SUPREME COURT OF QUEENSLAND

CITATION:	*Boon v Summs of Qld Pty Ltd t/a Big Bill's Bobcats* [2015] QSC 162
PARTIES:	**JOSHUA DAVID BOON** (plaintiff) **v** **SUMMS OF QLD PTY LTD T/A BIG BILL'S BOBCATS (ACN 140 816 119)** (defendant)
FILE NO/S:	BS No 789 of 2014
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	11, 12, 13 March 2015
JUDGE:	Ann Lyons J
ORDER:	**Judgment for the defendant.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – STANDARD OF CARE – GENERALLY – where the plaintiff was stabbed with a Leatherman knife in his left hand during a lunch break at a construction site by an employee of the defendant company – where the plaintiff suffered physical and psychiatric injuries – whether the employee of the defendant company was negligent – whether the defendant company is vicariously liable for the negligent act of its employee – whether the defendant company is personally liable for breaching its duty to take reasonable care not to expose the plaintiff to a foreseeable risk of injury *Civil Liability Act* 2003, s 9, s 59, s 61, s 62 *Civil Liability Regulation* 2003, s 6, Sch 4, Sch 6A *Howl at the Moon Broadbeach Pty Ltd v Lamble* [2014] QCA 74, cited *Fox v Wood* (1981) 148 CLR 438, cited *Jones v Dunkel* (1959) 101 CLR 298, cited *Klein v SBD Services* [2013] QSC 134, considered *Kriz v King & Anor* [2006] QCA 351, followed *Lister v Hesley Hall Ltd* [2002] 1 AC 215, cited

New South Wales v Lepore (2003) 212 CLR 511, cited
Seage v State of New South Wales [2008] NSWCA 328, followed
Wyong Shire Council v Shirt (1980) 146 CLR 40, followed

COUNSEL:	R Lynch for the plaintiff A Messina for the defendant
SOLICITORS:	Shine Lawyers for the plaintiff Cooper Grace Ward for the defendant

The plaintiff's claim

[1] The plaintiff claims damages in negligence against the defendant company on the basis that it is in breach of its duty to take reasonable care not to expose him to a foreseeable risk of injury and/or is vicariously liable for the negligent act of its employee, Tim Summerfeldt (Summerfeldt), in relation to an incident at work on 16 September 2011.

Background

[2] The plaintiff is 26 years old. He has worked as a labourer and concreter for various employers since 2007. In 2011, he was employed as a labourer by Globe Labour Services Pty Ltd (Globe) which had been contracted by Downer EDI Works Pty Ltd (Downer) to provide workers at a site located on Highbury Drive at Redbank Plains in Queensland (the Site). An asphalt road was being constructed on the Site which was controlled and monitored by Downer.

[3] The plaintiff operated a paver machine on the Site and the defendant company was subcontracted by Downer to remove and replace asphalt at that Site. Downer also engaged the defendant company to supply a skid steer loader and operator (also known as bobcats) and Summerfeldt was contracted to operate the bobcat.

The Incident

[4] The facts surrounding the incident are largely uncontested. On 16 September 2011, the plaintiff and Summerfeldt were working at the Site. The men knew each other and had worked together on prior projects undertaken by Downer. There was no designated lunch area and Summerfeldt was taking a lunch break on a grass verge adjacent to the Site which workers used to have lunch and take breaks. It was an area that was frequently traversed by workers.

[5] The plaintiff alleges that around 2pm Summerfeldt was crouching down eating an orange and was using a Leatherman knife (the Knife) to cut and peel the orange. He alleges that as he was walking past Summerfeldt, Summerfeldt stood up from his crouching position holding the Knife in his hands and, without intending to do so, stabbed the plaintiff in his left hand.

[6] The plaintiff gave evidence about the incident. He recalled that everyone had finished having lunch on the grassed area and as he was walking along the footpath to his car, which was around the corner, the following occurred:

> "---And, yeah, as I was walking there I was walking along the footpath and next thing I know I had a shooting pain in my hand, and I've pulled my hand back and it shot - it squirted out some blood. And then - then, yeah, so I've sort of grabbed my hand and - and Tim [Summerfeldt] was there and he sort of, you know, grabbed it after that as well and held it till the ambulance got there."[1]

The Knife

[7] The plaintiff had initially pleaded that the Knife was nine inches and non-retractable, but he conceded under cross-examination that he was unsure whether the Knife was retractable or not.[2] Having seen the Knife earlier on the day of the incident, he considered that the blade was at least six inches long.[3] The defendant argued that the Knife was a multi-tool containing various retractable tools, including a retractable blade, which was 180mm fully extended and that knives and tools of that nature were required on the Site to cut a product called Bio-Tac from a roll so it could be placed under the asphalt to prevent it from cracking.

[8] William Summerfeldt is the director of the defendant company and the father of Tim Summerfeldt. He gave evidence at trial concerning the Knife and said that he gave his son a multi-tool Leatherman knife for his birthday, and described it as having pliers, screwdrivers, files and a saw.[4] Mr William Summerfeldt identified the photo of a Leatherman multi-tool knife[5] as similar to the one which he had given his son for his birthday. That photo clearly shows that the Knife was extremely sharp.

[9] Irrespective of the length and retractability of the Knife, there is no evidence to indicate that the incident occurred other than as described by the plaintiff. The plaintiff was clearly stabbed in the hand by the defendant and there is no doubt he has sustained the injuries he described.

Injuries and treatment

Physical injuries

[10] As a result of the incident, the plaintiff's left hand was lacerated. There is no doubt that he suffered extensive injuries to two arteries, two tendons and four nerves in his left hand. He ultimately underwent surgery on three occasions. He was initially admitted via ambulance to the Princess Alexander Hospital and underwent surgery under a general anaesthetic on 19 September 2011. He also underwent surgery on 24 January 2012 and

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1 T 1-16, ll 37-41.
2 T 1-52, ll 15-16.
3 T 1-18, l 18.
4 T 2-39, ll 43-45.
5 Exhibit 8.

20 July 2012 to correct a neuroma. He also subsequently required extensive hand therapy and had considerable periods of time off work.

Psychiatric injuries

[11] In addition to the physical injuries sustained, the evidence indicates that he struggled with his return to work and was lacking in motivation, was turning up late and was angry and irritable. The plaintiff argues that he has experienced major depression since the accident whereas the defendant argues that "the plaintiff's symptoms are more likely caused by chronic adjustment disorder with depressed and anxious mood" which will "substantially improve in the future with treatment".

The plaintiff's evidence

[12] The plaintiff gave evidence that he left high school at the age of 16 because he "wanted to get in the workforce".[6] He observed that he has worked for various employers, performed many physically demanding tasks in the course of his employments, and helped his father build a house. His role as a concreter was particularly physically demanding. He commenced working in asphalt construction through Globe in February 2011 on a full-time casual basis and consistently worked long hours. He had performed well throughout his employment with Globe prior to the Incident, and was hoping to obtain a permanent position with Downer.

[13] The role of a paver operator, which was the role that the plaintiff was required to undertake on the Site, was described as follows:

> "Well, you described yourself as the paver operator?---Operator. Yes.
>
> And the reason you're described as a paver operator is because you operate the paver?---Yes.
>
> And there are people who are designated in a crew to do the labouring work. Isn't that true?---Yes.
>
> And their role is to effectively use shovels and rakes and whatnot to do the heavy labouring?---Yes.
>
> And the paver, I take it, is the big machine in which the asphalt goes and that lays it down on the road. Is that right?---Yes.
>
> And it moves along really slowly and - - -?---Yes, it does.
>
> Is it right to say that you as the paver operator, you control where it's turning and - - -?---Yes.
>
> - - - forward and back and all that sort of stuff. Doesn't go fast, though, does it?---No.
>
> Snail's pace, effectively?---Yes."[7]

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6 T 1-9, ll 29-30.
7 T 1-47, ll 22-44.

[14] The plaintiff indicated that a paver operator requires the assistance of two level hands who stand on the left and right hand side of the machine, and are essentially responsible for determining the level at which the paver needs to be on the road. The process for the construction of a road was briefly outlined by the plaintiff who explained that the paver operator is required to lay down the asphalt of the road and then the steel roller and multi rollers effectively roll out the road to make it smooth. He also explained that Bio-Tac is generally used in areas where water is present or where flooding is likely to occur and is essentially applied underneath a road to prevent water moisture from rising. He conceded that he had seen workers cut the Bio-Tac with a Stanley knife when it was required.

[15] The plaintiff gave evidence that he was in a good relationship with his then partner, Jade Guthrie, prior to the incident and enjoyed socialising with friends, cooking and gardening regularly. He said once he became aware of the fact that he was going to become a father, it prompted him to become more focused on work as he thought it was important for him to be a provider.

[16] After the incident, the plaintiff gave evidence that he was very restricted with what he could do, particularly in the immediate weeks following his release from hospital. His hand was in a cast and he was given Endone to relieve his pain. Following the first surgery, the plaintiff stated that his left hand throbbed if he did not keep it elevated and he would have "shooting pains and irritation".[8] He said that he stayed at home and retreated to watching TV. He said he could not effectively do anything around the house or cook, so his ex-partner began to do the housework and cooking. He also needed assistance with showering and with putting his clothes on, all of which were provided by his ex-partner. He also stated that someone else, usually his ex-partner's father or his brother, took care of mowing the lawn and the edging.

[17] The plaintiff stated that when he returned to work at Globe's office on 29 November 2011, he undertook restricted duties which consisted of filing, and whilst it did not require him to use his left hand much he still felt discomfort and cramping. He was unable to drive his manual car and his ex-partner would drive him from place to place. He then underwent the second surgery on 24 January 2012:

> "And after the surgery can you tell us about the - after that surgery what the state of your left hand was?---Wasn't really much notice - noticeable change. I had - relieved some scar tissue, I think, and so it was a bit easier on the palm, but I still experienced the same sensations in my fingers."[9]

[18] Following the second surgery, the plaintiff's left hand was again immobilised and placed into a splint. He further stated that he required the same assistance which he had after the first surgery.

[19] After his son, Jaden, was born on 6 February 2012, the plaintiff said that he had difficulties in changing and holding his son and confirmed that Jade did most of the nursing at the beginning.

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8 T 1-19, l 14.
9 T 1-21, ll 10-13.

[20] On 9 February 2012, the plaintiff said he returned to suitable duties with Globe and continued undertaking filing work only. He said that he still did not enjoy this type of work, and he subsequently became easily angered and upset, lacked motivation, had low enthusiasm levels, started manifesting anti-social tendencies and began to gamble to excess. He also noted that his personal relationship with his ex-partner began to deteriorate because of his anger and moods and lack of communication, which he conceded to be a problem. He also stated that the reason he engaged in excess gambling was due to boredom.

[21] The plaintiff ultimately commenced full-time employment with Downer on 26 March 2012 and was given a job driving a multi roller. He said the work he was doing for Downer was not similar to the work he had performed when he was employed by Globe, as "it's sort of, you know, back from everything. Just, you know, the roller going back and forth".[10] The plaintiff also noted that driving the multi roller would cause him discomfort at times and "tingly" sensations in his left hand, but this did not prevent him from performing his duties with Downer.

[22] He gave evidence that the employment with Downer was not successful in the end because he lacked motivation and had a poor work attitude. On 5 June 2012, whilst working on the Airport Link, he said he had an altercation with a supervisor employed by Thiess John Holland, and this led to the termination of his employment with Downer. The plaintiff conceded that he had acted "out of line" and would have reacted differently if he had encountered similar situations prior to the incident.

[23] Under cross-examination, the plaintiff conceded that he was not directly frustrated with the supervisor but rather the working conditions of the project. He was particularly frustrated with the ventilation inside the tunnel, as he was breathing in fumes from the asphalt of the machines. He complained that the fans inside of the tunnel were not helping with the working conditions of the project and stated that a number of meetings were held about this issue and many other workers were also frustrated.

[24] The plaintiff also accepted that he was not turning up to work on the Airport Link project and that he maintained a general attitude below the expected standard. He stated that he started displaying this attitude after his injury in September 2011. The plaintiff stated that he sought help with respect to his problems with depression, anger and gambling addiction and went to see a counsellor at the Strathpine GP Super Clinic who he claims to have seen "six or seven times".[11] The plaintiff said that he was offered anti-depressants but refused to take them and stated as follows:

> "And why was that?---Because my father has always told me that, you know, that pills don't help anything and that really all they're going to do is have a temporary fix on the problem and if not make it worse."[12]

[25] The plaintiff agreed he should have undertaken further counselling but he did not pursue further counselling after the initial period because the counsellor he had seen moved

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[10] T 1-23, ll 15-16.
[11] T 1-25, l 23.
[12] T 1-25, ll 40-43.

interstate or was transferred and he did not feel up to telling his whole story again to another person.

[26] Following the termination of his full-time employment with Downer, the plaintiff underwent a third surgery on 20 July 2012. His hand was immobilised again and he required the same assistance which he had required after the first and second surgeries.

[27] Following that third surgery, the plaintiff indicated that he commenced working for various employers on a casual basis. He was able to tip trucks, do paperwork, lift and carry shipping containers and undertake Quality Assurance (QA) work. However, whenever he was required to perform physical work, such as operating machines and raking, he said that he "suffered discomfort, like cramping and what not after excessive – excessively doing it".[13] He also said that he did not and was not able to do any "wacker plating or jackhammering" and whilst he is able to do QA work, he does not want to be working on the ground and would prefer to operate machinery so he can be more involved in the job.

[28] He also said that whilst he enjoys concreting, he would not be able to do the job because it is too physically demanding as it involves "raking, trowelling, screeding, jackhammering. Just basically everything."[14] In relation to the hierarchy of positions on a construction site, he stated that the QA work, leading hand, supervisor and foreman positions are all at a higher level.

[29] The plaintiff further agreed that there is nothing preventing him from becoming a level hand but noted that it was at the discretion of the owner or supervisor and it was not something that he would like to pursue. The plaintiff confirmed that he would like to be a plant operator in asphalt construction.

[30] In his evidence, the plaintiff indicated that he has struggled to find consistent and stable work. He agreed that his taxable income was $22,411 in the financial year ending June 2008, $38,082 in the financial year ending June 2011, and $61,859 in the financial year ending June 2012, but disagreed that he is now earning more than he did prior to his injury.

[31] The plaintiff conceded under cross-examination that his injuries do not prevent him from working in asphalt construction and agreed that economic factors such as the length of a project or whether the employer has work would prevent him from working in asphalt construction. He also agreed that construction jobs tend to run for periods of time and that workers are required to find work elsewhere once a job is finished. However, he noted that in asphalting there is usually always a road that needs to be repaired and such work was consistent when he was working for Downer. Whilst he has been working consistently in asphalting on various different projects for other employers since his employment was terminated by Downer, there have been periods of unemployment.

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[13] T 1-28, ll 30-31.
[14] T 1-33, ll 7-8.

[32] The plaintiff noted that workers were paid different rates depending on the level of their experience and the jobs that they could perform as opposed to the actual jobs that they were performing. The plaintiff stated that he has worked with plant operators who were 50 or 60 years old and labourers who were 30 or 40 years old.

[33] The plaintiff confirmed that he required 14 hours assistance each week (approximately 2 hours each day) following his release from hospital after each surgery.

Other evidence

[34] Whilst Tim Summerfeldt was not called to give evidence, it would seem that there was no real controversy about the circumstances surrounding the incident, but some controversy about the Knife used. In the circumstances, I consider it was appropriate for Tim Summerfeldt's father, who had given him the Knife and was the director of the defendant company, to give evidence about the Knife. The plaintiff argues that the rule in *Jones v Dunkel*[15] should be applied and an inference drawn that Tim Summerfeldt's evidence would not have assisted the defendant. I do not consider such an inference is required as I accept the plaintiff's version of events, which is not in fact disputed by the defendant.

[35] The plaintiff's mother, Susan Boon, gave evidence which was also largely uncontroversial. She gave evidence that the plaintiff had moved back to live with her about two years ago in February 2013 and that at that point he was "withdrawn, sullen, didn't want to communicate, snappy, you know."[16] She considered that his attitude was due to sitting around the house all day and not working whilst he was injured. He also did not like the special duties he was placed on when he did return to work and he became unmotivated.

[36] She indicated, however, that since Christmas of 2014 his attitude has improved with him describing that Christmas as "the best Christmas he'd had in years".[17] He also now has a good relationship with his son Jaden and his ex-partner even though his relationship with his former partner has terminated.

[37] The plaintiff's ex-partner, Jade Guthrie, also gave evidence and she described the plaintiff as someone who loved cooking prior to his injury. She stated that after his operations he had a splint on his hand which meant not only that he could not cook or do any housework, but that he needed assistance with showering, dressing and other activities, including driving and mowing. She stated he was not as disabled after the second and third surgeries, but he still required assistance. Ms Guthrie gave evidence that he became unmotivated after his accident as a result of sitting around all day and after he did not like being on light duties. She stated that he became very antisocial after the accident and took up gambling online and played poker machines. She stated that he did provide some assistance after Jayden was born in February 2012. They broke up in March 2013.

Expert medical opinion

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15 (1959) 101 CLR 298.
16 T 1-77, l 41.
17 T 1-78, l 12-13.

[38] The plaintiff has been the subject of assessment by two experienced Orthopaedic Surgeons, Dr David Gilpin and Dr Stephen Coleman, who specialise in surgery of the upper limb. The plaintiff has also been assessed by two Psychiatrists, namely Dr Axel Estensen and Dr John Chalk.

Dr Gilpin's evidence

[39] On 23 April 2013, the plaintiff was assessed by Dr David Gilpin, Orthopaedic Surgeon, who[18] assessed him as suffering from the following injuries:

(a) 100% division of flexor tendons left ring finger;

(b) 100% division of digital nerve and arteries left ring finger;

(c) 50% division of radial digital nerve middle finger;

(d) 100% division of ulnar digital nerve index finger.

[40] Dr Gilpin was of the view that the plaintiff has made a good recovery from the point of view of the tendon function, but still has reduced function on account of the sensory nerve injuries. He considered the plaintiff was at a point of maximum medical recovery and he considered that the plaintiff's symptoms are likely to remain to a large degree the same for the foreseeable future. He did not believe that the plaintiff was at risk of any degenerative disease or any residual effects of his injury. He considered that he could undertake some forms of work, although he accepted that his employability in the future was likely to be limited, particularly with respect to heavy lifting or gripping type activities. He did not consider that the plaintiff's working life would be foreshortened but that he will struggle with some symptoms of pain.

[41] Dr Gilpin assessed a 7% whole person impairment directly attributable to the effect of the injury, applying the Australian Medical Association (AMA) 5 methodology.

Dr Coleman's evidence

[42] Dr Stephen Coleman, Orthopaedic Surgeon, assessed the plaintiff on 6 July 2013.[19] At that time, Dr Coleman noted the plaintiff's report of reduced sensation in the second web space and on both sides of the ring finger, his difficulty in gripping small objects such as buttons and that he indicated that he drops things. Dr Coleman considered that overall he had regained good function of the hand, apart from the reduced sensation, that the neuroma tenderness has settled and he did not use medication.

[43] Dr Coleman assessed a whole person impairment of 6% which will be permanent according to the AMA 5 Guidelines. Dr Coleman noted that the plaintiff was managing asphalt work and preferred that occupation but whilst the plaintiff had done concreting in

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[18] Exhibit 1, B1.
[19] Exhibit 1, B2.

the past, his evidence was that he could not hold a trowel or do the constant hand work required of a concreter. Dr Coleman stated that it would preferable for the plaintiff to operate machinery rather than labouring work with the main concern being reduced sensation and that constant gripping may cause cramping and discomfort. He did not consider that he required further medical treatment and that the condition was now stable

[44] Dr Coleman noted that the plaintiff did need assistance from his partner when he had the splints on, and in the post-operative periods, but that he was now fully independent.

[45] I note that essentially Dr Coleman generally agreed with the report of Dr Gilpin. It would seem clear that the plaintiff is currently in full-time employment, although I accept that he still experiences pain and cramping in his hand, as well as reduced sensation and manipulation in his fingers.

[46] On the basis of that evidence, I consider that I should accept Dr Coleman's assessment of a 7% whole person impairment as the appropriate figure for the assessment of the physical injuries. I consider that the appropriate item in Schedule 4 of the *Civil Liability Regulation* 2003 is Item 119.

Dr Estensen's evidence

[47] The plaintiff was assessed by Dr Estensen, Consultant Psychiatrist, on 14 May 2013[20] and was diagnosed as suffering from a Major Depressive Episode of mild/moderate severity as a consequence of his physical injury. He considered that the loss of a previously enjoyed job, together with the physical impairment and difficulties in performing light duties, led to increased irritability and conflict which resulted in a decline in his mood. Dr Estensen assessed the plaintiff's PIRS (the psychiatric impairment rating scale) rating under the *Civil Liability Regulation* 2003 at 15%. He considered that he required further treatment in the form of ten sessions with a psychologist at a cost of $1,800.00 and anti-depressant medication.

[48] Dr Estensen noted that those who suffer anxiety and depression routinely have relationship difficulties and that the major depressive episode has contributed to the relationship breakdown rather than the relationship breakdown causing his major depressive episode. Dr Estensen indicated that people suffering from anxiety and depression routinely struggle in the workplace, begin to experience difficulties with workplace relationships and commonly are drawn into conflict in the workplace. Dr Estensen stated that the anger management issues, which had been reported in his employment with Downer, is consistent with the pattern of behaviour seen in people suffering from anxiety and depression who return to the workplace and are unable to manage their symptoms effectively in the presence of work colleagues. Dr Estensen stated that the features of this condition include irritability, frustration, a loss of energy and motivation and a loss of one's self-esteem. He stated that these are all impediments to finding and maintaining employment.

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[20] Exhibit 1, B3.

[49] Dr Estensen was initially of the view that the condition is not greatly amenable to treatment. He stated that the damage has already been done and although the symptoms can be to some extent ameliorated by treatment, it is a condition that was precipitated by a physical injury and the ongoing impact and effects of the physical injury continue to perpetuate the psychiatric injury. He did not consider that the condition would necessarily improve at the conclusion of litigation.

[50] Dr Estensen's initial conclusion was that whilst the plaintiff's PIRS rating is 15%, his AMA 5 Based Rating was 18%. Dr Estensen accepted in cross-examination that the improvements experienced by the plaintiff, since the consultation in May 2013, supported the conclusion that the plaintiff's condition had improved between May 2013 and October 2013 when the plaintiff consulted with Dr Chalk. He accepted that those improvements resulted in Dr Chalk's PIRS rating of the plaintiff.

Dr Chalk's evidence

[51] Dr John Chalk, Psychiatrist, assessed the plaintiff on 9 October 2013.[21] It should be noted that at the time the plaintiff saw Dr Chalk, he had recently obtained work for an asphalt company and was enjoying the work. The history given by the plaintiff to Dr Chalk in relation to his difficulty when he returned to work after the accident was that he was lacking motivation, was turning up late, was angry and irritable, got into a brawl with one of the supervisors and this ultimately led to the termination of his employment.

[52] Dr Chalk assessed a chronic adjustment disorder with a depressed and anxious mood. Dr Chalk did not consider that any pre-existing condition was of any great relevance in the development of his current diagnosis. He did note that the plaintiff may have had some difficulties in the past with impulsivity and that these have certainly been exacerbated by his current adjustment disorder.

[53] Dr Chalk was of the opinion that the plaintiff's condition might improve, thus reducing his whole person impairment. Dr Chalk noted that although the plaintiff is working on a full-time basis and could continue to do so, he may run into problems in the workplace because of his anger and irritability.

[54] Although Dr Chalk did not consider the plaintiff had a major depressive disorder, he did consider that the plaintiff very clearly has had a significant psychiatric illness.

[55] Dr Chalk considered that with appropriate treatment, the plaintiff's capacity to form a relationship may well improve, together with his concentration, and he would anticipate that his level of impairment may well halve.

[56] Dr Chalk did not agree with Dr Estensen's diagnosis and, in his opinion, the plaintiff's symptoms are of chronic adjustment disorder with a depressed and anxious mood.

[57] Adopting the PIRS rating system, Dr Chalk concluded that the plaintiff is median class 2 with a total score of 5. That equates to a whole person impairment percentage of 5%. Dr

[21] Exhibit 1, B4.

Chalk expressed the view that, with appropriate treatment, the plaintiff's level of impairment may well halve.

[58] I consider that the report of Dr Chalk documents a notable improvement in the plaintiff's mental condition. Those improvements have resulted in an improvement in the plaintiff's ability to attend and maintain employment. The evidence of Susan Boon also supports an improvement in the plaintiff's condition since 2014 and the plaintiff himself concedes that life has indeed improved. Given that documented improvement and the fact he is now employed, I consider that Dr Chalk's assessment should be preferred. It would seem to me that given the plaintiff's recent improvement that the appropriate diagnosis is indeed one of chronic adjustment disorder with depressed and anxious mood rather than a major depressive episode. I therefore consider that the appropriate item in Schedule 4 of the *Civil Liability Regulation* 2003 is Item 12 and I accept Dr Chalk's opinion that the plaintiff has a whole person impairment of 5% with respect to the psychiatric injury.

Is the defendant company vicariously liable for Summerfeldt's actions?

[59] As I have previously indicated, I do not consider that there is any real issue as to how the accident occurred. Tim Summerfeldt was eating lunch and peeling an orange with a knife, which I concluded was the Knife, given the evidence of his father and the plaintiff's evidence that it was a Leatherman knife. The plaintiff's evidence was that he was unintentionally stabbed in the hand as he walked past Summerfeldt who was in the process of standing up from a crouched position. It is clear from the plaintiff's description of the episode that the incident occurred when he and Summerfeldt were both in motion. He was walking past and Summerfeldt was in the process of standing up from a low position.

[60] Whilst there was a contention between the parties as to whether it was a retractable knife, I do not think it actually matters. It was clearly a knife which has a long sharp blade which resulted in a significant injury to the plaintiff's hand. I also accept that such an item would have been necessary on the Site to cut the Bio-Tac material which was required in the asphalting process.

[61] I accept that the plaintiff required three bouts of surgery which caused him pain, distress and inconvenience. I also accept that he has some long term consequences as a result of that injury.

[62] The real issue, however, is whether the defendant company is liable for the plaintiff's loss. In this respect, it is argued that Tim Summerfeldt was negligent in standing up with the Knife in his hand and the defendant company is therefore vicariously liable for the actions of its employee. The plaintiff also argues that the defendant company owed a duty of care to the plaintiff in any event independently of its vicarious duty.

Was Tim Summerfeldt negligent?

Duty of care

[63] The plaintiff argues that Summerfeldt's actions were negligent. The basis of that argument is that the blade of the Knife was sharp and there was a risk of harm which was great if it came into contact with another person. It is argued that there were other people working at the Site and that Summerfeldt was rising from a crouched position with the blade of the Knife exposed and he did not see the plaintiff coming towards him, or saw the plaintiff and chose not to take any action to move, and the blade of the Knife came into contact with the plaintiff. It is argued that Summerfeldt did not look, or did not look properly, before he rose from his position with the blade exposed.

[64] The plaintiff argues that the injury was foreseeable and significant and a reasonable person in Summerfeldt's position would have taken precautions. It is argued that the precautions required were minimal because all that Summerfeldt had to do was to look properly before he rose, or not rise until the plaintiff had safely passed, or put the blade away before he rose, or render the blade benign by pointing it towards the ground as he rose. Accordingly, it is argued that in those circumstances Summerfeldt was clearly negligent because he rose without checking to see if there was anyone nearby and as he rose the sharp blade of the Knife was exposed and he did nothing to prevent or minimise what was a foreseeable risk of injury to others.

[65] It is not entirely clearly to me that Summerfeldt's actions were negligent. The plaintiff concedes that the stabbing was unintentional, but argues that Summerfeldt failed to keep a proper lookout. Given the scenario as described by the plaintiff, I conclude that the plaintiff was in fact in a better position to see Summerfeldt than vice versa. The plaintiff was upright at all times and moving towards Summerfeldt, whereas Summerfeldt was crouching and it would appear he did not move from his spot. Summerfeldt clearly did not see the plaintiff, but the plaintiff obviously had observed Summerfeldt given that the plaintiff pleaded that Summerfeldt was in a crouched position and stood up with the Knife in his hand.

[66] Given that uncontested scenario, it is clear that it was the plaintiff who moved towards Summerfeldt and he must have seen him rising. To come into contact with the Knife, the plaintiff must have been moving fairly close to Summerfeldt and must have been within an arm's length of Summerfeldt given his injury. There is no evidence that Summerfeldt moved from his position as he rose. There is simply no evidence that Summerfeldt lunged at the plaintiff, came towards him, or even moved from the spot he was crouching on. The evidence would seem to be that he rose on the spot. There is no evidence that Summerfeldt was waving the Knife about or any evidence at all as to how he held it.

[67] There is no doubt that the plaintiff did not see the Knife or expect Summerfeldt to be holding a very sharp knife, although he stated in evidence that he had seen Summerfeldt with the Knife earlier in the day. It would seem to me that the undisputed evidence is that the plaintiff moved towards Summerfeldt. The plaintiff must have walked very close to Summerfeldt and entered his space unknown to Summerfeldt because as Summerfeldt rose he obviously did not expect the plaintiff to be so close to him. The accident did not happen simply because Summerfeldt had a knife in his possession. The accident happened because the plaintiff moved very close to Summerfeldt who was using the Knife or had used the Knife to peel an orange.

[68] It would seem to me that the plaintiff came towards the Knife which he did not see. A question surely remains as to whether the plaintiff was in fact keeping a proper lookout, as he walked past a group who were obviously taking a lunch break.

[69] I accept that it is possible that if Summerfeldt was using a sharp knife and if someone came within an arm's length of him without observing the Knife their hand might come into contact with the sharp blade of the Knife and be injured. Was it a significant risk? A knife with a six inch blade is not a small object and having seen a photo of the type of knife in question, it would seem to me that it is in fact quite visible and easily identifiable as a sharp knife. It is not alleged that the Knife was concealed in any way and it is not alleged that Summerfeldt was moving through a group of people with the Knife.

[70] In this regard, s 9 of the *Civil Liability Act* 2003 is relevant and is as follows:

> "**General principles**
>
> (1) A person does not breach a duty to take precautions against a risk of harm unless—
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
>
> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
>
> (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things)—
>
> (a) the probability that the harm would occur if care were not taken;
>
> (b) the likely seriousness of the harm;
>
> (c) the burden of taking precautions to avoid the risk of harm;
>
> (d) the social utility of the activity that creates the risk of harm."

[71] The defendant argues that Summerfeldt was not in fact negligent and relies on s 9 in this regard. Counsel for the defendant argues that any duty of care owed by Summerfeldt to the plaintiff to take precautions against a risk of harm only gives rise to the finding of a breach if the risk was foreseeable, the risk was not insignificant, and a reasonable person in Summerfeldt's position would have taken certain precautions. The defendant argues that Summerfeldt was taking adequate care of his use of the Knife and that, at the time of the incident, Summerfeldt acted reasonably in respect of a risk of harm that was insignificant and obvious to a reasonable person in the plaintiff's position.

[72] The defendant argues, therefore, that the injury was not foreseeable, was insignificant and such that a reasonable person in Summerfeldt's position would not have taken any further precautions in respect of the risk of injury.

[73] The test for a breach of duty of reasonable care was stated in *Wyong Shire Council v Shirt*[22] where Mason J stated:

> "A risk of injury which is quite unlikely to occur, such as that which happened in *Bolton v Stone*, may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable.
>
> In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.
>
> The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors." [23]

[74] Ultimately, I do not consider that the plaintiff has established, on the balance of probabilities, that a reasonable person in the position of Tim Summerfeldt would have foreseen that using a sharp knife, such as the Leatherman, to peel an orange during lunch would have involved a risk of injury to a class of persons nearby, which would have included the plaintiff. It would seem to me that the plaintiff is arguing that, because Summerfeldt had the Knife in his hand, he is responsible for any injury which occurred to any person in the vicinity, irrespective of that person's actions.

[75] I consider that the risk of a person coming into contact with the Knife as Summerfeldt was using it to peel an orange or had just used it to peel an orange during a meal break was insignificant. I do not consider that a reasonable person in the position of Tim Summerfeldt would have done any more than he did to avoid the risk of injury, because the magnitude of the risk was low and the probability of its occurrence was also low.

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[22] (1980) 146 CLR 40.

[23] *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47-48.

People use knives in the presence of each other every day without harm occurring. Normally, one person does not get so close to another person who is using a knife so as to be injured.

[76] In my view, the evidence does not indicate, on the balance of probabilities, anything else which Tim Summerfeldt might have done to have managed the risk of injury. I consider that the plaintiff has failed to discharge the onus of proving, on the balance of probabilities, that Tim Summerfeldt breached the duty of care owed to the plaintiff to take reasonable care to avoid a foreseeable risk of injury. I do not consider that it has been established that Tim Summerfeldt was negligent.

Was the defendant company negligent?

[77] Whilst the plaintiff has relied on the decisions of *Howl at the Moon Broadbeach Pty Ltd v Lamble*,[24] *Lister v Hesley Hall Ltd*,[25] and *New South Wales v Lepore*[26] to argue that the defendant company is liable for Summerfeldt's actions because his negligent actions were so closely connected with his employment that the company should be held responsible, it is clear that as the plaintiff has failed to prove that Summerfeldt was negligent then the case of vicarious liability must also fail.

[78] In relation to the second aspect of the plaintiff's claim, which is that the defendant company was itself liable, that proposition is based on an argument that the defendant company was negligent in permitting Tim Summerfeldt to use the Knife during the course of his employment when it ought to have known that doing so would expose other workers, such as the plaintiff, to a risk of injury and that it failed to instruct or adequately instruct Summerfeldt that he was not to use the Knife at any stage during the course of his employment at the premises.

[79] Alternatively, it is argued that Summerfeldt should have been instructed not to use the Knife when he was in close proximity to other workers and not to use the Knife in an area that was frequently traversed by workers or not to use the Knife in a designated eating area. The defendant company accepts that it allowed Summerfeldt to use the Knife at the workplace and the fact that the incident occurred during the lunch break is, I accept, irrelevant. I also accept that the nature of the work was such that a knife or other sharp implement was required to cut the Bio-Tac to be placed under the asphalt. I accept that the injury occurred in the course of Summerfeldt's employment and that there was a direct connection between the presence of the Knife and the workplace.

[80] In my view, however, the use of the Knife during a lunch break posed a risk of injury to a class of persons, which included the plaintiff, which I have already indicated that I consider was insignificant. In any event, even if it was not insignificant, what was the defendant company required to do? What steps should it have taken to eliminate the risk? In this regard, the decision of the New South Wales Court of Appeal in *Seage v State of New South Wales*[27] is relevant and pertinent:

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[24] [2014] QCA 74.
[25] [2002] 1 AC 215.
[26] (2003) 212 CLR 511.
[27] [2008] NSWCA 328.

> [30] Even if (contrary to my view) a reasonable person in the employer's position would have assessed the risk as a "not insignificant" one, the reasonable person would not in my view have taken any steps to attempt to reduce or eliminate that risk. That is, the reasonable person would at least have assessed the probability of occurrence as "very low" and would not have taken any action "by way of response to the risk".
>
> ...
>
> [32] It would be a large step to take to find as a general proposition that employers have an obligation to warn or take other precautions in relation to everyday activities in which employees might incidentally engage in the course of their employment, being activities which if not performed with care might lead to injury. Should employers reasonably be expected to warn employees not to cut themselves when using knives in the staff kitchen? Or not to scald themselves when pouring water which they have boiled for their tea or coffee? Or to be careful when ascending or descending steps? Or not to bump into furniture?" (Citations omitted)

[81] I consider that the probability of the occurrence of the injury which in fact occurred was actually low. I am not satisfied that a reasonable employer in the position of the defendant company would have taken the steps argued by the plaintiff to avoid the risk of injury. It was not reasonable for the defendant company to essentially ban knives and sharp items on the Site, especially when a sharp implement was required to cut the Bio-Tac. Neither do I consider that it was reasonable or necessary for the defendant company to warn its workers that knives are sharp and they should not walk near anyone who has a knife.

[82] Accordingly, the plaintiff's claim must fail.

[83] I am, however, required to calculate the damages which I consider would have been payable should the plaintiff have been successful.

General damages

[84] The plaintiff's claim is to be assessed under the *Civil Liability Act* 2003 and *Civil Liability Regulation* 2003. Sections 61 and s 62 of the *Civil Liability Act* 2003 provide the basis for the calculations of general damages. It is clear that the damages must be assessed in accordance with an Injury Scale Value (ISV) and the formula set out in s 6 of the *Civil Liability Regulation* 2003 which provides the ranges of ISV for particular injuries. It is clear that in this case the plaintiff has suffered two injuries, namely the injury to his hand and a psychiatric injury. It is necessary for the purposes of the *Civil Liability Act* 2003 to determine the dominant injury. Having considered the medical reports, I am satisfied that the hand injury is the dominant injury.

[85] I consider that it is a moderate hand injury and it has caused a whole person impairment in the order of 6% to 7% on the basis of the evidence of Dr Coleman and Dr Gilpin. It is clear that the other injury is a psychiatric injury, which is an adjustment disorder, which appears to be resolving. I have accepted Dr Chalk's assessment of a 5% PIRS rating. In

my view, given the fact that there are two injuries, the appropriate calculation of general damages is to assess the moderate hand injury in Item 119 at the top of the ISV range and allocate an ISV rating of 15.

[86] Accordingly, pursuant to the calculations in Schedule 6A of the *Civil Liability Regulation* 2003, this would give a figure of **$21,850** as the figure for general damages. I am not satisfied that the plaintiff has established that an ISV at the top of the available range is inadequate to properly compensate the plaintiff for his injuries. I am not satisfied that an uplift of 25% is appropriate such that it would give an ISV of 19.

Past economic loss

[87] I accept that the plaintiff developed a good work history in the period of eight months he was employed by Globe. He was clearly happy doing the work and the records tendered by Globe indicate that he had consistent earnings and long hours. I accept that prior to finding work with Globe and work in the asphalt industry, he had a relatively poor work record. I accept the plaintiff's evidence that once he became involved in the asphalt industry he was motivated to work. The evidence of his mother and former partner both indicate that once he became involved in the asphalt industry, the plaintiff's motivation to work improved. Significantly, after the injury, Downer was prepared to offer him permanent full-time work.

[88] I consider that the plaintiff has established that it is more likely than not that he would have continued to earn at least the rate he was earning at the time of the accident until the time he was employed full-time by Downer which was March 2012. The evidence indicates that he had been employed doing the asphalting for a significant period in 2011 and he was motivated to remain in employment given the impending birth of his son who was born in February 2012. Given that motivation, I consider that in the 27 week period from the date of the accident to 26 March 2012, when he was permanently employed by Downer, he would have earned an amount of $40,022.35 which I shall round up to **$40,023.**

[89] It is clear that the plaintiff received WorkCover payments during the period of time he was off work after the incident and during the periods accompanying the further surgery. When he returned to work after surgery on the first two occasions, he was placed on light duties to assist his recovery and his return to work. He was ultimately offered the position with Downer in March 2012 and during the ten weeks the plaintiff was employed by Downer he earned $1,284.20 after tax per week. The plaintiff argues that in the 143 weeks after his termination of employment with Downer, he would have continued to earn this amount per week which would give a figure of $183,640.60 (143 weeks x $1,284.20). He has, however, only earned $75,005.91 in the relevant period and the plaintiff argues that the past economic loss is therefore $108,634.69 ($183,640 - $75,005.91). When added to $40,022.35, it is argued that the total figure for past economic loss is a figure of $148,657.

[90] However, given the plaintiff's employment history at the time of the incident, I am not satisfied that he would have stayed working long-term for Downer for the 143 weeks as argued. The evidence indicates that he had a history of moving from employment to employment when he became dissatisfied. The evidence indicates that prior to the

incident, the plaintiff rarely stayed in a workplace for long periods and did not stay in a workplace for more than 18 months. Given the plaintiff's history, it is highly likely he would have become dissatisfied with Downer or otherwise moved on. Furthermore, the plaintiff accepted under cross-examination that economic factors such as the length of the project and that some construction jobs ran for set periods of time meant that workers are often required to find work once a particular job is finished.

[91] I do not, therefore, accept that, but for the incident, the plaintiff would have worked each week since the incident and earned an amount of $1,284.20 per week as contended. It would seem that there were clearly personality factors at play which were in evidence prior to the incident which made long-term commitment to a particular workplace difficult. Whilst I accept that he would have been committed to continue working to support his child, I think ultimately he would inevitably have struggled to stay permanently with Downer after that initial period.

[92] The defendant argues that the plaintiff's taxable income per year since 2010 is as follows:

Financial Year Ending	**Net income per annum**	**Average net income per week**
2008	$19,613	$377
2009	-$ 2,722	-$ 52
2010	-	-
2011	$32,536.17	$625
2012	$27,824	$535
2013	$32,957.39	$633.80
2014	$39,436.04	$758.40

[93] I note, however, that the average net income per week for the financial year ending 2012 in the pre-accident period was $1,235.32, which is based on the Globe Employee Pay Summary Report for the twelve week period from 30 June 2011 to the date of the incident on 16 September 2011. The average net income per week for the financial year ending 2012 in the post-accident period of 11 weeks to 30 June 2012 was $1,276.13 per week based on Downer EDI Works Pty Ltd Historical Payroll Register.

[94] Given my view that I do not consider that the plaintiff would have been permanently employed by Downer at the pre-incident rate for the entire period, what is the appropriate figure which represents past economic loss? There are a number of methodologies proposed by Counsel for the defendant in his submission none of which are ideal.

[95] I consider that the average earnings per week in 2013 and 2014 should be taken into account when coming to an appropriate weekly figure. Those figures are $633.80 in 2013 and $758.40 in 2014. It is clear that the 2013 and 2014 weekly figures have been calculated on the basis that the plaintiff has periods of time when he is not employed and periods of time when his hours of work and rates of pay vary. I consider that that work pattern would have been present in the period from 26 March 2012 when he became employed by Downer. He obtained employment which on paper looked good but it was not in fact ideal given a clash of personalities in the workplace and long and gruelling work.

[96] There are 143 weeks in the period from when he was terminated by Downer on 5 June 2012. Whilst the defendant has argued that a period of about 18 weeks should not be included as the plaintiff was offered light work duties during that period, I accept that his non-attendance was a result of his poor motivation as a result of his chronic adjustment disorder with depressed and anxious mood, which was caused by the accident.

[97] In that period, he has actually earned $75,005.90. If I take an average of the two figures for 2013 and 2014 that gives a rounded up average weekly figure of about $700 per week. That is a total figure of approximately $100,100 to the date of trial which means that the loss is $25,094.41 which I shall round up to $25,095. When the rounded up figure of $40,023 is added that gives a figure for past economic loss to the date of trial of **$65,118.**

Interest on past economic loss

[98] Interest on that figure should be calculated at the rate of one half of the 10 year bond rate for the most recent quarter which the parties agree is 1.435% per annum. After deducting net weekly benefits of $28,791.77, interest should be calculated on the balance of $36,326.23 over 182 weeks (3.5 years). Therefore, I allow a figure of **$1,824.48** ($36,326.23 x 1.435% x 3.5 years).

Past superannuation loss

[99] In relation to past superannuation loss, the statutory rates are as follows:

- Rate for calculation of occupational superannuation losses as per superannuation guarantee charge:
  - To 30 June 2013 - 9%
  - 1 July 2013 to 30 June 2014 - 9.25%
  - 1 July 2014 to date - 9.5%
  - Future rates at an average of 11.3%

[100] The calculation applied to past economic loss is therefore as follows:

- At 9% on initial loss of $40,023 = **$3,602.07**
- The second element of loss of $25,095 was sustained over 143 weeks. Arbitrarily using a weekly value ($25,095 ÷ 143) this gives a figure of $175.49 per week
- To 30 June 2013 ($175.49 x 56 weeks) = $9,827.44 x 9% = **$884.47**
- To 30 June 2014 ($175.49 x 52 weeks) = $9,125.48 x 9.25% = **$844.11**
- On the balance ($25,095 - $18,952.92) = $6,142.08 x 9.5% = **$583.50**
- Total past superannuation loss is **$5,914.15**

Future economic loss

[101] The issues relevant to economic loss were discussed in *Klein v SBD Services*[28] and the relevant issues are the availability of work, the determination of the plaintiff to pursue such work and the state of the plaintiff's injuries assuming the incident had not occurred. The plaintiff argues that he was earning $1,251.90 per week at Globe prior to the incident

[28] [2013] QSC 134.

and that his income since the accident is at the rate of $889.44. Accordingly, it is argued that his future economic loss should be calculated on the basis of $362.46 per week.

[102] The defendant argues that the plaintiff's average net weekly income from 2008 until the incident was $457.86 and that post-incident his income is $889.44. It is argued therefore on behalf of the defendant that the plaintiff has in fact not suffered any loss of income as a result of the incident. The defendant also argues that even if the plaintiff's income is only considered whilst he was working for Cheras Industries and Globe, his average weekly income was $724.27. Accordingly, given his post-incident income remains at $889.44, it is argued that he has not established he has suffered any loss of income. The evidence indicates that the plaintiff is currently working and earning a good income. There is no indication that he has long term physical problems, although I accept that there is some discomfort associated with his injuries. In his evidence, the plaintiff clearly stated he could continue to work in the asphalt industry and his intention to stay within that industry.

[103] Mr William Summerfeldt outlined in his evidence the various roles which are available within that industry and the way in which a person can progress through the various positions. In particular, his evidence was that he himself had moved up through the various positions within the asphalt industry starting in a construction crew, and ultimately going into management. He is currently an inspector. His evidence was that a person can progress through the industry and as they progress they receive more income.

[104] There is no evidence before me that the plaintiff would be prevented from continuing to work in the asphalt industry because of his injuries. I accept the defendant's argument that, as the plaintiff moves up the ranks within the industry, the injuries he has sustained become less and less relevant. Even if he wishes to stay as a plant operator, the evidence indicates the more experience he has in that position, the greater the demand for his services. The real issue is whether the plaintiff is likely to suffer economic loss into the future because of his injury. I accept the defendant's argument that the likelihood is that the plaintiff will continue to earn a good income within the asphalt industry.

[105] I should however allow for the possibility that an event may occur in the future which may exacerbate his physical injury and that an event may occur which could trigger his mental health issues such that there may be a recurrence of his chronic adjustment disorder with depressed and anxious mood. I accept that I should take into account the general disadvantage the plaintiff may suffer in the labour market due to his injuries and I should make an award for future economic loss. In particular, it may be that because he has to disclose his injury to future employers it may at some point disadvantage him. I will allow a global figure of **$50,000** in this regard.

Future superannuation loss.

[106] The agreed rate for this loss is 11.3% which on $50,000 is **$5,650**.

***Fox v Wood* damages**

[107] The figure for *Fox v Wood*[29] damages has been agreed between the parties as a figure of **$8,113.**

Past gratuitous care

[108] Is the plaintiff entitled to an award for gratuitous care? I accept that given the nature of the injury, the fact he was required to undergo surgery on 3 occasions and the need for large hand splints, the plaintiff required considerable assistance with daily care during the periods of post-operative surgery.

[109] The following schedule has been submitted by the plaintiff's lawyers.

Period	Reference	Assistance	Hours per week
21.09.11-9.11.11 (10 weeks)	Discharge from hospital – return to work on suitable duties	Showering, dressing, cooking, cutting up meals, driving, housework, mowing.	14 (roughly 2 hours per day)
29.11.11-24.01.12 (8 weeks)	Suitable duties programme	Cooking, house work, mowing	7 (roughly 1 hour per day)
24.01.12-09.02.12 (2.5 weeks)	Date of second surgery- return to work on suitable duties	Showering, dressing, cooking, cutting up meals, driving, housework, mowing.	7 (roughly 1 hour per day)
09.02.12-26.03.12 (7 weeks)	Return to work on suitable duties – commencement full-time with Downer EDI	Cooking, housework, mowing	7 (roughly 1 hour per day)
20.07.12-07.09.12 (7 weeks)	Date of third surgery – end of WorkCover weekly benefits	Showering, dressing, cooking, cutting up meals, driving, housework, mowing.	14 (roughly 2 hours per day)
Total – 34.5 weeks			378 hours

[110] It is clear, therefore, that the plaintiff required gratuitous care for thirty four and a half weeks. In this regard, s 59 of the *Civil Liability Act* 2003 is relevant and it provides:

> "**59 Damages for gratuitous services provided to an injured person**
>
> (1) Damages for gratuitous services provided to an injured person are not to be awarded unless—
>
> (a) the services are necessary; and
>
> (b) the need for the services arises solely out of the injury in relation to which damages are awarded; and

[29] (1981) 148 CLR 438.

> (c) the services are provided, or are to be provided—
>
> (i) for at least 6 hours per week; and
>
> (ii) for at least 6 months.
>
> (2) Damages are not to be awarded for gratuitous services if gratuitous services of the same kind were being provided for the injured person before the breach of duty happened.
>
> (3) In assessing damages for gratuitous services, a court must take into account—
>
> (a) any offsetting benefit the service provider obtains through providing the services; and
>
> (b) periods for which the injured person has not required or is not likely to require the services because the injured person has been or is likely to be cared for in a hospital or other institution."

[111] It is clear, therefore, that the plaintiff required assistance for more than 6 hours a day and for more than 6 months. This period of care was not continuous as the plaintiff returned to work after the first two bouts of surgery. Is the plaintiff precluded by s 59 from recovering this amount for gratuitous care because it is not 6 months of continuous care?

[112] It would appear that counsel have not found any authority on this particular issue although the requirements of s 59 were considered by the Court of Appeal in *Kriz v King & Anor.*[30] The Court held that s 59 does not create a statutory entitlement to damages for gratuitous services separate to the common law, but rather a restricted and modified common law entitlement. The Court held that s 59(1)(c) therefore should be interpreted in a way which least diminishes a claimant's right to damages for gratuitous services:

> "[18] Because s 59 restricts a claimant's previously unfettered common law right to seek damages for gratuitous services, the section should only be regarded as limiting that common law right if it does so clearly and unambiguously: *Potter v Minahan*; *Bropho v Western Australia*; *Coco v The Queen* and *Grice*. For that reason s 59(1)(c) should be interpreted in the way which least diminishes a claimant's common law rights to damages for gratuitous services. Giving the words their ordinary meaning and applying that important principle of construction, it is my view that s 59(1)(c) of the Act has the effect that damages for gratuitous services are not to be awarded unless the services have been provided or are to be provided for both six hours per week and for at least six months; once that threshold is met then damages for gratuitous services can be awarded even if the services thereafter are provided or are to be provided for less than six hours per week. This approach is consistent with that taken by McGill DCJ in *Carroll v Coomber & Anor* and with the submissions of senior counsel for the appellant at trial. The judge was required under the common law and consistent with s 59 of the Act to make the assessment of damages for future gratuitous services on the evidence accepted by him." (Citations omitted)

[30] [2006] QCA 351.

[113] I consider therefore that the interpretation of s 59 which least restricts the plaintiff's rights is an interpretation which does not require the period of 6 months to be a continuous period. I will therefore allow the amount claimed for gratuitous services at the agreed rate of $30 per hour for 378 hours (34.5 weeks) which is **$11,340.00.**

Future expenses

[114] I will allow also a component for future psychiatric care at **$1,800**. There is no future amount for medication given the plaintiff's reluctance to take medication.

Agreed amounts for damages

[115] The following claims have been agreed between the parties.

- WorkCover special damages -
  - Hospital $ 4,233.70
  - Medical $15,716.39
  - Rehabilitation $ 1,796.69
  - TOTAL **$21,746.78**
- Medicare Australia Refund $897.00
- Out of pocket expenses $647.06
- Net weekly benefits paid by WorkCover Queensland $28,791.77 (for the purposes of calculation of interest on past economic loss).

[116] Interest on the out of pocket expenses is $32.50 ($647.06 x 1.435% x 3.5 years).

Summary of damages

[117] The total damages to be awarded would be **$194,932.97** as set out in the following table.

General damages for pain, suffering and loss of amenities of life	$21,850.00
Past economic loss	$65,118.00
Interest on past economic loss	$1,824.48
Past Occupational Superannuation	$5,914.15
Future economic loss	$50,000.00
Future superannuation loss	$5,650.00
Fox v Wood damages	$8,113.00
Past gratuitous care	$11,340.00
Future expenses	$1,800.00
WorkCover special damages	$21,746.78
Medicare Australia refund	$897.00
Out of pocket expenses	$647.06

Interest on out of pocket expenses	$32.50
TOTAL	**$194,932.97**

Orders

[118] I give judgment for the defendant.

[119] I will hear from Counsel as to orders as to costs.