SUPREME COURT OF QUEENSLAND

CITATION:	*Muller v Nebo Shire Council* [2003] QCA 312
PARTIES:	**SHANE HENRY MULLER** (plaintiff/respondent) **v** **NEBO SHIRE COUNCIL** (defendant/appellant)
FILE NO/S:	Appeal No 10045 of 2002 SC No 127 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury – Quantum Only
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	25 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	15 May 2003
JUDGES:	Williams JA, White and Holmes JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed** **2. Cross-appeal allowed to the extent of substituting judgment in the sum of $333,329.23 for the judgment given at trial** **3. Appellant should pay the respondent's costs of the appeal and cross-appeal**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – METHOD OF ASSESSMENT – GENERALLY – where plaintiff sustained back injury – whether evidence that plaintiff had pre-existing degenerative condition should have been accepted – nature of onus on defendant to adduce evidence of pre-existing condition and effects - whether prospect of the plaintiff being otherwise injured should have been treated as a chance or an inevitability – whether past economic loss should have been calculated on the same basis as future loss *Purkess v Crittenden* (1965) 114 CLR 164, considered
COUNSEL:	J A Griffin QC, with P O Land, for the appellant D V McMeekin SC for the respondent

SOLICITORS: HBM Lawyers for the appellant
Macrossan & Amiet for the respondent

[1] **WILLIAMS JA**: I have had the advantage of reading the reasons for judgment of Holmes J. I agree with all that she has said therein, and with the orders proposed.

[2] **WHITE J**: I have had the opportunity of reading the reasons for judgment in the appeal and cross appeal of Holmes J and agree with her Honour's reasons and the orders which she proposes.

[3] **HOLMES J**: This appeal and cross-appeal are respectively concerned with whether damages awarded to the respondent plaintiff for a workplace injury were manifestly excessive or manifestly inadequate. The plaintiff was awarded $305,810.88 (after deduction of a WorkCover refund of $22,927.58) in respect of a back injury sustained when he lifted a drum of scrap metal, liability having been admitted. Central to the question of quantum at first instance, and to submissions here, was whether the plaintiff's disability was purely the result of that trauma, or whether it arose from a pre-existing degenerative condition which had merely been aggravated by the workplace injury. The learned trial judge accepted evidence that the plaintiff's spine was susceptible to injury because of a retrolisthesis (the posterior displacement of a vertebra relative to the one below it) and associated narrowing of the disc space at L5-S1, and discounted damages for economic loss accordingly.

The plaintiff's account

[4] The following is a summary of the plaintiff's account of his injury and his subsequent employment, none of which encountered any significant challenge. He had not, prior to 11 December 1997, ever suffered any back injury or experienced any back pain or discomfort. On that date, he was injured in the employ of the appellant defendant (a shire council in the Mackay district) while trying to manoeuvre a 200 litre drum of scrap steel off the tines of a forklift and onto the tray of a truck. He said that he heard a 'crack and tearing sound' in his back, and about 15 minutes later experienced intense pain in his lower back and loss of feeling in his legs. He was then 18, and was some seven months into an apprenticeship as a diesel fitter. He was off work for about a month after the incident, during that time receiving treatment from a general practitioner and physiotherapy. On his return to work he continued to suffer discomfort and back spasms.

[5] On 5 February 1998, the plaintiff said, he was tightening bolts on the bull bar of a utility when he suffered a recurrence of severe lower back pain. He was diagnosed by a general practitioner as having suffered a back sprain, and resumed physiotherapy. In April 1998, still continuing his apprenticeship, he moved to different employment, where the work was heavier. He continued to suffer back pain, but persevered with his apprenticeship with the aid of painkillers, physiotherapy, periods on light duties and a rehabilitation program. His employment was terminated in June 1999. He did not work again as a diesel fitter other than for one three-week work trial, and his apprenticeship was cancelled by agreement with the regional apprenticeship board in May 2000. After that he applied without result for a number of positions, and made an unsuccessful attempt to undertake a degree in engineering. His only subsequent employment was unpaid work experience as a bar attendant and part-time casual work as a yardman.

Work prospects for diesel fitters

[6] Evidence was tendered from a diesel fitter earning between $750 and $800 nett per week for ten hour days in employment at an earthmoving workshop; he said that there was considerable work available for diesel fitters in the area of Mackay. A fitter and turner working in the mining industry at Port Hedland said that his gross income for the previous financial year, working 10 or 11 hour days with occasional weekend work, was $76,000, and that there were jobs available in that area for diesel fitters. A representative of the Australian Manufacturing Workers Union said that rates in the Mackay area for diesel fitters were between $646 and $703 gross for a 38-hour week, while fitters working in the mining industry could command between $65,000 and $85,000 gross per year, usually on the basis of 12-hour shifts. The plaintiff's father, who was 44, gave evidence that he was a contract diesel fitter working in the mining industry and was currently receiving about $3,500 per week gross, from which he had to pay expenses of about $800 per week. In other positions he had earned $1,000 nett per week and $1,600 nett per week. He worked six or seven days a week between 12 and 14 hours a day, and there was no shortage of work. He had tendered for a mine contract and hoped to move into management, employing his sons; his elder son, a qualified mechanic, had worked for him in the past.

The plaintiff's work prospects post-injury

[7] The thrust of the medical evidence, including that of an occupational physician called for the plaintiff, was that the plaintiff could no longer work as a diesel fitter and should avoid any occupation involving heavy lifting, repeated bending and stooping or assumption of awkward postures.

The medical evidence

[8] It is necessary to set out the history of medical opinion as to the nature of the plaintiff's injury in some detail.

The radiological evidence

[9] A plain x-ray of the plaintiff's lumbar spine was taken on 5 February 1998, after the episode of back pain when he tightened bolts. According to the radiologist's report, the x-ray showed no bony injuries or abnormalities, but some muscle spasm was indicated by a slight loss of the lumbar lordotic curve. In April 1999 a CT scan was performed. The film of the scan was lost; the radiologist's report spoke of mild disc bulges with mild degenerative change at all levels from L3-4 to the sacroiliac joint. Another plain x-ray performed on 21 September 2000 showed slight posterior displacement of L5-S1, with no other abnormality reported. An MRI of the lumbar spine performed on 23 March 2001 was reported as showing a disc protrusion at L5-S1 with some mild narrowing of the right L5-S1 intervertebral foramen, minor narrowing of the left L5-S1 intervertebral foramen and loss of vertical disc height with desiccation at L1-2. A report of a CT scan of the lumbosacral spine of 30 May 2002 said that there was a disc protrusion at L5-S1 with slight posterior displacement of the right S1 nerve root.

The orthopaedic evidence

[10] The first of the orthopaedic specialists called by the plaintiff, Dr White, considered that the findings of the 2001 MRI scan report, of desiccation and loss of

intervertebral disc height at L5-S1, were consistent with the trauma of the work accident as reported by the plaintiff. He had seen no evidence which suggested degeneration in the plaintiff's spine pre-injury, and he had not encountered an eighteen year old with disc degeneration in the absence of prior trauma. He did not consider the fact that the MRI report indicated degeneration at two separate discs L5-S1 and L1-2 to militate against the proposition that the injury at L5-S1 was trauma induced. It was conceivable that the plaintiff had injured L1-2 in the same incident; or the degeneration there might be the product of some other trauma.

[11] Although Dr White conceded that the x-ray films of 5 February 1998 and September 2000 did show some slight projection of the exterior edge of the L5 vertebra over the first sacral vertebra, which technically amounted to a retrolisthesis, it might, he considered, have little significance. It was not related to disc narrowing. There was nothing of which he was aware to suggest that the plaintiff would not have had a normal life had the accident not occurred. In the context of earlier questions as to the significance of disc bulging, Dr White said that there was often little correlation between radiological appearances and actual symptoms.

[12] In relation to the question of disc bulging, Dr White doubted that the report on the missing CT scan taken in April 1999, which recorded mild bulging and degeneration at three levels, was accurate. The plain x-rays did not show the degeneration reported, nor did the MRI scan or the CT scan of May 2002. Dr Cook, another orthopaedic surgeon called by the plaintiff, agreed with Dr White that the report's interpretation was doubtful in light of the other evidence, and Dr Gibberd, called for the defendant, conceded that he would have expected signs of loss of water content in the affected discs to be evident on MRI. On the other hand, Dr Martin, an orthopaedic surgeon called by the defendant, considered there to be no necessary inconsistency between the MRI and CT scan reports, because the type of imaging involved in the scans was different. The learned trial judge, however, seems to have preferred the evidence of Drs White and Cook on this point, although his finding is somewhat obliquely expressed: he declined, in effect, to reach the conclusion that the CT scan report was "necessarily accurate". The defendant did not contend that the learned judge should have accepted the report as correct, and it seems to me, in consequence, unnecessary to explore further what the specialist witnesses had to say as to multi-level degenerative change suggested by the CT scan report.

[13] Dr Cook, like Dr White, did not believe there had been any pre-existing degeneration in the plaintiff's lumbar spine, and in consequence attributed the degeneration evident on the MRI scan to the 1997 injury. The history of that incident was consistent with injury to more than one disc. It was possible that L1-2 could be injured by being forcibly flexed. He had looked at the February 1998 x-ray film, and thought that the apparent retrolisthesis was merely a function of the position assumed by the plaintiff at the time that the x-ray was taken. He had not observed any retrolisthesis on the September 2000 x-ray, and there was none evident on the MRI. If the pathology existed it ought to be evident on all films.

[14] Three of the specialists called by the defendant, Drs Laister, Gibberd and Shaw, had examined the plaintiff for WorkCover, and had not had the opportunity to examine x-rays, or CT or MRI film. They were, in consequence, reliant in forming their views on the various radiological reports. Their evidence added little. Dr Laister had seen only the report of the February 1998 x-ray which had not revealed any

abnormality, while the questioning of Dr Gibberd and Dr Shaw was concerned with the significance of what was reported as to the April 1999 CT scan.

[15] The defence case relied to a far greater extent on the evidence of Drs Blue and Martin. Dr Blue had examined the plaintiff in March 2002. He thought that the plain x-rays of February 1998 and September 2000 revealed Schmorl's nodes (herniation of the disc through the endplate of the adjacent vertebra) at L4 and L5, a view not shared by any of the other specialists who gave evidence, and not adverted to by the learned trial judge in his reasons. Although he had not originally observed the retrolisthesis at L5-S1 in the February 1998 x-ray, Dr Blue had later examined the MRI films, which did, in his view, confirm its existence, and he was satisfied that it could also be seen in the x-rays of February 1998 and September 2000. It was not possible that the appearance of retrolisthesis could be created simply by the position of the patient. The MRI also indicated degeneration at L1-2.

[16] It was Dr Blue's opinion that the two conditions (Schmorl's nodes and retrolisthesis) had weakened the plaintiff's lumbar spine and made it more vulnerable to trauma, and that it was in any event pre-disposed to increasing degenerative change which would limit his working life insofar as it required physical activity. (He volunteered, however, a comment taken from a textbook in orthopaedics to the effect that most studies had shown no association between low back pain and conditions including, among others, Schmorl's nodes and disc space narrowing.) Dr Blue considered that the December 1997 incident had constituted an aggravation of those pre-existing conditions. He did not think it likely that the incident could have caused injury at both L5-S1 and L1-2, the most common cause of the latter type of injury being a fall. When asked the prognosis for the plaintiff had he not been injured in December 1997, Dr Blue's answer was atypically equivocal: "I can't give you a – you know, a definite yes or no to that, but he had an abnormal spine and that he may well have had back problems within the next five years but I – you know, I'd have to sit on the fence but I couldn't give you a – a straight answer to that."

[17] Dr Martin had examined the plaintiff in September 2000. In his report then, he gave his view that the plain x-ray films taken at his direction at that time showed an abnormal narrowing of the L5-S1 disc space and a slight retrolisthesis of L5 in relation to S1. He reported again in May 2001 when he had seen the MRI study and report. The appearances on the MRI film were consistent with significant degenerative disc disease at L5-S1 and L1-2, and confirmed narrowing of the disc space and retrolisthesis at L5-S1. At trial he was shown (for the first time) the February 1998 x-ray, and also that of September 2000, and pointed to the retrolisthesis and disc narrowing on each. He was the last of the witnesses; no other witness had been asked to look at the x-ray.

[18] Dr Martin's strongly held view was that an industrial accident could not cause damage to a disc unless it was already susceptible because of a pre-existing weakness; and he did not consider that the degeneration at L1-2 could have been caused in the incident. If somehow it were possible for trauma to damage a disc at L1-2 and L5-S1 he would expect disruption in the discs between. What he regarded as the inherent weakness at L5-S1 was always going to cause symptoms in the plaintiff, independent of the December 1997 incident. He could similarly have experienced symptoms from quite simple activities in a domestic or sporting environment.

The findings at first instance

[19] The following three paragraphs of the learned trial judge's judgment set out the findings which were the subject of contention on appeal:

> '17. I was most impressed with the evidence of Dr Martin who was able to demonstrate to my satisfaction from X-ray films the presence of a disc narrowing and retrolisthesis at L5-S1. This is apparently a misalignment of the discs which represents a weakness and consequently an area susceptible of damage. It also appears to be the site from which the plaintiff's problems emanate. This does not, of course, mean that the radiologist report which describes the missing CT scan films is necessarily accurate when it talks of observable degeneration.
>
> 18. On balance I am satisfied that the plaintiff did have a spinal weakness at L5-S1 which did make him more susceptible of injury. I am not satisfied however that the plaintiff's present complaints were inevitable as a result of that or any existing degeneration. I do not accept that without the incident with the drum he would not have completed his apprenticeship and would not be either working or qualified to work as a diesel mechanic. I accept Dr White's evidence that degeneration, much less weakness does not of itself necessarily result in pain or disability. I do not accept his evidence that young, and particularly very young, men with no history of traumatic injury cannot have degenerative change in their backs. This latter opinion seems to be at odds with the bulk of the medical opinion before me. The greater susceptibility of the plaintiff however should be reflected in a greater discount for life's contingencies when assessing economic and other anticipatory losses.'
>
> 19. I accept the predominant medical view that the plaintiff cannot return to heavy work including work as a diesel mechanic but is suitable for lighter duties. He thus retains a substantial residual earning capacity. I accept that the potential for earning as a diesel mechanic is, however, higher than in lighter occupations. Despite the medical evidence suggesting a substantial residual earning capacity there is no evidence from which I am able to assess what that is. Since the evidence establishes that a diesel mechanic of the plaintiff's age can earn at least $750 per week and up to $1600 or more net for an experienced diesel mechanic I propose to allow a conservative $250 per week for the reduction in earning capacity.

[20] The contentious aspects of the learned trial judge's award of damages made on the basis of those findings were the awards for pain and suffering of $50,000; for past loss of income at $41,890.69; and future loss of income at $167,550. Past economic loss was assessed on the basis that the plaintiff's calculations up to the completion of his apprenticeship in May 2001 were accepted, but after that the learned judge applied the figure he had arrived at for reduction in earning capacity to reflect the plaintiff's loss to trial. Future loss of income was predicated on the same reduction

in earning capacity: $250 per week was allowed for 37 years, and then discounted by 25%.

The contentions

[21] The defendant complained that the learned trial judge had wrongly placed an onus on it to prove the extent of the plaintiff's injury. He had, moreover, assumed, without support from the evidence, that the plaintiff would, but for the incident, have spent his working life as a diesel mechanic, when he should have found that the plaintiff at trial was in a similar position to that which he would have been in without the workplace injury. In consequence, the awards for pain, suffering and loss of amenities and past and future economic loss were too high. The plaintiff's counsel, on the other hand, contended that no finding of retrolisthesis or consequent susceptibility in the plaintiff's spine was warranted, and accordingly that the discount of future economic loss by 25% was far too high; that the plaintiff's residual earning capacity had been over-stated, and the awards for past and future economic loss were correspondingly inadequate; and that the calculation of past economic loss by applying the same weekly rate of loss used for future loss constituted an unjustifiable discounting.

The finding of weakness in the lumbo-sacral spine

[22] Because submissions turned to a very large extent round the question of weakness in the plaintiff's lumbar sacral spine, it is convenient to deal first with this argument raised by the plaintiff, on both appeal and cross-appeal: that the learned trial judge erred in accepting Dr Martin's evidence in this regard, and in consequence, in discounting damages for future economic loss by 25%. The plaintiff complained that the finding was against the weight of the evidence, particularly given the diversity of opinion amongst the witnesses. His counsel, Mr McMeekin SC, made these submissions: Dr Martin's evidence should not have been accepted because his opinion that a healthy disc could not be injured in an industrial accident was unique to him; his view of the February 1998 x-ray was formed only during the course of the trial; it was not put to the plaintiff's orthopaedic surgeons; Drs Shaw, Gibberd and Laister were not asked about it; the radiologist who reported on the February 1998 x-ray was not required for cross-examination; Dr White and Dr Cook did not consider the x-rays showed any abnormality; the value of Dr Blue's evidence was diminished by the fact that he failed to observe the retrolisthesis on first examination of the films and his view as to the existence of Schmorl's nodes was contradicted by Dr Martin and by Dr Cook; none of the radiologists had reported any retrolisthesis or disc space narrowing; degeneration was not to be expected in the spine of an 18 year old man; and it was possible that the x-ray appearance was simply the result of muscle spasm or the position of the patient. The finding being erroneous, the award for future loss of income should not have been subject to a 25 per cent discount.

The failure to ask three of the defendant's own witnesses about the retrolisthesis

[23] It is certainly the case that the question of the appearance of the retrolisthesis was not explored with Drs Gibberd, Shaw and Laister; but they had either not seen, or did not at trial recall seeing, the x-ray, CT or MRI films, primarily no doubt because they were examining the plaintiff at the behest of WorkCover with a view to determining his physical capacity for work, rather than in contemplation of litigation. The evidence they could give was, necessarily, limited by their lack of

opportunity to consider the original films. The defendant might have incurred the additional expense of inviting them to look at the original films prior to trial and reporting on their views, but it chose not to do so, relying instead on the two specialists who had examined the plaintiff at the request of its solicitors. Had an attempt been made to have each of Drs Gibberd, Shaw and Laister inspect the original films at trial, there is every reason to suppose it would have been objected to because no prior report had been given; as occurred when Dr Shaw was asked a question about the MRI report which he had not seen prior to giving his report and thus had no occasion to deal with in it.

[24] In my view, the defendant was entitled to call the three specialists to give evidence of the views they had formed in the context of WorkCover examinations. I do not think it was incumbent on the defendant to brief them further so that they would be in a position to comment on matters they had not dealt with in that context; and since they were not familiar with the x-ray appearances, it can hardly be said it was unreasonable not to seek their views on them.

The failure to cross-examine radiologists

[25] There is some validity in the plaintiff's point that the radiologist who gave the report of the February 1998 x-ray was not cross-examined as to any appearance of retrolisthesis; but the complaint falls a little oddly from the lips of the plaintiff, whose counsel tendered by consent the report of the April 1999 CT scan, and then by examination and cross-examination of the orthopaedic specialists successfully discounted it without feeling any need to seek its author's views. One can really only infer a mutual assent that the admission of the radiologists' reports would not preclude challenge by contrary opinion from the orthopaedic specialists.

The failure to put the x-rays, and the evidence about them, to the plaintiff's specialists

[26] It does not seem to me of significance that the x-ray films were not put to the other orthopaedic surgeons in court. Dr Martin's view that there was retrolisthesis evident on x-ray and MRI had been made clear in his reports, and supported by Dr Blue's report, well before trial. Drs White and Cook, the orthopaedic surgeons giving evidence for the plaintiff, had both before trial seen the x-ray films shown to Dr Martin in court, and had given their views. Dr White did not think that the retrolisthesis was significant, and did not consider that the x-ray showed any real narrowing of the disc space. Dr Cook did not accept that retrolisthesis was shown on the x-rays or the MRI, asserting a view that it was merely positional. The defendant's counsel put the existence of the retrolisthesis to Dr White and received the response that to the extent he accepted its appearance, it might mean absolutely nothing (as he had indicated in examination-in-chief) and to Dr Cook who did not accept its existence, but did describe the actual process of degeneration involved in producing retrolisthesis, which was progressive, and did, in re-examination, say that there was potential for the condition, depending on its cause, to bring on other degenerative change prematurely. Both had the opportunity to comment on what they made of the radiological appearances and the immediate physical implications of the condition. I do not think that there was unfairness to the plaintiff in the way that the questioning proceeded.

[27] The plaintiff's legal representatives had the relevant x-rays in their possession; they were borrowed at the commencement of the trial by defence counsel for the specific

purpose of showing them to the medical witnesses for the defence. If the plaintiff's counsel had wished his witnesses to expand on their views of the x-ray films, he was at liberty to ask them to do so. It seems to me that the defence counsel took an opportunity, which was equally available to the plaintiff's counsel, of having his witness explain his evidence in a more compelling way. The fact that one side availed itself of the opportunity and the other did not does not seem to me a legitimate matter for complaint.

Dr Blue's evidence

[28] Nor does the fact that Dr Blue did not immediately on examination of the films observe the retrolisthesis detract to any great extent from his evidence. One might, to the contrary, suppose that the view he reached subsequently was the stronger for being a considered and re-considered one. He did diverge, it is true, in his view that Schmorl's nodes were present, and that might have caused some doubt about his accuracy in that regard; but it does not mean that his views as to the retrolisthesis could not give at least some support to those of Dr Martin.

The acceptance of Dr Martin's evidence

[29] In criticising Dr Martin's evidence, Mr McMeekin placed considerable emphasis on the following passage from his cross-examination, because of what he regarded as Dr Martin's concession at its end:

> 'Would it be more consistent with your theory that he would've had symptoms of pain in his back through his teenage years when active in playing sport and doing all the things that younger people do? -- Did we[sic; presumably "he"]?
>
> All right. So the absence of those symptoms is an odd feature on your theory? -- Well, why is it a feature?
>
> I'm sorry? -- Why is it a feature?
>
> If he had no such symptoms of pain, that is a factor against your theory? -- If he had no symptoms, would be unlikely.
>
> HIS HONOUR: Sorry, what would be unlikely?
>
> MR McMEEKIN: That the Doctor's theory would be accurate. Excuse me a moment. That's all I have. Thank you very much.

Mr McMeekin relied on Dr Martin's last answer, taken in conjunction with his lack of objection to Mr McMeekin's interpretation of it, as a concession that a finding that the plaintiff was asymptomatic pre-accident would render his views untenable. I cannot for my part accept that as being the tenor of Dr Martin's answer. In context, it can only sensibly be taken as an expression of his view of the unlikelihood of the plaintiff's having been without symptoms before the accident, consistent with his previous questioning of that proposition.

[30] Dr Martin's view that a healthy disc would not have sustained damage might or might not be correct, but it was not essential to his point that the retrolisthesis existed and was an area of susceptibility. The learned trial judge accepted the latter, and did not make – and did not need to make – any finding about the former. Dr

Martin's opinion as to the existence of the retrolisthesis was consistently expressed in his reports, although he had not seen the February 1998 x-ray prior to trial. The fact that views differed among the orthopaedic surgeons as to the presence or significance of the retrolisthesis, and the likelihood of its appearance in a young man, are matters of divergence which are common experience in trials involving medical evidence. The learned trial judge was required to decide which evidence to accept; and his decision to prefer Dr Martin on this point has not been shown to be infected by error. He was entitled to reach the conclusion which he did: that there was a retrolisthesis with some narrowing of the disc space which constituted an area of weakness or vulnerability in the spine.

The onus on the defendant as to the plaintiff's susceptibility

[31] But the defendant said that, having made that finding, the learned trial judge fell into error in considering what followed from it, in this way: he reversed the evidentiary onus by requiring the defendant to prove that the plaintiff's existing incapacity was wholly or partly attributable to the condition. That error, it was said, is revealed by these sentences in paragraph 18 of the judgment:

> 'I am not satisfied however that the plaintiff's present complaints were inevitable as a result of that or any existing degeneration'

and

> 'I do not accept that without the incident with the drum he would not have completed his apprenticeship and would not be either working or qualified to work as a diesel mechanic'

[32] The defendant relied on the following passages from *Purkess v Crittenden*[1], dealing with what the earlier decision in *Watts v Rake*[2] had established:

> "We understand that case to proceed upon the basis that where a plaintiff has, by direct or circumstantial evidence, made out a prima facie case that incapacity has resulted from the defendant's negligence, the onus of adducing evidence that his incapacity is wholly or partly the result of some pre-existing condition or that incapacity, either total or partial, would, in any event, have resulted from a pre-existing condition, rests upon the defendant. In other words, in the absence of such evidence the plaintiff, if his evidence be accepted, will be entitled to succeed on the issue of damages and no issue will arise as to the existence of any pre-existing abnormality or its prospective results, or as to the relationship of any such abnormality to the disabilities of which he complains at the trial.
>
> ……it was stressed that both the pre-existing condition and its future probable effects or its actual relationship to that incapacity must be the subject of evidence (i.e. either substantive evidence in the defendant's case or evidence extracted by cross-examination in the plaintiff's case) which, if accepted, would establish with some reasonable measure of precision, what the pre-existing condition was and what its future effects, both as to their nature and their future development and progress, were likely to be."

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1 *Purkess v Crittenden* (1965) 114 CLR 164 at 168.

2 (1960) 108 CLR 158.

[33] The defendant is correct to say that it fulfilled the onus on it of adducing evidence as to the pre-existing weakness in the plaintiff's spine, and, although perhaps not quite as clearly, as to what its future effects were likely to be. Dr Martin's evidence served both those purposes. However, I do not take his Honour in the sentences identified by the defendant to be asserting any greater onus on the defendant. Taken in context, it is clear that he was doing no more, in the passage from which the two sentences were taken, than indicating which parts of the evidence he did and did not accept. To attribute any greater significance to the use of the words 'I am not satisfied' is to ignore that context.

[34] I read paragraph 18 as the learned trial judge's recording of his acceptance of Dr Martin's evidence as to the weakness at L5-S1; his rejection of Dr Martin's evidence that it followed that the plaintiff would have suffered his disability in any event, thus making it unlikely he could have continued as a diesel fitter; his acceptance of Dr White's evidence that signs of degeneration on x-ray were not necessarily reflected in symptoms, but a rejection of his evidence that young men could not, absent trauma, exhibit degenerative change; and an acceptance that while the plaintiff's condition was not necessarily symptomatic, it did make him more susceptible to injury. None of that, in my view, cuts across anything in *Purkess v Crittenden* or *Watts v Rake*.

The awards for pain & suffering and past and future economic loss

[35] The defendant argued that the learned trial judge erred in assuming in his assessment of damages that the plaintiff would have been able to spend his working life as a diesel fitter, and discounting damages on that premise, rather than regarding the injury as no more than an aggravation of a pre-existing condition in the plaintiff, who could at any time have suffered a similar injury with the same consequences. What the learned trial judge should have found, on the defendant's case, was that the plaintiff at trial was in a similar position to that which he would have been in without the injury the subject of the action. On that basis the awards for pain, suffering and loss of amenities and past and future economic loss were excessive. The first should be cut by half; past economic loss should be limited to the period before the plaintiff gave up his apprenticeship, and thus substantially reduced; and future economic loss should either not be allowed at all, or be restricted to $50,000 representing the loss of a chance.

[36] The plaintiff, on the other hand, contended that the setting of economic loss at a rate of $250 nett per week from the date he would have completed his apprenticeship was against the evidence that he could have earned between $750 and $800 nett per week. In allowing for contingencies the learned trial judge should have recognised a positive one: the possibility that the plaintiff would earn much more than the average diesel fitter, as his father had done. Apart from the inadequacy of the rate of $250 per week, the learned trial judge had erred in equating the rate of past loss after the expected date of completion of the apprenticeship with future loss, although there was no allegation of a failure to mitigate, no evidence on which to assume that the plaintiff would not have found work (particularly since his father was willing to employ him) and no reason to suppose he would have earned less than the average.

[37] The learned trial judge was perfectly entitled to accept Dr Martin's evidence as to the existence of the retrolisthesis and associated disc narrowing as a radiological appearance, while at the same time rejecting his view as to the inevitability of the

plaintiff's becoming symptomatic. The evidence was that prior to the December 1997 work accident the plaintiff had experienced no symptoms. There was also evidence that degenerative change evident on x-ray did not necessarily result in symptoms. That evidence was, perforce, of a general nature, because the orthopaedic specialists were not asked to consider the effects of retrolisthesis and associated disc space narrowing in isolation; not surprisingly, because the importance of the condition as the only abnormality accepted by the learned trial judge did not emerge until judgment. No specialist had attempted to put any timeframe on the plaintiff's prospective working life in the absence of the December 1997 accident other than Dr Blue, whose very equivocation emphasised the uncertainty of the exercise.

[38] In short, the plaintiff had a weakness in his spine that had been made symptomatic by the accident; something which might or might not otherwise have occurred. In those circumstances it was entirely appropriate for the learned trial judge to adopt the course which he did, of recognising the prospect of the plaintiff's being injured independent of the workplace accident as a chance, not an inevitability, and allowing for it, as *Malec v J.C. Hutton Pty Ltd*[3] prescribes, by the 25% discount of future economic loss. (The plaintiff did not contend that such a discount was inappropriate if Dr Martin's evidence as to the existence of the retrolisthesis were accepted). And in circumstances where the plaintiff had, on the evidence, had a pain-free existence prior to the accident and thereafter was significantly disabled, I do not think that it can be said that the award of $50,000 for pain and suffering was beyond the bounds of a proper exercise of discretion.

[39] In assessing loss of earning capacity the learned trial judge referred to evidence establishing that a diesel mechanic of the plaintiff's age could earn $750 per week, and up to $1600 with experience. That was a fairly generous premise from which to commence, given the evidence of the union organiser that diesel-fitters employed at sites in Mackay were receiving between $646 and $703 gross for a 38-hour week (in nett terms closer to the $500-$525 mark). It is clear that $750 nett was not, as described in submissions, "the low point of wages available to a diesel fitter". If there were, as the plaintiff's counsel submitted, a contingency of his earning as much as his father had, up to $1600, there was also a contingency on the other side of the balance: that the plaintiff would choose to work a less arduous 38 hour week and earn significantly less than $750.

[40] But accepting the plaintiff's prospects of earning $750 nett per week, the allowance for reduction in earning capacity of $250 nett per week, that is by one third, seems to me appropriate and reasonable, given the evidence that the plaintiff could maintain full-time employment in a range of occupations, albeit not in more physically demanding work. In all the circumstances I do not think any error is shown in the learned trial judge's assessment of reduction in earning capacity at $250 per week.

[41] The plaintiff is on stronger ground in his complaint of the way past economic loss was dealt with. The learned trial judge appended the following note in respect of his calculation of past loss of income:

> "I have accepted the plaintiff's calculations up to the completion of the apprenticeship in May 2001. Thereafter I consider the amount

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3 (1990) 169 CLR 638.

> should be limited to the amount allowed for future lost earning capacity to allow for his residual capacity and the uncertainty of the plaintiff, a young single man, immediately finding, commencing and continuing to work in his chosen trade. Because I have assessed the loss on the basis of residual learning capacity, actual earnings need not be deducted."

[42] The plaintiff is correct, in my view, in saying that the learned trial judge's finding that there was uncertainty as to the plaintiff finding and continuing work in his chosen trade was against the weight of the evidence, which was that jobs were available in the Mackay district; that there was a history in the plaintiff's family of qualifying and working as tradesmen (as manifested by his father and brother); and that the plaintiff had shown some determination to continue with his chosen trade by managing to complete 3 years of his apprenticeship notwithstanding the intervening injury. Any conclusion that he would not have completed his apprenticeship and found work is not, in my view, supportable. Nor was there any evidence to suggest that his earnings to trial were understated, or were the result of a failure actively to seek work. His loss should, therefore, have been calculated for this period by setting off his actual earnings against his prospective earnings as a diesel fitter.

[43] I accept the submission of the plaintiff's counsel that on the basis of his potential earnings of $750 nett per week the plaintiff had lost earnings to the date of trial in an amount of $71,500. Against that must be set his actual earnings of $4,941.25, giving a loss of $66,560. Mr McMeekin calculated interest on that loss to the date of trial at $11,720.83, and past loss of superannuation at 8% at $5,320. If those amounts are allowed, the total award would rise (after deducting the WorkCover refund) to $333,329.23. That would constitute an increase in the award of about 11%; a sufficiently significant amount to warrant correction of the judgment below.[4]

Orders proposed

[44] For the reasons given, I would dismiss the appeal, and allow the cross-appeal to the extent of substituting judgment in the sum of $333,329.23 for the judgment given at trial. The appellant defendant should pay the respondent plaintiff's costs of the appeal and cross-appeal.

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[4] *Elford v FAI General Insurance Company Limited* [1994] 1 Qd R 258.