SUPREME COURT OF QUEENSLAND

CITATION:	*Tabulo v Bowen Shire Council* [2004] QSC 038
PARTIES:	**MIKE BRENNAN TABULO** (Plaintiff) and **BOWEN SHIRE COUNCIL** (Defendant)
FILE NO/S:	S 635 of 2002
DIVISION:	Trial
PROCEEDING:	Claim for damages
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	
DELIVERED AT:	Townsville
HEARING DATE:	9-11 February 2004
JUDGES:	Cullinane J.
ORDER:	**I give judgment for the plaintiff against the defendant in the sum of $176,113.98 on the claim in contract and in the sum of $126,790.90 in the claim for breach of statutory duty.** **I order the defendant to pay the plaintiff's costs to be assessed, such costs to be payable as and from the 17th of June 2002, such costs to be limited to the amount which would have been recoverable had the action been instituted in the District Court.**
CATCHWORDS:	EMPLOYMENT LAW – NEGLIGENCE – BREACH OF STATUTORY DUTY – LIABILITY OF EMPLOYER – DUTY OF CARE – FORSEEABILITY OF INJURY– FAILURE TO PROVIDE A SAFE SYSTEM OF WORK – where employer suffered injuries in the course of building a retaining wall - whether employer owed a duty to provide scaffolding or like structure to reduce risk of injury - where employer claims employee feigned the injury – whether contributory negligence applies due to manner of work

performed.

DAMAGES –MEASURE OF DAMAGES – PAIN AND SUFFERING – QUANTUM – LOSS OF EARNING CAPACITY – claim for damages for injuries sustained in course of employment, past and future economic loss.

Law Reform (Tort Feasors Contribution Contributory Negligence and Division of Chattels) Act 1952 (Qld)
Workcover Queensland Act 1996 (Qld) s. 312
Workplace Health and Safety Act 1995 (Qld) s.28(1)

Astley v Austrust Ltd (1998-99) 197 CLR 1
Hawthorne v Thiess Contractors Pty Ltd & WorkCover Queensland 2001 QCA 223
Martin v Mackay City Council (2001) QSC 433
Rogers v Brambles Australia Ltd 1998 1 Qd.R. 212

COUNSEL: Mr Moon for the plaintiff
Mr Campbell for the defendant

SOLICITORS: Ruddy Tomlins & Baxter for the plaintiff
HBM Lawyers for the defendant

[1] The plaintiff was born on 18th July 1960. He has instituted proceedings against the defendant Council by whom he was employed at the time as what is described as a form worker for personal injuries which he alleges were sustained by him on or about the 30th June 1999.

[2] It is the plaintiff's case that he fell from a wall which had an unguarded edge to a drop of some two metres and sustained injury. The defendant denies that he fell as alleged or that he sustained any injury. Alternatively the defendant says that if he did fall and sustain injury it is not liable to him in damages.

[3] The plaintiff was employed by the defendant pursuant to an arrangement which involved the taking on of a number of employees through a training or placement programme for a period of one year. The plaintiff describes this position as a trainee labourer. The employment it seems, was arranged as part of a capital infrastructure project for which the Council had received a grant and those engaged by the Council were required to undergo a training programme at the Barrier Reef Institute of TAFE at its Bowen campus during the currency of the project and to undertake work on the site or sites involved.

[4] The project was a construction project at Horseshoe Bay near Bowen. The defendant was effectively constructing a walkway and grassed area beside the Horseshoe Bay Road. In its natural state this land apparently was broken and fell away. The work involved the placing of a retainer wall and building up the area between the road and the wall with aggregate and soil so as to produce the final

outcome which is shown in figure 2 of Exhibit 2A, a report of Mr Kahler, an engineer.

[5] There is a dispute as to just how far advanced the project was at the time the plaintiff says that he fell.

[6] According to the plaintiff he was one of a group of about eight who was performing this work. Records suggest it started before Christmas and involved the construction of a 40 metre long wall.

[7] Footings had been placed in the lower part of the terrain and the wall was constructed using blocks. The blocks which were used appear in Exhibit 25. Their dimensions were 200 millimetres in width, 200 millimetres in height and 450 millimetres in length.

[8] The wall varied in height according to the terrain but in the area where the plaintiff says he was working on the date I am concerned with the fall from the top of the wall was some two metres or thereabouts.

[9] As the wall was constructed, aggregate was brought and dumped on the roadside of the wall and it was necessary to shovel it manually so that it was placed against the wall. The area was filled in this way after soil was placed on top of the aggregate.

[10] The plaintiff says that at about 9 or 9.30 on the morning he was injured his task was to backfill the aggregate up to and against the edge of the wall. He was using a rake for this purpose. Because aggregate would be scattered over the top of the wall it was necessary for him to sweep that away and he used a broom for that purpose.

[11] He says that he was walking backwards along the wall sweeping the aggregate from it. He had been told that this was his task and he had done it on earlier occasions and had been doing it for some time that morning. In cross-examination he said at p. 62:-

> "*You see, would you agree it'd be more sensible, if you've got a broom, to be walking forwards?-- Well, if I had my time over again, yeah, probably.*
>
> *And just pushing ahead of you, perhaps angling the broom to one side to sweep the rock back onto the roadside?-- Yes, it would've been a better move.*
>
> *Yes. So, walking backwards you're sort of dragging it in series of movements, are you, and brushing it ---?-- Yes.*
>
> *---- to the roadside?-- Yes.*
>
> *And what was the advantage of walking backwards?-- It was just easy. I'd been raking backwards - 'cause you rake backwards, you don't rake forwards - then I'd just broom backwards."*

[12] According to the plaintiff as he was doing this his right foot slipped on some aggregate which was on the wall in the area where he was working. He describes the aggregate as being "like ball bearings".

[13] He says he fell approximately two metres experiencing pain in his shoulder.

[14] The area where he fell was, he says, an area where there were palm trees and dirt. There was some rock nearby but he did not fall on this.

[15] The plaintiff says that although the wall was almost complete the pink topping which appears in figure 2 of Exhibit 2A had not been put in place. As will be seen from that photograph a wall or fence was erected as a safety barrier as part of the completed job.

[16] The width available to somebody standing on the wall prior to the capping being placed on it was 200 millimetres. The evidence is that the width of the wall with the capping was at least 600 millimetres. This would obviously provide a more secure base upon which to stand.

[17] At the time the aggregate beside the wall on the road side was some distance below the top of the wall, and was broken rather than level. Steel mesh was used to provide some degree of reinforcement for the material which was being used as fill. The plaintiff estimates that at the time that he fell there was a distance of some three to four inches between the top of the block wall and the aggregate. Kingston-Lee, a fellow employee said the aggregate was about 6 inches below the top of the block. On his account this would not have been an appropriate base on which to stand when performing such work.

[18] It is common ground that no barrier was in place on the side of the wall on the day the plaintiff claims to have fallen.

[19] Although the plaintiff is adamant that at the time the capping had not been put in place and this also was the recollection of Kingston-Lee, other members of the gang who were called by the defendant gave evidence that the capping was in place and that the work was virtually complete. In particular the dairy of the foreman, O'Keefe, shows that the capping was in place. Whilst there are some rather unsatisfactory aspects of the diary in terms of identifying when certain parts of the work were performed, I have no reason to doubt that the diary as a contemporary account or virtually contemporary account of what happened is the most reliable indicator in this regard. I find that the wall was complete and the capping in place at the time.

[20] I think therefore that the plaintiff and Kingston-Lee were both mistaken as to the state of advancement of the work. It seems clear that the removal of aggregate from the wall would have been necessary whether the capping was in place or not.

[21] According to one Heath, then an employee of the defendant and now a tattooist living in Tasmania, on the day of the incident he saw the plaintiff performing cleaning work. He says he then saw him walk around the side of the retaining wall, that is to the side with the drop of two metres. He says he also saw a few pebbles on the top of the wall. He walked away and then he heard someone calling out "Bob" and he looked over the wall and saw the plaintiff on the ground, and said to him "Get up Mick. What's wrong?" The plaintiff said that he had fallen off the top of the wall.

[22] He went down to the plaintiff and asked him why he didn't get up and whether he was all right and says that the plaintiff told him that he was not all right and wanted to go to the doctor. Heath says that he went and got O'Keefe and also another employee Whitnall and that O'Keefe bought the truck up. He says that he saw a sling placed on the plaintiff's right arm. During this time the plaintiff was lying on his side and appeared to be in pain. He said that when the truck arrived the plaintiff "scurried up the slope" and opened the door. When he was asked whether he did so with his right arm he said "Yeah" and said he didn't think it was still in a sling at that stage.

[23] According to Heath, there was approximately five minutes between the time he saw the plaintiff walk around the wall and when he heard the plaintiff call out "Bob". He also said, "I can't actually remember if he kept walking down or came back up. I can't remember that."

[24] Another witness, one Webb, said that on the morning of the incident the plaintiff (at a time when the gang were together before work commenced), said: "Something to do with the fact that he didn't want to work there, didn't like the job or whatever and wanted to get out of there."

[25] The plaintiff, when he attended at the medical centre that he asked to be taken to, was not seen to be suffering from any bruises or abrasions or lacerations. He says that he had a lump on his head. Exhibit 10, a report from Dr. Daly, who saw the plaintiff, to WorkCover relates:

> *"Apart from a minor degree of shock there were no visible signs of injury."*

[26] It is thus the defendant's case that the plaintiff embarked on that day on a fraudulent enterprise, namely representing that he had fallen from a work site when he had not and that he then claimed to have sustained an injury when he had not and that he has maintained this false claim over the intervening years during the course of interviews with various doctors and in his evidence in the witness box.

[27] The plaintiff is a slightly built man who does not give the impression of being a robust character. His work history is a somewhat patchy one, but he has, obtained a number of qualifications through participating in various courses. He was said by counsel for the defendant to be a somewhat immature man. I do not think this is an unfair description of him. There were occasional signs of cockiness when giving evidence.

[28] He denied ever going around the side of the wall in the way which was suggested and he denied saying anything about wanting to leave the job as Webb suggested on the morning of the incident. Heath was plainly in a somewhat agitated state in the witness box and indeed the court had to be adjourned because he wanted to be sick. He gave the impression of being extremely nervous.

[29] I do not accept that the plaintiff invented the account of a fall on the day in question. And nor do I accept that he feigned an injury on that day. I do not find Heath's evidence convincing and as I have said I think that there was some features of his behaviour in the witness box which call for some reserve in approaching it. He does not know where the plaintiff was, immediately prior to his calling out to

him and although he says that the wall was completely clean at that time I think this too calls for some degree of scepticism as to whether he would be in a position to remember such a detail.

[30] So far as Webb's evidence is concerned I do not think that this is significant in terms of the issue that I have to resolve. The plaintiff denies having said it but it seems to me that even if he did so it would not cause me to doubt what the plaintiff has said. It may be that a somewhat more sinister light has subsequently been thrown on what might be regarded as no more than part of the interchange between employees that might be expected when the gang got together in the morning before starting work. If the plaintiff wished to leave the job he would not have had to feign an injury to do so.

[31] The absence of any marks on the plaintiff when seen by Dr Daly is also relied upon as suggesting that no fall occurred. I am not prepared to accept this in the absence of evidence that the point at which the plaintiff claims to have fallen would have brought him into contact with material which would have been likely to produce lacerations or abrasions. He says that where he fell was an area of dirt. There is, as I have said, evidence that he was suffering from shock when he was seen by Dr Daly and I take this to be an objective observable sign.

[32] In the result I accept the plaintiff's account of his having fallen.

[33] According to Mr Kahler, the standard work practices adopted on construction sites at the time would have seen the provision of scaffolding on the side of the wall where the plaintiff fell. He gave estimates of the cost of that which would suggest that it would not have involved any unreasonably large expense. Whilst no specific statutory obligation existed to take this step, Mr Kahler says a reasonably prudent employer would have perceived the risk when making an assessment of the job at the outset and, in accordance with generally accepted practices at the time would have taken steps to guard against it by, according to Mr Kahler, erecting scaffolding. He thought that the risk of falling existed whether the plaintiff was walking on the blocks or the capping and I accept this.

[34] Dr Low called on behalf of the defendant, was of the view that the risk of falling and the risk of injury likely to occur should a fall occur (he suggested a fracture of a limb) would not have required a prudent employer to take any such step. He suggested in the event that a risk was perceived to exist, there were cheaper and simpler methods of guarding against the risk of falling than the erection of scaffolding.

[35] I do not accept the evidence of Dr Low that the risk of injury in this case was not such as to require the taking of any steps to guard against it. Employees were known to walk on the wall when cleaning it. Kingston-Lee said that this was in fact the general practice which was adopted. He was at that time talking of the wall constituted by the blocks themselves prior to the placing of the capping on it. He said that it was safer to walk on the wall than on the aggregate and that everybody did so including himself and that the only one who did not was Barry Whitnall because he was very unstable on his feet as a result of surgery following the removal of a brain tumour. It was still necessary to clean the wall to remove aggregate once the capping was placed on it.

[36] I accept the evidence of Kahler that there was plainly a risk that in one way or another, a workman working close to the edge of the wall might lose his footing and fall and given the distance over which he might fall, the possibility of serious injury was plainly foreseeable.

[37] The defendant relied upon some of the provisions of s.312 of the *WorkCover Queensland Act* 1966 which was then in force. It provides as follows:

> "*Liability of employers and workers*
>
> *312.(1) In deciding whether a claimant is entitled to recover damages not reduced on account of contributory negligence, or at all, all courts must have regard to whether the claimant has proved such of the following matters as are relevant to the claim -*
>
> *(a) that the employer had made no genuine and reasonable attempt to put in place an appropriate system of work to guard the worker against injury arising out of events that were reasonably readily foreseeable;*
>
> *(b) that the actual and direct event giving rise to the worker's injury was actually foreseen or reasonably readily foreseeable by the employer;*
>
> *(c) that the worker did not know and had no reasonable means of knowing that the actual and direct event giving rise to the injury might happen;*
>
> *(d) that the injury sustained by the worker did not arise out of a relevant failure of the worker to inform the employer of the possibility of the event giving rise to the injury happening, in circumstances in which the employer neither knew nor reasonably had the means of knowing of the possibility;*
>
> *(e) that the worker did everything reasonably possible to avoid sustaining the injury;*
>
> *(f) that the event giving rise to the worker's injury was not solely as a result of inattention, momentary or otherwise, on the worker's part.*
>
> *(g) that the injury sustained by the worker did not arise out of a relevant failure of the worker to use all the protective clothing and equipment provided, or provided for, by the employer and in the way instructed by the employer.*
>
> *(h) that the worker did not relevantly fail to inform the employer of any unsafe plant or equipment as soon as practicable after the worker's discovery and relevant knowledge of the unsafe nature of the plant or equipment;*

(i) that the worker did not inappropriately interfere with or misuse or fail to use anything provided that was designed to reduce the worker's exposure to risk of injury.

(2) If the claimant relies exclusively on a failure by the employer to provide a safe system of work and fails to prove the matter mentioned in subsection (1)(a), the court must dismiss the claim.

(3) If the claimant fails to prove the matter mentioned in subsection (1)(b), the court must dismiss the claim.

(4) If the claimant fails to prove any of the matters mentioned in subsection (1)(c) to (i), the court must -

(a) dismiss the claim; or

(b) reduce the claimant's damages on the basis that the worker substantially contributed to the worker's injury.

(5) In deciding whether a worker has been guilty to completely causative or contributory negligence, the court is not confined to a consideration of and reliance on the matters mentioned in subsection (1)(c) to (i)."

[38] I am satisfied that the defendant failed to take any steps to provide a safe system of work in relation to the risk of falling that I have just referred to and that the plaintiff is not debarred by subsection 3 of section 312 from recovery on these grounds.

[39] I am also satisfied that the actual and direct cause of the injury (the falling from an unguarded wall) was foreseeable.

[40] The plaintiff is entitled to recover from the defendant for breach of the implied term of the contract of employment that the defendant would take reasonable care for the plaintiff's safety.

[41] The plaintiff has sued in contract and negligence and also for breach of statutory duty. I did not understand the cause of action in negligence to be pressed.

[42] The effect of the judgment of the High Court in *Astley v Austrust Ltd* (1998-99) 197 CLR1 is that an award of damages cannot be reduced under (in Queensland) the Law Reform (Tort Feasors Contribution Contributory Negligence and Division of Chattels) Act of 1952 where a plaintiff sues in contract.

[43] The effect of this judgment has been abrogated by legislation in Queensland but it is common ground that this legislation does not apply here.

[44] The defendant nonetheless argued that the effect of part 8 of chapter 5 of the WorkCover Queensland Act 1996 was to require the reduction of a damages award in the circumstances for which it provides. Reliance was placed upon the judgment of Dutney J in *Martin v Mackay City* Council (2001) QSC 433 in which His Honour expressed this view.

[45] On the other hand Thomas JA in *Hawthorne v Thiess Contractors Pty Ltd v WorkCover Queensland* 2001 QCA 223 speaking of claims generally under the *WorkCover Queensland Act* of 1996 said at para 11:

> *"Claims of the present kind are almost invariably brought in the alternative upon both breach of contract and negligence and, since Astley, contributory negligence has become a virtual dead letter because of the plaintiff's ultimate right to elect to proceed in contract."*

[46] His Honour though not dealing directly with the issue raised here, clearly thought that *Astley*'s case precluded any apportionment in actions to which the Act applied where the claim was framed in contract.

[47] I do not think that part 8 should be regarded as having the effect of statutorily overriding *Astley*'s case from the time of that judgment.

[48] It is the 1952 Act which confers upon a court a power to reduce damages for contributory negligence. Part 8 in my view should be regarded as doing no more than providing for the manner in which that power should be exercised in actions between employees and employers in the circumstances for which it makes express provision.

[49] Since the 1952 Act has been held not to apply to actions in contract, part 8 in my view should be regarded as similarly circumscribed having application only to actions in tort and for breach of statutory duty.

[50] The plaintiff advances a claim for breach of statutory duty based upon the terms of section 28(1) of the *Workplace Health and Safety* Act.

[51] It was held in *Rogers v Brambles Australia Ltd* 1998 1 Qd.R. 212 that proof of a failure to ensure the plaintiff's workplace health and safety gives rise to a cause of action. That case was concerned with a section in the same terms as Section 28(1).

[52] It seems to me that the plaintiff has made out this statutory cause of action for the reasons that I have already referred to.

[53] In relation to this cause of action the plaintiff's damages can be reduced for contributory negligence.

[54] I am satisfied that the plaintiff who apparently walked backwards along the wall as a continuation of what he was doing whilst on the aggregate was guilty of contributory negligence. He acknowledges that it would have been safer for him to walk forwards and there was no reason suggested why he could not have. I would in respect of the claim for breach of statutory duty reduce his damages by 25 per cent.

[55] The plaintiff left school having completed Grade 11. He undertook a course at the TAFE for some 18 months which is described as a pre-vocational course in which there were various modules including electrical and mechanical modules.

[56] Schedule A to Exhibit 1 is a history of the plaintiff's employment. He has worked in unskilled and semi-skilled positions.

[57] As will be seen he had a number of different jobs during the period after he left school until the time of the accident. He also was out of employment for significant periods. He had not been employed before the time of commencing with the defendant in the latter part of 1998 for some three years

[58] He had earlier worked for the defendant as a gardener's assistant.

[59] The plaintiff has undertaken a number of different courses and a list of the certifications and licences that he has obtained is schedule B to Exhibit 1.

[60] The majority were obtained prior to the accident I am concerned with but some have been obtained since.

[61] None of these, as counsel for the defendant pointed out, conferred any trade qualification as such upon the plaintiff but nonetheless they cover a significant number of fields and would presumably provide at least an advantage to him if not a necessary prerequisite in seeking work in a variety of positions.

[62] The plaintiff has worked since the accident on only two occasions. The first was as a nursery hand at Home Hardware, Bowen. This employment was obtained through CRS and lasted about one month and the second was in 2002 for two days as a truck driver.

[63] The plaintiff did not have a good attendance record with the defendant prior to the accident. The material would suggest that the plaintiff in this time had a number of days absences, for some of which he did not have a doctor's certificate. He gave evidence of having difficulties with asthma and some other problems which kept him away from work. Although it was suggested by O'Keefe that the plaintiff was absent without leave in the week before the accident it seems that in fact he was granted sick leave for the period 21 June - 23 June. See exhibit 32.

[64] The plaintiff had not been at work for some days prior to the accident because of such leave and two public holidays.

[65] Howe (the defendant's director of engineering services) speaks of the plaintiff as being a poor employee and said that he would not have recommended him as a person to be continued in the employment of the defendant after the expiration of the twelve months. Some employees were kept on. O'Keefe on the other hand said that the plaintiff's performance was "okay".

[66] Dr Reimers, a neurologist says that the plaintiff suffered from dizziness and headaches as a result of the accident. These have improved and when last seen by Dr Reimers, were mild.

[67] The plaintiff, according to Dr Lewis, an orthopaedic surgeon who was called on his behalf, has a disability of the neck. He had already existing degenerative changes in the neck and Dr Lewis ascribes one half of the present disability which he estimates as some four percent of the spine as a whole to pre-existing degenerative changes. Dr Lewis said that the plaintiff's degenerative changes may have ultimately led to the restrictions he currently has but they may not have. I am satisfied that these changes were not symptomatic prior to the accident. Dr Lewis's assessment largely coincides with that of another orthopaedic surgeon Dr Ness.

Both thought that his shoulder problems had largely resolved when each last saw him. Dr Lewis thought that the pain in the shoulder was referred pain from the neck. Dr Watson, a specialist in rehabilitative medicine thought the plaintiff but for the accident would have worked until a normal retirement age. I think some allowance has to be made for the risk that he may not have.

[68] Ms Purse, an occupational therapist says that the plaintiff is not suitable to perform work involving heavy lifting or repetitive use of the arm or shoulder and I accept this evidence.

[69] The plaintiff is recorded in Exhibit 17 when being interviewed in January 2001 by an officer of CRS, Ms Hemmett who was called as a witness as complaining that his shoulder "pops out" from time to time causing him to spend up to three days a week in bed.

[70] In his evidence before me the plaintiff explained this somewhat differently saying that what he meant was that his shoulder dropped from time to time.

[71] Although the plaintiff says that he told the specialists he saw about this none have recorded it. Dr Lewis in evidence described a possible cause of this, but was speaking only in the abstract.

[72] The plaintiff says that this occurs now only occasionally.

[73] The defendant submitted that the plaintiff was not worthy of belief having regard to the nature of this complaint and his failure to refer to it when speaking to the orthopaedic surgeons.

[74] I do not know what to make of this. I did not have the impression the plaintiff was deliberately overstating his injuries or their consequences. However I am not prepared to find that any such problems were the consequence of the accident and in any case as I have said, they no longer seem to be of any real consequence.

[75] The plaintiff had sustained serious injuries some years earlier in a motor vehicle accident. He said that he had made a complete recovery but it is noteworthy that he was complaining of lower back and hip pain (an area injured in the earlier accident) when seen by Ms Hemmett.

[76] The plaintiff has a disability which in terms of its percentage loss of function is quite small but I am satisfied that it imposes significant limitations upon him.

[77] The plaintiff has to be compensated for an impairment of his earning capacity between the accident and the present and for the future. He is now 40. The loss of the capacity to engage in work involving heavy lifting or repetitive use of his arm and shoulder is, for someone with his background, significant.

[78] Any assessment of the plaintiff's past and future economic loss must realistically take into account the fact that his work history prior to the accident involves significant periods of unemployment. As against that he demonstrated a willingness to pursue qualifications in a wide variety of fields this improving his prospects of employment. I have already referred to the risk that the degenerative changes in his neck might have limited his employment.

[79] So far as general damages are concerned I assess these in the sum of $30,000. Of this I ascribe $15,000 to the past and allow interest at the rate of two percent per annum for 4.5 years producing an amount of $1,350.

[80] The only other heads of claim are for past and future economic loss, special damages and future pharmaceutical expenses.

[81] There is no dispute as to the plaintiff's entitlement to recover $5,389.74 representing monies paid by WorkCover, $2,757.70 which has to be refunded to the CRS and $361.10 which has to be refunded to the HAC.

[82] The plaintiff claims $5,824 representing medication at the rate of $20 per week from the time of the accident until the present. (In fact it was calculated over some 5.6 years which represents a greater period than has passed since the accident.) There is evidence that the plaintiff has been taking Panadol and Panadeine at a cost of about $20-$40 per week. I allow under this head, the amount of $20 for 4.6 years producing an amount of $4,784 and I allow interest at the rate of five per cent on that amount for 4.6 years, producing a figure of $1,100.

[83] There are calculations as to past and future loss of earnings contained in Exhibit 7. These are based upon two scenarios. The first is based upon the plaintiff continuing to work with the defendant following the expiration of the trial period until the present. Some adjustments have been made to these figures because the plaintiff was assumed to have been in receipt of a full wage from the time of the accident for the purposes of this scenario. The second is based upon the plaintiff's working as a welder from about the middle of 2000. Up until that time it was assumed that he would continue working with the Council.

[84] The plaintiff gave some evidence of an intention to go to Western Australia and work in the mining industry as a welder at the expiration of the year that he was to work for the defendant.

[85] The plaintiff did not have any qualifications as a welder although he had some training in welding in the course of obtaining a certificate in engineering (pre-employment).

[86] I think it unlikely that the plaintiff would have earned income as a welder as assumed by this scenario.

[87] Whilst the plaintiff has the limitations on his employment I have referred to he has the capacity to engage in a wide range of occupations.

[88] There is, I think, some justification in the claim by the defendant that the plaintiff is not as highly motivated as he might be but I do not have the impression that he is a malingerer.

[89] No precise mathematical approach to the qualification of past and future economic loss in a case like this. The figures in Exhibit 7 can be no more than a starting point.

[90] So far as past economic loss is concerned I allow $45,000. The plaintiff has received more than this in the form of income substitution and thus no award of interest is allowed.

[91] I allow superannuation at the rate of seven per cent on $45,000 being an amount of $3,150.

[92] So far as the future is concerned I allow $100,000.

[93] This figure takes into account general vicissitudes and contingencies as well as the specific factors I have already referred to.

[94] I allow superannuation at nine percent producing a figure of $11,250.

[95] There is a claim for future medical expenses based upon $20 per week for 20 years. This seems to me to be reasonable and I allow the sum claimed, namely $13,328.

[96] The total of the plaintiff's damages then is $197,292.26. The refund to Queensland Local Government WorkCover Scheme is $21,178.28.

[97] I give judgment for the plaintiff against the defendant in the sum of $176,113.98 on the claim in contract and in the sum of $126,790.90 in the claim for breach of statutory duty.