# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Hopkins v WorkCover Queensland* [2003] QSC 257 |
| PARTIES: | **SHANE WILLIAM HARRY HOPKINS**<br>**(plaintiff)**<br>**v**<br>**WORKCOVER QUEENSLAND**<br>**(defendant)** |
| FILE NO: | Maryborough S2 of 2001 |
| DIVISION: | Trial Division |
| PROCEEDING: | Trial |
| DELIVERED ON: | 14 August 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 18-19 June 2003 |
| JUDGE: | Mullins J |
| ORDER: | **The defendant pay to the plaintiff the amount of $419,834.44** |
| CATCHWORDS: | DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – METHOD OF ASSESSMENT – where plaintiff sustained back injury - where plaintiff established a prima facie case that his lower back injury was caused by incidents for which the defendant accepted liability - where evidence that the plaintiff had a pre-existing degenerative spinal condition pre-dating incidents - evidential onus on defendant to show that the plaintiff's incapacity was wholly or partly the result of the plaintiff's pre-existing spinal condition - onus not discharged<br><br>*WorkCover Queensland Act* 1996<br><br>*Purkess v Crittenden* (1965) 114 CLR 164<br>*Watts v Rake* (1960) 108 CLR 158 |
| COUNSEL: | M Grant-Taylor SC for the plaintiff<br>JB Rolls for the defendant |
| SOLICITORS: | McDuff & Daniel for the plaintiff<br>Bell Dixon Butler for the defendant |

[1] **MULLINS J:** This proceeding is brought by the plaintiff, Mr Shane Hopkins, against WorkCover Queensland as the defendant pursuant to s 306(2)(b) of the *WorkCover Queensland Act* 1996 ("*WQA*"), as the plaintiff's employer at the respective times when he was injured, Aceford Pty Ltd (in liquidation) ("the

employer") was wound up in or about July 2000. The plaintiff claims to have suffered a significant low back injury during 3 separate incidents in February 1998, March 2000 and May 2000, as a result of the negligence and/or breach of duty and/or breach of contract of employment and/or breach of statutory duty of the employer. The defendant concedes that the plaintiff suffered some injury to his low back, as a result of one or more of the incidents which are the subject of this proceeding, but the nature and extent of the plaintiff's injuries and the consequence of the injuries for the plaintiff are in issue.

**The plaintiff's history**

[2] The plaintiff was born on 5 February 1959. He was brought up around Dalby and left school when he was 15 years old. He worked on farms for a few years, horse studs and at a foundry. He worked as a tyre fitter in Dalby for about two years, commencing in 1990. After then working at Eromanga for about a year, he returned to Dalby and worked as a tyre fitter for Whimps Tyre & Mechanical. He became manager of that business. His family ended up buying the business and it commenced to trade as "Dalby Tyre Supplies" but in 1995 the business was sold. The plaintiff relocated to Hervey Bay with his partner Ms Cordner and obtained employment with the employer which traded as Beaurepaires for Tyres as a tyre fitter in December 1996.

[3] Whilst working for the employer, the plaintiff was promoted to service fitter, then to assistant manager and later to manager. The plaintiff stated that when he was working his weight was between 100 to 105kgs.

[4] The schedule of the plaintiff's pre-accident earnings (Ex 2) shows a steady increase in his net earnings between the year ended 30 June 1995 of $18,549.70 and the year ended 30 June 2000 of $35,087.60. The progression of the plaintiff with the employer is reflected by his net earnings having increased from $25,151.20 for 1997-98, to $27,861.30 for 1998-99 and to $35,087.60 for the last year of his employment.

**The incidents**

[5] In February 1998 the plaintiff was required by the employer to transport a scraper tyre weighing approximately 700kgs without assistance from the employer's premises at Islander Road, Pialba, to the premises of an earthmoving business at Howard and there to fit the tyre to a scraper. When the plaintiff arrived at the property at Howard, he jacked the scraper up, got the tyre off that was to be replaced and was in the course of attempting to remove the replacement tyre from the tray of the vehicle which he had used to transport the tyre, when the tyre dropped over the side and was rolling on the ground. As the plaintiff knew that if it fell to the ground he had no-one to help him get the tyre up again, he jumped to the ground and caught the tyre and tried to get it back in an upright position. The plaintiff described having a lot of trouble trying to stand the tyre up and that it felt as though he had been crushed in the kidneys. Eventually he was given assistance by the owner of the earthmoving business and was able to put the replacement tyre on the scraper.

[6] From the time of the first incident, the plaintiff suffered constant pain in the kidney area of his back. He was in pain every morning, but sometimes the pain improved during the day. The plaintiff did not take any time off work, as a result of this

incident, although he described that he struggled to keep working. The plaintiff took Panadol regularly, because of the pain.

[7] In March 2000, the plaintiff took a telephone call from a customer who was looking for a secondhand tractor tyre. The secondhand stock was stored behind a shed. The plaintiff went to look for the tractor tyres and had to move a scraper tyre to gain access to where the tractor tyres were. When the plaintiff went to move the scraper tyre out of the way, he felt pain shoot straight up his spine. The plaintiff did not take time off work, after this incident. The plaintiff continued taking Panadol.

[8] The third incident on 30 May 2000 occurred when a customer wanted his truck tyres and a super single tyre which is a wide based tyre for trucks delivered to his fuel depot. When the plaintiff went to load the super single tyre onto the back of the employer's utility, the plaintiff felt pain in his lower spine. The next day he was standing at the computer at work and went to assist a customer when his back froze, he felt a lot of pain and he could not move. The plaintiff was thereafter unable to carry out his work functions properly, but continued to attend at work.

[9] The plaintiff then ceased work on 14 June 2000 after obtaining the results of the CT scan of his lumbar spine and has not worked since that day.

**Medical history prior to the incidents**

[10] According to the records of the Dalby Hospital (Ex 32), the plaintiff was seen in outpatients in the afternoon of 12 December 1989 and gave a history of a painful back for several weeks and that since lunch time the back pain had increased and he was suffering muscle and joint pain in the chest, neck and arms. In giving evidence, the plaintiff disagreed that he had related a history of a painful back for several weeks and stated that he was diagnosed as suffering from a 24 hour virus and was given an injection and discharged.

[11] On 26 June 1996 the plaintiff's then general medical practitioner, Dr I E Keys, referred the plaintiff to the Dalby Hospital for investigations, as Dr Keys recorded that the plaintiff had been complaining of constant pain radiating to the right testicle for months which worsened with manual activity. The plaintiff stated in evidence, however, that the pain was coming from the right testicle radiating up to the front of his stomach. The plaintiff also recalled having numerous investigations for that complaint, but stated that no diagnosis was ever made.

[12] One of the investigations that was carried out was an x-ray of the plaintiff's lumbo sacral spine on 24 May 1996. The report of the x-ray (Ex 3) states:

> "There are small osteophytes at the vertebral margins in the lower lumbar spine. Vertebral bodies otherwise appear normal. Disc space height is maintained throughout. Pedicles are intact and there are no pars defects evident. Alignment is satisfactory."

The comment on this report is "Very mild changes of lumbar spondylosis. Otherwise normal appearances."

[13] The plaintiff described his general health as good at the time he commenced working for the employer. He stated that he was getting over the death of his mother who had died earlier that year from bowel cancer and was not looking after himself, but that his work capacity was good. The only health problem which he

identified was that which had been investigated by Dr Keys. According to Ms Corner who had by the time of the trial known the plaintiff for about 9 years, the plaintiff had never complained of back pain prior to the incident in February 1998.

**Treatment after the incidents**

[14] On 3 November 1998 the plaintiff consulted general medical practitioner Dr A I McGrouther. According to Dr McGrouther's notes and report to Dr Peirce dated 5 September 2000 (Ex 34), the plaintiff complained of recurrent abdominal pain, mainly right-sided and sometimes radiating to his right testis. Dr McGrouther referred the plaintiff to the Hervey Bay Hospital for investigation. The plaintiff had numerous tests and procedures unrelated to his lower back including an ECG conducted by Dr Ekin and a colonoscopy conducted by Dr Cavallo. Ultimately, the plaintiff was seen by physician Dr Barry Smithurst at the Hervey Bay Hospital who in his report dated 13 January 2000 (Ex 36) expressed the opinion that the plaintiff's lower abdominal pain was his main problem and that the plaintiff also had problems with his back and stated:

> "I was wondering whether he has some degree of nerve root compression and a x-ray of his spine does show some quite marked degenerative changes at the lower thoracic lumber (*sic*) region."

[15] After a consultation on 12 February 1999, the plaintiff did not consult Dr McGrouther until 16 March 2000. After the second incident, the plaintiff consulted general medical practitioner Dr Peirce. Dr Peirce ordered an x-ray of the plaintiff's lumbar spine and the report dated 23 March 2000 (Ex 4) noted:

> "The upper lumbar spine tilts towards the left. Mild degenerative disease of the spine is seen throughout the lumbar spine as characterised by osteophyte formation. The inter-vertebral disc spaces appear within normal limits. There is no spondylolisthesis."

[16] The plaintiff consulted Dr Peirce on 31 May 2000 after the third incident. On examination Dr Peirce recorded (Ex 12) that the plaintiff was suffering severe lower back pain and recommended that the plaintiff cease working. A CT scan was arranged for 9 June 2000. The report dated 9 June 2000 (Ex 5) noted:

> "**L3-4:**
> Minor generalised disc bulging has caused minor anterior indentation of the thecal sac. The L3 nerve roots escape through large intervertebral foramina. Small vertebral end plate osteophytes are seen. The retro-peritoneal regions are normal.
>
> **L4-5:**
> Minor generalised disc bulging has caused minor anterior indentation of the thecal sac. There is also minor hypertrophy of the ligamentum flavum. The combination of abnormalities has caused some compression of the thecal sac. I don't think that this is of any clinical significance. The L4 nerve roots escape unimpeded through large intervertebral foramina.
>
> **L5-S1:**

> No prolapse is present. The nerve roots escape through the large intervertebral foramina. The S1 nerve roots are normal."

That report summarised the findings as "Minor compression of the thecal sac at L4-5 and less markedly at L3-4."

[17] The plaintiff was taking analgesia for the pain.

[18] Dr Peirce referred the plaintiff to orthopaedic surgeon, Dr Sean Mullen. Dr Mullen reported to Dr Peirce by letter dated 4 July 2000 (Ex 33) and provided a similar report to the defendant by letter dated 11 July 2000 (Ex 6). In the latter report, Dr Mullen assessed the plaintiff's injury as follows:

> "I think that Mr. Hopkins has predominantly severe mechanical low back, which has been exacerbated by a recent lifting injury at work. I think, that although he has had a pre-existing condition, his lifting at work, has been the major problem. I have suggested to him that as well as looking at modification or in fact changing occupation, which I think may be necessary in the future, we should look at weight loss as well as a hydrotherapy program and also to start some anti-inflammatory such as Celebrex. This may help some of the inflammatory components of pain. I have been through this with him extensively to day and explained that this is probably the best option and surgery is not indicated at this time."

[19] The plaintiff underwent the MRI scan of his lumbar spine on 22 August 2000. The findings set out the report on the scan (Ex 11) included:

> "The T11-12 disc is markedly reduced in height and desiccated. However, no posterior disc herniation is detected at this level.
>
> There are old end plate fractures in T12-L1 and L3. The L3-4 disc is minimally reduced in height and is moderately desiccated. There are small anterior disc bulges at the L2-3 and L3-4 levels. However no posterior disc herniation or far lateral disc herniations are identified."

The comment made on the report in respect of the findings is:

> "No compressive lesion is identified. There is degeneration of the T11-12 disc and early degenerative change in the L3-4 disc. Additionally, there are small anterior disc herniations at the L2-3 and L3-4 levels."

[20] The defendant referred the plaintiff to Sunshine Coast Rehabilitation Services at the Noosa Hospital and Specialist Centre for a work hardening program comprising 10 sessions each lasting one-half day between 18 and 29 September 2000 and vocational assessment. The work hardening component involved exercise, education and work simulation. After the two weeks, there was an improvement in the plaintiff's general posture, but his lumbar spine remained unchanged. It was noted that thoracic kyphosis and cervical lordosis had reduced. There was active flexion to mid thigh level and extension was approximately 25% of normal. Lateral flexion and rotation was near normal range. The physiotherapist who conducted the reassessment at the end of the program observed a range of abnormal pain behaviours during performance of active movements. The plaintiff was

unsuccessful in applying the techniques suggested by the occupational therapist for managing activities of daily living. He continued to utilise the walking stick, despite advice from the rehabilitation team that the stick was not necessary for his daily function. Functionally there were no significant improvements observed on completion of the program. It was recommended that the plaintiff continue with the exercise program to include walking, floor exercises and gym.

[21] Dr Mullen provided an updated report dated 17 October 2000 (Ex 7) in which he reviewed the MRI findings and expressed the opinion that the MRI scan was not representative of the reason for the plaintiff's recent injury and stated:

> "I believe his pain is definitely related to the recent injury and is musculoskeletal in origin and is mechanical and has little to do with the MR findings."

Dr Mullen was of the view that it was important for the plaintiff to continue with his hydrotherapy program and gym program and that he would not get back to tyre fitting and would find it difficult to manage with a job that required sitting for long periods.

[22] The plaintiff acknowledged that after he ceased work in June 2000, his inability to engage in similar physical activity resulted in his weight increasing to 117kgs.

[23] Dr Mullen reviewed the plaintiff on or about 1 December 2000 and by letter of 1 December 2000 (Ex 8) reported to Dr Peirce that the plaintiff was improving slowly with the hydrotherapy program. Dr Mullen noted that the plaintiff was still using a walking stick.

[24] The plaintiff stated in evidence that about 6 months after the third incident, the pain continued to worsen and he was taking not just Panadol but Panadeine Forte and Oxycontin.

[25] Dr Mullen reviewed the plaintiff on 14 August 2001 when the plaintiff had lost 9kgs in weight and was mobilising with one walking stick and advised that the hydrotherapy program was beneficial to his pain. In the medico legal report dated 1 October 2001 (Ex 9) Dr Mullen provided this assessment of the plaintiff:

> "I believe in summary Mr Hopkins has quite a significant mechanical low back pain secondary to his lifting accident at work. There is a small history of pre-existing degenerative disease and this is confirmed on x-ray. His injury at work therefore is an exacerbation of his previous lower back complaints. There was no surgically treatable lesion at any stage and with appropriate non-operative management Mr Hopkins is improving. Long term however Mr Hopkins will not be able to return to his previous occupation as a tyre fitter and may well require to look for other occupations which are more light in activity. He needs to continue loosing *(sic)* weight and needs to continue with is hydrotherapy program pro-term."

In a supplementary report dated 20 November 2001 (Ex 10), Dr Mullen expressed the opinion that the plaintiff had sustained a permanent disability figure of 10%.

[26] It was acknowledged by Dr Mullen that where there was an underlying degenerative back condition, heavy lifting accidents are more likely to lead to severe exacerbations of pain. When asked whether, because of the nature of his work, the

plaintiff could have been in the same position within 2 years or 3 years of the 1998 incident, even if these three incidents had not occurred, Dr Mullen responded that it was hard to answer emphatically, because he saw patients who were able to work in their occupations despite mechanical low back pain for long periods. Dr Mullen stated that there was a possibility that in his current condition the plaintiff would still have needed to change from being a tyre fitter to another vocation, because of ongoing problems, but would not place a time period on that occurring.

[27] In oral evidence Dr Mullen explained that the degenerative condition of the plaintiff's spine as shown on x-ray was present prior to the incident in February 1998 and that each of the incidents exacerbated the pre-existing condition. Dr Mullen stated that his assessment of 10% permanent disability took into account the underlying degeneration, because it was hard to assess how much of the disability was due to the acute exacerbation and how much was due to the underlying process. Dr Mullen used the description "musculoskeletal" to describe the plaintiff's pain, on the basis that the plaintiff's back pain was caused by the degeneration of his spine and the exacerbation of it, rather than nerve root compression.

[28] Dr Mullen was questioned about the involvement of each of the incidents in producing the symptoms of pain from which the plaintiff suffered. Dr Mullen explained that it is always possible for someone to have degenerative back disease and be able to remain relatively asymptomatic with it. He stated:

> "The difficulty is that the time of symptoms from a degenerative spine is always difficult to determine because there can be a long lag period when someone has degeneration within the spine but does not have symptoms from that degeneration. If you remove February '98 from the equation and look at recent events, it is very hard to be able to say when the spine may have become [painful] … . It is most likely that a discrete episode will cause pain within a degenerative spine. My experience is that it is very rare for someone with a degenerative spine to go through a whole period of their working life without symptoms at some stage, but generally those symptoms are exacerbated by an incident or an accident. And, therefore, it is very hard to tell when those symptoms may have come on, I agree."

[29] Dr Peirce referred the plaintiff to neurosurgeon Dr Terry Coyne for review. By report dated 1 March 2002 (Ex 15) Dr Coyne noted that the plaintiff described his main pain as across all of his lumbar region with radiation to the buttocks and that the plaintiff had some right leg pain, but that was tolerable. At that stage the plaintiff was still requiring maintenance Oxycontin. Dr Coyne noted that examination revealed an absence of any lumbosacral spine movement, but there was no focal neurological deficit in the lower limbs. Dr Coyne expressed the opinion that, given the absence of any clinical or radiological features of nerve root compression, there was nothing to offer the plaintiff in the way of surgery which would be of benefit.

**Employment prospects after the incidents**

[30] As it turned out, because of financial difficulties the employer ceased to conduct its business in late June 2000. The business had been for sale prior to its closing down. Prospective purchasers of the business, Mr and Mrs Osbourne, provided a statement dated 26 April 2002 (Ex 25) in which they indicated that they were keen to keep the

plaintiff employed in the business, because he knew everyone who came to the business and they thought he was good at his job. Mr and Mrs Osbourne stated that they did not buy the business ultimately, because of a combination of the profit level, as a result of the rent being too high, and the fact that the plaintiff was injured and they could not have conducted the business without him. Mr and Mrs Osbourne estimated that there was a 70% chance of their proceeding with the purchase, if the plaintiff had not been injured. Mr and Mrs Osbourne indicated that, if they had purchased the business, they would have maintained the plaintiff's wage at the level it was and had no plans to terminate his employment.

[31] Ms Linda Heselwood who was employed by the employer as the office manager described the plaintiff as having an excellent rapport with the customers and as very conscientious and that he did work beyond what was expected of him.

[32] Mr Ian Farrell who is a director of the company that conducts the business Pialba Tyre and Battery and Muffler offered the plaintiff a job with his business, when he became aware that the employer's business was failing. He would have given the plaintiff the job of being assistant manager which he understood to be a similar role to that which the plaintiff had been performing for the employer. Mr Farrell stated that he would have started the plaintiff off on an award wage of about $30,000 per year and then, depending on his performance, would have paid him above that. Mr Farrell would have been prepared to pay the plaintiff what he was earning from the employer, if the plaintiff's performance in Mr Farrell's business warranted that.

[33] Mr Farrell was born in 1959 and stated that every time he picked up a battery or a tyre, he would get a bit of a twinge in his back. He stated that he had a tyre fitter working for him who was about 53 years old, but that most tyre fitters only do that work for about 10 or 15 years, because of the back trouble they have had and then have gone into selling tyres or batteries or motor related goods.

[34] Whilst undertaking the program at Sunshine Coast Rehabilitation Services in September 2000, the plaintiff was assessed by a psychologist for alternative occupations. Although the report lists alternative vocational options which the psychologist had explored with the plaintiff, the listing proceeded on the basis of occupations that the plaintiff was interested in. These included working as a motel manager, real estate salesperson or sales assistant. The report acknowledged, however, that the obstacles to employment by the plaintiff were the effects of the back injury and his lack of formal qualifications.

[35] The plaintiff has not made any attempt to pursue these alternative employment options, as he has been conscious of the limitations on his capacity to undertake the tasks required by any of these other jobs. As he stated in evidence:

> "Well, in all fairness, I think a 44 year old going around with a walking stick with a crook back is going to find it very tough finding something that he is capable of."

[36] By the time of the trial of the proceeding, the plaintiff had reduced his weight to 85kgs. He had taken himself off the Oxycontin about 8 months prior to the trial, but was still taking Panadol and sometimes Panadeine Forte for the pain. The plaintiff still required the use of a walking stick to assist him in walking about 95% of the time. He described the pain from which he was still suffering as "it is actually in my buttocks going down my right leg and still got the same pain in the side of the

back that I have always had". The plaintiff did not consider that he had been able to have a good night's sleep in about 5 years.

**Other medical evidence**

[37] The defendant had the plaintiff examined at an early stage on 4 August 2000 by orthopaedic surgeon Dr Lloyd Toft. The plaintiff was using a walking stick at that stage and presented with the appearance of being in severe pain. At the trial the defendant cross-examined the plaintiff on the differences between the history of injury noted in Dr Toft's report dated 4 August 2000 (Ex 27) and the evidence of the plaintiff in respect of the three incidents. The plaintiff could not explain why Dr Toft referred to being told by the plaintiff that on 14 July 2000 the plaintiff had stepped down a small step and severe pain recurred. The plaintiff was adamant in his denial that no such event had occurred and that he had not described any episode whatsoever to Dr Toft about stepping down a small step. I am satisfied from my observations of the plaintiff and consideration of his evidence and the fact that the plaintiff had ceased work on 14 June 2000 that the plaintiff did not describe an episode to Dr Toft as occurring on 14 July 2000 involving stepping down a small step.

[38] Dr Toft reviewed the plaintiff on 14 November 2000 and his MRI scan. In his report dated 24 November 2000 (Ex 28) Dr Toft expressed the opinion that the findings of the MRI scan would support a diagnosis of aggravation of pre-existing degenerative disc disease in the lumbar spine. As the opinions expressed in Dr Toft's report dated 8 December 2000 (Ex 29) are based on the history that Dr Toft was using of an incident on 14 July 2000 subsequent to the incident on 30 May 2000, the opinions expressed in that report are not helpful.

[39] In his report dated 30 September 2002 (Ex 30) Dr Toft expressed the opinion that, considering the severity and the multi-level nature of the plaintiff's thoraco-lumbar spinal degeneration, the plaintiff would have been likely to have had to give up tyre fitting within 2 or 3 years of the incident of 30 May 2000.

[40] In oral evidence Dr Toft explained that the natural history of multi-level degenerative disease in a spine is one of a chronic relapsing nature where there are episodes of pain of varying severity and then periods of quiescence when the spine can be normal with no symptoms and no restriction of movement and the causes of the episodes of pain vary significantly from nothing discernable to prolonged sitting in an uncomfortable chair to some lifting or some sudden episode. In cross examination Dr Toft could not disagree with the proposition that it was impossible to prognosticate hypothetically with any reasonable measure of precision to arrive at a point in time at which, absent the February 1998 incident, the plaintiff's low back would have been reduced to a similar state of disability that he suffered after the February 1998 incident.

[41] Orthopaedic surgeon, Dr Peter Boys, examined the plaintiff at the request of the defendant on 8 November 2000. Dr Boys referred to the history of the February 1998 incident and the March 2000 incident which appears to correspond to two claim files of the defendant in respect of which Dr Boys' opinion on the plaintiff was sought. From the CT scan and MRI scan Dr Boys identified that the plaintiff had suffered from Scheuermann's disease which he explained involves inflammation of the growth plates on the upper and lower surface of each vertebra

which can result in spinal deformity, but in less severe cases, the person who has suffered from the condition is at risk of earlier degenerative changes in the back and a higher incidence of back pain than the normal population.

[42] Dr Boys, in his report dated 8 November 2000 (Ex 23), diagnosed symptomatic thoracolumbar degeneration and that the incidents resulted in soft tissue strains to the lower back aggravating degenerative changes. At the time of examination Dr Boys formed the opinion that the plaintiff's complaints were primarily constitutional in nature, reflecting his age, weight, past Scheuermann's disease and associated degeneration. He therefore assessed a 1% impairment to each of the two claims referred to in his report.

[43] In cross examination Dr Boys stated that, if the incident of February 1998 had not occurred, it was possible that the plaintiff could have continued to remain asymptomatic, whether for the balance of his working life or a lesser period or until the next day and that it was not possible to say with any reasonable measure of precision when the plaintiff would have otherwise become symptomatic, but for the incidents.

[44] The plaintiff had an income protection policy with MLC Limited and was examined for that company on 7 August 2001 by Dr Ian Niven who is an occupational health consultant. In his report dated 15 August 2001 (Ex 14), Dr Niven also diagnosed that the plaintiff had extensive and quite severe degenerative changes in his lumbar spine and that he was likely to experience ongoing persistent low back pain of at least a moderate nature. Dr Niven considered that the plaintiff was entirely unfit to undertake the tasks of a tyre fitter and, because the plaintiff's level of education was low, his levels of literacy and numeracy were mediocre and he had no formal training in office skills, Dr Niven doubted that the plaintiff was suited to undertake any sort of administrative, managerial or clerical role, even though medically his physical limitations would not have stopped him undertaking sedentary work. Dr Niven's assessment was that the likelihood of a return to remunerative work by the plaintiff was very low and more than likely he would be unable to ever return to the workforce.

[45] The defendant obtained a medico-legal report from orthopaedic surgeon, Dr Gregory Nutting, which is dated 24 April 2002 (Ex 35) which was when Dr Nutting examined the plaintiff. I infer from Dr Nutting's report and his oral evidence that he was sceptical about the real extent of the symptoms from which the plaintiff described he was suffering. Dr Nutting was of the opinion that each of the three incidents was an aggravation of a pre-existing condition and that the plaintiff has returned to the normal progression of a pre-existing condition, although Dr Nutting describes the plaintiff's reaction to that condition as "inordinately unusual". Dr Nutting assessed the plaintiff's permanent impairment related to the aggravation of his pre-existing condition as being in the order of 2-3%. In cross examination, Dr Nutting agreed that if the precipitating event that occurred in February 1998 was eliminated from the history, and the plaintiff had continued working with some mild degenerative changes in his low back, it was impossible to say when the plaintiff's low back would have become symptomatic without some further insult to his low back.

[46] The plaintiff's solicitors obtained a medico-legal report from Dr Coyne dated 29 July 2002 (Ex 16) which was based on the examination which Dr Coyne had made

of the plaintiff on 22 February 2002. Dr Coyne expressed the opinion in this report that the incident of February 1998 was probably the single most important contributing factor to the plaintiff's current condition. Dr Coyne considered that it was likely the plaintiff's symptoms were stable and stationary and that the plaintiff had a 15% permanent impairment of the whole person, as a result of his lumbar spine condition, of which Dr Coyne would attribute 10% to the effects of the work related incidents and 5% to constitutional and natural ageing factors.

[47] The defendant's solicitors obtained a medico-legal report from neurosurgeon Dr Michael Weidmann dated 4 March 2003 (Ex 22). On examination Dr Weidmann noticed that the plaintiff had difficulty sitting or standing for more than 10 minutes at a time and, on direct testing of back movements, there was virtually no movement in any direction. Dr Weidmann considered that the plaintiff's inability to move his back in any direction on examination was unusual and formed the impression that the plaintiff was overstating the severity of his ongoing symptoms. Dr Weidmann accepted that the plaintiff may have persisting back pain with some leg radiation as a result of pre-existing degenerative changes and the injury of February 1998, but that the injuries of March and May 2000 caused temporary aggravation only and had not resulted in any permanent impairment. Dr Weidmann assessed the plaintiff with an 8% partial permanent impairment of the whole person as a result of his back condition of which three-quarters was due to pre-existing and ongoing degenerative changes and one-quarter was a result of the work related injury in February 1998. Dr Weidmann considered that the plaintiff was medically fit for lighter desk work or administrative tasks.

[48] During the course of his oral evidence, Dr Weidmann acknowledged that it involved a great deal of speculation and some "crystal ball gazing" to comment on what would have been the progress of the plaintiff's spinal condition, if the events of 1998 and 2000 had not occurred, but believed it was unlikely that the plaintiff would have continued working in his line of work until normal retiring age and that it was more likely than not that he would have developed some back problems at some time in the future, but it would be difficult to state when that might have happened.

**Findings on liability**

[49] Because some of the doctors queried whether the plaintiff was overstating his symptoms after the incidents, I have carefully evaluated the plaintiff's evidence in light of all the evidence about his dealings with doctors and others subsequent to each of the incidents. The plaintiff endeavoured to give his evidence about what he had experienced during and subsequent to each of the incidents in a straightforward and factual manner and did not appear to exaggerate. Ms Cordner's observations of the plaintiff since the incident in February 1998 support the plaintiff's evidence of his symptoms. Allowing for some mistakes which were clearly made by doctors, particularly Dr Toft, in recording what they were told by the plaintiff, there is also consistency in the plaintiff's reporting to these doctors of his pain and experiences. I reject the notion that the plaintiff has overstated his symptoms. I accept the plaintiff's evidence describing the pain from which he has suffered and continues to suffer and the consequent limitations on his activities.

[50] I find that the plaintiff's lower back was asymptomatic prior to the first incident in February 1998. I find that each of the incidents in March and May 2000 contributed

to the back pain from which the plaintiff suffered after the incident in February 1998 and that the plaintiff is continuing to suffer from that back pain. The plaintiff has established a *prima facie* case that his low back injury was caused by the subject incidents for which the defendant accepts liability, as a result of the negligence and/or breach of duty and/or breach of contract of employment and/or breach of duty of the employer.

[51] It was common ground between the parties that, relying on the approach in *Watts v Rake* (1960) 108 CLR 158, as explained in *Purkess v Crittenden* (1965) 114 CLR 165, 168, there was an evidential burden on the defendant to show that the plaintiff's incapacity was wholly or partly the result of his pre-existing degenerative spinal condition and that his incapacity would, in any event, have resulted from that pre-existing condition which requires evidence to "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".

[52] The defendant has discharged the evidential burden of showing that the plaintiff had a pre-existing degenerative spinal condition at the time he was injured in the incident in February 1998. The defendant has failed, however, to discharge the evidential burden in respect of showing what the future effects of that pre-existing condition were likely to have been, if the plaintiff were not injured in each of the three incidents. This is because there must be some reasonable measure of precision in the evidence, as to the future effects of the pre-existing condition, absent the injuries that were sustained. Each of the doctors who were questioned about the future effects of the plaintiff's pre-existing spinal degeneration, but for the subject incidents, conceded that the exercise could not be undertaken with a reasonable measure of precision. Although Dr Toft thought it was likely that the plaintiff would, without the three incidents, have had to give up tyre fitting within two or three years of the incident of 30 May 2000, he acknowledged that he could not disagree with the proposition that it was not possible to predict with any reasonable measure of precision as to whether the plaintiff's low back would have become symptomatic, absent that incident in February 1998.

[53] As the defendant has failed in discharging the evidential burden in respect of the role of the pre-existing condition on the plaintiff's symptoms, I am satisfied that the plaintiff has shown that his low back injury from which he has continued to suffer since February 1998 was caused by the subject incidents. I also accept that it has been reasonable in the light of the plaintiff's continuing pain and lack of educational qualifications for him not to endeavour to find alternative employment since 14 June 2000. I accept Dr Niven's assessment of the plaintiff's being unlikely to return to the workforce.

**Pain, suffering and loss of amenities**

[54] In the light of the plaintiff's evidence of his suffering and my finding on liability, the assessment by each of Dr Mullen and Dr Coyne as to the extent of the plaintiff's disability is the appropriate basis for determining this head of damages. The plaintiff seeks the sum of $40,000 for pain, suffering and loss of amenities on the basis that that reflects a disability of 10%. Mr Rolls of counsel on behalf of the defendant conceded that damages of $40,000 for pain, suffering and loss of

amenities was not an inappropriate sum for a 10% disability. I therefore assess damages under this head for the amount of $40,000.

**Past economic loss**

[55] It was common ground that the plaintiff was paid by the employer to and including 16 June 2000 and that past economic loss needs to be calculated between 17 June 2000 and the date of judgment. The defendant's calculations were done on the basis that the net weekly earnings of the plaintiff at the time he ceased with the employer were $698, but the total amount for the period 17 June 2000 to the date of judgment should be discounted by 50% to reflect that the plaintiff was capable of doing other work, but chose not to.

[56] The plaintiff's calculation of past economic loss proceeded on the basis that his net loss per week for the two weeks until 30 June 2000 was $615 and that his loss from 1 July 2000 until the date of judgment should be calculated on the basis of $642 net loss per week, taking into account the change in the amount of tax withheld. The amount of $642 net was derived by allowing 70% of what the plaintiff would have earned in his employment with Mr and Mrs Osbourne plus 30% of what the plaintiff would have earned in employment with Mr Farrell. In the light of the evidence that it was possible that he could have worked for either of these two employers, it is reasonable to use as the net weekly loss of income the figure which takes into account the earnings from the different possible employers. In view of my acceptance of the evidence that the plaintiff has not been capable of working since he ceased work on 14 June 2000, it is not appropriate to discount the calculation of the plaintiff's past economic loss in the manner sought by the defendant. The plaintiff's past economic loss should be calculated as follows:

| **Period** | **Basis of Calculation** | **Net Loss** |
|---|---|---|
| 17.06.00 to 30.06.00 | 2 weeks @ $615 net loss per week | $ 1,230.00 |
| 01.07.00 to 30.06.01 | 52.14 weeks @ $642 net loss per week | 33,473.88 |
| 01.07.01 to 30.06.02 | 52.14 weeks @ $642 net loss per week | 33,473.88 |
| 01.07.02 to 30.06.03 | 52.14 weeks @ $642 net loss per week | 33,473.88 |
| 01.07.03 to 14.08.03 | 6.43 weeks @ $642 net loss per week | 4,128.06 |
| | | $105,779.70 |
| | Rounded off at | $105,700.00 |

The parties were agreed that interest on past economic loss should be calculated at 5% after allowance for receipt of weekly workers' compensation payments of $17,376.06 and Centrelink benefits (of about $20,000) which results in interest in the sum of $10,795. The parties were also agreed that past loss of employer's contributions to superannuation should be calculated at 8% of the award for past economic loss which results in the sum of $8,456.

**Future impairment of earning capacity**

[57] It is probable that, without the subject incidents, the plaintiff's degenerative condition of his spine would have interfered at some point with his capacity to

continue with his work as a tyre fitter and his capacity to undertake alternative forms of employment. That probability has to be assessed against the plaintiff's work history, that he was a good and conscientious worker and that the degenerative spine was asymptomatic until the incident in February 1998.

[58] It is submitted on behalf of the defendant that the discount to be applied to the calculation of future economic loss should be in the vicinity of 50% to take into account the contingency that the plaintiff may, in any case, have become unemployable as a tyre fitter and also to take into account that the plaintiff has a residual earning capacity for sedentary work.

[59] Mr Grant-Taylor of Senior Counsel on behalf of the plaintiff submitted that future economic loss should be calculated on the basis that the plaintiff would have worked only until 60 years of age (rather than the customary 65 years), of using $642 net per week as the loss without allowing for any increase in wages which was the trend of the plaintiff's earnings prior to the accident and was likely if the plaintiff went to work for Mr Farrell's company, and then of discounting by one-third. On this basis it was submitted no further discount was required, as this approach adequately allowed for the vicissitudes of life and the probability that at sometime in the future the degenerative spine would have affected his capacity to work in whole or in part.

[60] In view of my finding that the plaintiff has not been capable of working since he ceased work on 14 June 2000, I reject the defendant's submission that the calculation of future economic loss has to be discounted to reflect residual working capacity. In the circumstances of this case, I find that the approach of the plaintiff to the calculation of future impairment of earning capacity is appropriate. Calculating this head of damage at a continuing rate of loss of $642 net per week discounted at 5% over 15 years (multiplier 555) to age 60 gives the sum of $356,310 which, when reduced by one-third, results in this head of damage being assessed at $237,500. I am satisfied that there is at least a 51% likelihood that the plaintiff will sustain future impairment of earning capacity to this extent. Future loss of employer's contributions to superannuation should be calculated at 9% of the award for future impairment of earning capacity, making this head of damage the sum of $21,375.

**Future GP attendances**

[61] The plaintiff sought to recover damages for future GP attendances on the basis that since the incident in February 1998, according to the plaintiff's claims history statement from the Health Insurance Commission (Ex 19), he had been spending an average of $7.55 per week on attendances on his general medical practitioner. There was no medical evidence, however, that the plaintiff will require regular visits to his general practitioner for his continuing pain, in light of the conservative treatment which he has been receiving. I also accept the submission of the defendant that it is not appropriate to use a figure for future attendances based on historical attendances by the plaintiff on his general practitioners, when many of the visits after the February 1998 incident were concerned with endeavouring to diagnose his problem. It cannot be inferred that those historical attendances reflect the pattern of future treatment. In light of the state of the evidence on this head of damage, I am not satisfied that it is appropriate to make an award.

**Future pharmaceutical expenses**

[62] The plaintiff gave evidence that at the time of trial he was using a packet of Panadeine Forte at a cost of $3.80 each week and 3 to 4 boxes of Panadol per week at a cost of $2.50 to $3 per box. In view of the medical evidence, particularly that of Dr Coyne, that the plaintiff's injuries had stabilised, but he has been left with a permanent impairment of 10% due to the work incidents, it is reasonable to infer that the plaintiff who has been suffering pain since February 1998 will continue to suffer pain which is appropriately treated with analgesia. The plaintiff's claim for future expenses for pharmaceuticals at $13.40 per week is based on $3.80 per week for Panadeine Forte and $9.60 for Panadol which reflects the plaintiff's evidence. It is appropriate to assess this head of damages on the basis of $13.40 per week discounted at 5% over 15 years (multiplier 555) to age 60, but then discounted by one-third for the same reason that the assessment for future economic loss was discounted, which results in the sum of $4,955.

**WorkCover special damages**

[63] On the basis of the defendant's payment history reports in respect of the 3 claims for statutory benefits made by the plaintiff from the defendant arising out of the subject incidents (Ex 26), the sum of $9,428.85 has been incurred by the defendant in respect of items of special damages which must be reimbursed to the defendant.

**HIC medial expenses**

[64] The plaintiff claims the sum of $3,753.40 which is the total benefits paid by the Health Insurance Commission between 3 February 1998 and 23 May 2003 on account of services provided to the plaintiff by medical practitioners which the plaintiff has identified as relating to his claim for damages. This list includes procedures and tests organised after the plaintiff consulted Dr McGrouther which did not relate to pain in the plaintiff's lower back. Although temporally these investigations were carried out when the plaintiff was seeking a diagnosis for his low back pain, the ECG, the colonoscopy and associated procedures and pathology tests related to other possible ailments of the plaintiff, rather than his lower back injury. The services provided by Drs Ekin, Cavallo, Barker and Storey should be excluded from this head of damages. I calculate the benefits paid by the Health Insurance Commission for medical services relating to the subject incidents to be $2,444.20. It follows that the gap medical expenses should also be reduced to exclude the services of those doctors which I have identified as not relating to the subject incidents. I calculate the gap medical expenses to be $344.20.

**Hydrotherapy expenses**

[65] The plaintiff should be compensated for this head of damage which relates to the cost of his undergoing hydrotherapy treatment. The amount claimed in the list of special damages (Ex 20) is $1,185 which should be allowed.

**Jim's Mowing Service**

[66] The plaintiff gave evidence of being unable to mow his yard from the time he ceased work on 14 June 2000. He has engaged Jim's Mowing Service each 4 weeks to carry out that mowing at a cost of $27.50. The amount which should be allowed between 14 June 2000 and the date of judgment is $1,127.50.

**Pharmaceutical expenses**

[67] The pharmaceutical expenses claimed as special damages are set out in the list (Ex 20). It is common ground that the item of magnetic appliances should not be recovered and that the amount allowed for pharmaceutical expenses should be $2,512.60. The plaintiff also seeks interest on the pharmaceutical expenses, Jim's Mowing Service expenses, the hydrotherapy expenses and the gap medical expenses. Those 4 items of special damages total the sum of $5,169.30. Interest should be allowed at 5% on that total sum for 3.16 years which makes $816.

**Other matters**

[68] It is common ground that the *Fox v Wood* amount is $5,073.75 which should be allowed as a head of damage. The plaintiff is obliged to refund to the defendant the sum of $31,878.66.

**Conclusion**

[69] My findings in relation to quantum can be summarised as follows:

| | |
|---|---|
| Pain, suffering and loss of amenities | $40,000.00 |
| Past economic loss | 105,700.00 |
| Interest (5% on $68,323.94 for 3.16 years) | 10,795.00 |
| Past loss of employer's contributions to superannuation @ 8% | 8,456.00 |
| Future impairment of earning capacity | 237,500.00 |
| Future loss of employer's contribution to superannuation @ 9% | 21,375.00 |
| Future pharmaceutical expenses | 4,955.00 |
| WorkCover special damages | 9,428.85 |
| HIC medical expenses | 2,444.20 |
| Gap medical expenses | 344.20 |
| Hydrotherapy expenses | 1,185.00 |
| Jim's Mowing Service | 1,127.50 |
| Pharmaceutical expenses | 2,512.60 |
| Interest on 4 preceding items (5% on $5,169.30 for 3.16 years) | 816.00 |
| *Fox Wood* | 5,073.75 |
| | $451,713.10 |
| Less WorkCover refunds | 31,878.66 |
| | **$419,834.44** |

[70] It follows that the following order should be made:
The defendant pay to the plaintiff the amount of $419,834.44.

[71] I will hear submissions from the parties on the question of costs.