Supreme Court

New South Wales

Case Name:	Addison v BHP Billiton Iron Ore Pty Ltd (No 3)
Medium Neutral Citation:	[2021] NSWSC 1031
Hearing Date(s):	5, 6, 7 and 8 July 2021
Date of Orders:	18 August 2021
Decision Date:	18 August 2021
Jurisdiction:	Common Law
Before:	Cavanagh J
Decision:	(1) Judgment for the plaintiff for the sum of $581,235. (2) The defendant is to pay the plaintiff's costs. (3) Should either party seek a variation of the costs order, I grant leave to the parties to have the matter relisted on 3 days' notice.
Catchwords:	EVIDENCE – Opinion evidence – Use of psychological testing by expert witness NEGLIGENCE – Damages – Economic Loss – Application of Civil Liability Act 2002 (WA) – Defences – Contributory negligence
Legislation Cited:	Civil Liability Act 2002 (NSW) Civil Liability Act 2002 (WA)
Cases Cited:	Allianz Australia Insurance Ltd v Cervantes [2012] NSWCA 244 Fox v Wood (1981) 148 CLR 438; [1981] HCA 41 Martinez v OCS Services Pty Ltd [2009] WADC 42 Nairn v The Board of Management of Warren District Hospital [2006] WADC 97 Rabay v Bristow [2005] NSWCA 199 Thompson v J-Corp Pty Ltd [2018] WADC 164

	Watts v Rake (1960) 108 CLR 158; [1960] HCA 58
Category:	Principal judgment
Parties:	Ronald Addison (Plaintiff) BHP Billiton Iron Ore Pty Ltd (Defendant)
Representation:	Counsel: B Dooley SC with J Lee (Plaintiff) G Watson SC with W Liu (Defendant) Solicitors: Don Cameron & Associates (Plaintiff) HWL Ebsworth Lawyers (Defendant)
File Number(s):	2017/151451
Publication Restriction:	None

JUDGMENT

1 The plaintiff sustained injuries in a single vehicle motor accident on 27 January 2016 at Yandi Central Mine.

2 The accident occurred on an entrance road leading into the mine. The plaintiff was jolted around his cabin (the extent to which is in dispute) when he came across a floodway at speed (being a speed he was required to travel at to get up the upcoming hill).

3 The defendant was the occupier of the area where the accident occurred. At the time of the accident, the plaintiff was employed by Linfox Australia Pty Limited ("Linfox") and was driving a truck pulling a road train containing diesel.

4 Shortly prior to the hearing, the defendant admitted breach of duty but disputes that the injuries and disabilities alleged by the plaintiff were caused by the accident. Further, the defendant disputes that the plaintiff suffers from the level of disability that he maintains.

5 The defendant maintains that the plaintiff was guilty of contributory negligence, albeit, that by the end of the hearing, the allegation of contributory negligence was limited to a failure to wear a seatbelt at the time of the accident.

6 Although the accident occurred in Western Australia, the plaintiff now resides in Wagga Wagga. Damages must be assessed in accordance with the *Civil Liability Act 2002* (WA) ("*CLA WA*").

7 In these circumstances, the central issues for determination are:

(1) was the plaintiff wearing a seatbelt at the time of the accident?

(2) if not, is the plaintiff guilty of contributory negligence and to what extent should any judgment be reduced on account of his contributory negligence?

(3) what physical injuries did the plaintiff sustain as a result of the accident?

(4) did the plaintiff develop a psychiatric condition as a result of the accident?

(5) to what extent is any disability caused or contributed to by any pre-existing condition(s) or the result of any subsequent unrelated accidents?

(6) what amount is the plaintiff entitled to in respect non-economic loss?

(7) what amount is the plaintiff entitled to in respect of past economic loss?

(8) is the plaintiff entitled to any amount on account of future economic loss?

(9) what amount is the plaintiff entitled to in respect of domestic assistance and medical expenses?

8 The matter is somewhat unusual in that:

(1) according to the expert orthopaedic evidence the plaintiff would have recovered from his physical injuries within three months of the accident such that he would have been fit for his work as a truck driver at that time;

(2) the plaintiff himself accepted in evidence that by the end of 2016 the reason that he was not back at work was because of his psychological condition rather than any physical incapacity;

(3) the plaintiff received Workers Compensation payments from or on behalf of his employer Linfox in the amount of approximately $300,000;

(4) subsequent to receipt of those payments the plaintiff entered into an agreement with Linfox to the effect that he would only be required to repay the sum of $250,000 to Linfox out of any settlement or judgment that he might obtain in these proceedings;

(5) at least according to the defendant, the sum of $59,979.63 representing the difference between payments received and $250,000 must thus be deducted from any assessment of damages as the plaintiff has already received that amount by way of compensation and the plaintiff is not liable to repay that sum;

(6) the plaintiff returned to heavy truck driving 14 hours per day in September 2020 at the age of 71. He has been driving trucks, performing the work he was performing prior to the accident, working 14 hours a day for 4 to 5 days a week since September 2020, despite his age. He says that he intends to continue to do so until the age of 75; and

(7) he says that he remained off work for a period of four years subsequent to the accident because of his psychological state which, on his case, is a combination of anxiety, depression and PTSD. He says that even though he has returned to work 14 hours a day, he continues to suffer from psychological symptoms.

9 Brian Dooley SC appeared with James Lee on behalf of the plaintiff. Geoffrey Watson SC appeared with Winnie Liu on behalf of the defendant.

10 The hearing was conducted entirely with the use of Microsoft Teams during the period of a lockdown in Sydney. Whilst there was the occasional technological problem, no-one suggested that the evidence or the giving of the evidence was in any way impacted by the inability to appear in person.

Background

11 Both the pre and post-accident chronology of events is not in dispute. Much of the plaintiff's evidence (contained in his evidentiary statements) was not the subject of challenge. That is not to say that I must accept every aspect of the plaintiff's evidence that has not been the subject of challenge but the following chronology is uncontroversial.

12 The plaintiff is currently 72 years of age. He left school in Year 11 and initially worked on the family farm in Victoria. He first obtained a truck licence at the age of 19. He has spent most of his working life driving heavy trucks, primarily semi-trailers and tankers. Much of his work has been in long-distance truck driving. In 2013, he obtained employment with Linfox as a tanker driver working out of Port Hedland in Western Australia. He was required to drive a road train carrying diesel fuel, transporting the fuel from a depot into the mine. The round-trip from Port Hedland to the mine sites would take approximately 14 hours and cover a distance of 700 kilometres. He did this 4 days a week and worked 56 hours per week.

13 He appears to have had a consistent work history for many years prior to commencing with Linfox.

14 On 27 January 2016 he started work at the Port Hedland depot. He picked up a triple road train filled with 118,000 litres of diesel. He left the depot at approximately 8.00am and drove to the Yandi Central Mine site. To get to the delivery point of the mine site, he was required to use the OHP2 access road. He had driven the road with loaded tankers many times before.

15 There was a boom gate controlling access to the road. After proceeding through the boom gate he drove approximately 5 to 6 kilometres before turning into the OHP2 access road. When using the OHP2 access road he was required to conform with a procedure called “Ascend Yandi Central Hill”. He believes that this procedure was prepared by Linfox and approved by BHP. The procedure would require him to stop at the summit of the first hill and write out a “Take 5” document being a process by which the driver is required to identify and take note of any potential hazards such as cattle on the road or roadworks.

16 On the occasion of the accident he completed the Take 5 document. From the summit of the hill, he was not able to see the state of the floodway at the bottom of the hill. The passage through the road involved a descent, followed by a sharp ascent. At the bottom of the descent there was a floodway. As he approached the bottom of the hill, he was required to maintain his speed of 60 kilometres per hour, so as to ensure that he could make it up to the top of the hill. Approximately 50 metres from the floodway, he first noticed that the floodway looked rough. As he got closer, he saw two deep trenches in the floodway. He said that by that stage, he had no option but to hold his line and continue to drive through the floodway. He believed that if he tried to stop, the trailers would crush the prime mover, no doubt leading to a catastrophic accident.

17 As he hit the first trench, the bullbar hit the ground. He says that he was thrown up and down in the cabin. Gravel from the floodway was thrown onto the sides and the front of the cabin. The equipment in the bunk was thrown around the cabin. Despite this, he was able to keep the tanker on the road even though that same jolting process was repeated when he hit the second trench. He

believed that, if the prime mover was allowed to jack-knife, then the trailer would have come over the top of the prime mover and probably overturned.

18 Although he experienced immediate pain, he continued to drive to the unloading point. He says that at that point he was screaming with pain. He had never experienced pain like that before. He immediately reported the accident and his injury. He was given an injection by BHP paramedics and transported to hospital. He was taken by ambulance to Newman Hospital. He was admitted for a period of five days. Thereafter, he was transferred to Royal Perth Hospital by air ambulance. He was admitted for a period of three days. He then returned to Port Hedland. He sought treatment from his general practitioner and was referred to Dr Brian Hsu, an adult and paediatric spine surgeon.

19 On 9 March 2016 he returned to his home in Wagga Wagga. On 11 March 2016 he first consulted a psychiatrist, Dr Adesina Adesanya. During this period, he continued to wear a back brace. He remained off work. He was informed on 15 March 2016 that surgery for his orthopaedic complaint was not required.

20 He made a claim for Workers Compensation payments and received payments for a period of 104 weeks. He says that was the maximum that he could receive having regard to the relevant legislation. During this two year period, his medical expenses were also paid by the Workers Compensation insurer.

21 He continued to see his treating psychiatrist, Dr Adesanya, on a regular basis throughout 2016, 2017 and 2018. However, he only saw Dr Adesanya once in 2019 (4 February 2019) and twice in 2020 (7 July 2020 and 29 October 2020). By 1 February 2017, he was informing his general practitioner that he had less back pain and more back mobility.

22 The plaintiff did not perform any work between the date of the accident and 4 July 2017. On that day he commenced volunteer work with Baptist Care as an offsider on a community transport bus picking up and dropping off elderly passengers. He worked two hours for two days a week and then three hours for two days a week. He ceased that voluntary work on or about 27 September 2018. He says that two elderly patients passed away and he found it difficult to cope with this.

23 On 7 March 2019, he attempted to restart his truck driving career. He took some lessons and on 22 May 2019 he undertook the Roads and Maritime Services heavy vehicle driving test. He says he was required to take this test to retain his licence in any event. However, he did not attempt to obtain any regular work at that time.

24 On or around July 2020 he contacted his old boss at Linfox and made an enquiry as to whether there would be any work for him. Whilst he initially sought casual work, that was not possible, so he started back at work on a full-time basis. His original plan was to work 12 weeks straight and then have four weeks off. His first day at work was 14 September 2020. Since that time he has been back driving tankers, working 4 to 5 days a week for 14 hours per day.

25 The effect of his evidence is that he would like to work longer hours but he is not permitted to do so. He says that he intends to work until the age of 75. In his original evidentiary statement, which was obviously prepared well before he returned to work, he said that but for the accident he would have worked until the age of 72. In fact, he returned to work at the age of 71.

26 The plaintiff says that he is entitled to his full loss of income between the date of the accident and his return to work in September 2020, with a deduction of five weeks when the plaintiff was injured in an unrelated accident. Further, he says that he is entitled to a buffer on account of future loss of earning capacity. He claims domestic assistance for three hours per week from the date of the accident. He claims a buffer on account of future domestic assistance. He says that he is entitled to payment of all of his medical expenses, whether paid by the Workers Compensation insurer or paid by him.

27 At the expiration of the two year period subsequent to the accident, the plaintiff entered into a settlement with Linfox. The nature of the claim pursued by the plaintiff against Linfox is not entirely clear but the effect of the settlement is that, even though Linfox had paid a total of approximately $300,000 in Workers Compensation payments up to that time, it agreed to accept repayment of a sum of $250,000 should the plaintiff negotiate a settlement or receive damages arising out of these proceedings. This means that the plaintiff does not have to repay all of the Workers Compensation payments he has received.

28 The defendant submits and the plaintiff agrees (at least partially) that should the effect of any judgment in this matter be that he is awarded damages, including sums equivalent to the amount that he received by way of Workers Compensation, then the defendant will be entitled to a deduction in the judgment sum in respect of an amount up to $59,979.63.

29 I will now deal with the issues as identified by the parties.

Contributory negligence

30 Although the defendant pleaded a number of particulars of contributory negligence, by the conclusion of the hearing, the defendant relied only on one allegation being that the defendant was not wearing a seatbelt at the time of the accident.

31 The basis of this contention was not that the plaintiff had admitted to not wearing a seatbelt but rather that, based on the defendant's expert engineering evidence and having regard to the plaintiff's description of what occurred inside the cabin of his truck, he could not have been wearing a seatbelt.

32 Indeed, there was general agreement between the defendant's expert, Dr Gibson, and the plaintiff's expert, Mr Byrnes, that this must be so. Both Dr Gibson and Mr Byrnes prepared a joint report and gave evidence concurrently. Having said that, Mr Byrnes did not have much of a role to play on the issue of wearing a seatbelt because he accepted that he did not have the same expertise as Dr Gibson. In particular, he does not have any experience in biomechanical engineering.

33 I should say that the defendant only admitted breach of duty of care shortly before the hearing and much of the original reports of the three experts who were retained in the matter was devoted to the issue of primary negligence. Their evidence was rendered irrelevant following the admission of a breach of duty of care and the focus of the oral expert evidence was on the seatbelt issue.

34 It is only necessary to say that having considered the dimensions of the cabin (based on a scale drawing) and having assumed as accurate the proposition that the result of the incident was that the plaintiff was thrown upwards and hit

his head on the roof of the cabin (perhaps twice), Dr Gibson concluded that the plaintiff must not have been wearing a seatbelt or, at the very least, that the seatbelt could not have been properly fitted.

35 This is because the distance between the plaintiff's head when sitting on the driver's seat and the roof of the cabin was such that the seatbelt would have prevented him from being thrown upwards a sufficient distance so as to hit his head on the roof of the cabin. That is, the effect of the expert evidence prior to the experts entering the witness box was very much that if the plaintiff hit his head on the roof of the cabin he could not have been wearing a seatbelt.

36 However, as a result of a forensically successful cross-examination of Dr Gibson by Mr Dooley (with the assistance of Mr Lee), Dr Gibson had cause to change his opinion. Firstly, he accepted that his calculations as to whether it was possible for the plaintiff to have hit his head might be different if the plaintiff was leaning forward or sitting in some funny position at the point of impact. More significantly, he accepted that if the plaintiff had hit his head on the roof, he would have expected there be some record of injury to the head or some other bruising (there was no such record or complaint).

37 Further, the proposition that the plaintiff was jolted upwards to such an extent that he hit his head on the roof would be inconsistent with the plaintiff keeping his foot on the accelerator and keeping a hold of the steering wheel at all times (as he must have done to control the vehicle as it went through the floodway).

38 The plaintiff says that he was wearing a seatbelt. Indeed, he said so to his employer (Mr Hogg) at the same time as he was telling Mr Hogg that he had hit his head on the roof. The plaintiff had been driving for over an hour prior to the accident. Whilst he did stop at the top of the hill and complete the Take 5 exercise, that was undertaken in his truck. It was just a matter of filling in a form. It seems inherently improbable that an experienced truck driver carrying a load of diesel fuel would not have been wearing his seatbelt.

39 Having regard to the concessions made by Dr Gibson, there is really no evidence to support the proposition that he was not wearing a seatbelt and, in the circumstances, the defendant fails on its allegation of contributory negligence.

40 Of course, as Mr Watson submits, it remains somewhat puzzling that the plaintiff would have been providing a history, essentially to all those who had a need to find out about the circumstances of the accident, that he did hit his head on the roof. Whilst the plaintiff was extensively cross-examined on this issue and the defendant has detailed all of the occasions on which the plaintiff must have said that he hit his head on the roof in the defendant's closing submissions, it is only necessary to say that it seems highly unlikely that the plaintiff did hit his head on the roof. Indeed, when giving oral evidence on the hearing he specifically stated that he did not recall hitting his head on the roof.

41 Whilst I accept that sometimes, particularly in hospital or GP's notes, the same history can be repeated when in fact it was only given once, it is difficult to understand where the consistent history of hitting his head could have come from other than the plaintiff. The plaintiff attempted to explain the inconsistency between the pre-hearing history and his oral evidence by suggesting that whenever he explained the force of the impact, those interviewing him always asked or assumed that he hit his head on the roof. I do not accept this explanation.

42 There were a number of explanations or justifications which the plaintiff gave during his evidence which are difficult to accept. Be that as it may, the significance of whether the plaintiff hit his head on the roof was somewhat diminished by the end of the hearing because:

(1) there is no dispute that the plaintiff sustained an axial compression fracture at T9. Further, there is no dispute that that fracture only rendered him unfit for work for a period of three months; and

(2) according to Dr Gibson, he could have sustained such a fracture either by hitting his head on the roof or being jolted off the seat and landing heavily on it again (which most likely occurred).

43 In my view, the likely explanation for the regular statements by the plaintiff that he hit his head on the roof is that he was providing an exaggerated or dramatic version of what occurred inside the cabin. It may just be an example of the well-known phenomenon of persons being involved in traumatic events not being able to provide a clear description of what actually occurred or it may be an example of a deliberate exaggeration. I would only say that its significance was greatly diminished by the time of the presentation of all of the evidence.

Damages

44 It is convenient that I deal with the damages assessment on an issue-by-issue basis.

The plaintiff's evidence

45 Much of the plaintiff's evidentiary statements was not the subject of challenge during cross-examination. The focus of cross-examination was very much on:

(1) the mechanics of the accident and what happened to the plaintiff inside the cabin;

(2) whether he was wearing a seatbelt;

(3) the nature of pre-existing back and PTSD conditions;

(4) his symptoms subsequent to the accident;

(5) whether he remained unfit for work for more than 12 months after the accident; and

(6) whether he had any need for care at all.

46 The upshot of the cross-examination was that it was suggested that he was not giving accurate evidence in a number of respects and that he had not provided correct histories to the doctors. Further, and of most significance to the central issue in the case (being his entitlement to economic loss), was the emphasis on his bike riding activities subsequent to the accident.

47 There are other statements made by him in the witness box which I would not accept as being entirely accurate. For example, when it was suggested to him that he was able to be back riding the same distances that he had been prior to the accident, the plaintiff referred to his speeds as if to suggest that there was a reduction in average speed due to his injuries. His own records do not support that suggestion.

48 His statement that he remained unfit for any useful work until the day he actually started work in September 2020 is difficult to accept. His suggestions of an ongoing inability to perform some of the domestic tasks are difficult to accept. The history provided to his occupational therapists for the purpose of this case was not accurate. It seems improbable that he has difficulty carrying the grocery bags. His complaint of increased pain when undertaking modest

lifting or mowing the lawn again seems improbable when he is either riding hundreds of kilometres per week or working 14 hours per day.

49 On the other hand, Mr Dooley submits that I would have regard to the fact that the plaintiff returned to work nine months before the commencement of his hearing, after a four year absence. The effect of this submission is that if he was seeking to maximise his claim, he would not have returned to work.

50 There is merit in that suggestion, although of course in his original evidentiary statement he said that but for the accident he would have retired at the age of 72 in any event.

51 In the end, I formed the view that some of the plaintiff's evidence was somewhat self-serving. This does not mean that he was being dishonest. Rather, he had a tendency to offer explanations which might assist in recovering damages, rather than detract from this claim.

52 It must be remembered that injured persons often become aggrieved about what has happened to them as a result of the conduct of another person, that is, the defendant, and come to believe in their entitlement to be compensated. Sometimes they have unrealistic expectations and are made aware by their own solicitors that the amount they might recover will necessarily depend upon their own evidence, particularly their answers in cross-examination.

53 There may be circumstances in which self-serving evidence is a reflection of dishonesty, but there may also be circumstances in which self-serving evidence should be viewed in a different context.

54 It is instructive to examine the plaintiff's evidentiary statements, having regard to not only the content but when they were made. The principal evidentiary statement is dated 22 December 2017. In that statement, the plaintiff refers to both his physical and psychological complaints. He also refers to his bike riding. In terms of his physical complaints, he says:

> "Presently, I still suffer from significant pain in my mid back under the shoulder blade on the left hand side. This pain is still there all the time but fluctuates in intensity. This pain causes me a good deal of trouble at night and interferes with my ability to get a good night sleep. If I engage in some physical activity such as mowing the lawn or doing some modest lifting, it can aggravate my back and I will have increased pain which usually comes on slowly over the

> next few hours. When this happens, I just take a few more painkillers and rest until the pain subsides. If this pain persists I seek treatment from Markus Smith. I continue to wear my brace every day for approximately 12 hours a day."

55 As at the date of that statement the plaintiff had been involved in regular and substantial road riding. Further the orthopaedic experts agree that having regard to the nature of the plaintiff's orthopaedic injury, he would have been fit to return to his pre-accident long-distance truck driving within three months of the accident.

56 It is difficult to reconcile his evidence about the state of his back in December 2017 with any medical evidence. It is also difficult to reconcile that evidence with his own statement, during oral evidence, to the effect that the reason he was still off work by the end of 2016 was his psychological condition. He did not suggest that it was in any way related to any physical problem.

57 Further, he spoke of his cycling activities in his December 2017 statement as follows:

> "I have been a keen cyclist for many years. In December 2015 I was home on leave and I rode 1258kms in one month. This included a ride from Wagga to Bairnsdale via Mount Hotham.
>
> I made an effort, encouraged by my doctors and physiotherapist to return to bike riding. Initially this was connected with a lot of pain and significant anxiety. Now, I am regularly able to ride up to 50kms, however, I have always required a family member to be in the riding group as, if I do not have someone there who understands my situation, I'll become fearful and anxious and usually this would mean that I would turn around and immediately return home."

58 Whilst his observations as to his pre-accident cycling may have been accurate, his reference to his post-accident cycling was not. He was plainly riding more than 50 kilometres at a time and had been doing so for more than 12 months (at the time of the statement). The proposition that he would only ride with a family member in the group cannot be accepted. If it be accurate, it must mean that this unidentified family member would have had to ride with him on a daily basis, often more than 100 kilometres a day.

59 In the end I consider that I must treat the plaintiff's evidence with caution. There is a degree of overstatement or exaggeration in a number of aspects of his evidence. It will be particularly important (as it always is) to have regard to objective contemporaneous evidence and expert medical opinion.

The plaintiff's bike riding

60 For many years, the plaintiff has been a serious cyclist. He records his cycling though an app known as Strava. Through this app, he keeps a record of the precise time, distances, speed, elevation and even the type of bike he is riding.

61 Prior to the accident the plaintiff was regularly riding in excess of 50 kilometres a day and sometimes in excess of 100 kilometres. Indeed, as part of the narrative provided to the doctors for the purposes of this case, the plaintiff identified that he undertook riding a bicycle at that level prior to the accident.

62 The defendant's approach to cross-examination was to demonstrate that the plaintiff had not volunteered to the doctors that he had seen for the purposes of this case that he had returned to riding at that same level at some point after the accident. That is not to say that there is any statement by the plaintiff that he no longer rides a bicycle at all or a positive assertion that he could barely ride a bike. Yet, the defendant's submission that there is really no statement by the plaintiff to the doctors that he had returned to riding at that level is correct. The defendant sought to portray this as deliberately misleading. Perhaps it again falls into the category of self-serving.

63 Although this topic was the subject of considerable focus by the defendant, it seems to me that it is only necessary to say this about his riding:

(1) prior to the accident the defendant was a serious cyclist. He rode extensively and recorded his activity frequently. He owned a number of road and mountain bikes. Subsequent to the accident, the plaintiff did not ride for approximately six months. In late June 2016, he recommenced riding. The records suggest a graduated return to his pre-accident levels. He purchased an expensive bike;

(2) by December 2016, he was again riding extensively. The records tend to suggest that he was back to something approximating his pre-accident levels. By this, I mean that he was riding similar distances, similar times and similar speeds. That pattern of riding has continued;

(3) whilst there was little focus on with whom he rode, being a serious cyclist, it must be that he rode in a group and sometimes alone. He explained that after the accident he would ride in a group or with someone as if for some sort of support or protection having regard to his PTSD symptoms. Whether that be so, no evidence was adduced from any other person that that person was some type of support rider; and

(4) his riding was at a high level both before and after the accident. After the accident he went to the Tour Down Under, not just to watch the race

> but to participate in the section of the event which allowed amateurs such as the plaintiff to ride the same course for a period. He has participated in other events after the accident, sometimes riding more than 100 kilometres a day on consecutive days. There is no doubt for a man in his late 60s and early 70s, he is very fit but it must be recognised that cycling is something that he has done all his life. He has not suddenly decided to become a cyclist after the accident. He is also involved in the organisation of cycling as he plays a role in the Tour de Riverina. During the period that he was off work his cycling was not limited to the Wagga area.

64 The defendant submits that a return to cycling at this level is quite inconsistent with the allegation of any ongoing physical or psychological problem. Indeed, there is a considerable emphasis on the cycling as a basis for a finding that the plaintiff has been fully fit for work since approximately 12 months after the accident.

65 Again, it is necessary to make findings about the significance of the cycling but its significance is perhaps overblown, bearing in mind the uncontested evidence that the plaintiff had sufficiently recovered from the physical consequences of his accident within three months, such as to be fit for his truck driving work. Further, the plaintiff himself stated in his oral evidence that the reason he could not work by the end of 2016 was his psychological condition, rather than any physical problems.

66 It may be that, as he asserts, he has continued to suffer from some form of back discomfort at all times subsequent to the accident but having regard to the expert medical evidence that discomfort would not have prevented him from returning to work as a truck driver three months after the accident and has plainly not prevented him from returning to the same level of pre-accident cycling. His cycling is thus only of particular significance in the context of his psychological complaints.

67 I do not accept the defendant's submission that a return to cycling within months of the accident is inconsistent with the alleged level of psychological symptoms that the plaintiff maintains. Whether or not exercise is a form of treatment for PTSD, the benefits of exercise are well-known. It could hardly be disputed that psychiatrists will generally encourage their patients to exercise.

68 Whilst I will comment further on the significance of this exercise when dealing with the psychiatric evidence, I do not understand even Dr Lee to be suggesting that the ability to exercise is inherently inconsistent with the diagnosis of PTSD. Having said that, as identified by the defendant, there remains a question as to whether the level of the plaintiff's participation in cycling is inconsistent with the level of psychological symptomatology that he maintains.

Prior injuries and accidents

69 When considering the issues raised by the defendant two principles are particularly relevant being:

(1) the defendant must take the plaintiff as it finds him (the eggshell skull principle); and

(2) to the extent that the defendant maintains that any ongoing incapacity or disablement is caused by any pre-existing condition rather than the accident, the onus is on the defendant to disentangle the consequences of the pre-existing condition from the consequences of the accident.[1]

70 The plaintiff was cross-examined on a number of pre-accident events and injuries. It is clear that the plaintiff had suffered from back problems during the course of his career but he maintains that those problems did not prevent him from working and they were no different from the sort of problems experienced by truck drivers generally.

71 I accept that the plaintiff had suffered from back problems prior to the accident for which he had received treatment from time to time, in particular, chiropractic treatment. However, there is no evidence that such problems had ever interfered with his capacity to work in any meaningful way. He has a consistent work history. The defendant did not identify any particular period during which he was unfit to work for months or years.

72 Whilst I accept that the plaintiff experienced back symptoms prior to the accident and it may be that he would have experienced back symptoms on an ongoing basis even but for the accident, I do not accept that such problems would have caused the plaintiff to stop work. I do not accept that the defendant has established that the prior back problems were the cause of any incapacity

[1] Watts v Rake (1960) 108 CLR 158 at 163-164; [1960] HCA 58 (Menzies J).

for work during the period between the time of the accident and September 2020.

73 The plaintiff was also cross-examined on hospital notes and other records to the effect that he was suffering from PTSD prior to the accident or at least that he had been diagnosed with PTSD at differing times prior to the accident.

74 The plaintiff denied ever suffering from PTSD previously but admitted that he suffered from claustrophobia. There is no doubt that he had suffered from claustrophobia both prior to and after the accident. The following exchange ensued:

> "Q. Mr Addison, do you remember when I asked you earlier if you ever suffered previously from post-traumatic stress disorder?
>
> A. Yes, I did.
>
> Q. You had, hadn't you?
>
> A. Well, I'm not a specialist, and I didn't consider that feeling claustrophobic or trapped in certain conditions was a psychiatric disorder or it was PTSD. I'm not aware of that."

75 The proposition that he previously suffered from PTSD was based on an admission to the Sir Charles Gairdner Hospital in Perth in May 2015. The hospital notes record as part of the plaintiff's past medical history PTSD and claustrophobia. He appears to have been admitted to the hospital following an incident on a flight from Port Hedland to Perth when he developed hot and cold shakes and abdominal pain. However, the ultimate diagnosis was cellulitis.

76 The defendant emphasises that s 5D *CLA WA* is in different terms to s 5E *Civil Liability Act 2002* (NSW) in the sense that whilst both sections relate to the onus imposed upon the plaintiff, s 5D *CLA WA* refers to liability for damages.

77 Although s 5D *CLA WA* does refer to a liability for damages, I do not accept that this provision has the effect of overriding long-established principles in assessing damages for economic loss. Specifically I do not accept that the effect of s 5D *CLA WA* would be that the principles set out in cases such as *Watts v Rake*[2] *and Rabay v Bristow*[3] would not apply; that is, in cases in which the plaintiff establishes that he is unfit for work for the job that he would be

[2] (1960) 108 CLR 158; [1960] HCA 58.
[3] [2005] NSWCA 199.

performing if not for the accident, the defendant must adduce evidence of other work that he could perform including other jobs that he could obtain.

78 In its closing submissions the defendant described the pre-accident reference to PTSD as being an unexplained loose end. That may be so and it may also be that the plaintiff did not provide a history of the earlier reference to PTSD to doctors such as Dr Diamond but, again, it does not seem to me that the evidence is sufficient to lead to a finding that the symptoms from which the plaintiff was suffering in the period following the accident were referable to a pre-existing condition, rather than the consequences of the accident.

Physical injuries

79 As a result of the accident the plaintiff suffered an axial compression fracture at T9 and other bruising. This would have been initially very painful and disabling but he largely recovered within months.

80 In a conclave report dated 3 April 2019 the orthopaedic specialists, Professor Michael Ryan, Dr James Bodel and Dr David Maxwell opined that the duration of the injury was from six weeks to three months.

81 The doctors agreed that the plaintiff did not have any current orthopaedic disabilities and that there was no reason for the plaintiff to limit his physical activity levels.

Psychological disability

82 The defendant does not dispute that the plaintiff developed PTSD following the accident. However, it is the defendant's position that the plaintiff recovered from that condition such that he would have been fit for all forms of work within 12 months of the accident. The plaintiff accepts that there has been some improvement in his PTSD but maintains that he was unfit for all forms of work until he returned to driving in September 2020. He says that he returned to driving when he felt able to do so and that the return to work has led to improvement in his condition albeit he still suffers from some symptoms.

83 In his evidentiary statement of December 2017 the plaintiff identifies his psychological symptoms at that time as follows:

> "I feel that I am psychologically stronger than I was 12 months ago.

> I still get anxious and have panic attacks.
>
> My concentration has improved however I still have difficulties maintaining concentration for any length of time. I can read one article in the newspaper before I need to rest.
>
> I still have significant memory problems and I find this very upsetting. I have had recent situations where I have socially been in contact with people whom I knew very well prior to my accident and have not only been not able to remember their names but unable to recognise them as somebody that I knew.
>
> I feel tired all the time.
>
> I lack motivation. Prior to my accident, I always felt that there was some extra activities that I could cram into the day. Now I just feel like I cannot be bothered or I will leave it until some other time.
>
> I have lost interest in sexual relations and feel my libido is non-existent."

84 In his evidentiary statement of 17 June 2021, he says that his improvement between 22 December 2017 and September 2020 was gradual and quite slight. He says:

> "I feel that I am psychologically stronger than I was since I started work in September 2020, however, I still get anxious and have panic attacks to this day. For example, on 9 June 2021 I had a panic attack when I had an appointment with Dr Leonard Lee and there was a delay of some hours due to technological issues. I depend upon talking to Margo during these times to get me through."

85 The critical question is really to what extent the plaintiff has recovered from those symptoms which he was experiencing in the months following the accident and which led to the diagnosis of PTSD. Plainly, there has been a significant recovery. The effect of the plaintiff's evidence is to admit this.

86 The plaintiff was examined for the purpose of this case on behalf of his solicitors by Dr Michael Diamond on 12 January 2017 and 12 December 2020. Dr Diamond prepared reports dated 17 January 2017 and 14 December 2020. The plaintiff was examined on behalf of the defendant by Dr Leonard Lee on 6 June 2018 and 9 June 2021. Dr Lee prepared reports dated 22 June 2018 and 18 June 2021. Dr Diamond and Dr Lee participated in a conclave on 14 December 2018 and prepared a joint report.

87 There is considerable divergence of opinion between the doctors. Suffice to say that Dr Diamond considers that the plaintiff suffers from PTSD that has become chronic and that he had an associated co-morbid major depressive disorder and that he had only responded to some extent to treatment.

88 Dr Diamond considered the plaintiff totally unfit for work because of his psychiatric condition when he examined him in 2017. He acknowledged that the plaintiff's return to work was a good sign but described his psychological status as continuing to be brittle and was somewhat pessimistic about his ability to continue working in the way that the plaintiff was working as at the time of his last consultation in December 2020.

89 On the other hand, Dr Lee did not consider that the plaintiff was suffering from any psychological condition at least by the time he examined him in June 2018. He considered that there was evidence of over-reporting or feigning. Presumably, Dr Lee's opinion provides the evidentiary basis for the defendant's suggestion that the plaintiff would be fit to return to his former work within 12 months of the accident.

90 In my view, there are some problems with the reports and opinions of both medicolegal experts.

91 Dr Lee now works almost exclusively as a medico-legal consultant. He identified that he might have 3 to 4 ongoing patients with PTSD but having regard to the nature of his own job description it must be that his main focus is in examining persons and providing reports for the purposes of these cases. He stated that the main basis of his opinion (that is that the plaintiff was feigning) was his mental state examination and the results of the psychological testing he undertook.

92 On any view, there must be limitations in psychiatric evaluation in a medico-legal context. That is because psychiatrists generally only see a plaintiff for a very limited period in the context that injured persons must know that the psychiatric evaluation will very much influence the amount of money that might be recovered.

93 This situation is stressful and plaintiffs often approach such evaluations with apprehension and concern. The same might be said about the evaluation by the medico-legal practitioner nominated by the plaintiff's solicitors. It is often a short once-only consultation with plaintiffs often in a precarious position in their lives. With the knowledge that they need to identify absolutely all of their symptoms, the likelihood of understatement is remote.

94 In some cases there is evidence from a psychiatrist who has treated the plaintiff for a lengthy period and on a regular basis. The evidence of that psychiatrist might sometimes be given more weight than the evidence of the medico-legal practitioner.

95 Of course, independent medical examiners must come to their own independent view and the Court starts with the assumption that they have done so. Having said that, Dr Lee appears to pay little regard to the observations of the treating psychiatrist, Dr Adesanya, and the nature and extent of the plaintiff's treatment. Dr Lee focuses primarily on his own mental state examination and the results of his psychological testing.

96 In my view, considerable caution must be exercised before placing too much weight on the results of this type of psychological testing undertaken by a psychiatrist in the context of these types of cases.

97 Firstly, as Dr Diamond said in oral evidence, this type of testing is not generally undertaken by psychiatrists. Psychiatrists treating patients for conditions such as PTSD do not require that their patients submit to psychological testing as some sort of diagnostic tool.

98 Secondly, requiring a plaintiff to submit to psychological testing without notice as part of a psychiatric evaluation could only be fair (and the results could only be given weight) if the medico-legal practitioner discloses and reveals the processes undertaken and all of the results obtained. This would allow other experts to properly assess the significance of the results.

99 Thirdly, when exposing the results, it will be necessary for the expert to explain in some detail the significance of the test results, bearing in mind that the results can mean different things, depending on context and other factors. This is best illustrated in this case.

100 Dr Lee apparently administered four psychological tests. Yet on reporting on the results of the MMPI-2 he referred only to a limited number of test results and offered the opinion that the results demonstrated that the plaintiff was over-reporting or feigning.

101 It emerged during cross-examination that he had not disclosed the results of all of the validity scales.

102 There are both clinical and validity scales in MMPI-2. There are 5 validity scales. Dr Lee reported only on one being the one which was adverse to the plaintiff (that is, on his interpretation of the result).

103 When asked about the results of the other validity scales, he identified that 3 were “normal”. When asked about the fifth, he said he could not find the result. He gave evidence by AVL. He left the room to seek the assistance of his secretary but the result was never provided. He may have felt that the one result which he disclosed was so significant that it was not necessary to disclose the other results of the validity scales. That is a matter for his expert judgment but I would not place any weight on an expert opinion which, according to the expert, is so heavily based on the results of testing in circumstances in which the expert did not disclose all of the results in his report.

104 Apart from anything else, even a brief analysis of the MMPI-2 suggests that so-called over-reporting on one or other of the validity scales can be reflective of something other than feigning. In my view, if medico-legal experts are going to use so-called objective psychological testing as a basis for concluding that a person is feigning, much more needs to be exposed than merely a reference to a small number of selected test results. Apart from anything else the expert would need to demonstrate why any results suggest feigning as opposed to the other explanations that are available.

105 In these circumstances, I do not consider that I should give any real weight to Dr Lee’s opinion.

106 Dr Diamond’s reports are not lacking in substance or detail. He is plainly an expert in PTSD. He treats hundreds of patients. He treats many patients who suffer from the condition. Dr Diamond’s reasoning process was well exposed and the basis of his opinion is set out in his reports. Having said that, it must be that in the medico-legal context he attaches a significant weight to the history provided by the plaintiff and the mental state examination.

107 The problem with Dr Diamond's opinion is that it is not based on an entirely accurate history as provided by the plaintiff. The level of activity engaged in by the plaintiff was understated. Again, having said that, I do not accept the defendant's contention that in some way the type of exercise undertaken by the plaintiff would be inconsistent with PTSD. Dr Diamond certainly rejected that proposition.

108 The idea that exercise, even vigorous exercise, would be inconsistent with suffering from PTSD should be rejected (not that the defendant went that far).

109 Further, Dr Diamond's prognosis for the plaintiff, even though he had returned to work, has been shown to be overly pessimistic. The plaintiff has now been working 10 months, full-time, 14 hours a day, seemingly without any restriction in his work activities or without any difficulty performing his work because of his psychological symptoms.

110 In these circumstances, it seems to me that, whilst I should pay due regard and consider the medico-legal psychiatric evidence, particular importance must be attached to the opinion of the treating psychiatrist, Dr Adesanya.

111 After recording the history of the accident in his report of 26 September 2017, Dr Adesanya said:

> "Ronald subsequently started experiencing symptoms including recurring flashbacks, nightmares, insomnia, anger, concentration/memory problems and low libido. He also continues to ruminate on all the fine details of the accident. Ronald denied any suicidal thoughts or ideas. Ronald is currently on workcover since the work accident.
>
> Ronald suffered from claustrophobia and was on prescribed doses of Diazepam prior to the work injury on 27th January 2016. He was also on medications for asthma prior to the work accident, and was admitted to the Newman hospital in WA after the work accident. Ronald denied any known family psychiatric history."

112 On examination, Dr Adesanya noted that the plaintiff presented as an anxious looking man who was depressed and angry in his mood/affect but did not appear to be currently clinically depressed or cognitively impaired. He diagnosed the plaintiff as suffering from PTSD. He thought that the plaintiff would require ongoing treatment on a month to six weekly basis. His prognosis was guarded. He considered the plaintiff was unfit for his pre-injury work duties, albeit, he was at that time engaged in a return to work programme and

was attending modified duties three hours per day, for two days per week. He thought that the plaintiff would be permanently incapacitated for his pre-injury employment or would be fit for part-time employment.

113 Dr Adesanya provided only one further report being a report addressed to the solicitors for the plaintiff dated 5 November 2020. By this time, the plaintiff had gone back to work. Dr Adesanya updated his findings noting that at the time of his consultation on 29 October 2020, the plaintiff presented as reasonably stable, more confident and grossly cognitively intact. He thought that the plaintiff would require ongoing psychologist maintenance in the nature of six month review sessions at a cost of $600-$785 per session. He concluded that having regard to the plaintiff's recent return to work, his prognosis was more favourable.

114 He said that his ongoing back pain and residual PTSD symptoms "are possible limitations to his ongoing work capacity" concluding that his return to work suggested little limitation in his future work capacity.

115 I accept the opinion of Dr Adesanya in preference to the opinions of the medico-legal experts.

Findings

116 In addition to the evidence which I have specifically reviewed, I have had regard to all of the evidence, including the GP's notes and records, the hospital reports, the records of prior problems and the Workers Compensation insurer's reports.

117 In summary for the purposes of my assessment, I make the following findings:

(1) as a result of the accident, the plaintiff suffered an axial compression fracture at T9 as well as other soft tissue injuries;

(2) following the accident, the plaintiff developed PTSD;

(3) within 3 months of the accident, the plaintiff had recovered from his physical injuries to such an extent that his physical injures did not prevent him from resuming his normal truck driving duties;

(4) he may suffer from some ongoing back pain and soreness but bearing in mind his longstanding general back soreness, I am not satisfied that any ongoing soreness is related to the accident; and

(5) he has made a gradual improvement from his PTSD, assisted by his return to riding and voluntary and then full time work. He may need psychiatric review from time to time but, whatever his level of symptoms, he is now able to work and exercise to his full capacity.

Assessment

General Damages

118 There are restrictions on the plaintiff's entitlement to general damages or non-pecuniary loss as set out in s 9 *CLA WA*. The effect of s 9 is to preclude any allowance for non-pecuniary loss if the amount assessed is not more than the amount specified in s 10(1) and to adjust the amount payable in respect of non-pecuniary loss, having regard to the amount assessed and the sums known as amount A and amount C.

119 It is agreed between the parties that for the purpose of this case, amount A is $23,000 and amount C is $66,500. The process I am required to follow is to make an assessment in respect of general damages having regard to all of the evidence and then apply the thresholds or deductions referred to in s 9.

120 Further, as set out in s 10A, in determining damages for non-pecuniary loss, the Court may refer to earlier decisions of that or of other Courts for the purposes of establishing the appropriate award in the proceedings.

121 In this matter, both parties referred me to a number of decisions by way of comparison. Of course, each case is different and there are reasons why each case identified by the parties might be distinguished from this case.

122 I have had regard to the cases identified. None are particularly similar to this matter but the cases relied upon by the defendant tend to suggest that even in respect of comparatively much more seriously injured plaintiffs, the amount assessed for general damages is considerably less than the sum sought by the plaintiff.

123 In *Nairn v The Board of Management of Warren District Hospital*[4] a 30 year-old plaintiff had a leg amputated and received $120,000 in general damages.

[4] [2006] WADC 97.

124 In *Martinez v OCS Services Pty Ltd*[5] a 49-year-old plaintiff suffered a fractured lower leg with ongoing knee and psychiatric problems and received $75,000 in general damages.

125 In *Thompson v J-Corp Pty Ltd*[6] a 24-year old plaintiff suffered a comminuted distal radial fracture of the left wrist which did not heal properly and impacted upon his long-term employment prospects. He received the sum of $45,000.

126 The plaintiff submits that the principles in assessing general damages (absent statutory regulation) are common throughout Australia and references to cases from the Western Australian District Court, some of which are 10 to 15 years old are of little assistance.

127 The plaintiff seeks the sum of $250,000 on account of general damages. In my view, such an amount is excessive and considerably above the appropriate range. The defendant submits that the plaintiff should receive between $50,000 and $70,000. That assessment is reflective of the defendant's approach to the plaintiff's injuries and disabilities which I have only accepted to a limited extent.

128 Ultimately, whilst I must have regard to s 10A, it is a matter of undertaking the usual evaluative task. I consider that general damages should be assessed in the sum of $120,000. As that figure exceeds the combined amount for the sums referred to as amount A and C in s 9, then there is no deduction from that assessed sum.

Past economic loss

129 The defendant accepts both that the plaintiff sustained the thoracic fracture and that he suffered from PTSD for a period consequent upon the accident. However, the defendant submits that within 12 months of the accident the plaintiff had recovered from both his physical injuries and his PTSD to such an extent that he was not, by the 12 month point, suffering from any diminution in his earning capacity. That is, the defendant submits that the allowance for economic loss should be limited to 12 months based on his pre-accident earnings. There should be no other allowance for economic loss.

---

[5] [2009] WADC 42.
[6] [2018] WADC 164.

130 The plaintiff accepts, as he must, having regard to the joint orthopaedic opinion that, at least by the 12 month period, he was physically fit for work. Indeed, the plaintiff said in his oral evidence that the reason he was still off work by the end of 2016 was his psychological condition.

131 The plaintiff submits that the nature and extent of his PTSD was such that he did not become fit for any work until he actually returned to work in September 2020. The plaintiff thus submits that he should be entitled to his full loss of income between the date of the accident and his return to work on a permanent basis as a truck driver, subject to a deduction of five weeks as he was disabled as a result of an unrelated accident which occurred in April 2017.

132 I consider that the plaintiff remained unfit for all work up to July 2017. By July 2017 he was back to his pre-injury level of riding and general activity and he was undertaking part-time voluntary work. This view is consistent with the opinion of Dr Adesanya who examined the plaintiff in July, August and September 2017.

133 Thereafter his capacity to work gradually improved until he was able to return to full-time driving in September 2020.

134 In terms of the plaintiff's earning capacity, the defendant relies on a report of an organisation known as Earning Capacity Assessments ("ECA") dated 14 August 2018. Of course, any opinion as to the type of work that the plaintiff could be doing at any particular time is only as good as the assumptions made as to physical and psychological capacity. Unsurprisingly, ECA identifies that the plaintiff could be working as a tanker driver or truck driver. It also identifies that the plaintiff could be working as a delivery driver, driving vans and cars to deliver goods. It provides examples of jobs which would have been available in the Wagga Wagga area so as to establish not only that the plaintiff had the skills to perform such work but also that there was work available. A similar approach was taken to the job of being a truck driver or tanker driver.

135 According to ECA, the sort of jobs that might have been available to the plaintiff (excluding being a tanker driver) would have paid gross earnings of between $1,000 and $1,300 per week.

136 It follows that even if the plaintiff had undertaken this work on a full-time basis, he would have continued to suffer a substantial weekly loss. It is difficult to assess the plaintiff's capacity to perform such alternate work. It seems to me that he would have been fit to obtain employment working as a small truck driver or delivery driver or even bicycle courier, at least on a part-time basis, by July 2017. Having regard to the improvement in his condition and his regular activities, he would have been fit to perform such work on a full-time basis by July 2019.

137 Of course, prior to the accident, he was driving tankers at a much higher rate of pay. I accept that he attempted to return to that type of work when he felt able to do so and that it took him a little time to get organised back into that type of work. It must be remembered that the plaintiff suffered from PTSD arising from the accident whilst driving a tanker. Returning to that type of driving would be a different proposition to returning to other forms of driving.

138 I would assess his claim for past loss of income on the basis that:

(1) he remained unfit for all forms of work up to July 2017;

(2) thereafter, from July 2017 to July 2019, he was fit to undertake a lighter form of truck driving or delivery type work or other work for which he was suited on reduced hours which I would assess at 70% capacity; and

(3) from July 2019 until September 2020, he could have undertaken all forms of alternative work for which he was fit on a full-time basis, albeit he was not able to return to the more lucrative tanker driving until September 2020.

139 There is dispute between the parties as to the figure which should be assessed as representing his pre-accident earnings. This is because he received tax-free benefits as part of his income.

140 Both parties rely on the same Linfox pay advice. The defendant says that his earnings should be calculated on the basis of a figure referred to as taxable gross in his pay advice being $73,370.49 (divided by the number of weeks and then calculated on a net basis). The plaintiff submits that the figure referred to as total gross being $89,379.09 should be allowed.

141 Damages for personal injury are compensatory. They are intended to put the plaintiff back in the position that he would have been if not for the tortfeasor's

conduct. However, tax is not payable on a lump sum damages award. As such, the plaintiff is only entitled to damages for loss of income on the basis of net earnings.

142 The task of the Court is to assess what benefit the plaintiff would have received but for the accident and then convert that to a monetary sum so as to put the plaintiff in the position that he would have been if not for the accident.

143 It follows that if he was receiving benefits which were not subject to tax but are reflected in a monetary payment to him (as the pay advice in this matter suggests), then the Court should take account of that benefit.

144 Having said that, the plaintiff must only be compensated for his loss. Tax free allowances which are more in the nature of reimbursement for necessary expenditure, such as for equipment or travel, would not be compensable but additional benefits which are capable of being converted into a sum of money which are not subject to tax would be compensable.

145 The only inference from the payslip is that the sum of $13,800 represented an additional tax free benefit to the plaintiff. It is equivalent to approximately $450 per week (the year-to-date summary being only for 30 weeks of the year up to 24 January 2016). Leaving aside that additional sum, the plaintiff's net earnings per week were approximately $1,600. The additional weekly benefit of $450 should then be added to that figure. If not for the accident, the plaintiff would have been earning $2,050 net per week.

146 I assess his potential earnings as a truck driver or delivery driver, having regard to the ECA report, as approximately $1,150 (the mid-range of the various jobs).

147 For the period 1 July 2017 to 30 June 2019 he had the capacity to earn at 70% of that figure ($805), meaning his loss is $1,245 per week for that period. His loss for that period amounts to $129,480.

148 Thereafter (from 1 July 2019), his loss amounts to $900 per week up to the time he returned to work on 14 September 2020. This amounts to a period of 63 weeks and thus a further sum of $56,700.

149 His loss for the period 27 January 2016 to 30 June 2017 amounts to $151,700. I deduct the sum of $10,250 from that amount to factor in the five weeks he was incapacitated as a result of the unrelated accident. The loss for that period amounts to $141,450.

150 His past loss of income amounts to $327,630. I allow past loss of superannuation of $36,039.

Fox v Wood

151 As identified by the defendant, there is a difficulty with the plaintiff's claim for what is known as *Fox v Wood* damages.[7] The additional allowance for what is termed *Fox v Wood* damages arises in a case in which the plaintiff has received Workers Compensation benefits and is liable to repay those benefits. The plaintiff must repay those benefits on a gross basis, but he is compensated for his loss in the damages assessment only on a net basis.

152 In *Fox v Wood*, the Court held that the payment of tax on Workers Compensation weekly benefits was a foreseeable consequence of the injuries sustained and, as such, the amount of tax paid on the Workers Compensation benefits may be recoverable as part of the damages claim.

153 Ordinarily, all of the Workers Compensation benefits received by an injured worker would be repayable should he recover damages from a third party tortfeasor of any significant sum. It is ordinarily a simple matter of determining the tax that was paid on the weekly benefits and including it in the damages award.

154 However, in this matter, the plaintiff does not have to repay all of his weekly benefits because the sum that he has agreed with the Workers Compensation insurer of $250,000 includes weekly payments and out-of-pocket expenses. The defendant suggests that it is not clear that there is any entitlement to *Fox v Wood* damages, maintaining that this issue needed to be sorted out.

155 I do not know how the plaintiff has arrived at a figure of $85,533 in his schedule of damages.

[7] (1981) 148 CLR 438; [1981] HCA 41.

156 In his final submissions, the plaintiff suggests that in order to reflect the benefit he has received from the agreement with his employer, he reduces the amount he has claimed for medical expenses in this matter from $90,545.69 to $30,566. He says he received weekly payments totalling $219,433.94. He received weekly payments for a period of two years.

157 By my calculations, the tax payable on such a sum would be $57,000 which I allow.

Medical expenses

158 I will adopt the plaintiff's approach to dealing with the agreement with Linfox. There is no detriment to the defendant in such an approach, as if the plaintiff had claimed the whole amount of $90,545.69, the defendant would have been entitled to a credit of $59,979.63. The overall assessment would have been increased by the sum of $59,979.63 but the damages payable would have been reduced by that amount.

159 I thus allow past out-of-pocket expenses in the sum of $30,566 with an additional sum of $5,000 to reflect additional expenses subsequent to the cessation of Workers Compensation benefits.

160 It is thus not necessary to consider further the effect of the settlement with Linfox. The amount that the plaintiff has recovered in damages has been reduced to reflect the difference between the total amount of Workers Compensation benefits received and the amount that the plaintiff must repay Linfox.

Future Loss of earning capacity

161 The plaintiff also submits that, although he has returned to work and is apparently working full-time 14 hours a day, there should be some buffer on account of loss of earning capacity.

162 I do not accept that later submission. The plaintiff has now been working for over nine months on a full-time basis, indeed, for around 70 hours a week. There is no evidence that he has had to take any time off work or that he might be ceasing work in the future. He said he hoped to work until the age of 75. Whilst that might be viewed as a significant achievement, having regard to his

age and the type of work he is performing, the only evidence which might suggest that he would have to cease work at any time because of the injuries which he suffered in the accident comes from Dr Diamond.

163 Dr Diamond suggests that the plaintiff's ongoing psychological state remains brittle. In December 2020 Dr Diamond was somewhat pessimistic about the plaintiff's ability to continue working in the job he was doing. However, at least at the nine-month stage, that opinion has been shown to be unduly pessimistic. The plaintiff continues to work 14 hours a day. There is no evidence he is having difficulty performing the work or that he will be ceasing work in the future.

164 The Court may award a buffer in circumstances in which there are difficulties in assessing the precise loss and there is considerable uncertainty as to when an injured person might cease work or what his or her diminution in earning capacity might be.[8] However, the plaintiff is not entitled to a buffer merely based on some speculation (without any evidence in support) that he might cease work. In my view, the plaintiff is not entitled to any allowance for future economic loss.

Future out-of-pocket expenses

165 The plaintiff claims the sum of $10,000 by way of a buffer. I allow the sum of $5,000 only because, whilst the plaintiff has returned to work, Dr Diamond suggests that he may need some ongoing psychiatric treatment from time to time and there may be some need for treatment if there is a temporary relapse.

Care

166 The plaintiff claims for past domestic assistance at 3 hours per week for most of the period since the accident and claims a buffer of $10,000 on account of future domestic assistance.

167 Both parties relied on expert occupational therapists, Suzanne Miller-Ravagnani on behalf of the plaintiff and Deborah Hammond on behalf of the defendant. They participated in a conclave and prepared a joint report. Their estimates for the need for care differed. Ms Ravagnani estimated that the

[8] Allianz Australia Insurance Ltd v Cervantes [2012] NSWCA 244 at [38] (per Basten JA, McColl and Macfarlan JJA agreeing).

plaintiff's partner had provided 4 hours a day care for an initial period in 2016. She thought that he would require 2 hours per day care on an ongoing basis as well as some additional equipment needs.

168 Whilst Ms Hammond agreed that the plaintiff would have required some care initially, she did not consider that the plaintiff required any ongoing assistance.

169 The opinions of the occupational therapists, experts as they are, often rise or fall depending on the assumptions that they have made and the information with which they have been provided.

170 As I have already indicated, some of the plaintiff's statements about his inability to perform domestic tasks must be taken as exaggerated or over-statements. I am unable to reconcile the proposition that the plaintiff was unable to perform ordinary domestic tasks around the home when he was able to undertake serious and extensive riding on a daily basis. He was back on his bike by late June 2016. By the end of December 2016 he was riding the same distances and the same speeds as he was before the accident.

171 As I have already indicated, that does not mean that he had recovered from his psychological condition but it does tend to suggest that his physical disability was somewhat limited.

172 The plaintiff claims an amount of 3 hours per week from the date of the accident until the time that he went back to work on 14 September 2020. Whilst he may have needed 3 hours per week for the initial period, it is difficult to understand why that same need would have been present by, for example, December 2016.

173 There is no claim for past care on a commercial basis. The claim is based on gratuitous care provided to the plaintiff. The assessment of damages for gratuitous care is governed by s 12 *CLA WA*.

174 No damages are to be awarded for the services if the services would have been provided to the person even if the person had not suffered the injury. Further, there is a threshold set out in s 12(3). If the amount of damages that could be awarded under s 12(5) or s 12(7) is less than the specified amount

(identified as Amount B or less), no damages are to be awarded for the services.

175 As set out in s 12(7), if the services are provided for less than 40 hours per week (that is, this matter), the amount of damages awarded is not to exceed the amount calculated on an hourly basis at an hourly rate that is 1/40th of the weekly rate, that would be applicable under sub-section 12(5).

176 The parties were unable to agree on the rate. The plaintiff claimed the maximum permissible rate. The defendant suggested $20 per hour.

177 In my view, on a proper application of s 12, the rate should be 1/40th of average weekly earnings in WA which would be $42 per hour.

178 For the purposes of s 12, Amount B as at 2021 is $7,000. The plaintiff is not entitled to recover any amount for gratuitous care unless the amount to be awarded is greater than $7,000.

179 In my view, the plaintiff's return to extensive bike riding by December 2016 must be taken to have put an end to his need for assistance in hanging out the clothes on the line, doing the vacuuming or any tasks around the home. Further, he was back driving a car and could of course ride a bike anywhere he wanted to. If he had a need for care at the 3 hours per week claimed by the plaintiff, that would amount to $126 per week. Plainly, on that calculation, the total amount recoverable for 2016 would not exceed the amount specified as Amount B.

180 Damages must be assessed in accordance with *CLA WA*. The plaintiff has not overcome the threshold. Further, there is no basis on which he could be entitled to any sum for future care, having regard to his current activities.

Assessment

181 In the circumstances, I assess damages as follows:

Head of Damages	**Amount**
General damages	$120,000

Past economic loss	$327,630
Past Superannuation	$36,039
Fox v Wood	$57,000
Past out-of-pocket expenses	$35,566
Future out-of-pocket expenses	$5,000
Total	$581,235

Orders

182 There will be judgment for the plaintiff in the sum of $581,235.

183 I order that the defendant pay the plaintiff's costs. Should either party seek a variation of that order, I grant leave to the parties to have the matter relisted on 3 days' notice.

****