SUPREME COURT OF QUEENSLAND

CITATION:	*Phillips v MCG Group Pty Ltd* [2013] QCA 83
PARTIES:	**LAWRENCE WILLIAM PHILLIPS** (appellant) **v** **MCG GROUP PTY LTD** (respondent)
FILE NO/S:	Appeal No 5567 of 2012 SC No 11924 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	9 November 2012
JUDGES:	Fraser and White JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – NON-PECUNIARY DAMAGE – PAIN AND SUFFERING – where appellant suffered spinal injury while working for respondent as scraper driver on mine site – where respondent accepted liability – where appellant had prior spinal injury in different part of lumbar spine to latter injury – where parties in dispute about how much pain attributable to latter injury – whether error is identifiable in primary judge's assessment of general damages DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – where appellant had no residual earning capacity after injury – where parties in dispute about what employment the appellant would otherwise have had between injury and judgment – whether error is identifiable in primary judge's assessment of damages for loss of earning capacity, such as double discounting

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – where parties in dispute about what employment the appellant would have otherwise had for the remainder of his working life – where parties in dispute about date appellant would otherwise have retired – whether error is identifiable in primary judge's assessment of damages for loss of future earning capacity

Arthur Robinson (Grafton) Ltd v Carter (1968) 122 CLR 649; [1968] HCA 9, considered
Bell v Mastermyne Pty Ltd [2008] QSC 331, considered
Cameron v Foster [2010] QSC 372, considered
Commonwealth of Australia v Elliott [2004] NSWCA 360, cited
Craddock v Anglo Coal (Moranbah North Management) Pty Ltd [2010] QSC 133, considered
Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd (1981) 146 CLR 336; [1981] HCA 4, cited
Hopkins v WorkCover Queensland [2004] QCA 155, considered
Koven v Hail Creek Coal Pty Ltd [2011] QSC 51, considered
Malec v JC Hutton Pty Ltd (1990) 169 CLR 638; [1990] HCA 20, considered
Medlin v State Government Insurance Commission (1995) 182 CLR 1; [1995] HCA 5, cited
Miller v Jennings (1954) 92 CLR 190; [1954] HCA 65, cited
Minchin v Public Curator of Queensland [1965] ALR 91, cited
Montemaggiori v Wilson [2011] WASCA 177, cited
Newell v Lucas [1964-5] NSWR 1597, considered
Paul v Rendell (1981) 55 ALJR 371; (1981) 34 ALR 569, considered
Purkess v Crittenden (1965) 114 CLR 164; [1965] HCA 34, considered
Seltsam Pty Ltd v Ghaleb [2005] NSWCA 208, considered
Smith v Topp [2003] QCA 397, considered
State of New South Wales v Moss (2000) 54 NSWLR 536; [2000] NSWCA 133, cited
Todorovic v Waller (1981) 150 CLR 402; [1981] HCA 72, cited
Van Gervan v Fenton (1992) 175 CLR 327; [1992] HCA 54, considered
Watts v Rake (1960) 108 CLR 158; [1960] HCA 58, considered

COUNSEL: R C Morton for the appellant
G W Diehm, with GC O'Driscoll, for the respondent

SOLICITORS: Morton & Morton for the appellant
McInnes Wilson for the respondent

[1] **FRASER JA**: I have had the advantage of reading the reasons for judgment of White JA. I agree with those reasons and with the order proposed by her Honour.

[2] **WHITE JA**: On 28 August 2008, eight days after he commenced employment with the respondent as a scraper driver at a mine site near Moranbah, the appellant sustained a compression fracture of L2 with between 50 per cent and 70 per cent loss of vertebral height. Thereafter he was unable to return to any paid employment and, at the time of trial, was in receipt of a disability support pension.

[3] Liability was not in issue at the trial. The respondent accepted responsibility for the state of the vehicle which the appellant was driving which had led to the accident in which he was injured.

[4] The parties were in agreement about many heads of damage and various rates of pay but went to trial on the assessment of general damages, past economic loss and loss of future earning capacity. This was because the appellant had sustained a serious back injury during earlier employment and was able to undertake employment thereafter only with the assistance of a considerable amount of prescribed opioid analgesics.

[5] The primary judge assessed the disputed heads of damage as follows:

General damages:	$ 50,000.00
Interest on $17,000 at two per cent for 3.8 years:	$ 1,292.00
Past economic loss:	$123,000.00
Interest on $73,255 at five per cent for 3.8 years:	$ 13,918.45
Past loss of superannuation:	$ 11,070.00
Future economic loss:	$215,276.00
Future loss of superannuation:	$ 19,374.84

Her Honour assessed the total award at $413,082.39 after deducting the WorkCover refund of $73,637.05.

[6] The appellant contends that her Honour's assessment in respect of those disputed heads of damage was manifestly inadequate. In his Notice of Appeal he seeks to recover $1,045,353.73. The challenged heads of damage sought are:

General damages:	$ 80,000.00
Interest:	$ 2,016.55
Past economic loss:	$240,000.00
Interest:	$ 35,967.98
Future economic loss:	$630,000.00
Superannuation loss:	$ 78,300.00

[7] The appellant produced a number of tables on the hearing of the appeal which proposed several different scenarios for the appellant's employability had he not been injured.

Grounds of appeal

[8] The primary judge concluded:

> "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."[1]

The appellant contends that such a finding was not supported by the evidence and was contrary to the expert evidence. He further contends that her Honour failed to give any reasons for the apparent rejection of evidence which was contrary to those findings.

[9] Flowing from those contentions is the more general argument that each challenged head of damage was manifestly inadequate.

Factual findings

[10] The primary judge set out her principal findings of fact between paras [2] and [31] of her reasons.[2] Those findings are expressly not challenged by the appellant.[3] Her Honour analysed the evidence thoroughly. For the appeal it is not necessary to set it all out. Her Honour commenced with a close consideration of the appellant's employment, injuries, and management of dealing with those injuries, before he sought employment with the respondent.[4] What follows is the distillation of those findings.

[11] The appellant was born in 1957 and educated to year 10. He started his working life as an apprentice boilermaker, joined the Army and worked as a truck driver, crane driver and labourer. He was employed as a sales representative in 1990 when he suffered an injury to his lumbar spine at L5/S1, experienced extreme pain and was treated with an opioid analgesic, Palfium. In 1992 the appellant underwent an L4/L5/S1 instrumental fusion operation which inserted metalware into his spine. He then engaged in extensive rehabilitation and continued to take Palfium, Panadeine Forte and anti-inflammatory medication to manage his back pain.

[12] The primary judge set out the detail of the appellant's medication which was required to be authorised through various departments of health because it comprised drugs of high dependency. In 1996 his treating doctor was asked by the New South Wales Department of Health to consider trialling alternative medication. It was not successful. In the latter part of 1997 the appellant was started on Endone, a scheduled narcotic analgesic.

[13] For a few months in early 1997, the appellant was able to return to work on a casual basis packing shelves with Woolworths. He then worked for approximately 18 months as a sales representative for Autosmart (ACT) Pty Ltd selling automotive chemicals from the back of a truck. He worked as a postman. He returned to sales working as a travelling sales representative, and then as an acting sales manager, for a seller of hygiene products for almost two years until mid-2003.

[14] It was an important part of the appellant's case at trial, and on appeal, that in his spare time in about 2002 he constructed terraced retaining walls in his garden at Queanbeyan, and engaged in other home improvement work, requiring heavy labour. Dr Bryce Clubb, of the Pain Management Unit at the Canberra Hospital,

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1 AR 711 at [56]. The 22 December 2009 date is an agreed fact.
2 AR 701-707.
3 Appellant's Outline of Submissions, para 8.
4 AR 701-704; reasons [2]-[17].

wrote to the appellant's general practitioner on 25 March 2002[5] giving a history of the appellant's consultations at that clinic. Dr Clubb noted that the appellant was first seen at the clinic in 2000 with a history of lower back pain of about 10 years duration:

> "He had been seen by multiple doctors, physiotherapists and neurosurgeons and eventually had a fusion at the L4/5 and L5 S1 levels. …
> His pain is increasing despite the fact that he is able to work. He has returned to this Unit for further review."[6]

[15] The appellant told Dr Clubb that the pain was diffuse across his back radiating into the outer gluteal areas and also into the back of both buttocks extending to the knees; it was "constant and fluctuant" and was particularly severe at night affecting his sleep; it was "dull and aching with severity going from moderate to severe"[7]; almost any activity aggravated the pain and only medication relieved it. Despite the pain, the appellant said he was able to work a full day as a salesman spending a considerable amount of time in the car; he had no difficulty with his activities of daily living but had to cut back on activities within the house. The appellant's medication was then Oxycontin 20 mg twice daily, up to 12 tablets of Panadeine Forte per day, up to four tablets of Endone per day and Celebrex 200 mg of an evening.

[16] Dr Clubb noted lumbar flexion limited to about 30 degrees; extension limited to about five degrees; and right and left lateral flexion limited to about 30 degrees. All movement produced pain at the extremity. Straight leg raising was limited on both right and left side to about 25 degrees due to pain. Hip movement was normal, as was heel and toe standing.

[17] As noted by the primary judge, Dr Clubb reviewed the appellant, and discussed drug dependency with him, on 2 October 2002. Dr Clubb observed that the appellant found pain a problem when he did "what sounds to be excessively active activities around the house such as putting up a ceiling".[8] He was advised to pace his activities with adequate periods of relaxation.

[18] The appellant consulted with Dr E J Cassar in January 2003. He was a specialist at a pain management clinic in Garran in the ACT. He noted that the appellant had chronic pain which was not responsive to non-narcotics but he was not a drug dependent person. He was able to continue working with the assistance of opiate drug medication and counselling from the pain clinic. The appellant's medication was changed from Endone to Physeptone twice daily and Oxycontin 20 mg in the evening (as opposed to twice daily) which permitted him to work as a salesman without drowsiness.

[19] The appellant was employed as a logistics manager during the financial year ended 30 June 2004. Whilst working as a night storeman loading goods onto trucks in early June he slipped over in a freezer and had time off work.

[20] The appellant and his wife moved to Hervey Bay in 2004 where he established a relationship with a general medical practice. In the latter part of 2004 he was taking Prodeine, Methadone, Oxynorm, Diazepam and Celebrex.

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5 AR 433.
6 AR 433.
7 AR 433.
8 AR 430.

[21] As recounted by the primary judge, following his move to Hervey Bay the appellant worked delivering bread in a 10 tonne truck, drove a mobile crane for a week in Dalby and later worked for a short time as a compressor truck driver at Cloncurry. For about a year he was an on-call driver of tipper and water trucks for JJ Byrne & Son Pty Ltd, but worked only about 52 hours in total. When he prepared his Curriculum Vitae for employment, including with the respondent, he described his work with that employer as "on call 2005-2007", conveying the impression, as found by the primary judge, that the work was more than it was.[9] Between late 2004 and 2006 the appellant also worked in an office making sales telephone calls.

[22] The appellant's gross wages for the 2005 financial year were $12,203, half the amount he had grossed in the previous financial year. His gross wages for the 2006 financial year were $10,941.

[23] The appellant attended Dr Senior's practice in Hervey Bay each month to obtain a renewal of his prescriptions. Dr Senior liaised with Queensland Health's Drugs of Dependence Unit about the appellant's medication. The appellant was cross-examined about the reason for several consultations apart from obtaining scripts for pain relief. Her Honour referred to the consultation on 18 November 2005 where the appellant is reported to have told Dr Senior that he "has had a bad month 'barely out of bed'".[10] When challenged that this meant because of pain, the appellant responded "Not that I remember"[11] – he said it could have been because he had the flu. Of this response, her Honour said:

> "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]

[24] In giving this example the primary judge was, it might be thought, somewhat generous to the appellant. For the consultation the following month, on 16 December 2005, the note, after referring to the forthcoming consultation with Dr Cassar in Canberra, reads "cont with a bad month re pain".[13] Also, an entry in February of that year was in the following terms: "had a couple of bad days for no partic reason, spent much of it in bed accepts these as his lot."[14]

[25] During the 2006 and 2007 financial years the appellant was a taxi driver in Hervey Bay working full-time on night shifts. There was an agreed schedule of his income. For the 2007 financial year the appellant received $36,209 gross ($29,996.30 net) from driving a taxi. In the 2006 financial year he earned $7,371 from that source. Her Honour concluded that those figures would suggest that the appellant drove a taxi for no more than 18 months. When his night driving position was given to another driver the appellant drove during the day instead but for fewer hours.

[26] It was at that point that the appellant sent out his resume for other employment. He was hoping to obtain work as a plant operator in the mines. To assist him in

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9 AR 706; reasons [25]-[26].
10 AR 284, AR 703; reasons [11].
11 AR 703; reasons [11].
12 AR 703; reasons [11].
13 AR 285.
14 AR 287.

achieving that goal he worked as a utility/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 the nine hour journey between Hervey Bay and the worksite on his motorcycle. The work involved maintenance to the accommodation units and gardening. He resigned from that position, with effect from 13 May 2008, because he thought he had a job at a mine, but it did not eventuate. He was out of work for three months before he commenced employment with the respondent.

[27] Her Honour found:

> "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."[15]

[28] As to his pre-accident pain, her Honour noted:

> "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."[16]

Employment with the respondent

[29] In response to his application for employment the appellant was assessed on 28 May 2008 under the Coal Mine Workers' Health Scheme by a medical officer who worked in the practice of Dr Fenner – Dr Fenner being the nominated medical adviser for the purposes of completing an assessment for coal mine work. The appellant was assessed as fit for work as an operator, but was noted to have a condition which resulted in restrictions related to load lifting and bending, and him being unfit for heavy manual work. He also had, irrelevant to the appeal, hearing issues.

[30] He was examined by an occupational therapist, Ms van der Heyden, at the end of May 2008 for a functional capacity evaluation. He reported to her that he was in good health "with no current medical conditions".[17] He disclosed to her his prior spine injury and admitted experiencing pain which remained the same whether he was working or at home. He told her that 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."[18] To Ms van der Heyden's observation the appellant was able to sit, stand and walk in a normal manner and have full functional mobility.

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15 AR 704; reasons [16].
16 AR 704; reasons [17].
17 AR 705; reasons [19].
18 AR 705; reasons [19].

She concluded that he was capable of operating machinery but recommended against labouring, repetitive bending and lifting objects. Of some importance, Ms van der Heyden recommended work which enabled the appellant to change position regularly, such as alternating between sitting, standing and walking.

[31] Dr Fenner made an assessment of the appellant dated 11 August 2008. He concluded that, functionally, the appellant was able to drive on the mine site. Much was made of Dr Fenner's familiarity with the machinery used on mine sites. This was said to put him at something of an advantage over other medical specialists who gave evidence in the proceedings. He was aware that the relevant machinery was protected with anti-vibration fittings. Dr Fenner explained, and the primary judge noted, that even if a potential employee had an increased risk of injury to his lumbar spine in the event of trauma, that was no reason for assessing him as unable to operate machinery on a mine site. Her Honour set out his evidence:

> "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."[19]

[32] On 11 August 2008 the appellant underwent a pre-employment medical examination with Dr Nieuwoudt, a general practitioner retained by the respondent. Dr Nieuwoudt reported that the appellant was fit to undertake the proposed position of operator with some limitations in relation to heavy manual work and lifting. In evidence-in-chief, he said he reached that conclusion because the appellant had described doing truck driving work from 2006 to 2007 – a similar position.

[33] After being told that the appellant had worked no more than 52 hours (spread over a year or so) as an on-call driver, Dr Nieuwoudt said he would have had less confidence in his capacity to work as an operator. However, in re-examination that opinion was further revised when he was informed that the appellant had worked 12 hour shifts as a taxi driver for 12 to 18 months. In that circumstance, Dr Nieuwoudt would have had more confidence that the appellant was fit to undertake the driving work at the mine. He did agree that the fusion in the lumbar spine, although carried out many years before, meant that the appellant was more vulnerable to physical injury than the ordinary person.

[34] The primary judge concluded, as was conceded by the appellant, that he had overstated his recent prior experience. He said he "fudged" his resume to suit the job.

[35] The appellant commenced working as a scraper driver on 17 August 2008. He graduated to a larger machine the next day and worked from 21 to 24 August 2008. The accident occurred when he returned to work on 28 August. In a manoeuvre to pass another vehicle, the appellant moved his scraper and its rear end slid off onto the slope. As he attempted to drive it down the slope, he lost control and bounced around inside the vehicle (injuring his spine) until it came to a halt. This spinal injury was in a different spinal location to the former injury.

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[19] AR 705; reasons [23].

Post-accident

[36] The appellant spent some days in the Moranbah Hospital where he was treated with painkillers and rest and continued to take his previously prescribed medication. He was discharged on 3 September 2008. Following the accident the appellant's prescription for Oxycontin was increased to three 20 mg doses per day which continued to trial. He also took Endone and Physeptone.

[37] The primary judge noted that he had not returned to any paid employment; was unable to enjoy activities which previously he had undertaken, such as fishing, playing darts, riding his motorcycle, doing jobs around the house or gardening. He had difficulty sleeping and his intimate relationship with his wife was adversely affected. The appellant reported that any activity involving movement "the wrong way" aggravated his back pain. He was able to sit comfortably for no more than 30 minutes. The appellant's diary, which recorded his perception of his levels of pain and limitation on activities, which was unchallenged, recorded an estimate of pain at nine and a half out of 10 which, as her Honour found:

> "… was higher than the five or six out of 10 at which he estimated his pain (with the medication) before the accident."[20]

Medical evidence

[38] The appellant was examined by Dr Scott Campbell, neurosurgeon, on 12 March 2009. He was noted by Dr Campbell to walk "with a slow and cautious gait and a slight limp". There was a restricted range of movement of his lumbar spine by 30 to 40 degrees with flexion and extension.[21] Dr Campbell concluded, in response to a question from WorkCover about the relationship between the work-related conditions and pre-existing conditions in the appellant's spine, as follows:

> "Mr Phillips had a pre-existing lower back complaint and underwent an L4 to S1 instrumented fusion operation in 1992. Thereafter he experienced ongoing chronic lower back pain. The rigidity of the fusion site would have placed his lumbosacral junction at higher risk of trauma to the area."[22]

[39] The appellant was assessed by an occupational therapist on 12 March 2010. His pain levels were, reportedly, better, averaging six out of 10 on the analogue pain scale. She noted, as described by her Honour, that:

> "[h]e 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… [She] 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."[23]

[40] The appellant was examined by Dr Denis Nave, a consultant orthopaedic surgeon, on 12 March 2010. He described the appellant exhibiting significant loss of spinal movement with pain evident with all movement. He noted that after the spinal

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20 AR 707; reasons [31].
21 AR 207.
22 AR 208, AR 707; reasons [33].
23 AR 707; reasons [35].

fusion in 1992 the appellant was on pain relief and returned to work "after two years … but could manage subsequent duties without any time away from work, apparently".[24] Dr Nave assessed the appellant's whole person impairment at 23 per cent. This percentage was assessed to the same degree by Dr B H McPhee and Dr S Campbell. Dr Nave was provided with further information which revealed that the appellant's employment history, after his 1992 surgery, was "more patchy" than the appellant had described to him. As noted by her Honour, Dr Nave said, had he been consulted by the appellant prior to the accident, he would have advised him not to work at a job which jarred his back, such as driving a scraper. He thought his previous occupation as a taxi driver was suitable provided he did not have to lift heavy items. A concession was extracted in cross-examination that he was neither familiar with the scraper used on the mine site nor the seating provided.

[41] Professor Bruce McPhee, spinal surgeon, examined the appellant on 21 June 2010. He concluded that the appellant had "a significant past history of lower back problems"; that he had been "reliant on long term narcotics for pain relief"; the "material evidence indicates a significant pre-existing impairment of the lumbar spine".[25]

[42] Dr Campbell re-examined the appellant on 16 November 2011. He told Dr Campbell that the pain level rated 10 out of 10 on the pain scale. Dr Campbell assessed 30 per cent of the impairment to be attributable to the pre-existing pathology from the 1992 fusion so that there was 16.1 per cent whole person impairment due to the accident.

[43] The appellant relied heavily on Dr Campbell's opinion, expressed at trial, that if the accident had not occurred, and he were otherwise able to manage his back problems and not be exposed to heavy lifting, bending, working in awkward positions or trauma, "he would probably have worked through to his early sixties".[26] As her Honour observed, Dr Campbell conceded that there was no scientific basis for that opinion. It was based on his experience. He accepted that the appellant was at a slightly increased risk of injury compared to a person who did not have back injuries.

[44] The appellant also relied upon a letter from Dr Cassar to the appellant's general practitioner in August 2004. The appellant visited Dr Cassar after he had resumed working after he had been injured slipping at his work place. After reviewing the appellant's pain management, Dr Cassar wrote:

> "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."[27]

[45] Her Honour referred to the opinion of Dr Michael Robertson, a forensic toxicologist, about the relationship between long term use of opioids and tolerance to opioids. That opinion was unchallenged:

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24 AR 244 referred to by her Honour at AR 708; reasons [36].

25 AR 250 referred to by her Honour at AR 708; reasons [38].

26 AR 709; reasons [40].

27 AR 709, quoted by the primary judge at reasons [41].

> "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."[28]

[46] Mr R Morton, for the appellant, submitted that it was not clear what reliance the primary judge placed upon this evidence.

Findings about credit

[47] The primary judge observed that the appellant'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."[29]

Even so, her Honour "largely accepted" the appellant's evidence about his pain levels prior to the accident; what activities he did undertake with the benefit of medication; the effect of the accident on his pain levels; and the consequent curtailment on his physical activities. Nonetheless, her Honour concluded:

> "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."[30]

[48] Her Honour reached this conclusion on the basis that the appellant was motivated by his desire to prove that he was still capable of working, and could undertake physical work and activities, but that he relied on his substantial narcotic medications to lead this relatively active life. Her Honour noted, however, that his employment was not continuous or consistent and was "at relatively modest levels".[31] The maximum gross income he had earned in any of the 10 years prior to the accident was $38,016 for the 2003 financial year. She accepted that in the three years immediately prior to the accident he showed significant physical stamina in his work. It was in that context that she concluded he was "overly ambitious".

General damages

[49] The primary judge was referred to *Cameron v Foster*[32] and the comparable decisions mentioned therein. Below the respondent contended for an award of $35,000 to take account of the prior pain from which the appellant suffered.

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28 AR 709; reasons [43].
29 AR 709; reasons [44].
30 AR 710; reasons [49].
31 AR 710; reasons [48].
32 [2010] QSC 372.

Her Honour rejected this, rightly, because such a severe reduction relied upon the contention that there was no demonstrable increase in the level of the appellant's pain, other than from his subjective reporting, as a result of the accident. As her Honour noted, the compression fracture at L2 was in another part of the appellant's lumbar spine from the 1990 injury. Her Honour also noted the increase in narcotic analgesics since the accident.

[50] The appellant sought an award of $80,000 for general damages, the amount awarded in *Cameron*. The appellant was of a similar age to the plaintiff in *Cameron*. However, Cameron had no pre-existing condition but had suffered a significant psychiatric response to his injury and subsequent pain. The primary judge concluded:

> "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."[33]

Discussion

[51] Her Honour was correct to conclude that the submissions on behalf of the appellant did not reflect the reality of the situation. Indeed, denying that he experienced any difficulty or pain doing the many activities which he enjoyed – for example, that doing all the renovation work in the garden did not aggravate his back, nor any of the other recreational activities that he enjoyed, nor any of the work which he carried out, – was neither consistent with his presentation to Dr Clubb nor the other notifications referred to in Dr Senior's notes (mentioned above at [23]). It is true that he expressed more optimism to Dr Cassar in 2004. But the appellant's enjoyment of life was diminished by the accident because he had managed a relatively active lifestyle formerly which was no longer achievable.

[52] The compensatory principle which applies to the assessment of damages for personal injury is relatively limited in its exactness. As long as the trial judge makes an assessment which is, in all the circumstances, reasonable and takes into account the relevant evidence and is broadly comparable with like awards there can be no complaint of error. That another judge might have awarded $10,000 more or less does not lead to appellate intervention provided the process is correct. There is no error identified in her Honour's assessment of general damages.

Past economic loss

[53] It was uncontentious that the appellant had no residual earning capacity after he was injured at the mine site. The appellant advanced a case below that he would have continued to work as a scraper driver, or advanced to higher paying positions in the mine, and would have remained working in one or other capacities to the age of 67.

[54] The respondent contended below that even though it had employed the appellant after assessment by its own medical assessors, he was not qualified to work in the

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33 AR 711; reasons [52].

industry because of his pre-existing back condition and the medication regime under which he operated. The respondent based this contention on the appellant's misleading statements about the effect of his prior injury and his work history. The primary judge found that the mine doctors were concerned to evaluate only the appellant's functionality for the job of a machine operator. Her Honour noted that the plaintiff had disclosed his significant narcotic medication. It was well understood that drug screening occurred in the mines. He did misstate the extent and nature of his immediate work history orally and in his application resume, but her Honour concluded that his actual experience and qualifications did fit him for the job as a scraper driver. She referred to the fact that he was able to perform the training, and ride his motorcycle the 800 kilometres to the mine site, to take up the job.

[55] Her Honour concluded:

> "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."[34]

Her Honour continued:

> "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."[35]

It is those two propositions which the appellant principally attacks on the basis that neither is supported by the evidence.

[56] Her Honour correctly set out the principles applicable to the assessment of damages for loss of earning capacity between the date of the accident and judgment. Her Honour noted that this case raised the application of *Malec v JC Hutton Pty Ltd*.[36] The appellant had contended below that the approach in *Purkess v Crittenden*[37], as applied in *Hopkins v WorkCover Queensland*[38], should be applied. The respondent sought an approach similar to that applied by McMeekin J in *Bell v Mastermyne Pty Ltd*.[39]

[57] In *Seltsam Pty Ltd v Ghaleb*[40] Ipp JA, with whom Mason P agreed[41], said:

> "104 What was said in ***Watts v Rake*** and ***Purkess v Crittenden*** now has to be qualified by these principles (cf ***Commonwealth of Australia v Elliott*** [2004] NSWCA

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34 AR 711; reasons [55].
35 AR 711; reasons [56].
36 (1990) 169 CLR 638.
37 (1965) 114 CLR 164 at 168.
38 [2004] QCA 155.
39 [2008] QSC 331.
40 [2005] NSWCA 208.
41 Basten JA dissented but not with respect to the principles enunciated by Ipp JA.

360 at [81]). ***Malec*** has an important bearing, for example, on the way in which a court must determine whether a defendant has discharged the "disentangling" evidentiary burden on it of showing that part of the plaintiff's condition was traceable to causes other than the accident and that, had there been no accident, the plaintiff would have suffered disability from his pre-existing condition.

105 Where a defendant alleges that the plaintiff suffered from a pre-existing condition, the evidential onus as explained in ***Watts v Rake*** and ***Purkess v Crittenden*** remains on the defendant and must be discharged by it. Nevertheless, to the extent that the issues involve hypothetical situations of the past, future effects of physical injury or degeneration, and the chance of future or hypothetical events occurring, the exercise of "disentanglement" discussed in those cases is more easily achieved. That is because the court is required to evaluate *possibilities* in these situations – not proof on a balance of probabilities.

106 Without intending to give an exhaustive list of possibilities, it may be that, had the defendant's negligent act not occurred, a pre-existing condition might have given rise to the possibility that the plaintiff's enjoyment of life and ability to work would have been reduced and to a susceptibility to further injury; in addition, other causes entirely unrelated to the defendant's negligent act might have contributed to the plaintiff's ultimate condition.

107 Appropriate allowances must be made for these contingencies. A proper assessment of damages requires the making of a judgment as to the economic and other consequences which might have been caused by a worsening of a pre-existing condition, had the plaintiff not been injured by the defendant's negligence. A pre-existing condition proved to have possible ongoing harmful consequences (capable of reasonable definition) to the plaintiff, even without any negligent conduct on the part of the defendant, cannot be disregarded in arriving at proper compensation.

108 As was pointed out in ***Newell v Lucas*** [1964-5] NSWR 1597 (at 1601 per Walsh J, with whose judgment Hardie and Asprey JJ agreed), the court must determine whether a comparison may be made between the plaintiff's condition prior to the injuries sustained by the defendant's negligence (including the plaintiff's economic and other prospects in that condition) and the plaintiff's condition and prospects after the injuries. Nothing in ***Watts v Rake*** and ***Purkess v Crittenden*** precludes the judge from carrying out this exercise.

109 Of course, if the evidence does not adequately establish the pre-existing condition or its possible consequences (as was

> the case in ***Purkess v Crittenden***), it would not be possible to carry out such a comparison and assessment. In regard to the possible consequences, a scintilla of evidence would not suffice. The evidence must be such that a reasonable person could draw from it the inference that the possible consequences contended for by the defendant existed (see McCormick, *Evidence*, 5th ed, para 338, p511)."

[58] In that case a claimant in the Dust Diseases Tribunal alleged that his employers had negligently caused him to be exposed to asbestos so that he suffered pleural disease. The defendants contended that the claimant suffered from another restrictive condition that was pre-existing and affected his lung functioning: obesity. It was therefore for the employer to demonstrate that the claimant's pre-existing condition was a contributing factor to his injury.

[59] Here the appellant accepted that he had a greater vulnerability because of the state of his lumbar spine.

[60] The primary judge's approach to this issue was conventional. She found of assistance McMeekin J's approach in *Bell v Mastermyne*. McMeekin J discounted an employee's past economic loss in the mining industry to 10 per cent. This was because he had a pre-existing degenerative spinal disorder and also suffered from Crohn's disease. His Honour then discounted the calculated amount by 35 per cent.

[61] Here, the parties were in agreement about the calculations. They also agreed that there had been a high demand for truck drivers and plant operators in Central Queensland. The case advanced below for the appellant for past economic loss was a calculation of the wages he would have earned if he had graduated to driving trucks at the mine site. That resulted in past economic loss to the date of trial of about $280,000. An alternative calculation was on the basis of the maintenance of the existing employment as a scraper driver which resulted in a figure of $190,000. Damages for past economic loss were sought in the sum of $240,000. That sum is maintained on this appeal.

[62] Below the respondent relied on the approach in *Bell v Mastermyne* and contended that the appellant's prospects of staying in the mining industry were no more than 10 per cent. The respondent submitted that the date at which the respondent's mine closed was the appropriate date to calculate loss of earning capacity, that is, 22 December 2009. Thereafter, the respondent allowed a likely wage that the appellant could have earned as a taxi driver. Without setting out those calculations, which are in her Honour's reasons, past economic loss contended for by the respondent below was approximately $100,000. The respondent's alternative calculation was on the basis that the appellant retained mine site employment to the date of trial in the figure of $214,500, applied 10 per cent to that figure and added 90 per cent of what he would have earned as a taxi driver. This resulted in a figure of about $110,000. This, her Honour observed, was "the high end of the plaintiff's calculation of past economic loss".

[63] Her Honour observed:

> "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."[42]

[64] Her Honour noted that the appellant was tenacious in obtaining the job and was technically capable of carrying it out for the two weeks before the accident, however:

> "…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."[43]

[65] Her Honour mentioned alternate ways of approaching the calculation of damages for past economic loss but said:

> "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."[44]

Her Honour then proceeded to assess damages on the basis that the appellant earned $17,468 in 24 weeks with the Mac Services Group and $29,996 for one year as a taxi driver, his average weekly net wage was $625. Before discount this amounted to $154,066. Her Honour said:

> "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."[45]

[66] The appellant is critical of this approach on the basis that the primary judge has treated as certain the cessation of mining employment after the closure of the respondent's mine site; that her Honour erred in using the average of the employment with Mac Services Group and as a taxi driver, because the appellant actually had a higher capacity for work than those figures would suggest; and her Honour had engaged in double discounting, which led to a discount of 20 per cent rather than 12 per cent.

Discussion

[67] In postulating that the appellant would work to the closure of the mine, the primary judge was using that event as a sensible device for measuring the chance of continuing employment in the mining industry – a period of some 16 months. Inherent in that conclusion is all that had gone before in her Honour's reasons – the

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42 AR 713; reasons [63].
43 AR 713; reasons [64].
44 AR 714; reasons [66].
45 AR 714; reasons [68].

appellant's prior back injury resulting in significant debilitating pain which made daily life manageable only with a high dosage of medication; his past "patchy" employment history; and his increased vulnerability to trauma. Apart from those few days at the mine, there was no evidence over the previous 18 years of a capacity to achieve higher wages than the average selected by her Honour. There was no double discounting; as her Honour evaluated the chance that the appellant would not maintain regular employment through the period after the closure of the mine, even at the rate of his pre-mine site employment (which had been selected by her Honour as the appropriate measure for calculations).

[68] In *Koven v Hail Creek Coal Pty Ltd*[46] McMeekin J observed of the prospects of remaining in employment in the mining industry:

> "It needs hardly to be said but work in the mining industry is not for everyone. It involves working in difficult conditions and usually in remote areas. Long periods can be spent away from home. Plant operation in such conditions has its risks as evidenced by the occasional claim for damages for personal injury that comes before the courts. There are more reasons to limit time in this industry than in many others particularly as one ages. It is not inherently surprising that the statistical evidence, limited though it is, points strongly to the likelihood that, on average, drag line operators do not generally stay on in the industry."[47]

His Honour also observed:

> "…the prospects of the plaintiff maintaining employment in the mining industry diminish. Plainly men do go on past 60 years of age in the industry. But they are relatively few. There are good reasons for the plaintiff to have continued in high paying work as identified in the submissions. However quite apart from he [sic] becoming wearied with age there is the prospect that the present mining boom will not last. I think that I can take judicial notice of the fact that commodity prices are at record levels and hence so are employment levels in that industry. But it has not always been so. Much depends on overseas demand for Australia's mineral wealth which is unpredictable."[48]

In that case his Honour assumed continued employment of a person with an injured ankle but discounted the possibility by 50 per cent.

[69] In McMeekin J's earlier decision of *Craddock v Anglo Coal (Moranbah North Management) Pty Ltd*[49] his Honour spoke of the discounting percentage for the vicissitudes of life. His Honour referred to Barwick CJ's description, in *Arthur Robinson (Grafton) Ltd v Carter*, of the contingencies which affect the assessment of loss of earning capacity:

> "Ill health, unemployment, road or rail accidents, wars, changes in industrial emphasis, so that industries move their location, or are

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46 [2011] QSC 51.
47 Reasons [44].
48 Reasons [48].
49 [2010] QSC 133.

> superseded by new and different techniques, the onset and effect of automation and the mere daily vicissitudes of life."[50]

[70] His Honour accepted the conventional discount of 15 per cent on the basis that it was "essentially an assessment of imponderables that apply generally".[51] He observed that the mining industry has "more than its share of risks …".[52] Observations by the Central Judge about the mining industry deserve considerable respect. His locations makes him experienced in this field of personal injury litigation.

Loss of future earning capacity

[71] At trial the appellant based his calculations for loss of future earning capacity on the assumption that he would have remained in employment until 67 years of age while the respondent contended for 65. He contended for a figure of $630,000 as appropriate for loss of future earning capacity on the basis that he would work for a further 12 years to age 67 and that the minimum earnings/position be his earnings as a taxi driver or with the Mac Services Group – the average of which the primary judge used. The appellant then argued for an increase over that average figure to take account of the chance that the appellant may have continued operating heavy equipment on mine sites earning significantly greater remuneration to retirement age.

[72] The respondent contended that there was no demonstrable reduction in the appellant's earning capacity compensable in damages, a contention plainly and correctly rejected by the primary judge. Alternatively, the respondent submitted for a sum of $500 net per week for a further 10 years resulting in $206,500 discounted at 25 per cent. Her Honour concluded:

> "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*[53] or *Smith*.[54] I will discount the calculated figure by 25 per cent. That results in future economic loss of $215,276."[55] (footnotes added)

[73] No error is discernable in this approach.

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50 *Craddock* per McMeekin J at 13 para [73] quoting Barwick CJ in *Arthur Robinson* at 459.
51 *Craddock* at 14 para [76].
52 *Craddock* at 14 para [77].
53 *Hopkins v WorkCover Queensland* [2004] QCA 155.
54 *Smith v Topp* [2003] QCA 397.
55 AR 714; reasons [71].

Conclusions about the assessment of damages

[74] Recently the Court of Appeal in Western Australia made some reference to past authorities in the High Court about the assessment of damages for personal injuries in an action for negligence.[56] Buss and Newnes JJA said:

> "28 …as Deane and Dawson JJ pointed out in ***Van Gervan v Fenton*** [1992] HCA 54; (1992) 175 CLR 327, 343, the assessment of damages for personal injuries in an action for negligence is not an exact science. The process of assessment must be governed by considerations of practical common sense in the context of the facts of the particular case. In a similar vein, in ***Paul v Rendell*** (1981) 34 ALR 569 the Privy Council observed:
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> > The assessment of damages in actions for personal injuries is not a science. A judgment as to what constitutes proper compensation in money terms for pain, suffering or deprivation of amenities of life, can only be intuitive, and the assessment of future economic loss involves a double exercise in the art of prophesying not only what the future holds for the injured plaintiff but also want the future would have held for him if he had not been injured (571).
>
> 29 Such an assessment has many of the characteristics of a discretionary judgment: ***Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd*** [1981] HCA 4; (1981) 146 CLR 336, 381. In order to justify the review by an appellate court of an assessment of damages on the grounds they are excessive, the compensation so assessed must be so excessive as to be beyond the limits of what a sound discretionary judgment could reasonably adopt: see ***Miller v Jennings*** [1954] HCA 65; (1954) 92 CLR 190, 197; ***Minchin v Public Curator of Queensland*** [1965] ALR 91, 96."[57]

Their Honours continued:

> "The plaintiff who seeks damages has the legal onus of proving loss of earning capacity and the extent to which that loss produces, or might produce, financial loss: ***Todorovic v Waller*** [1981] HCA 72; (1981) 150 CLR 402, 412; ***Medlin v State Government Insurance Commission*** [1995] HCA 5; (1995) 182 CLR 1, 3. If it is determined that there has been a loss of earning capacity it is then necessary, having regard to the established facts of the past and the probabilities of the future, to determine the damage that will flow from the loss of that capacity: ***Medlin v State Government Insurance Commission*** (19). As the plurality pointed out in ***Malec v J C Hutton Pty Ltd*** [1990] HCA 20; (1990) 169 CLR 638, 643, when the law takes account of future or hypothetical events in

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56 *Montemaggiori v Wilson* [2011] WASCA 177.

57 Reasons [28] and [29].

> assessing damages, it can only do so in terms of the degree of probability of those events occurring. Unless the chance is so low as to be speculative or so high as to be practically certain, the court will take that chance into account in assessing damages. The inquiry – the process of estimation of probabilities – is thus an imprecise and indeterminate one to be carried out within very broad parameters: ***State of New South Wales v Moss*** [2000] NSWCA 133; (2000) 54 NSWLR 536, 553. Accordingly, damages for financial loss likely to result from personal injury can only be an estimate, often a very rough estimate, of the present value of the prospective loss: ***Todorovic*** (413)."[58]

[75] Her Honour referred to all the relevant evidence. She applied the correct legal principles in reaching her assessment. It was incumbent upon her to bring her judgment to bear with respect to the evidence, which she did. The appellant contends her Honour ought to have embraced more fully the evidence of Dr Fenner, Dr Campbell and the occupational therapist, Ms van der Heyden. Her Honour had the benefit of seeing and hearing from the appellant. While she accepted him as, overall, credit worthy, and to be admired for his determination in seeking employment while the subject of so much pain, she did not fall into error in injecting a dose of reality into his evidence that no activities aggravated his pre-existing back condition. As her Honour recognised, only large doses of narcotics kept him going and his past employment history demonstrated that, in truth, he could not maintain full employment in positions that were relatively demanding in terms of his back.

Conclusion

[76] I am not persuaded that the appellant has demonstrated any error in her Honour's approach to her assessment of his damages.

[77] **Order**

[78] I would dismiss the appeal with costs.

[79] **DAUBNEY J**: I respectfully agree with White JA.

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58 Reasons [30].