SUPREME COURT OF QUEENSLAND

CITATION:	*Jones v Mollking Holdings Pty Ltd* [2010] QSC 134
PARTIES:	**CHERRIE ANN JONES** (plaintiff) v **MOLLKING HOLDINGS PTY LTD (ACN 104 505 660)** (defendant)
FILE NO/S:	269 of 2009
DIVISION:	Trial
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	30 April 2010; varied on 17 May 2010
DELIVERED AT:	Cairns
HEARING DATE:	15 April 2010; 16 April 2010; 19 April 2010; 17 May 2010
JUDGE:	Peter Lyons J
ORDER:	**Judgment for the plaintiff against the defendant in the sum of $463,158.93**
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 the plaintiff was injured when she slipped and fell at her place of employment – whether the defendant failed to provide a safe system of work TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – GENERALLY – where the defendants alleged that the plaintiff's conduct contributed to her injuries – whether the plaintiff was contributorily negligent DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES - PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – where the plaintiff was able to work for a period after the accident – where the plaintiff eventually stopped work - where the plaintiff claimed she was unable to continue working because of pain resulting from the accident – where the plaintiff's decision to stop working coincided with the break-down of her relationship with her partner - whether the decision to

	stop work was caused by pain resulting from the accident – whether the decision to stop work was caused by the break-down of the plaintiff's relationship
	Workplace Health and Safety Act 1995 (Qld), s 28
	Cervellin v Russo & Suncorp Metway Insurance [2006] QSC 239, considered *Langton v West & Suncorp Metway* [2006] QSC 234, considered *Syben v Mackay TFS Pty Ltd* [2009] QSC 367, considered
COUNSEL:	P Lafferty for the plaintiff M Glen for the defendant
SOLICITORS:	Roati and Firth Solicitors for the plaintiff McCullough Robertson Lawyers for the defendant

[1] The plaintiff was injured when she slipped and fell at her place of employment. She has sued her employer, alleging breaches of a number of the duties it owed her as employee. In its defence, the defendant has raised contributory negligence, primarily in relation to the speed at which the plaintiff was moving at the time of the accident. Quantum issues relate to the nature and extent of the plaintiff's injury, and particularly to her economic loss.

The accident

[2] The accident occurred on 20 June 2005.

[3] At that time, the defendant conducted a business described as a café/roadhouse from premises known as Seaview Café and BP at Cardwell. The defendant employed the plaintiff as a cafeteria worker.

[4] The premises are located adjacent to the Bruce Highway. Externally, there is a service station operation. Internally, in that part of the premises accessible to the public, is a space used as a café or restaurant. This area is shown as being approximately square on a hand drawn sketch of the premises. Two sides of this area are bounded by the exterior of the building. On the third side is a counter where the cash register is located, and some refrigerators. The fourth side of the restaurant adjoins the cooking and servery area. On that side of the building nearest to the counter and refrigerator area, the building extrudes. The extrusion includes a dishwashing area and a freezer. Behind the freezer, with an entry into the cooking and servery area, there is a cold room.

[5] The accident occurred at night, getting toward closing time. The plaintiff was moving from the washing-up area and into the cooking and servery area, carrying some plates and a tray. Suddenly, her feet went out from under her and she fell heavily, landing on her buttocks. She experienced severe pain.

[6] I should say a little more about the events which led up to the accident. The plaintiff had commenced employment with the defendant some weeks before the accident. The defendant had supplied her with a uniform which consisted of a shirt. Otherwise, employees wore their own clothing and footwear, usually joggers. On the day of the accident the plaintiff was wearing joggers known as Colorados.

[7] The course of work in the evening, and towards closing time, was regulated by the arrival of buses which stopped at the premises. In the interval between the arrival of the last two buses of the day, a clean-up was carried out. This included the washing up of dishes and other items of equipment, and mopping the floor of the premises.

[8] On the evening of the accident, the plaintiff had mopped the floor. A number of mops were available. These were described as the "stringy" type of mop, used with a bucket to which were attached rollers, for the purpose of squeezing water out of the mop. These were stored outside, and to the rear of, the building. Also located there was a tub of liquid with a volume the plaintiff estimated at 20 litres containing what the plaintiff had been told was vinegar. It was her practice to include this in the water used for mopping. She had also commenced other aspects of the clean-up, including the washing up, when the accident happened.

Course of proceedings and negligence-related allegations

[9] Paragraph 4 of the Statement of Claim alleged the plaintiff slipped on the wet floor of the kitchen area of the roadhouse. At the end of the case, the defendant's submissions commenced with the proposition that the plaintiff had failed to prove her case, because she had not proven that the floor was wet when she slipped. While that submission may appear to be of some force, it has to be considered against the background of the way the trial was conducted, and other pleadings of the parties.

[10] The defendant's defence had not admitted that the floor was wet. It had also positively denied that the floor was slippery, alleging that the floor surface was safe and adequate for the purposes of conducting a café/roadhouse; in good order and without defects; had an adequate co-efficient of friction against slipping when wet or dry; and met the Australian Standard minimum criteria for wet or dry tiles in their location in the kitchen. It contained further allegations, at least one of which was not related to the floor being wet at the time of the accident. I have underlined some expressions taken from the defence, to show that it was not confined to meeting a case that the plaintiff slipped on the floor when it was wet.

[11] The reply to this pleading was delivered, without objection, just before the commencement of the trial. This pleading dealt separately with the denial in the defendant's defence that the floor was slippery, alleging that it was the slippery surface of the tiled floor which caused the plaintiff to slip and fall. There were further allegations in this pleading relating to the slippery condition of the floor. Those allegations denied that the floor was safe and adequate, that it was in good order and without defect, that it had an adequate co-efficient of friction, and that it met the Australian Standard.

[12] Both from the opening of the plaintiff's case, and the evidence advanced, it was clear that the case the plaintiff sought to advance at trial was by no means limited to a case that the floor was wet, and that it was the wet condition of the floor which caused the plaintiff's action. No objection was taken by the defendant to evidence directed to a case based on the generally slippery condition of the floor.

[13] As a result of the submission made by the defendant, previously referred to, an application was made by the plaintiff to amend the Statement of Claim. This application was granted, for reasons then given. Although Counsel for the defendant took a brief time to consider his position, no application was made by the defendant for the opportunity to cross-examine the plaintiff further as a consequence of the amendment, or to have recalled another witness who gave supporting evidence of the floor's general condition, and matters relevant to whether the floor was slippery, whether or not it was wet. Nor did the defendant seek to reopen its case in view of the amendment; nor did it seek an adjournment, although in opposing the application to amend, its counsel suggested that an amended pleading would have led to an application for an adjournment. What remained of the case proceeded on the basis that the plaintiff slipped and fell on a floor which had been mopped somewhat earlier and was either dry, or almost dry, at the time of the accident.

[14] In addition to generalised allegations relating to the failure to provide a safe system of work and a safe place of work, the plaintiff's allegations relate to the requirement that she continue to work in the kitchen area shortly after the floor had been mopped; a failure adequately to assess work tasks and to design, implement and enforce safe working practices; and a failure, in breach of s 28 of the *Workplace Health and Safety Act* 1995 (Qld), to ensure the health and safety of the plaintiff, this allegation picking up the previous particulars of negligence.

[15] I have already identified that the defendant alleges that the plaintiff was moving too quickly at the time of the accident. It also alleges that she failed adequately to clean spillages from the floor of the premises when she mopped it; that she used too much detergent in the water, thereby making the floor slippery; and that she failed adequately to mop up excess water from the floor.

Cause of accident

[16] The plaintiff gave evidence about a number of matters relevant to this topic. When describing her accident, she said that she slipped. She said that her feet went forward from under her. This evidence was not challenged, and no other explanation for her fall was suggested.

[17] She said that the floor of the working areas in the premises was tiled. She said that the tiles were always slippery, even when dry. She said that people working in the kitchen area slipped regularly. The plaintiff said that there had been a number of complaints to Ms Rachelle King, a director of the defendant company, who worked in the business. On at least two occasions, the plaintiff had discussed the slippery condition of the floor with Ms King. On one occasion, Ms King gave advice about footwear, which included purchasing and wearing shoes referred to as Colorados. The plaintiff did this. However, she had occasion to discuss the matter again with

Ms King, because the Colorados had not been successful. On this occasion, Ms King recommended joggers known as Volleys. The plaintiff said that she had not had the opportunity to buy a pair of these shoes prior to the accident.

[18] The plaintiff gave evidence of a number of practices which resulted in spillages of oil and fat onto the floor. The most notable of these was a result of the arrangement of the cooking and servery area. There were two deep fryers, located on one side of this space, and a bain-marie and servery bench, which were located on the other side of this space. That resulted in a practice of lifting the basket containing cooked food out of the deep fryer, and carrying the basket over to the servery bench. It was also necessary to empty oil daily from each of the deep fryers, occasionally to replace the oil, and otherwise to filter it. The oil was hot, and sometimes it was spilt. This procedure was carried out for one deep fryer while the other was in operation; it was then carried out for the other deep fryer. Even apart from these activities, the plaintiff gave evidence that, in the vicinity of the deep fryers and the exhaust fans, she would feel oil on her skin. The evidence was perhaps intended to support an inference that some oil vapour may have condensed, ending up on the floor.

[19] The plaintiff also gave evidence that water was likely to get on the floor. Some water dripped from the freezer, and some came from dishes which had been through the dishwasher.

[20] The plaintiff gave evidence that, when she worked at the premises, her shoes would become dirty and greasy, by reason of contact with oil and food on the floor. They would be dirty at the end of the shift, and she would clean them.

[21] The plaintiff gave evidence of discussions in which Ms King participated about the fact that people slipped on the floor, and about its slippery condition. It was described as "ridiculous". Ms King's response was that the staff should "do the best you can". In addition to the earlier evidence relating to staff slipping on the floor, there was evidence that the mother of Mr Molloy, the other director of the defendant, had slipped on the floor, prior to the plaintiff's accident.

[22] The plaintiff gave evidence to the effect that the cleaning up, including the mopping of the floor, was carried out before the arrival of the last bus, rather than after the roadhouse closed at night, because that suited the directors of the defendant. I have already mentioned that Ms King was one director. The other was Mr Theo Molloy, Ms King's partner. They lived in a house behind the roadhouse. It was the practice of one of them to attend when the roadhouse closed at night. The roadhouse opened again at 2.30 am, and was staffed by Ms King and Mr Molloy, without assistance from employees, from opening until 7.30 am; hence a desire to complete all activities as early as possible. There was also a suggestion that by having the cleaning work done before the last bus arrived, staff could finish up a little earlier, with some cost savings to the defendant; though there was no direct evidence that this influenced the cleaning arrangements.

[23] Another witness, Ms Cornwell, had worked at the premises since 2003. She described the floor as very slippery. Ms King had recommended both Colorados and Volleys to her, but even with them the floor was very slippery. She gave

evidence of conversations with Ms King about the slippery condition of the floor, before the plaintiff commenced work there. Ms Cornwell had asked Ms King about using mats in the area near the bain-marie. Ms King told her that they used to have some, but when they became old they were thrown out, and had not been replaced. Ms Cornwell said she had suggested to Ms King that a particular type of paint be applied to the floor to roughen the surface, but Ms King replied that she had looked into it, and it was too expensive. Ms Cornwell said that sometimes staff placed paper towels on the floor, because it was slippery. She gave evidence that she had slipped and fallen a couple of times. She also said that a number of other staff had slipped and fallen.

[24] There was also evidence from the plaintiff and Ms Cornwell about the lack of any instruction in safe work practices, and the fact that no provision was made for recording accidents at the roadhouse.

[25] Neither the plaintiff nor Ms Cornwell was challenged in respect of this evidence, and I accept it.

[26] The most likely explanation of the accident is that the plaintiff slipped because of the slippery condition of the floor. There may have been some build-up of greasy material on her shoes over the course of the day, and this may have contributed to the accident. However, there is no direct evidence of this.

[27] The slippery condition of the floor, and the consequent risk that someone might fall and suffer injury, was plainly known by Ms King. It is almost inevitable that it was also known by Mr Molloy. In the past, mats had been used to reduce the risk of someone slipping and falling, but they had not been replaced. Consideration had also been given to treating the floor, but it had been thought too expensive.

[28] In my view, the evidence clearly demonstrates that the fall occurred as a result of the failure of the defendant to provide a safe place of work, by reason of the slippery condition of the floor.

[29] While the evidence raises the prospect that oil had been spilt on the floor and this contributed to the plaintiff's fall, it does not seem to me to be sufficient to establish this. The floor had been mopped a little earlier in the evening. That is likely to have removed oil spilt on the floor, and other greasy substances; or, at least, substantially reduced the extent to which they were present. There was no evidence about the state of the soles of the plaintiff's shoes after the accident, although she gave evidence that usually grease and dirt built up on them in the course of a work shift.

[30] If, nevertheless, the correct view of the evidence was that it was likely that greasy material spilt on the floor contributed to the plaintiff's accident, then in my view that, too, is attributable to negligence on the part of the defendant. The arrangements in the kitchen area were such that it was likely that oil would spill on the floor. That must have been known to Ms King, who regularly worked in the kitchen area. A system which required the movement of baskets containing recently cooked food from the fryers to a servery area on the other side of the workspace seems to me inevitably likely to have resulted in the spillage of oil, increasing the

risk of accident. There were benches on either side of the fryers. It is difficult to think that no practical arrangement could have been made which would have avoided this practice.

[31] It follows that the plaintiff's injuries were caused by the defendant's negligence and breach of s 28 of the *Workplace Health and Safety Act*.

[32] The evidence does not demonstrate that the plaintiff was guilty of contributory negligence. A submission to that effect was made on behalf of the defendant.

Plaintiff's background and post-accident history

[33] The plaintiff's date of birth is 23 October 1976. She was educated to Grade 9, and has not undertaken any further education or training. After leaving school, she worked as a sales assistant in a bakery for two years. She then worked in a pizza shop, both in sales and doing some cooking. Her first child was born on 1 November 1994, and her second child was born on 22 November 1995. She ceased work to raise her children.

[34] In 1998 she commenced a relationship with Paul Dametto. The plaintiff's third child was born on 20 October 1999.

[35] Mr Dametto owns a sugar cane farm. The plaintiff and Mr Dametto lived there during the relationship. Until 2005, in addition to domestic duties, the plaintiff gave evidence that she assisted Mr Dametto with farming activities. Mr Dametto also engaged in what was described as a fibre-glassing business. The plaintiff also gave evidence, which I accept, that in this period she performed a significant amount of work on a daily basis on the farm, and in the fibre-glassing business.

[36] The plaintiff also gave evidence that in more recent times, the farming business struggled, due to depressed sugar prices. That evidence is likely to be true, and I accept it. She also gave evidence that an attempt was made to manufacture a specific type of boat, as part of the fibre-glassing business. The boat was taken to boat shows, obviously for the purpose of marketing it. However, this venture failed, and the fibre-glassing business struggled financially. Again, I accept this evidence.

[37] The plaintiff commenced employment with the defendant in May 2005. She attributes her decision to return to employment to a number of matters. They include the financial circumstances to which I have referred. They also include the fact that her then youngest child had commenced school at the beginning of that year. In addition, she gave evidence that she needed an involvement away from the house, providing some interaction with other adults. She considered that, while economic pressures in fact played a significant role, even without them she would have returned to employment at about this time.

[38] Quite shortly after the accident, in about September 2005, she attempted to return to work. However, she was unable to work for more than a few hours on this occasion, and did not continue her employment with the defendant.

[39] In cross-examination, it was suggested to the plaintiff that about a week before this attempt, she had told a WorkCover officer that she was not prepared to drive to Cardwell for just a couple of hours work per day. She had no recollection of this conversation, and no witness was called to prove it. In my view, the sequence of events makes it inherently unlikely that she should attempt to return to employment very shortly after stating that it was not worth her while to do so. I do not accept that the conversation suggested by the defendant's counsel in cross-examination in fact occurred.

[40] The plaintiff said in her evidence that she wanted to go back to work, but that she had discussed her plans with her doctor, and as a result of those plans she wanted to resume employment by undertaking part-time work to see whether she could manage it. She also gave evidence that, had she been able to cope, she would have gone back to full-time work at the Seaview Café.

[41] On 9 March 2006, she obtained work at the Victoria Hotel in Ingham. She was employed as a bar attendant. This employment assumes particular significance in this case, and I shall return to it later. It ended in about July 2007, at about which time the plaintiff's relationship with Mr Dametto came to an end.

[42] The plaintiff moved to Townsville a short time later. She obtained employment there for a brief period, apparently in September. She subsequently returned to Ingham. She then became pregnant, something she said was unplanned. She then obtained part-time employment, two hours per day for five days per week, delivering bread for a bakery. She ceased work on 30 May 2008. Her youngest child was born on 12 August 2008.

Plaintiff's employment at the Victoria Hotel

[43] This period of employment, and the circumstances in which it came to end, are of particular significance for the assessment of the plaintiff's economic loss. The effect of the defendant's submissions is that it is a measure of the plaintiff's post-injury working capacity. However, it is also relevant to an assessment of the plaintiff's general damages for pain and suffering.

[44] The plaintiff was employed at the Victoria Hotel for approximately 16 months. Excluding a week in which she took holidays, and the last week in which she worked, the number of hours she worked per week varied from about 10 to 56 hours. The calculation of counsel for the parties put the average between 34 and 35 hours per week. The number of days per week for which the plaintiff worked also varied, though it was not uncommon for her to work six days a week. It was also common for her to work split shifts, with several hours between the shifts.

[45] Generally, she was employed as a bar attendant. However, in that capacity, she was also responsible for a TAB facility, located in a separate area adjacent to one end of the bar. At times she worked in the bar alone. At other times, one or two other persons worked with her, including Ms Di Bella, who was the hotel manager.

[46] For a period commencing in the last week of March and ending in early June, the plaintiff also worked for part of the day in the hotel's drive-through bottle shop. However, the wage records from the hotel and the work rosters suggest that this rarely occurred after the middle of May. The plaintiff took a holiday in the middle of April, during the period when she was working in the bar and the bottle shop.

[47] Not surprisingly, the bar work involved pouring and serving drinks. The taps and refrigerated spaces were behind the work area, so that a bar attendant would be required to turn from the bar to this area to pour drinks. The drinks would then be carried across the narrow space behind the bar, to serve customers. Occasionally it would be necessary to bend down to pick things up off the floor. The work also involved collecting glasses to put them in the washing machine. At times it involved carrying cartons of beer from one fridge to another.

[48] The work in the drive-through bottle shop was obviously heavier. It involved carrying purchases, including cartons of beer, to customers' cars. The plaintiff gave evidence that during this period of employment, her pain levels intensified, and that she had to take increasing amounts of analgesic medications in order to cope with the work. At times she would reduce her shifts, as well as taking time off work. When she worked split shifts, she would go home and rest between shifts. When she worked in the bar, she was able, at times, to sit and rest in the TAB area.

[49] The plaintiff also gave evidence that she managed to do the work by taking a lot of pain-relief medication. She said that she obtained such medication for herself; but at times she requested such medication from Ms Di Bella, or Mr Russo, who was Ms Di Bella's partner and one of the owners of the hotel. She said that she had asked for time off work because of low back pain. She also said that at times Ms Di Bella had offered her the opportunity to sit in the TAB area to take Nurofen and relax.

[50] The plaintiff also gave evidence that, although she had pain the period of her employment at the Victoria Hotel, it varied "from bad to not too bad".

[51] It is apparent from the plaintiff's evidence that there were serious difficulties in her relationship with Mr Dametto at least from May 2007. In the final weeks of her employment at the Victoria Hotel, at times she did not attend work, notwithstanding that she that she had been rostered to do so. According to her evidence, pain, and in particular the heavy work at the hotel and her reluctance to take strong pain medication, was responsible for her absences. However, she also made reference to "a lot of stuff going on at that time", which appeared to include a reference to the relationship difficulties. She also gave evidence that she had told Mr Dametto that she was unable to endure the greater levels of pain that resulted from her work in the drive-through bottle shop and that she intended to cease work in the near future. She stated that this placed an enormous strain on her relationship with Mr Dametto.

[52] Ms Di Bella gave evidence that the plaintiff was excellent in the bar, she had a good rapport with the staff and with the customers, and she had a "really good personality and was a great little worker". She also gave evidence that she did not have to supervise the plaintiff in her work. She said that the plaintiff enjoyed working at the hotel. She said that the plaintiff did not ask her for time off work because of back

pain. Ms Di Bella gave evidence that at times she worked with the plaintiff in the bar; at times she worked in the TAB area when the plaintiff was in the bar; and at other times she observed the plaintiff as Ms Di Bella was moving through the hotel as part of her general role as manager.

[53] Ms Di Bella gave evidence that when she told the plaintiff that she was looking for somebody for the drive-through, the plaintiff said she was interested in the position. The plaintiff said that she needed extra money, and that she had to buy the household groceries in alternate weeks.

[54] Ms Di Bella also gave evidence that she did not observe the plaintiff to be in pain when carrying out her duties. However, at times she appeared tired.

[55] It is necessary to say something about the impression formed from observing the plaintiff giving evidence. On a number of occasions, her responses to questions were given frankly, notwithstanding the potential difficulties they created for her case. Not surprisingly, her recollection of matters about which she was asked was less than perfect. She appeared to answer questions asked of her to the best of her recollection. My impression was that her evidence was given honestly.

[56] There is conflict between the evidence of Ms Di Bella and the plaintiff, both in respect of the general tenor of the evidence, and some specific matters. I have no reason to think that Ms Di Bella was not an honest witness. However, a person with the responsibility for the successful operation of a hotel is not likely to be particularly sensitive to difficulties being experienced by some of the staff. That seems to be particularly true in Ms Di Bella's case. Ms Di Bella gave evidence that she worked 100 hours a week, though when queried, on reflection this was said to be "a good 80 – 90 hours a week". She worked seven days a week. Her day might commence as early as 7.30 am, and conclude at 10 pm, or even 3.00 am the following day. In addition, in 2007 she had a daughter who was at school, and she used to leave in the afternoons to pick her up from school and spend a little time at home. She said that she would get very tired, and that she herself experiences a lot of pain. She also said that she did not show it to the outside world, and that she would probably appear tired.

[57] Ms Di Bella's duties were broad ranging. She worked in the office, doing the administration, the pays and the rosters. She also helped in the kitchen, washed the sheets, cleaned the rooms, and served in the bar. At times when she worked in the bar, Ms Di Bella took responsibility for the TAB facility, and worked in that area. The range of her duties inevitably had an impact on her ability to observe the plaintiff, and to note whether she was experiencing pain. I also note that the work rosters from the hotel, which were put in evidence, indicate that approximately 10 people were working at the hotel in this period.

[58] In the circumstances, I do not consider the conflicts between her evidence and that of the plaintiff are such as to warrant my rejection of the plaintiff's evidence.

[59] In cross-examination, it was put to the plaintiff that on 17 May 2007 she attended a general practitioner in Ingham, and that she discussed experiencing considerable stress as a result of the break up of the relationship. She accepted that that could

possibly have occurred. This was relied on for a submission that she had accepted that she attended the doctor because of stress from the relationship break-down; and this in part was the basis of a submission that the true (and only) cause of the plaintiff's cessation of employment at the Victoria Hotel was the relationship breakdown. The date of the visit to the general practitioner was given particular significance, because the plaintiff did not work for the next three days.

[60] It is apparent from the plaintiff's evidence that she did not positively accept the proposition. Nor did she appear to have a clear recollection of the visit. No attempt was made to put in evidence a complete record of what occurred when the plaintiff visited the doctor. I am also conscious of the plaintiff's evidence that her back pain played a role in the break-down of the relationship. It is by no means clear that any visit to a general practitioner in Ingham on about 17 May 2007 was unrelated to back pain then being experienced by the plaintiff.

[61] The defendant also cross-examined the plaintiff about a visit to Dr Heng in September 2007, after she moved to Townsville. Dr Heng administered a questionnaire directed to the plaintiff's mood and emotional state, and issued a medical certificate dated 3 September 2007 to the effect that the plaintiff would be unfit for work until 3 November 2007, based on the fact that the plaintiff was tired, and suffered from "depressed mood". Although the defendant tendered these documents, no attempt was made to produce the doctor's notes, or to explain why this was not done. It seems likely that Dr Heng focussed on the plaintiff's emotional state. That is not surprising after the break-up of her relationship, the discontinuance of her employment in Ingham, and her move to Townsville with young children. I do not consider, however, that it establishes that the plaintiff did not experience considerable pain when working at the Victoria Hotel, or that that pain played no part in the break-up of the relationship, or the cessation of her employment.

[62] The plaintiff's evidence about the condition of her back and her pain in this period must be weighed up against the objective facts relating to the nature and extent of her work in this period. Dr Boys, the orthopaedic surgeon who examined the plaintiff at the request of the defendant, clearly accepted that the plaintiff had pain in the general region of her sacrum and coccyx which was the result of her accident. However, it was also clear that he based his assessment of her capacity for employment principally on her period of employment at the Victoria Hotel, as well as on the relatively brief period of part-time employment in early 2008. For that reason he did not see the need for any physical assessments relating to her capacity. Dr Boyes saw the plaintiff on one occasion, on 16 September 2009.

[63] Dr Scott Campbell, a neurosurgeon, examined the plaintiff on 20 November 2006, at the request of the plaintiff's solicitors. This was not long after she had commenced work at the Victoria Hotel. The plaintiff complained of pain at a rate of up to 8 out of 10. She reported difficulty in her work, standing for long periods, and lifting and carrying alcohol and other stock, and stated she had the assistance of other workers for tasks involving heavy lifting and bending. She reported taking pain relief medication "as required". Dr Campbell considered the plaintiff's prognosis for her then current employment to be "satisfactory to guarded". He

recommended that she avoid all heavy lifting at work, and any activity which would risk aggravating her injury.

[64] Dr Campbell examined the plaintiff again on 16 September 2009. He then considered that the prognosis with regard to the plaintiff's returning to work as a bar attendant, cook or waitress, could be poor. He thought she would be best suited to re-entering the workforce by performing light sedentary work in a position where she could alternate her activities, and move about the work place at regular intervals. Orally, he explained the change as reflecting the plaintiff's subsequent history relating to employment. He acknowledged that his view depended, at least in part, on the plaintiff's reporting of her pain levels. When asked about the fact that she had continued to work at the Victoria Hotel for 16 months, he stated that some people can be on heavy pain relief medication, or simply suffer greatly, and by reason of financial need or other significant pressures continue to work for a substantial period of time. He thought it would be difficult for the plaintiff to work fulltime, on an ongoing basis, but that she might be capable of working 5 – 10 hours per week, and perhaps longer, performing light duties.

[65] The plaintiff was also examined by a Ms Purse, an occupational therapist. She examined the plaintiff on 8 April 2008, and again on 24 April 2009. Her assessment occurred over a number of hours, and involved testing the plaintiff's physical capacities. It also involved a consideration of the consistency between how the plaintiff presented and performed, the history the plaintiff gave, and medical information. She considered that the plaintiff's employment at the Victoria Hotel, as a work trial, had failed.

[66] I am conscious that there are a number of matters which weigh against accepting the view that the plaintiff suffered significant pain during her period of employment at Victoria Hotel, and that this played a significant role in the cessation of this employment. I have previously described my impression of the plaintiff as a witness. In addition, I am satisfied that she was motivated to work. She gave evidence of her reasons for seeking work with the defendant, which I accept. Ms Di Bella said that the plaintiff enjoyed her work at the Victoria Hotel, which I again accept. It is consistent with the plaintiff's own evidence. The plaintiff gave evidence that she took this work, in part for financial reasons. I consider that to be likely to be true. Those reasons were likely to have provided motivation for her to work, notwithstanding the fact she experienced significant pain. I accept her evidence that Mr Dametto placed pressure on her to continue work, because of the financial situation in which the family was placed, as a result of the failure of his attempt to manufacture a fibreglass boat, and because of the financial circumstances of the sugar cane industry. It seems to me to be inherently likely that those circumstances would result in pressure being placed on the plaintiff to continue work, notwithstanding the fact she experienced pain when doing so. I am conscious that when she took on the work in the drive-through bottle shop, the plaintiff gave the financial circumstances of the family as a reason for doing so, including the fact that Mr Dametto required her to pay a substantial amount of household expenses. I also note the plaintiff's premature attempt to return to employment with the defendant; and her brief period of employment in September 2007 at a time when, on any view of the evidence, she was likely to be in a distressed state. I also note that subsequently, when pregnant, she found part-time employment for some months.

[67] Notwithstanding the matters that have been raised on behalf of the defendant, I am satisfied that the plaintiff experienced significant pain while she worked at the Victoria Hotel. I am satisfied that her physical condition as a result of the accident played a significant role in the cessation of her employment with the hotel.

[68] On behalf of the defendant it was submitted that the plaintiff ceased working at the Victoria Hotel because of the break-down in her relationship. It seems to me to be likely that the break-down in the relationship played a significant role in the cessation of the employment. However, I accept the plaintiff's evidence that she had decided that she could not continue for much longer with this employment because of the pain she was experiencing, and that she had communicated that to Mr Dametto. I also accept her evidence that this placed considerable stress on the relationship. I accept that it made a significant contribution to the break-down of the relationship.

General damages

[69] The plaintiff suffered a fracture of the sacrum, and a chronic soft tissue musculo-ligamentus injury to the lumbar spine. The evidence from the medical professionals concludes that the plaintiff has suffered a permanent functional impairment of the whole person of the order of 5 – 7%. I accept the plaintiff's injuries cause her substantial pain, and that her condition is unlikely to change significantly.

[70] For the plaintiff, it was submitted that amount of general damages should be $80,000. The defendant submitted that the award should be between $40,000 - $50,000. Counsel for the plaintiff referred me to *Syben v Mackay TFS Pty Ltd*[1] where an order of general damages was made in the sum of $100,000 for a plaintiff who was more seriously injured, but was considerably older than the present plaintiff. Counsel for the defendant referred me to *Langton v West & Suncorp Metway*[2] and *Cervellin v Russo & Suncorp Metway Insurance*[3]. In these cases, general damages were assessed at $45,000 and $37,500. These cases are less recent. In each of them, it seems to me that the injuries were a little less significant than the injuries of the present plaintiff. I am also mindful of the fact that the plaintiff worked while experiencing significant pain at the Victoria Hotel.

[71] I assess the plaintiff's general damages in the sum of $60,000, and I allow interest on $35,000 at the rate of 2% for 4.85 years, producing a figure of $3,395.

Preliminary observations on economic loss

[72] To assess both past and future economic loss, it is necessary to attempt to determine what income the plaintiff might have earned, had she not suffered the accident. That involves a number of hypothetical considerations. It is convenient specifically to discuss some of them.

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1 [2009] QSC 367
2 [2006] QSC 234
3 [2006] QSC 239

[73] I have expressed the view that the break-down in the plaintiff's relationship in mid-2007 played a significant role in the cessation of her employment. I have also expressed the view that the pain the plaintiff experienced at that time contributed to that break-down. Nevertheless, it seems to me that in this case I must take into account the prospect that, even without the accident, at some time the relationship between the plaintiff and Mr Dametto may have broken down, and that that may have caused some not insignificant interruption of the plaintiff's employment.

[74] The calculations provided to me by both parties proceed on the basis that the plaintiff's economic loss is to be assessed having regard to a period for which she would not seek employment, by reason of the birth of her youngest child. I have expressed the view that, but for the pain the plaintiff experienced in the course of her employment at the Victoria Hotel, the break-down of the relationship with Mr Dametto might not have occurred, or might have occurred at a later time. In either of these circumstances, it is highly unlikely that the plaintiff would have given birth to a child at the time when her youngest child was in fact born. Indeed, there is a real prospect that the plaintiff may not have had further children. Her return to the workforce in 2005 was associated with the commencement of her then youngest child's schooling, and reflected a deliberate decision by her to move from a situation where she was not in paid employment, to one where she was. She stated that she had not discussed with Mr Dametto whether they would have any more children, but her intention at that time to commence employment suggests no immediate plan to have another child, and the prospect that, had she remained in the relationship with Mr Dametto, she would have had no further children. Further, her most recent pregnancy was unplanned. It therefore seems to me that I should not treat the birth of her most recent child as something which was certain to occur, even if the plaintiff had not been injured. While it seems to me that I should make some allowance for the prospect of the plaintiff having another child, even if she had not been injured, when that might have occurred is quite uncertain.

[75] It follows from these considerations that it is necessary to take a broad-brush approach to the assessment of the plaintiff's economic loss, attempting to give some effect to the matters which I have mentioned.

[76] It is also necessary to say something of the plaintiff's pre-accident employment history. It may be fairly described as relatively limited. However, it is necessary to bear in mind that during the period of her relationship with Mr Dametto, in addition to attending to matters relating to the home and the children, the plaintiff worked on the farm and in the fibreglass business. I have previously referred to the plaintiff's attitude to employment. The evidence of Ms Di Bella strongly indicates that the plaintiff would have been relatively sought after as an employee. Indeed, it would suggest the prospect that, within the limits of her education and qualifications, she may have improved her position, for example, by moving to better-paid forms of employment.

[77] In my view, although I should make some allowance for the plaintiff's pre-accident employment history, it does not seem to me to carry great weight in the present case.

[78] I am conscious that for much of the recent past, the plaintiff has lived in Ingham. The evidence suggests that employment opportunities there are quite limited. Again, this seems to me to be a factor to be taken into account. Nevertheless, its significance is relatively modest. The plaintiff has displayed an ability to obtain employment there, both before and after the accident; and having obtained employment, it seems to me likely that she would have retained it, or possibly improved her position.

Past economic loss

[79] Counsel for the defendant submitted that at the time of the accident, the plaintiff was earning $445 net per week; and that during her employment at the Victoria Hotel, her average net weekly earnings were $547 per week, for less than 35 hours of employment. In my view, these figures suggest that, had the plaintiff been employed permanently from the date of accident until now, her net income could be assessed on the basis that her average weekly earnings would have been $550 per week, resulting in a total of $138,700. However, for a number of reasons which I have identified, it is necessary to reduce this figure substantially. It seems to me that an appropriate figure to allow for the plaintiff's net earnings, had she not been injured, is $100,000.

[80] In that period, the plaintiff has in fact been employed. She identified her net earnings as $40,100. I would therefore assess her past economic loss at $59,900. Interest on one half of this amount, calculated at 5% for 4.85 years, gives a figure of $7,263.

[81] In addition, an allowance should be made for the past loss of superannuation contributions, calculated at 9%, resulting in a figure of $5,390.

Future economic loss

[82] In addition to the matters I have previously mentioned the plaintiff has some ongoing capacity for obtaining employment. I accept that it is limited to part-time work, and to areas of work consistent with the plaintiff's condition. It is difficult to think that, with those restrictions, it would be as easy for her to find employment, as it would have been had she been uninjured, and capable of fulltime employment in a greater range of fields. Again, it is necessary to make some form of global assessment in relation to this matter.

[83] The defendant submits that a global assessment should be made for future economic loss. The plaintiff has provided a calculation based on a net figure of $700 per week. Those calculations deal separately with the next four years, and the 30 years thereafter, which is to age 67. For the latter period, a 38 hour week is assumed.

[84] I calculate that the net present value of a weekly sum of $700, for a period of 34 years, is $606,520. That figure may be a little high, because it assumes the plaintiff would be employed to age 67; however, calculations provided by the defendant assume employment to age 65. A difference of two years is unlikely to have a significant effect on the calculation, but I shall assume that $600,000 is an

appropriate figure to adopt as the net present value of a weekly sum of $700 for a future period of approximately 33 years.

[85] It seems to me that that figure should be reduced to make an allowance for the plaintiff's residual earning capacity. Doing the best I can, I would reduce it for this consideration by 25%, resulting in a figure of $450,000. It is then necessary to reduce the figure further for a range of considerations, including those previously mentioned, and the general vicissitudes of life. It seems to me that the reduction for these purposes should be a little in excess of one third, resulting in a figure for future economic loss of $280,000.

[86] An amount should be allowed for future superannuation contributions at 9%, which results in a figure of $25,200.

Other claims

[87] For past expenses, the defendant has conceded an amount of $2,181.30 for medical expenses, and submits that a further global allowance of $1,500 is sufficient. The plaintiff submits that past expenses should be allowed at $8,286.30, including the medical expenses, pharmaceutical expenses, and travel expenses. Her travel expenses are in the amount of $855, and approximate to five round trips to Townsville.

[88] The evidence in relation to the pharmaceutical expenses and travel was sparse. It seems to me that a global assessment should be made for these claims. For convenience, I will make an allowance for past expenses including the medical expenses of $7,000. Interest is not claimed on the past medical expenses. On the balance, I will allow interest at $900.

[89] For future expenses, Counsel for the plaintiff submits that an amount of $20,000 should be allowed. This was based on a calculation of estimated amounts for pharmaceutical expenses, resulting in a calculation of $34,860 (a present value calculated by reference to the 5% tables). The period of calculation is 55 years. The figure for which the plaintiff's counsel contends is plainly a global figure, substantially reduced from the calculation. Given the uncertainty, it seems to be a not inappropriate amount to allow.

[90] The parties have agreed on *Fox v Wood* damages at $1,580.

Summary

[91] The amounts I would award are set out in the following table:-

General damages	$ 60,000.00
Interest	$ 3,395.00
Past economic loss	$ 59,900.00
Interest	$ 7,263.00
Past superannuation	$ 5,390.00
Future economic loss	$280,000.00
Superannuation	$ 25,200.00

Past expenses	$ 7,000.00
Interest	$ 900.00
Future expenses	$ 20,000.00
Fox v Wood	$ 1,580.00
Total:	$470,628.00

Conclusion

[92] I find the plaintiff's injuries were caused by the negligence of the defendant. Contributory negligence has not been established. I assess the plaintiff's damages, including interest, in the sum of $470,628.00. I give judgment for that amount.

Addendum

[93] Since the delivery of these reasons and the giving of judgment in this matter on 30 April 2010, my attention has been drawn to s 270 of the *Workers Compensation and Rehabilitation Act* 2003, and to the fact that an amount has been paid to the plaintiff by way of compensation. That amount was $7,469.07. The parties have agreed that the judgment should be varied, by reducing the amount of the judgment by the amount paid to the plaintiff by way of compensation.

[94] Accordingly, I vary the judgment given on 30 April 2010, and give judgment for the plaintiff in the sum of $463,158.93.