that accords with a more just outcome, is to treat the defendant's submission as a concession as to the appropriate rate. I adopt the defendant's rate of $27 per hour.

[119] The plaintiff's submission concerning the number of hours of care that the plaintiff required depends upon the opinions of Ms Aitkens. The defendant was critical of that approach, and with good reason. Ms Aitkens did not interview those who had provided the care or undertake any private investigation herself in the form of home visit. Rather she used her expertise to arrive at what she thought would be the "varying levels of gratuitous assistance that [she] considers likely to have arisen as a result of Mr McAndrew's disabilities".[75] While her unchallenged expertise and the opinions that she holds can obviously buttress estimates of care provided, where there is in fact evidence from the care givers as to what they have done then that has to be the superior evidence.

[120] To confuse matters further the defendant analysed the care provided by reference to the table that Ms Aitkens had prepared[76] but the plaintiff did not. I am not sure why not.

[121] I propose to allow care in accordance with the following table:

Period[77]	**Plaintiff's hrs/wk**	**Defendant's hrs/wk**	**My Assessment**	**Rate**	**Weeks**	**Amount Allowed**
20/12/08 – 31/12/08	nil	1	1	$27	1	$27
1/1/09 – 16/2/09	31.25	49	49	$27	8	$10,584

73 At [7]
74 *Munzer v Johnston & Anor* [2009] QCA 190 at [32] per McMurdo P
75 See p 11 of Ex 4 - the report of 18 August 2011 (B11 of Volume 1)
76 See p29 of exhibit 4 (B29 of Volume 1)
77 I have adopted Ms Aitkens' periods save for period 5

26/2/09 – 5/8/09	15	14	14	$27	23	$8,694
6/8/09 – 16/9/09[78]	27.5	21	21	$27	6	$3,402
17/9/09 – 31/7/10	14	3.5	10	$27	44	$11,880
1/8/10 - present	7	3.5	4	$27	164	$17,712
Total						**$52,299.00**

[122] Generally my impression was that the plaintiff was a deal more able than Ms Aitkens had realized.

[123] It needs to be appreciated too that over the longer periods the plaintiff improved over time. To an extent there has to be an averaging.

[124] Ms Hoch is the major care provider and while her evidence indicates that she does provide a deal of assistance to Mr McAndrew it comes nowhere near the level that Ms Aitkens has assumed. Thus Ms Hoch's direct evidence as to the assistance provided after their move to Brisbane in March 2009 was half an hour in the morning assisting him with getting dressed and showering and then "maybe an hour and a half at night between cooking dinner and tidying up and just doing simple tasks like washing or tidying the house."[79] She confirmed that Mr McAndrew became more independent as time went on and as he adapted to his disability. At the current time she estimated that around half an hour a day was spent doing tasks for him but some days there may be more time, for example if they go grocery shopping as he is unable to carry items. He needs assistance on holidays and the like with luggage.[80]

[125] Ms Hoch was an impressive witness and I am sure doing her best to estimate the times involved accurately. Plainly her estimates were hardly precise.

[126] Generally I have adopted the defendant's submission on the hours as it seemed to me to represent the evidence reasonably accurately but increased the number of hours for the period from 17 September 2009 on to reflect my understanding of Ms Hoch's evidence.

[127] I assess the damages at $52,300 for the past.

[128] For the future I assess an ongoing need of 4 hours per week assistance. Again I adopt the defendant's concession of $30 per hour. Applied over a life expectancy of 47 years,[81] I arrive at a figure of $115,320.

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78 The plaintiff's submission has 25/9/09 as the change in circumstance date – I am not sure why

79 See T1-55/10-15

80 See T1-57/20

81 Multiplier 961

[129] The defendant applied a discount of 15% for contingencies. The plaintiff agreed to that discount but started from a higher base of 7 hours per week rather than the 4 hours per week that I have adopted. The contingencies that needed to be brought into account for this head of loss were not identified by either party. Adverse contingencies are certainly not the same as those relevant to an assessment of economic loss and I think considerably less likely to occur. What is clear is that from time to time the plaintiff may well require a greater level of assistance than my estimate has allowed and to my mind that offsets any need to discount for contingencies.

Wilson v McLeay Damages

[130] The plaintiff claims a global sum of $5,000 for the support provided to the plaintiff during his periods of hospitalization. He has had five such periods. There is no doubt that the plaintiff's parents and partner did provide him with support on those occasions.

[131] The leading case in the area is the single judge decision of *Wilson v McLeay*.[82] The general principle that applies is that the visits need to be reasonably necessary for alleviation of the plaintiff's condition. Visits prompted merely by love and affection are not compensable.[83]

[132] There is very limited evidence here to support the contention that the visits were reasonably necessary to alleviate the plaintiff's condition.

[133] Further the decision in *Wilson v McLeay* itself was to allow the amount of expenses incurred by the mother in coming on three occasions and by the father in coming on one occasion to see the injured plaintiff. Taylor J held that if there had been no expenditure there could be no recovery. The need to demonstrate actual expenditure was doubted in *Wann v Fire and All Risks Insurance Company Ltd*.[84]

[134] Here the lack of evidence going to the reasonable need for the attendance of parents and Ms Hoch and the lack of evidence as to the expenses incurred make me cautious in allowing any significant sum. Given the seriousness of the plaintiff's injuries and the impairments that he subsequently had it does seem likely that the presence of his loved ones would have been of some assistance to him and indeed it is conceded by the defendant that services were provided whilst he was hospitalized in the initial stages.

[135] It seems to me is that all I can do is assess a very modest sum and I will allow $1,000.

Past Special Damages

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82 (1961) 106 CLR 523 per Taylor J

83 For a discussion of the relevant authorities see *Assessment of Damages for Personal Injury and Death* by Professor Harold Luntz (4th edition) at pp298 – 299.

84 [1990] 2 Qd R 596 per Ryan J

[136] The parties are agreed on special damages as $211,721.73. Of this sum $156,519.06 has been met directly by the insurer.

[137] The plaintiff claims interest in the sum of $1,656.93 which is substantially less than that conceded by the defendant. I will allow the amount the plaintiff claims as I assume the plaintiff knows best what amounts have been actually expended.

Costs of Future Treatment

[138] The plaintiff claims approximately $482,000 under this head. The defendant allows $122,000.

[139] The defendant's general submission is that there is a deal of double counting involved. For example if the plaintiff is to be allowed the costs of surgery to have a spinal cord stimulator put in place then there ought be some reduction in claims made for future medical expenses. Relief of pain may not be certain but if the prospects of relief from pain are nil, which seems to be the assumption behind the claims for continued pharmaceuticals, massage treatment, hydrotherapy and so on then why have the surgery at all, at least at the expense of the defendant? From the defendant's perspective it is not reasonable to allow the full costs of all pain relieving medication and treatment at the present day level with the full cost of the spinal cord stimulator. Those submissions are plainly right.

[140] Further there are claims made for aids and equipment that depend entirely upon the plaintiff's probable future activities. An example was made of bike riding. Hand braces and the like to enable the plaintiff to ride a push bike might be appropriate when he is relatively young but may not be as appropriate as he enters middle age, as his interests and activity level may change. Such things are simply unpredictable.

[141] A further claim is made for the cost of conversion of a transmission in a car that has sentimental value to the plaintiff. I do not see how that claim can possibly be reasonably brought home to the defendant.

[142] As Mr O'Driscoll for the plaintiff conceded there is an element of double counting in requiring hydrotherapy and the cost of attending a gym for the balance of the plaintiff's life.

[143] I will deal with each claim briefly.

Future Pharmaceutical Expenses

[144] The plaintiff takes a range of medications. There are two principal issues. First, there is a debate about the costs of the principal pain relieving medication "Lyrica". A pharmacist has advised that the cost is $170 per box. The plaintiff has paid $150 per box in the past – the cost seems to depend on where he obtains the drug. A mid point would seem appropriate.

[145] The second issue concerns how to bring into account the impact of future surgery – it may fail or it may result in a substantial reduction in pain. I propose to allow a 30% discount for that contingency.

[146] I allow $30,000.

Future Aids & Equipment

[147] Generally there is no complaint about future aids and equipment. A claim is made for $10,000 after allowing for a 15% contingency.[85] I am not sure that the contingencies are at that level and that the discount is justified. I cannot imagine what contingency will result in the plaintiff ceasing to need the various aids save and unless the surgery proposed improves function significantly – and I did not understand that was the expectation. Premature death, or severe illness or accident rendering him similarly disabled, are each possibilities. But there is at least a strong argument that the use of life expectancy tables accounts for one. And the chances of the other must be well below 15%. There is also an argument that Mr McAndrew might be in need of more assistance than he would otherwise have required in coping with illnesses or accident. That might tend to balance out any need for discounting.

[148] The discount takes account of any possible complaint from the defendant. I allow the amount of $10,000 more or less as claimed but rounded to reflect the imprecision involved in these estimates.

Future Surgery

[149] The plaintiff proposes to have an operation that has been suggested, described as a free muscle transfer. As I follow the evidence Dr Tonkin is the advising surgeon. The advantage is that the plaintiff may gain some finger flexion converting a "useful assist limb into a limb with some hand function."[86] Dr Tonkin has explained that the surgery is complicated by the absence of circulation to the relevant area. Exploration of the right brachial artery indicated that there was no pulsatile pressure indicating that it was not an appropriate donor vessel. A vein graft was possible but had its difficulties.[87] The presence of blood flow is essential to the success of the surgery and Dr Tonkin will not attempt it without establishing that he can achieve that blood flow. As best I can see that pre-condition has not been established.

[150] In those circumstances I cannot see why it is that the costs of the surgery should be allowed. In the present state of knowledge it will not be attempted.

[151] In this regard I assume that Dr Tonkin's opinions over ride those of Dr Harris who advised on remedial surgery to the scarring. He thought a muscle transfer ought not to be tried in the affected area.[88]

[152] As well Mr McAndrew seeks the cost of remedial surgery for his extensive scarring as advised by Dr Harris. His decision is not unreasonable. It was not contended otherwise. For this operation I allow $20,000.[89]

[153] Colorectal surgery has been recommended at a cost of $5,000. Again I do not understand there to be any argument against the surgery being undertaken.

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85 See Ex 221 p24 - I note that for many items the calculation averages the cost on a weekly basis over the period of replacement and uses the 5% multiplier for the years in question whereas the evidence indicates a replacement every so many years. The more accurate method is to use the deferred tables for that period. There is a small difference in the result – in the order generally speaking of about 5% overstatement.

86 See report 18 June 2013 (at p C36 of volume 1 of the exhibits)

87 See report 18 June 2013 (at p C36 of volume 1 of the exhibits)

88 See Ex 9 (at B96 of volume 1 of the exhibits)

89 See the range of costs suggested by Dr Harris at B96 of volume 1 of the exhibits

[154] Mr McAndrew is also interested in having a dorsal column stimulator inserted. A total of $103,412 is claimed. The defendant argues for a global sum of $17,500.

[155] Dr Atkinson thought that the stimulator worked in 60% of patients and would modify pain by 50%.[90] Mr McAndrew thinks those odds justify the decision to go ahead. That is not an unreasonable approach. I am conscious of Dr Moore's advice to "persist as long as possible without any further significant intervention". But it is not Dr Moore's pain.

[156] The costs include a trial, which, if successful, will be followed by the insertion of the stimulator. There is only a 60% chance that the trial will prove successful. I propose to allow the costs of the trial ($11,684), 60% of the costs of the insertion of the stimulator ($28,820), and 60% of the costs of the battery replacement (at $34,034 every 9 years). Those battery replacement costs I calculate at $33,000.[91] I allow a total of $78,500.

[157] The total allowed under this head is $103,500.

Future Treatment Costs

[158] The plaintiff seeks $16,700 for dental treatment. There is no complaint about that claim.

[159] Mr McAndrew also seeks:

Review by a pain specialist	$4,450
Occupational Therapy reviews	$2,194
Physiotherapy and massages	$70,446
Hydrotherapy	$33,031
Gym	$18,167
Travel to receive treatment	$25,000
Total	**$153,288.00**

[160] Putting to one side the surgery proposed I think that there is a deal of double counting in all this. The onus plainly lies on the plaintiff to show that each item of expense is justified as a reasonable response to the accident caused disabilities. I cannot see any evidence that shows that each and every remedy is reasonably necessary and will be so for the whole of the plaintiff's life.

[161] As well the spinal cord surgery may obviate the need for much of these expenses and it may not. Something in the order of a 30% reduction in the claim would be justified to allow for the chance of success of this surgery.

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90 See report of 24 October 2013 p 19 (at B115 of volume 1 of the exhibits)

91 Applying a cost of $34,034 each nine years to age 75 using the 5% deferred tables and discounting to 60%

[162] If Mr McAndrew continues to live in Brisbane it is difficult to think that his travel costs will be so high. The claim is simply a global estimate. Again he may not stay there. He made it plain it was not his choice to move to Brisbane in the first place but Ms Hoch's present intention seems to be to continue to reside in the city and she has proved influential to date.

[163] Doing the best I can I allow a global sum of $50,000 to reflect these various considerations.

Hand Braces

[164] The sum of $81,140.65 is claimed for the cost of hand braces. They are needed to enable Mr McAndrew to pursue his gym and bike riding activities. The defendant opposes any allowance. Ms Aitken supported their acquisition as keeping active has been of importance to Mr McAndrew through his life, there are general health benefits for him in pursuing these activities, and without the braces he could not do the activities independently, safely or, in some instances, at all.[92] I accept that some allowance is appropriate. But there are a number of difficulties.

[165] I cannot correlate the amounts claimed[93] with the costs proved. The costs are set out in the letter from Artificial Limbs and Appliances Pty Ltd of 2 September 2013.[94] There is a reference there to $4,980 for a gym/weight lifting brace and $5,903.75 for a mountain bike arm brace. The claim encompasses those two forms of braces but:

(a) Asserts a need for replacement every three years, a fact not proved as best I can see; and

(b) Claims additionally for "four types of braces per annum" but without a reference to the evidence supporting the claim. I cannot find any evidence about the matter.

[166] So while I accept a need for replacement is probably inevitable I am not persuaded that the costs can be as accurately divined as the submission supposes.

[167] I have mentioned the defendant's argument above that it is impossible to know what the future holds in terms of activity levels and interests for Mr McAndrew and there needs to be significant discounting. I agree.

[168] Again the calculation of the claim assumes an ongoing weekly cost as opposed to a replacement every three years. That results in an overstatement.

[169] I will allow $30,000. It is a global sum reflecting these criticisms in a broad sense.

Summary

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

Pain Suffering and loss of amenities of life	$150,800.00
Past economic Loss	$115,000.00
Interest on Past Economic Loss	$10,400.00
Past loss of Superannuation Benefits	$10,350.00

92 Ex 5 at p 21 (B60 of Volume 1)

93 $33.72 and $64.54 per week for 49 years

94 Ex 31 (at D1 of Volume 1)

Future Economic Loss	$600,000.00
Future Loss of Superannuation benefits	$67,980.00
Past Care & Assistance	$52,300.00
Future Care & Assistance	$115,320.00
Wilson v McLeay	$1,000.00
Future Pharmaceutical Expenses	$30,000.00
Future Aids & Equipment	$10,000.00
Future Surgical Costs	$103,500.00
Future Treatment Costs	$50,000.00
Dental Treatment	$16,700.00
Wrist Braces	$30,000.00
Special Damages	$211,721.73
Interest on special damages	$1,656.93
Total Damages	**$1,576,728.66**

Orders

[171] There must be an adjustment to reflect the $156,519.06 advanced to meet expenses incurred by the plaintiff which I have included in the above total.

[172] There will be judgment for the plaintiff in the sum of $1,420,209.60.

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