SUPREME COURT OF QUEENSLAND

CITATION:	*Phillips v MCG Group Pty Ltd* [2012] QSC 149
PARTIES:	**LAWRENCE WILLIAM PHILLIPS** **(plaintiff)** **v** **MCG GROUP PTY LTD** **(defendant)**
FILE NO:	BS11924 of 2010
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	8 June 2012
DELIVERED AT:	Brisbane
HEARING DATE:	30-31 January 2012
JUDGE:	Mullins J
ORDER:	**Judgment is given for the plaintiff in the sum of $413,082.39**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY– where the plaintiff sustained injury to his lumbar spine in 1990 and underwent a spinal fusion, but was left with chronic lower back pain for which he took narcotic analgesics on a daily basis – where two weeks after plaintiff commenced working as a machine operator on a mine site, he had an accident where he suffered a compression fracture of L2 with up to 70% loss of vertebral height – where liability was admitted – where general damages, past economic loss and loss of future earning capacity were in issue – whether general damages should be reduced for pain and suffering due to the 1990 injury – whether damages for loss of earning capacity should be assessed on the basis that plaintiff would have been able to continue to work on a mine site, but for the accident *Bell v Mastermyne Pty Ltd* [2008] QSC 331, considered *Cameron v Foster* [2010] QSC 372, followed *Hopkins v WorkCover Queensland* [2004] QCA 155, considered *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638, followed *Purkess v Crittenden* (1965) 114 CLR 164, considered

Smith v Topp [2003] QCA 397, considered

COUNSEL: R C Morton for the plaintiff
G W Diehm SC and G C O'Driscoll for the defendant

SOLICITORS: Morton & Morton for the plaintiff
McInnes Wilson Lawyers for the defendant

[1] The plaintiff was driving a scraper as an employee of the defendant at a mine site on 28 August 2008 when he injured his back (the accident). Liability for the injury is admitted. The parties agreed on many aspects of the assessment of damages, but the trial proceeded as the amounts for general damages, past economic loss, and loss of future earning capacity, were not agreed. It was an agreed fact that the defendant ceased its operations at the subject mine site on 22 December 2009.

The plaintiff's antecedents

[2] The plaintiff was born in 1957. He was educated to year 10. He started as an apprentice boilermaker, joined the Army, and worked as a truck driver, crane driver and labourer. He was working as a sales representative in 1990, when he suffered an injury to his lumbar spine at the level of L5/S1. He suffered extreme pain. He was treated conservatively with an opioid analgesic Palfium. In 1992 he underwent an L4/L5/S1 instrumental fusion operation that inserted metalware into his spine. Following that he had extensive rehabilitation. The plaintiff continued to take Palfium, as well as Panadeine Forte and an anti-inflammatory, following his surgery to cope with the continuing back pain.

[3] The New South Wales Department of Health had to authorise the prescription of Palfium. In 1996 the department required the plaintiff's treating doctor to consider alternative medication. A trial of MS Contin was not successful. The plaintiff was referred to Dr Speldewinde on 14 July 1997 who suggested the use of Endone instead of Palfium. The plaintiff's general medical practitioner then obtained authorisation to prescribe Endone for the plaintiff.

[4] During the trial, Dr Cassar gave unchallenged evidence on the nature of some of the medications used by the plaintiff. Oxycodone is a scheduled narcotic analgesic. Prior to Oxycodone becoming available, an opioid analgesic Palfium was prescribed, but it was short acting. Oxycontin is a slow acting form of Oxycodone. Endone is a quick acting form of Oxycodone. Oxynorm is an alternative trade name for Endone which comes in different strengths, whereas Endone comes in one strength. Oxynorm is therefore a quick acting form of Oxycodone (which is contrary to what the plaintiff understood). Physeptone is a stronger scheduled narcotic analgesic than Oxycontin and has a longer duration of action than any of the other oral preparations including Oxycontin and morphine. Physeptone is commonly referred to as Methadone in the community. Endep is a tricyclic antidepressant.

[5] The plaintiff was able to return to paid employment on a casual basis with Woolworths packing shelves in early 1997 for a few months. He then worked as a sales representative for Autosmart (Act) Pty Ltd for about 18 months selling automotive chemicals out of the back of a truck, followed by working as a postman. He then worked for ACT Hygiene Products as a travelling sales representative and then as an acting sales manager for almost two years until mid 2003. In his spare time around 2002, the plaintiff constructed terraced retaining walls in his yard at

Queanbeyan, built an extensive Besser block wall around the swimming pool in the yard, and paved under the back verandah. The extent of the works undertaken by the plaintiff to improve his home is shown in the photographs in exhibit 22.

[6] The plaintiff could not recall that he was referred to Dr Clubb at the pain management unit of the Canberra Hospital in 2002 by his general medical practitioner at Queanbeyan. The reports of Dr Clubb are on the general medical practitioner's file that is included in exhibit 20. Dr Clubb recorded in his report dated 25 March 2002 that the plaintiff's lower back pain was "constant and fluctuant," but despite his pain he was able to work a full day as a salesman and had no difficulty with his activities of daily living. At that stage his current medications included Oxycontin 20mg twice daily, Panadeine Forte up to 12 tablets per day, Endone up to four tablets per day, and Celebrex 200mg nocte. When Dr Clubb reviewed the plaintiff on 2 October 2002, the plaintiff reported that he found pain particularly a problem when he did things that Dr Clubb described as "excessively active activities around the house such as putting up a ceiling." Dr Clubb reported that he had discussed with the plaintiff the importance of pacing his activities with adequate periods of relaxation.

[7] The plaintiff was referred to physician Dr Cassar in January 2003 for an opinion on management of his chronic lumbar back pain, as a result of which the plaintiff's medication was switched from Endone to Physeptone. Dr Cassar was of the opinion that the plaintiff at that time suffered from chronic pain that was not responsive to non-narcotics, and he was not a drug dependent person, but was able to continue working with drug medication and counselling. Dr Cassar authorised 10mg Physeptone twice daily and 20mg Oxycodone as an evening dose. This enabled the plaintiff to undertake his sales work without drowsiness.

[8] The plaintiff worked as a logistics manager (involving some truck driving) for Ensign Services (Aust) Pty Limited in the financial year ended 30 June 2004. Whilst working as a night storeman loading goods onto trucks on 10 June 2004 for Cold Seas Pty Limited, he slipped over in a freezer and had some time off work.

[9] The plaintiff and his wife relocated to Hervey Bay in 2004. His first consultation with his Hervey Bay general medical practitioner, Dr Senior, was on 18 October 2004. His medication in the latter part of 2004 was Prodeine, Methadone, Oxynorm, Diazepam and Celebrex.

[10] Following the move to Hervey Bay, the plaintiff delivered bread in a 10 tonne truck, drove a mobile crane for a week in Dalby, and later worked as a compressor truck driver at Cloncurry for a short time. For approximately a year he was an on-call driver of tipper and water trucks for JJ Byrne & Son Pty Ltd, but only worked around 52 hours in total. In the period from late 2004 to 2006 the plaintiff also worked in an office, making sales telephone calls. The plaintiff's gross wages for the 2005 financial year were $12,203 which was half the amount that he had grossed in the previous financial year. His wages for the 2006 financial year were also quite low, being a gross amount of $10,941.

[11] From the time of the plaintiff's relocation to Hervey Bay, he attended on Dr Senior's practice each month in order to obtain a renewal of his prescriptions. Dr Senior liaised with Queensland Health's Drugs of Dependence Unit from time to time about the plaintiff's analgesic requirements. The plaintiff was cross-examined on various entries recorded in the notes for Dr Senior's practice. These notes, however, relate to

all medical complaints for which the plaintiff sought advice or treatment. One example is Dr Senior's notes for the plaintiff's consultation on 18 November 2005. When the plaintiff attended on Dr Senior on 18 November 2005, he reported that he had an appointment to see Dr Cassar in February. The word "Pain" then follows in brackets which I infer is a reference to Dr Cassar's specialty of pain management. Dr Senior then recorded "has had a bad month, 'barely out of bed'." It was suggested in cross-examination to the plaintiff that the entry meant he had been barely out of bed because of pain. The plaintiff responded "Not that I remember." When pressed, the plaintiff made the point that he saw Dr Senior for more than the pills and it could have been because he had the flu and not because of the pain. In view of the equivocal nature of the brief note recorded by Dr Senior and the variety of matters covered in other notes, it is not possible to conclude that this particular note related to back pain or draw an inference adverse to the plaintiff from the not unreasonable suggestion offered by him.

[12] In early 2006, the plaintiff travelled to Canberra to have his medications reviewed by Dr Cassar who by his letter dated 8 February 2006 advised the plaintiff's general medical practitioner:

> "I support your Authority Application to Queensland Health Department to prescribe Methadone 20mg split dosage 10mg twice daily, issuing 60 tablets every 30 days. Additional Oxynorm to a total of no more than 20mg daily preferably all in one dosage for break-through pain, either day time or evening, issuing no more than 60 capsules Oxynorm each 30 days rather than using Oxynorm 10mg tds dosage, as currently taken. To assist in minimising narcotic intake, regular Paracetamol in recent form Panadol Osteo 665mg strength two tablets at a time regularly three to four times daily should be taken by Mr Phillips and only occasionally should this Paracetamol be replaced by Prodeine 15 tablets one or two tablets at a time respectively replacing one or two tablets of Paracetamol 665mg strength. There would be concern if higher consumption of quick-acting Oxynorm or Codeine-containing Prodeine 15 tablets were taken on any regular basis. Separately, Celebrex could be removed as a trial but I would leave in place night dose 5mg Diazepam and Tricyclic Endep 50mg."

[13] When the plaintiff was cross-examined on his visit to Dr Cassar that resulted in this letter, he suggested that the letter that was sent by Dr Cassar was not what he had talked about in the consultation and that Dr Cassar "had lost the plot." The plaintiff then referred to making arrangements to go to the Bundaberg Pain Clinic. It is clear from Dr Senior's file that the plaintiff was mistaken about which letter from Dr Cassar that he was unhappy with. He got another letter from Dr Cassar in late 2009 which proposed a treatment plan that increased his Methadone, but required him to cease all forms of Oxycodone. It appears to have been that letter that precipitated the plaintiff's visit to the Bundaberg Pain Clinic in early 2010.

[14] The plaintiff attended on Dr Senior on 6 March 2006 for the purpose of a medical examination to obtain a taxi licence. Dr Senior recorded "is not drowsy after taking analgesics but states does not take same when driving." It was put to the plaintiff in cross-examination that was what he had said to Dr Senior. The plaintiff's response was that he would not have said that. Dr Senior was seeing the plaintiff at least on a monthly basis in order to prescribe analgesics including those that were slow release.

I therefore have no difficulty in accepting the plaintiff's evidence that the note of Dr Senior is not an accurate record of what the plaintiff told him on this occasion.

[15] During the 2006 and 2007 financial years the plaintiff was a taxi driver in Hervey Bay, working full-time night shifts. According to the agreed schedule of the plaintiff's income (exhibit 16), the plaintiff's income in the 2007 financial year from driving a taxi was $36,209 gross ($29,996.30 net). He earned $7,371 from driving a taxi in the 2006 financial year. This suggests that he drove a taxi in total for no more than 18 months. When the plaintiff's night time position was given to another driver, he drove during the day, but for fewer hours. He sent out his curriculum vitae for other jobs (exhibit 27). His aim was to get work as a plant operator in the mines. To assist in making contacts in the mines, the plaintiff worked as a utilities/maintenance officer for Mac Services Group at mining camp sites at Dysart and Nebo, commencing on 28 November 2007. He worked two weeks on and one week off and rode between Hervey Bay and his work site on his motorcycle which took nine hours. The work involved maintenance to the accommodation units and gardening. He resigned with effect from 13 May 2008, because he thought he had a job at a mine, but that did not eventuate, and he was out of work for three months before he commenced his employment with the defendant.

[16] The schedule of the plaintiff's income shows that in the period of 10 years preceding the accident the plaintiff had many jobs, but none of them lasted for more than two years, and the quantum of annual gross wages for each of the years during that period is consistent with some gaps in the periods of employment.

[17] When the plaintiff commenced working for the defendant, the plaintiff's medications were: 200mg Celebrex, 665mg Duatrol SR, 50mg Endep, 5mg Diazepam, 20mg Oxycontin twice daily, and 10mg Physeptone twice daily. He estimated that his pain, even with the medication, was five or six on a scale of 10. The plaintiff was adamant that he could manage the pain and it had not stopped him prior to the accident from doing anything. The plaintiff explained that before the accident the pain in his lower back was present, whether he worked or stayed at home. The medication dulled the pain and did not stop him working.

Employment by the defendant

[18] The plaintiff underwent a medical assessment for coal mine work for the job type of operator where he was examined by a medical officer on 30 April 2008. An interim report that applied to a worker who did not have a job, but presented for a medical assessment under the Coal Mine Workers' Health Scheme, was completed in respect of the plaintiff (exhibit 5). The medical officer who examined the plaintiff worked in the practice of Dr Fenner who was the nominated medical adviser for the purpose of completing the report. Dr Fenner signed the report on 28 May 2008. The plaintiff was assessed as fit for work as an operator, but it was noted that he had a condition which resulted in restrictions that were set out:

> "Avoid lifting about 10 kilos floor to waist: 15 kilos above
> Avoid recurrent bending
> Unfit for heavy manual work
> Requires strict attention to hearing protocols."

[19] The plaintiff was examined by occupational therapist Ms van der Heyden on 24 May 2008 for a functional capacity evaluation. The plaintiff reported to her that he was in

good health with no current medical conditions and disclosed the surgery to his spine 17 years previously following the injury that caused disc damage at L5-S1 level with posterior disc protrusion. He admitted to experiencing pain since the surgery and that the pain level remained the same, whether he was at work or at home, but the pain medication which he took on a daily basis enabled him to live a full normal life, without any restrictions to his daily activities at home.

[20] Ms van der Heyden observed the plaintiff to sit, stand and walk in a normal manner and have full functional mobility. She expressed the opinion in her report dated 24 May 2008 (exhibit 4) that the plaintiff was capable of operating machinery, but recommended against labouring work, repetitive bending and lifting objects. She also recommended work that involved regular change of position, such as alternating between sitting, standing and walking for the plaintiff's spinal health.

[21] Ms van der Heyden's report was forwarded to Dr Fenner for the purpose of his assessment under the Coal Mine Workers' Health Scheme. Dr Fenner is not certain whether he had that report for the purpose of the interim report, but he is certain that he had Ms van der Heyden's report for the purpose of the assessment dated 11 August 2008 (exhibit 6) which was also based on the examination that was done by the medical officer supervised by Dr Fenner on 30 April 2008. Dr Fenner was surprised at the medication that the plaintiff was taking, but when he realised that the plaintiff had been taking it for many years and that it was under control, what he acted on was that functionally the plaintiff was able to drive on the mine site.

[22] Dr Fenner is familiar with the machinery on mine sites and had himself driven a scraper on a mine site. Even allowing for the plaintiff's long term back injury, Dr Fenner did not foresee any significant risk to the plaintiff of exacerbating his back injury. Dr Fenner was aware that the seats in the machinery on mine sites are protected with antivibration fittings.

[23] Dr Fenner explained that the form he completes for the purpose of the Coal Mine Workers' Health Scheme does not incorporate any medical diagnosis, but assesses fitness to undertake the proposed position. The final assessment dated 11 August 2008 was the same as the interim assessment. Dr Fenner explained that the fact that a person may have an increased risk of injury to the lumbar spine in the event of trauma is not a reason for assessing that person as unable to operate machinery on a mine. He stated (at Transcript 2-57):

> "Whether you call it social or medical, I would say that it was – so long as their back is moving satisfactorily and they do not appear to be restricted by it at all, the chances of them sustaining an injury, albeit perhaps kind of slightly more, would be within a reasonable sort of acceptance because otherwise anyone who had a back injury would not be allowed on a mine site and that's not the way it goes."

[24] The plaintiff had sent out his curriculum vitae to many organisations. He was subsequently contacted by an employee of the defendant about working at a mine site and the defendant made arrangements for the plaintiff to be medically assessed. The curriculum vitae that the plaintiff sent to the defendant has not been located, but a curriculum vitae that was typical of the documents that the plaintiff was sending at that time was tendered (exhibit 14).

[25] On 11 August 2008 the plaintiff underwent a pre-employment medical examination with Dr Nieuwoudt, the report of which was provided to the defendant (exhibit 7). The first part of the report was completed by the plaintiff. The plaintiff set out his work history as sales representative for ACT Hygiene from 2004 to 2006, truck driver for JJ Byrne & Son from 2006 to 2007, and utilities officer for the Mac Group from 2007 to 2008. Dr Nieuwoudt reported that the plaintiff was fit to undertake the proposed position of operator. The report noted that, because of the plaintiff's past spinal surgery, he was 'not to do heavy manual work,' and that he was on long term medication that will show up in drug screening.

[26] The plaintiff clearly overstated his recent prior experience for the purpose of the assessment by Dr Nieuwoudt. The plaintiff conceded during cross-examination that he "fudged" his resume to suit the job. When it was clarified for Dr Nieuwoudt during cross-examination that, instead of working as a truck driver from 2006 to 2007, the plaintiff's actual hours were 52 hours spread out over a year as an on-call driver, Dr Nieuwoudt noted that information would have influenced his decision as to his fitness to drive. When told in re-examination that the plaintiff had been a taxi driver during that period for 12 to 18 months doing 12 hour shifts, Dr Nieuwoudt considered that on the basis of that information he would have been more confident in his decision that the plaintiff was fit to undertake the job of operator. Dr Nieuwoudt accepted the proposition that the plaintiff's spine was more vulnerable to physical injury than that of the ordinary person by virtue of the fusion in his lumbar spine.

[27] The plaintiff commenced working as a scraper driver on 17 August 2008. He was driving a scraper 631. He graduated to a larger machine, a scraper 651, the following day. He worked on 21 to 24 August 2008. It was when he returned to work on 28 August 2008 that the accident occurred. The scraper had a large bucket that he operated to pick up the overburden in the area that was being dug. The scraper was pushed from behind by a bulldozer to maximise what the scraper scraped into the bucket. The plaintiff was having difficulty raising the bucket in order to drive off to the dump site and overshot the road to the dump site. He managed to turn the scraper around to return to the road to the dump site when he had to pass another vehicle. He moved his scraper over and its rear end slid off onto the slope and, as he attempted to drive it down the slope, he lost control and bounced around inside the scraper until it came to a stop.

[28] He suffered a compression fracture of L2 with between 50 per cent and 70 per cent loss of vertebral height.

The plaintiff's circumstances post-accident

[29] Immediately following his accident in 2008, the plaintiff's prescription for Oxycontin was increased to three 20mg doses per day which has continued. In addition the plaintiff takes Endone and Physeptone.

[30] The plaintiff has been unable to return to any paid employment since the accident. He is now in receipt of a disability support pension. The plaintiff is unable to go fishing, ride his motorcycle or play darts which he enjoyed before the accident. He is also unable to do jobs around the house or gardening. He has trouble sleeping and his sexual relationship with his wife has been adversely affected.

[31] The plaintiff has found since the accident that any activity in which he moves the wrong way aggravates his back pain. He can sit or stand comfortably only for about

20 minutes to 30 minutes. This was evident while he was giving his evidence. He moved awkwardly when he needed to stand and needed to move around whilst he was sitting. The diary (exhibit 23) in which was recorded the plaintiff's perception of the level of his pain and limitations on his activities was unchallenged. At the time of the trial, the plaintiff estimated his pain was 9 ½ out of 10 which was higher than the five or six out of 10 at which he estimated his pain (with the medication) before the accident.

Medical evidence

[32] After the accident, the plaintiff was able to get out of the scraper. He had pain in the middle of his back radiating down his right leg. He was driven to the Moranbah Hospital by another employee. He was treated with painkillers and rest and continued to take the medications that had previously been prescribed for him. He was discharged on 3 September 2008. The defendant's safety officer drove the plaintiff to Mackay where he flew back to Hervey Bay via Brisbane.

[33] WorkCover referred the plaintiff for a medico-legal report to neurosurgeon Dr Scott Campbell on 12 March 2009. At that stage the plaintiff walked with a slow and cautious gait and a slight limp and reported suffering from lower back pain/stiffness and bilateral leg pain which he rated up to 10/10 on the visual analogue scale. On examination there was a restricted range of movement of the lumbar spine by 30 percent to 40 percent with flexion and extension. Dr Campbell was of the opinion that the plaintiff's capacity for work at that time (including alternative employment) was poor due to his chronic pain and the poor sitting/standing tolerance. Dr Campbell expressed the view that:

> "The rigidity of the fusion site would have placed his lumbarsacral junction at higher risk of trauma to the area."

[34] The plaintiff obtained a referral from his general medical practitioner to Dr Cassar in September 2009. The plaintiff telephoned Dr Cassar for assistance and, as a result, Dr Cassar spoke with the plaintiff's general medical practitioner on 29 October 2009. Dr Cassar advised that the plaintiff should be managed at a Methadone clinic, if he wanted to exceed a daily dose of 40mg. Dr Cassar supported the plaintiff trying Methadone to a maximum daily dose of 40mg split at individual doses of 10mg or 20mg at a time. The plaintiff was unhappy with Dr Cassar's advice and obtained a referral in January 2010 to Dr Carter of the pain clinic in Bundaberg which the plaintiff attended. Dr Carter was unsuccessful in trialling the plaintiff on other drugs and doing a facet block.

[35] The plaintiff's solicitors had the plaintiff assessed by occupational therapist Ms Aitken on 12 March 2010. The plaintiff reported that his pain levels were better, averaging 6/10 on the analogue pain scale. He moved with a marked left-sided antalgic gait with short shuffling steps and a stooped posture. His trunk flexion and extension were impaired to about 50 percent of normal range and rotation and lateral flexion were markedly restricted bilaterally. Ms Aitken expressed the opinion that the plaintiff was unlikely to be able to continue as a heavy machine operator in the long term and may need to consider retraining into a more sedentary occupation.

[36] The plaintiff's solicitors organised for orthopaedic surgeon Dr Nave to examine the plaintiff for the purpose of a medico-legal report on 12 March 2010. Dr Nave noted that the plaintiff exhibited significant loss of spinal movement: forward flexion was

with fingertips to lower femur with no extension past neutral; rotation to the right was a quarter of normal and a third of normal to the left; lateral flexion to the right was about half of normal and a third of normal to the left; and pain was evident with all movements. There was also pain evident with all hip movements and reduction in range of hip movements, because of pain in the lower back and hips. In relation to the plaintiff's work history, Dr Nave noted that after his fusion between L4 and S1, the plaintiff was on pain relief, returned to work after two years, and was able to manage subsequent duties without any time away from work. As the crush fracture of L2 was greater than 50 per cent, that was consistent with DRE Category IV for which the impairment range was from 20 to 23 per cent whole person impairment. Dr Nave was therefore of the opinion that a figure in that range was appropriate for the plaintiff's injury sustained in the accident.

[37] Because Dr Nave retired from practice in mid-2011, he was prepared to offer further opinion only in respect of evidence that was before him prior to his retirement. He expressed a further opinion on 17 January 2012 on the basis of being provided with material that showed that the plaintiff's employment history subsequent to his rehabilitation from his 1992 surgery was "more patchy" than described by the plaintiff. Dr Nave expressed the opinion that if he had been consulted by the plaintiff prior to the accident, he would have advised him not to do something that was jarring to his back, such as driving a scraper, but that his previous occupation as a taxi driver was suitable for him, provided he was not required to lift heavy cases. In cross-examination, Dr Nave conceded that he was not familiar with a scraper used on a mine site or the seating provided in such a machine.

[38] Spinal Surgeon, Professor McPhee, examined Mr Phillips for the purpose of a medico-legal report on 21 June 2010 at the request of WorkCover. On the basis of the plaintiff's history, Professor McPhee considered there was significant pre-existing impairment of the lumbar spine and that the major wedge compression fracture of L2 in the accident had healed in a position of major deformity which left the plaintiff's condition stable and stationary and unlikely to change in the foreseeable future. Professor McPhee considered that surgery was not indicated and that physical therapies were unlikely to result in any substantial or sustained improvement and the ongoing treatment depended on self-management of pain with appropriate analgesia or other modality that was helpful to the plaintiff. On the basis of the plaintiff's clinical presentation, Professor McPhee considered that it was probable that the plaintiff is totally and permanently incapacitated for work. Professor McPhee expressed the opinion that, given the plaintiff's degree of incapacity, the maximum of impairment of 23 per cent whole person impairment as a result of the compression fracture of L2 applied to the plaintiff.

[39] Dr Campbell examined the plaintiff again on 16 November 2011 at the request of the plaintiff's solicitors. The plaintiff reported that he still suffered from lower back pain and stiffness on a daily basis where the pain radiated down both legs and rated up to 10/10 on the visual analogue scale. Examination of the lumbar spine revealed decreased flexion and extension by 75 percent. Dr Campbell agreed with the assessments of Professor McPhee and Dr Nave that the plaintiff's impairment belongs in DRE Category IV with a 23 percent whole person impairment. Dr Campbell considered that 30 percent of the impairment was attributable to the pre-existing pathology from the 1992 fusion at L5/S1 which meant that there was a 16.1 percent whole person impairment due to the accident.

[40] During his evidence at the trial, Dr Campbell expressed the view that, if the accident had not occurred and the plaintiff were otherwise able to manage his back problem and not be exposed to any problems, such as heavy lifting and bending, working in awkward positions or trauma, he would probably have worked through to his early sixties. Dr Campbell conceded, however, there was no scientific basis for that opinion, as it was a projection based on his experience and he could not object to other subjective projections. Dr Campbell confirmed that even though persons in the plaintiff's position might be able to undertake the work tasks that they wished to, they were at slightly increased risk of injury compared to a person who did not have a back injury.

[41] The defendant's solicitors obtained an opinion from Dr Cassar for the purpose of this proceeding dated 13 January 2012. Dr Cassar was surprised that a clearance was provided to the plaintiff to work as a plant operator on a mine site in 2008, because of the dosage of narcotic medication that he was on and the potential for jarring his back on a regular basis. Dr Cassar's opinion was that prior to the accident, the plaintiff was already suited to sedentary duties and restricted in his ability to operate machinery. This opinion was difficult to reconcile with the report that Dr Cassar sent to the plaintiff's general medical practitioner at Queanbeyan on 23 August 2004 after reviewing the plaintiff's pain management with using Physeptone 10mg twice a day, and Oxynorm 10mg for breakthrough pain. This letter was sent after the plaintiff started working and was injured at Cold Seas as Dr Cassar stated:

> "I was particularly encouraged by the fact that [the plaintiff] is now capable of lifting 25kg and coping with storeman duties whereas in the past he was only in sales. He is in full time employment and any pain which manifests has right leg and hip girdle radicular component and can be dealt with by stretching floor exercises and medications as stated. His lifestyle is again active including capacity to fish, camp and to ride his motorcycle."

[42] Dr Cassar stated in his evidence that, despite what he expressed in this letter, he had told the plaintiff that he should not be working as a storeman and that it did not surprise him that the plaintiff had aggravated his back (which I infer was a reference to the slip in the freezer at Cold Seas). It was what was in this letter that was conveyed to the plaintiff's general medical practitioner at that time and it is appropriate to act on that as Dr Cassar's opinion that was expressed in August 2004.

[43] The defendant's solicitors obtained an opinion from forensic toxicologist, Dr Robertson, on 17 January 2012 which was unchallenged. Dr Robertson noted that whilst a person who had been prescribed long term opioid medication for pain relief could develop a tolerance to the medication, the tolerance could be affected by changes in medication levels or use of other drugs. Dr Robertson expressed the opinion that, even if the person on long term opioid medication may appear to have little or no impairment of function due to that medication, the person's capacity to react to novel or unexpected situations may still be impaired.

The plaintiff's credit

[44] The plaintiff's history of his employment and his treatment and medication since the 1990 injury did not always accord with the schedule of his income, reports from doctors and notes on medical and hospital files.

[45] The defendant submits that because of the many aspects of the plaintiff's evidence that are contradicted by the documentary evidence, the inference should be drawn that the plaintiff's account had consciously or sub-consciously understated his pre-accident problems and their consequences and overstated his abilities. A number of examples were relied on, such as the plaintiff's failure to recall that he used Palfium for seven years after the 1990 injury or that he had been prescribed Endone before the accident.

[46] It is not surprising that there were discrepancies in the plaintiff's account, in view of the fact that he was asked to recall quite specific details of events, treatment and medications over a period of 21 years.

[47] Even recognising the plaintiff's gloss on detail, I have largely accepted the plaintiff's evidence about his pain levels prior to the accident and what activities he did undertake with the benefit of medication and the effect of the accident on his pain levels and curtailment of his physical activities. I do not find that the inconsistencies between the plaintiff's evidence and documentary evidence about matters prior to the accident have the significance that was placed on them by the defendant.

[48] In the ten years prior to the accident, the plaintiff was motivated by his desire to prove that he was still capable of working and to undertake physical work and activities and relied on his substantial narcotic medications to work and lead a relatively active life. In that period, however, the plaintiff's employment was not continuous or consistent and was at relatively modest levels, as the maximum gross income that he earned in any of those years was $38,016 which was for the 2003 financial year. The positions that he had as a night-shift taxi driver and for the Mac Services Group during the three years immediately prior to the accident involved significant physical stamina on his part which he managed.

[49] On the basis of the high levels of narcotic medication that the plaintiff required to maintain his physical activities prior to the accident, and his work history prior to the accident, and noting the tolerance that the plaintiff must have developed to his daily medications, I consider the plaintiff was overly ambitious about what physical activities he could have maintained on a medium to long term basis, but for the accident.

General damages

[50] The plaintiff submits that he should be awarded $80,000 for general damages. This is on the basis that he has suffered a significant increase in his levels of pain since the accident and a significant decrease in his quality of life. The plaintiff relies on *Cameron v Foster* [2010] QSC 372 and the comparable decisions referred to in that decision.

[51] The defendant does not dispute that *Cameron* is an appropriate comparable quantum decision and contends that the range for the restrictions on the plaintiff's enjoyment of life and pain is between $60,000 and $80,000, but that the award of general damages for the accident has to take into account the level of pain from which the plaintiff suffered consistently prior to the accident, so that the award should be reduced to $35,000. This severe reduction relies on the defendant's contention that there has been no demonstrable increase in the level of the plaintiff's pain other than the plaintiff's subjective reporting. The compression fracture of L2 sustained by the plaintiff in the accident compromised another part of the plaintiff's lumbar spine that

has been reflected in Dr Campbell's estimation of the increase in the plaintiff's whole person impairment due to the accident. This is also supported by the increase in narcotic analgesics that has been maintained since the accident.

[52] In view of the significant medications that the plaintiff required in order to function before the accident, it would not reflect the reality of his pre-accident condition to compensate him on the basis that the accident should be treated as the cause of all his pain and suffering. His enjoyment of life had been diminished prior to the accident by the persistent pain level that required significant medications. The defendant's submission proposed a reduction for the pre-existing pain that does not reflect the active lifestyle that the plaintiff managed prior to the accident, despite his back pain. The plaintiff's general damages should therefore be assessed at a sum of $50,000 of which $17,000 should be attributed to the past and bear interest at 2 per cent for 3.8 years ($1,292).

Past Economic Loss

[53] The preponderance of the medical evidence, in conjunction with the plaintiff's evidence, supports the conclusion that I reach that the plaintiff had no residual earning capacity after the accident.

[54] The plaintiff contends that he had a capacity to earn income as a scraper driver at the date of the accident and would have continued to do so, but for the accident.

[55] The defendant contends that, despite the plaintiff's employment as a scraper driver at the date of the accident, his pre-existing back condition and medication regime disqualified him from the occupation in the mining industry of a scraper driver or operator of machinery. Although the defendant contends that the plaintiff obtained employment at the mine site by making misleading statements about the effect of his prior injury and his work history, it is patent from the evidence of Dr Fenner and Dr Nieuwoudt that what was important in the assessment under the Coal Mine Workers' Health Scheme was the plaintiff's evaluation as functionally capable of performing the job of a machine operator. The plaintiff disclosed the significant narcotic medication that he required in order to enable him to work to those who assessed him and yet he was still employed by the defendant. Even though the plaintiff had misstated the extent and nature of his immediate work history for these assessments and in his curriculum vitae, his actual experience and qualifications qualified him for the job as a scraper driver. He was able to perform the training and ride his motorcycle the 800kms or so to the mine site in order to take up the job. I therefore reject the defendant's contention that the plaintiff was not qualified for employment as a scraper driver, but I proceed on the basis that the reality of the plaintiff's pain from his pre-existing back injury, his extensive medication regime, and his work history in the preceding 10 years meant that he was unlikely to continue at that job for any length of time.

[56] Although the fact that the defendant ceased its operations at the subject mine site on 22 December 2009 did not necessarily mean that that would be the end of the plaintiff's employment on a mine site if he would have managed to remain employed until then, his prospects of continuing to work on a mine site must have been extremely limited or minimal, so as not to be worth quantifying.

[57] The assessment of damages for a loss of earning capacity between the date of the accident and this judgment raises the application of *Malec v J C Hutton Pty Ltd*

(1990) 169 CLR 638. The plaintiff contends that the principle to be applied was that in *Purkess v Crittenden* (1965) 114 CLR 164, 168, as applied in *Hopkins v WorkCover Queensland* [2004] QCA 155. The defendant submits *Malec* should be applied in a similar manner to how it was applied by McMeekin J in *Bell v Mastermyne Pty Ltd* [2008] QSC 331.

[58] *Purkess* was referred to during the argument in *Malec*, even though it is not referred to in the judgments in *Malec*. That is explained by the fact that *Malec* was concerned with an assessment of damages on the basis of the evaluation of the likelihood that a hypothetical event would have occurred: *Malec* at 639, 643. *Purkess* was concerned with the evidential burden on a defendant in a personal injuries claim in circumstances, such as where there is a contention that a pre-existing condition of the plaintiff would have had a particular outcome, irrespective of the supervening injury. See also *Hopkins* at [5] and *Smith v Topp* [2003] QCA 397 at [38].

[59] *Bell* concerned a much younger plaintiff who was 26 years old when injured 10 years before the trial. He had a poor work history before he relocated to Queensland in order to obtain work in the mines. He had worked casually for a couple of months before the accident which resulted in an internal derangement of the L5/S1 intervertebral disc, but in the context of pre-existing degenerative change in that disc. The plaintiff did not work after the accident, although he did have a residual earning capacity, but it was found that he did not try to obtain employment in any meaningful way. It was found at [67], applying *Malec*, that his prospects of obtaining and maintaining employment in the mining industry were not better than 10 per cent. On the basis that the plaintiff would have earned something in the order of $450,000 if he had continued to be employed in the mining industry until trial, McMeekin J took 10 per cent of that figure and added $45,000 to 90 per cent of what the plaintiff would have earned in another job at around $550 net per week. Because the plaintiff had Crohn's disease, there was the possibility of his pre-existing spinal condition interfering with his work capacity, and it was also necessary to take into account that his residual earning capacity that was not exercised, McMeekin J discounted the calculated amount by 35 per cent to arrive at the award of past economic loss.

[60] The parties set out in exhibit 20 the agreed amounts of the weekly net wages that would have been earned by the plaintiff had he remained employed by the defendant between the date of the accident and the trial. It was also agreed that since the accident there has been a high demand for truck drivers and plant operators in Central Queensland.

[61] The plaintiff works out past economic loss on the basis of the wages the plaintiff would have earned if he had graduated to driving trucks on the mine site. It was submitted on behalf of the plaintiff that resulted in past economic loss to the date of trial of about $280,000. An alternative calculation was done on behalf of the plaintiff on the basis of the agreed weekly net wages in exhibit 20 and the plaintiff came up with a lower figure of about $190,000. It was therefore submitted that an allowance of $240,000 for past economic loss was appropriate.

[62] The defendant relies on the approach in *Bell* and contends that the plaintiff's prospects of staying in the mining industry were slight and no more than 10 per cent. The defendant suggests using the date at which the mine closed down to calculate loss of earning capacity to 22 December 2009 on the basis of the wages that the plaintiff could have earned working on the mine site until then. The plaintiff does

this calculation at $1,000 net per week for 68 weeks ($68,000) and then reduces that to reflect the 10 per cent chance of the plaintiff staying in the mining industry. (Consistent with *Bell* at [98] the defendant should also have allowed 90 per cent of the figure that the plaintiff was likely to have earned during this period of 68 weeks, if not in the mining industry.) What the defendant then does is was to take $500 net per week as the likely wage the plaintiff could have earned as a taxi driver. There are 127 weeks between 1 January 2010 and the date of judgment. On the defendant's method that would result in the sum of $63,500 to which the defendant would add $6,800 from working in the mining industry and to which another $30,000 should be added for the 90 per cent chance that the plaintiff would have worked as a taxi driver in the period of 68 weeks after the accident. That makes past economic loss of about $100,000. The defendant does an alternative calculation based on $1,100 net per week for the entire period of the past economic loss which is $214,500. The defendant then applies 10 per cent to that figure and adds 90 per cent of what would be earned as a taxi driver (195 weeks at $500 net per week). That results in a figure of about $110,000 which is the high end of the plaintiff's calculation of past economic loss.

[63] Just as McMeekin J recognised in *Bell* at [95] the artificiality of the exercise that was undertaken in that case in calculating economic loss for a plaintiff based on full employment in the mining industry where the plaintiff had been injured after a very short time working at a mine site and that calculation bore no relationship to the plaintiff's prior earnings, I have the same difficulty in this case.

[64] Although the plaintiff was tenacious in obtaining the job on a mine site and technically was capable of performing the job of a scraper driver for the two weeks before the accident, his aspirations for continuing that work have to be tempered by the reality of his pre-existing condition that meant he suffered from chronic lower back pain, his medication regime and his prior work history to which I have already referred in detail.

[65] One way of calculating damages for past economic loss would be to do the figures in the manner proposed by the plaintiff using the agreed monthly net wages on the assumption that the plaintiff had continued on the mine site as a scraper driver and to discount that figure significantly (in the vicinity of 40 per cent) to take into account, in accordance with *Malec,* the likelihood that the plaintiff would not have been able to continue in that job. Another way is to calculate his past economic loss on the basis of a lower weekly wage than he could have earned on the mine site that better reflects his working history prior to the accident and the discount to be applied to that calculation would accordingly be less than 40 per cent.

[66] Although it is arbitrary in some respects, it accords better with the conclusion that I have reached about the plaintiff's real prospects of continuing to work on a mine site in the medium to long term to do the calculations on the basis of what he could have earned on the mine site until the defendant ceased its operations and after that by calculating lost earnings on the basis of the average of what he earned from the Mac Services Group and as a taxi driver, taking into account the percentage increases in average Queensland earnings from the Australian Bureau of Statistics Figures that are shown in exhibit 30.

[67] On the basis that the plaintiff earned $17,468 in 24 weeks with the Mac Services Group and $29,996 for one year as a taxi driver, his average net weekly wage was

$625. Before discount, the calculation on account of past economic loss results in a figure of $154,066 calculated as follows:

02/09/08 to 22/12/09 (68 weeks @ $1,000 net per week)	$68,000.00
01/01/10 to 30/06/10 (26 weeks @ $652.25 net per week)	16,958.50
01/07/10 to 30/06/11 (52 weeks @ $673.77 net per week)	35,036.04
01/07/11 to 08/06/12 (49 weeks @ $695.33 net per week)	34,071.17
	$154,066.00

[68] Having regard to this manner of calculation, the discount that I will apply to reflect the *Malec* approach and the vicissitudes of life is 20 percent. That results in damages for past loss of earning capacity of $123,000.

Future economic loss

[69] The plaintiff seeks damages for future loss of earning capacity calculated on the basis that he would have worked to age 67 years.

[70] The defendant's primary submission is that there is no demonstrable reduction in earning capacity compensable in damages. In the alternative, the defendant submits that a sum of $500 net per week for a further 10 years is an accurate assessment which would result in a sum for future economic loss of $206,500 less discount at 25 per cent.

[71] The plaintiff does his calculations for the purpose of damages for future loss of earning capacity on the basis that he would have remained in employment until 67 years of age. The defendant does the calculations on the basis of the plaintiff remaining in employment until 65 years of age. In view of the matters that I have already emphasised in this judgment that affected the continuity of the plaintiff's employment prior to the accident, I consider it appropriate to do the calculations on the basis of a further 10 years employment for the plaintiff (multiplier 413). Consistent with the approach that I have taken to past economic loss, I will use the net weekly wage of $695 per week for the purpose of calculating future economic loss. That results in a gross sum of $287,035. In addition to the usual approach of applying a discount in the calculation of future economic loss for the vicissitudes of life, the discount also has to reflect the *Malec* approach. It should be higher than the discount used for past economic loss. Because of using the lower net weekly wage of $695, the discount does not need to be as high as that used in *Hopkins* or *Smith*. I will discount the calculated figure by 25 per cent. That results in future economic loss of $215,276.

Other heads of damages

[72] The parties agreed on the damages for past and future lawnmowing expenses including interest, past and future pool/hydrotherapy expenses including interest, the expenses met by WorkCover, the *Fox v Wood* component, the amount refundable to the Health Insurance Commission, pharmaceuticals, and past and future aids and equipment. The amount of the WorkCover refund is $73,637.05 and the net statutory WorkCover benefits were $49,745.

Conclusion

[73] The damages which should be awarded to the plaintiff are calculated as follows:

General damages	$50,000.00
Interest on $17,000 @ 2% for 3.8 years	1,292.00
Past economic loss	123,000.00
Interest on $73,255 @ 5% x 3.8 years	13,918.45
Past loss of superannuation	11,070
Future economic loss	215,276.00
Future loss of superannuation	19,374.84
Past and future lawnmowing including interest	10,000.00
Past and future pool/hydrotherapy expenses including interest	5,000.00
Past and future aids and equipment	5,000.00
Hospital, medical and other expenses paid by WorkCover	11,211.05
Health Insurance Commission	896.00
Fox v Wood	12,681.00
Past pharmaceuticals plus interest and future pharmaceuticals	8,000.00
Subtotal:	**$486,719.44**
Less WorkCover refund	73,637.05
Total:	**$413,082.39**

[74] Judgment is given for the plaintiff in the sum of $413,082.39. I will hear submissions on costs.