SUPREME COURT OF QUEENSLAND

CITATION:	*Boon v Summs of Qld Pty Ltd* [2016] QCA 38
PARTIES:	**JOSHUA DAVID BOON** (appellant) **v** **SUMMS OF QLD PTY LTD trading as BIG BILL'S BOBCATS** ACN 140 816 119 (respondent)
FILE NO/S:	Appeal No 6085 of 2015 SC No 789 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2015] QSC 162
DELIVERED ON:	26 February 2016
DELIVERED AT:	Brisbane
HEARING DATE:	6 November 2015
JUDGES:	Holmes CJ and Gotterson JA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. Set aside the order made on 12 June 2015.** **3. In lieu thereof, order that there be judgment for the plaintiff in the amount of $215,286.11.** **4. Direct that each party file and serve submissions with respect to costs of the proceedings at first instance and on appeal within seven days of the publication of these reasons, such submissions not to exceed four pages.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – STANDARD OF CARE - GENERALLY – where three fingers of the appellant's left hand were cut when he came in contact with the extended blade of a Leatherman knife held by an employee of the respondent – where the respondent would be vicariously liable for the employee's alleged negligence, and liable for alleged negligence on its own part in failing to appropriately supervise or give instructions to the employee with respect to the use of the knife – where the appellant claimed damages in the Supreme Court for personal injury caused to him by negligence on the part of

the respondent and of the employee, together with interest and costs – where judgment was given in favour of the respondent, ordering the appellant to pay the respondent's costs of the proceeding on the standard basis – where the appellant filed a notice of appeal on 16 June 2015 – whether the respondent is liable in negligence

Civil Liability Act 2003 (Qld), s 9(1), s 55(3)
Uniform Civil Procedure Rules 1999 (Qld), r 766

Roads and Traffic Authority (NSW) v Dederer (2007) 234 CLR 330; [2007] HCA 42, applied
Tep v ATS Australasian Technical Services Pty Ltd [2015] 2 Qd R 234; [2013] QCA 180, cited

COUNSEL:	R J Lynch for the appellant R N Traves QC, with A Messina, for the respondent
SOLICITORS:	Shine Lawyers for the appellant Cooper Grace Ward for the respondent

[1] **HOLMES CJ:** I agree with the reasons of Gotterson JA and the orders he proposes.

[2] **GOTTERSON JA:** The appellant, Joshua David Boon, commenced proceedings in the Supreme Court of Queensland against the respondent, Summs of Qld Pty Ltd trading as Big Bill's Bobcats, on 24 January 2014. His claim was for damages for personal injury caused to him by negligence on the parts of the respondent and of one of its employees, together with interest and costs.

[3] The claim arose out of an incident at a construction site at Redbank Plains ("the site"). The appellant's employer, Globe Labour Services Pty Ltd ("Globe"), had been engaged by a construction contractor, Downer EDI Works Pty Ltd ("Downer EDI"), to provide labour services at the site. The respondent had been sub-contracted by Downer EDI to remove and replace asphalt at the site.

[4] On 16 September 2011, the appellant was at the site where he was working as a labourer. Timothy Summerfeldt, an employee of the respondent, was working at the site as a skid steer loader operator. At about 2 pm that day, three of the fingers on the appellant's left hand were cut when they came in contact with the extended blade of a Leatherman knife which Mr Summerfeldt had in his hand. The cutting damaged nerves in two of the fingers, tendons in one of them and arteries in another. The wounds required surgery. The appellant has continuing symptoms which have impaired, at least, his capacity to participate in many of his former activities and caused him to develop major depression.

[5] The appellant's pleaded case[1] attributed vicarious liability to the respondent for negligence alleged on the part of Mr Summerfeldt,[2] and liability for alleged negligence on its own part in failing appropriately to supervise or give instructions to Mr Summerfeldt with respect to use of the knife.[3] Some 10 heads of loss and damage were claimed,[4] the quantum of a number of which was agreed at the trial.

---

1 Amended Statement of Claim filed 9 May 2014: AB650-657.
2 *Ibid*, paragraphs 3-9.
3 *Ibid*, paragraphs 10-12.
4 *Ibid*, paragraph 15.

[6] The appellant's claim was tried over three days in the Supreme Court at Brisbane during March 2015. On 12 June 2015, judgment was given for the defendant (respondent) and the plaintiff (appellant) was ordered to pay the former's costs of the proceeding on the standard basis.[5] In reasons for judgment published that day, the learned trial judge assessed total damages that would have been awarded had the appellant succeeded on liability, at $194,932.97.[6]

[7] On 16 June 2015, the appellant filed a notice of appeal to this Court against the whole of the judgment at first instance.[7] The grounds of appeal put in issue both the dismissal of the appellant's claim and aspects of the assessment of damages. Orders sought include setting aside the judgment; judgment for the appellant, and substitution of an award of damages as this Court considers appropriate.

[8] It is convenient to consider the topics of liability and quantum separately.

Liability

[9] **The appellant's case:** It was admitted on the pleadings that Mr Summerfeldt was taking a recess and was crouching down and eating an orange. He was on a grassed area immediately adjacent to the site, which did not have a designated eating or recess area of its own.[8] The grassed area was frequently traversed by workers at the site.[9] Mr Summerfeldt was peeling the orange with a Leatherman knife.[10]

[10] The appellant was also on temporary recess. He "was walking past Summerfeldt when Summerfeldt stood up from a crouching position whilst still holding the knife in his hand and, without any intention to do so, stabbed the [appellant] in his left hand…".[11]

[11] The learned trial judge found, consistently with the evidence, that the Leatherman knife had a long, sharp blade and that it was a tool that would have been necessary on site for the asphalting process.[12]

[12] The appellant gave the following evidence-in-chief detailing how the accident occurred:

> "Now, do you recall having a lunch break on that day?---Yes.
>
> And where did you have that lunch break?---Just on the grass next to - next to where we were paving.
>
> Okay. And tell us what happened towards - or at the end of that lunch break?---Finished lunch, sort of thing, everyone was moving to go back to work, and I've gone to go to my car to put something in it or grab something from it. I'm not too certain on that. But as I was walking along - - -
>
> Where was your car parked?---Around the corner.
>
> Okay. Yes. Keep - - -?---And, yeah, as I was walking there I was walking along the footpath and next thing I know I had a shooting pain

---

5 AB695.
6 Reasons [117]: AB693.
7 AB696-698.
8 Amended Statement of Claim filed 9 May 2014, paragraph 3(b): AB651, admitted Further Amended Defence, paragraph 4: AB659.
9 *Ibid*, paragraph 4(a): AB652, admitted Further Amended Defence, paragraph 7(a): AB660.
10 *Ibid*, paragraph 3(c): AB651, admitted Further Amended Defence, paragraph 5: AB659.
11 *Ibid*, paragraph 3(d): AB651, admitted Further Amended Defence, paragraph 6: AB659-660.
12 Reasons [60]: AB681.

> 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 was there and he sort of, you know, grabbed it after that as well and held it till the ambulance got there.
>
> Okay. Now, you mentioned Tim, you're talking about who?---Tim, the person with the knife.
>
> Is that Tim Summerfeldt?---Tim Summerfeldt, yeah.
>
> All right. Now, did you - you said you were on the footpath; is that right?---Yes.
>
> So you were walking either towards your car or returning from your car on the footpath?---I was walking to my car, yeah.
>
> To your car?---Yeah.
>
> On the footpath?---Yes."[13]

[13] **The respondent's position:** Apart from brief questioning about the Leatherman knife which concentrated upon whether its blade was retractable or not, the appellant was not cross-examined concerning the circumstances of the incident. The respondent did not plead a positive case that the incident occurred differently from the appellant's version. A plea of contributory negligence that was initially made was subsequently abandoned.[14]

[14] Mr Summerfeldt was not called in the respondent's case. Evidence was led from Mr William Summerfeldt, a principal of the respondent. He had given the knife to his son, Timothy Summerfeldt.[15] However, he was not on site at the time of the accident.[16]

[15] **Findings of fact:** The learned primary judge made findings that were consistent with the admissions and the appellant's evidence as to how the accident occurred. Her Honour observed that it was clear from the appellant's description of it that it "occurred when he and Summerfeldt were both in motion. He was walking past and Mr Summerfeldt was in the process of standing up from a low position."[17]

[16] **Conclusions as to negligence**: The learned primary judge accurately summarised the pleaded case for negligence on the part of Mr Summerfeldt as follows:

> "[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."[18]

---

13 AB16; Tr1-16 l25 – AB17; Tr1-17 l8.
14 Further Amended Defence, paragraph 17: AB664.
15 AB136; Tr2-29 l39. Photographs of the knife are depicted on Exhibit 8 at AB546-547.
16 AB138; Tr2-41 l3.
17 Reasons [59]: AB681.
18 AB682.

[17] Her Honour was sceptical of the proposition that Mr Summerfeldt had acted negligently. She elaborated her scepticism in the paragraphs which followed:

> "[65] It is not entirely clearly (sic) 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."[19]

[18] The respondent contended that Mr Summerfeldt had not been negligent. It embellished its contention with a submission that s 9(1) of the *Civil Liability Act* 2003 (Qld) was engaged so as to exclude a breach of duty on the part of Mr Summerfeldt because the risk of injury to the appellant in the circumstances described by him was not foreseeable; that it was insignificant; and that it was such that a reasonable person in Mr Summerfeldt's position would not have taken any further precautions in respect of the risk of injury.[20]

---

19 AB682-683.

20 Reasons [72]: AB683.

[19] The learned trial judge concluded that Mr Summerfeldt had not been negligent. She stated her reasons for this conclusion in the following terms:

> "[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. 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."[21]

[20] Her Honour separately considered whether the respondent itself had been negligent. She concluded that it had not.[22]

[21] Consistently with the conclusions that neither Mr Summerfeldt nor the respondent had been negligent, her Honour determined that the appellant's claim must fail.[23]

[22] **The appellant's grounds of appeal:** The appellant's grounds of appeal challenge a number of factual findings made by the learned primary judge as unsupported by the evidence. Elaborated in oral submissions, these findings were that the appellant had obviously observed Mr Summerfeldt rise from a crouched position with a knife in his hand, and that the appellant must have been moving fairly close to Mr Summerfeldt, "within an arm's length".

[23] However, the appellant's principal challenge is to the ultimate conclusion as to foreseeability of risk and its significance. It is contended that there was a misidentification by her Honour of the relevant frame of factual reference for assessment of those factors in this case.

---

21 AB684-685.

22 Reasons [77]-[81]: AB685-686.

23 Reasons [82]: AB686.

[24] In response, the respondent sought to uphold the reasoning adopted by the learned primary judge.

[25] **Discussion:** I accept that the first finding to which the appellant specifically referred was unsupported. There was no evidence that the appellant saw Mr Summerfeldt rise from a crouched position with a knife in his hand: that was not recounted in the version that he gave in his evidence-in-chief; nor was it suggested in cross-examination. That the appellant's statement of claim pleaded that Mr Summerfeldt was using the knife to peel an orange and that he rose from a crouched position with it in his hand is not a sound basis for an inference that the appellant observed those events happening before the accident occurred. However, although the appellant's point is well made, this errant finding concerning him has little significance for an analysis risk arising from Mr Summerfeldt's conduct.

[26] As to the other finding to which reference was made, the fact that the appellant's hand was cut by the knife blade warranted a factual inference that their bodies were fairly close at that point. There is scope for debate whether it was appropriate to infer that they were necessarily within an arm's length. However that may be, the precise distance between their bodies is a relatively insignificant factor in terms of analysis of risk.

[27] The appellant's principal challenge to the analysis of risk is centred upon the learned trial judge's statement at paragraph 74 of the Reasons that the appellant had failed to establish that a reasonable person in Mr Summerfeldt's position would have foreseen that using a sharp knife to peel an orange during lunch would have involved a risk of injury to persons nearby, including the appellant. The appellant submits that the adoption of the peeling of an orange with a sharp knife as the relevant frame of factual reference for risk analysis was wrong and led to an erroneous conclusion with respect to breach of duty.

[28] In *Roads and Traffic Authority (NSW) v Dederer*,[24] Gummow J, with whom Hayne J agreed, stressed the importance of the correct identification of actual risk to the assessment of breach of duty.[25] His Honour observed that it is only through the correct identification of risk that one can assess what the reasonable response to the risk would be.

[29] The guidance given by Gummow J in *Dederer* requires a precise identification here of what it was that exposed the appellant to risk of injury. To my mind, it clearly was the conduct of Mr Summerfeldt in rising from a crouched position with a knife in his hand, the knife having a long, sharp blade which was unsheathed. The risk of injury to the appellant arose because, as Mr Summerfeldt was moving to an upright stance, the blade might have struck a passer-by such as the appellant.

[30] I am unable to agree with her Honour that the relevant conduct on Mr Summerfeldt's part was using the knife to peel an orange. The mere actions involved in peeling the orange with the knife did not expose the appellant to any relevant risk.

[31] Once the appropriate risk is identified, the inescapable conclusions are that there was a foreseeable risk that a passer-by such as the appellant might have been struck by the blade of the knife; that Mr Summerfeldt ought reasonably to have known, at least, of that risk; and that the risk was not an insignificant one. The last conclusion is fortified by the admitted fact that the location where the incident occurred was frequently traversed by workers.

---

24 [2007] HCA 42; (2007) 234 CLR 330.

25 At [59]; applied in *Uniting Church in Australia Property Trust (NSW) v Miller* [2015] NSWCA 320, per Leeming JA at [102].

[32] A further and no less inescapable conclusion is that a reasonable person in Mr Summerfeldt's position would have taken the simple precaution of looking properly to see if there was any person approaching his vicinity before he began to rise. Alternatively, he could have retracted the blade on the knife before he began to rise. The manner in which the accident occurred demonstrates that he took neither precaution.

[33] In my view, these intermediate conclusions compel an ultimate conclusion that Mr Summerfeldt acted negligently and that his negligence caused the appellant's injury. It is not in issue that the respondent is vicariously liable for negligence on Mr Summerfeldt's part in circumstances such as those. The appellant's case should not have been dismissed for want of proof of negligence.

Quantum

[34] **Jurisdictional issue:** The assessment of damages made by the learned primary judge is not reflected in any orders her Honour made. It cannot therefore itself be the subject of appeal. However, it is open to this Court pursuant to the powers given to it by r 766 of the *Uniform Civil Procedure Rules* 1999 to make an award of damages based on the findings of fact at first instance, adjusted as this Court considers appropriate. In *Tep v ATS Australasian Technical Services Pty Ltd*,[26] Holmes JA, with whom Douglas J and I agreed, observed:

> "The primary judge, because of the convention that an assessment of damages is made to assist the court on appeal should it reach a different view on liability,[27] made a series of findings on quantum, arriving at an amount for each head of damage. It may be accepted that although the assessment of damages is not itself capable of appeal, the court's powers under r 766 would enable it, were it to give judgment for the appellant, to make an award of damages on the basis of the primary judge's findings on the facts. That power would extend to adjusting the monetary amounts arrived at by the primary judge where the court considered that the findings supported a higher award. …"[28]

[35] **The assessment at first instance:** The learned primary judge assessed damages in total at $194,932.97. This sum is comprised of the following components:[29]

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

26 [2013] QCA 180.
27 *Elliott v Lawrence* [1966] Qd R 440 at 444-5.
28 At [32].
29 Reasons [117]: AB693-694.

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**

[36] **The challenge components:** The appellant challenges the assessments for past economic loss (and, derivatively, for interest on past economic loss and past occupational superannuation), and for future economic loss (and, derivatively, for future superannuation loss).

[37] The assessment of past economic loss spanned two periods: the first being from the date of the accident until the appellant took up work full-time with Downer EDI (27 weeks); and the second, being for a period which began when his employment with Downer EDI was terminated (on 5 June 2012) and ended at the date of commencement of the trial (143 weeks). Her Honour assessed the loss for the first period at $40,023,[30] and for the second period at $25,095,[31] in total $65,118.

[38] As I will explain, the assessment for the first period appears to have been arrived at by an arithmetic miscalculation. The loss for the second period was derived by adopting a "rounded up average weekly figure of about $700" after tax to calculate putative earnings over 143 weeks of $100,100. From this amount, the appellant's actual earnings over that period of $75,005 were deducted in order to calculate the loss.[32]

[39] **Past economic loss:** With respect to the first period, the learned trial judge observed:

> "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."[33]

[40] It appears that the figure of $40,023 was taken from written submissions made at trial for the appellant.[34] It had been submitted for him that over the 29 weeks immediately preceding the accident and during which he had worked for Globe, he had earned an average of $1,251.90 per week after tax and that for the last 11 of those weeks, the average had increased to $1,347.55 per week after tax. It was further submitted that, in all likelihood, the appellant would have earned at least the higher average over the 27 weeks that he was incapacitated for work by his injuries.

---

30 Reasons [88]: AB687.
31 Reasons [97]: AB689.
32 Reasons [97]: AB689.
33 Reasons [88]: AB687.
34 Plaintiff's written submissions, paragraph 74: AB567.

[41] I would accept this further submission. A loss of earnings of $1,347.55 per week after tax over 27 weeks amounts to a total loss of $36,383.85 after tax. At the hearing of the appeal, counsel for the appellant conceded that there had been an error in the written submissions as to the total and that the loss for the first period needs to be adjusted accordingly.[35]

[42] In the case of the second period, the learned trial judge rejected a submission that the income that the appellant would have earned in the 143 weeks had he not been injured, would have been $183,640.60. That figure was calculated using the weekly income that he had earned at Downer EDI, $1,284.20 after tax. Her Honour's reasons for not accepting the submission were expressed in the following terms:

> "[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."[36]

[43] Instead, the after tax weekly income figure that her Honour did adopt of "about $700" was substantially reflective of the average after tax weekly earnings that the appellant did in fact earn after his employment at Downer EDI was terminated. That appears from the reasoning given by her Honour in which she observed:

> "[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

---

35 Appeal transcript 1-29 ll18-34.

36 AB687-688.

> 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."[37]

[44] The appellant submits that $700 per week after tax inadequately reflects the income he would have earned during this period. On appeal, it is suggested that a figure of $1,000 per week after tax would be "more realistic".[38] It is submitted that the figure adopted by her Honour did not sufficiently acknowledge that but for the continuing symptoms, the appellant might have continued in full-time employment with Downer EDI for a substantially longer period than he did.[39]

[45] There is, I think, force in the appellant's submission. The average for each of 2013 and 2014 is much less than the $1,284.20 per week after tax that the appellant had earned at Downer EDI. These averages are for twelve-month periods which include considerable periods of time when the appellant was not employed. Adoption of them assumes an employment pattern from 5 June 2012 with periods of substantial intermittent non-employment. Such a pattern does not, in my view, sufficiently recognise a potential substantial period of continuing full-time employment at Downer EDI after that date.

[46] It need be acknowledged that the learned trial judge accepted evidence of Dr J Chalk, a psychiatrist, and found that the appellant's mental condition had notably improved. His ability to attend and maintain employment had also improved.[40] Dr Chalk's evidence[41] was based upon the one occasion he interviewed the appellant on 11 October 2013, some 16 months after the appellant's employment at Downer EDI had been terminated. I do not regard Dr Chalk's evidence, or her Honour's findings based on it, as precluding an inference that, but for his symptoms, the appellant might have continued full-time employment at Downer EDI for a substantial period beyond 5 June 2012.

[47] To my mind, a figure of $850 per week after tax is appropriate for calculation of the appellant's putative earnings for this period. At that rate, the total earnings for the 143 weeks would have been $121,550 after tax which, after deduction of the appellant's actual earnings of $75,005.90, is reduced to $46,544.10. This is the appellant's loss for the second period. Together with the loss of the first period ($36,383.85), it yields a sum of $82,927.95 for past economic loss which I would round to $82,928.

[48] **Interest on past economic loss:** The methodology used by the learned primary judge to calculate interest on past economic loss is not challenged on appeal. When it is applied to the recalculated past economic loss reduced by the net weekly benefits paid

---

37 AB688-689.

38 Appellant's Amended Outline, paragraph 32.

39 The appellant said in cross-examination that after he was injured, he experienced frustration in the work environment. The frustration heightened at Downer EDI on account of a ventilation issue in a tunnel in which he was required to work. This led to an altercation with a superior for which his employment was terminated: AB55; Tr1-55 ll6-44.

40 Reasons [58]: AB681.

41 Report dated 29 July 2013: AB191-205.

to the appellant of $28,791.77, the interest on past economic loss to 12 June 2015 is $2,718.98 ($54,136.18 x 1.435% x 3.5 years).

[49] **Past superannuation loss**: The methodology used by her Honour to calculate past superannuation loss is also not challenged on appeal. Applied here, the methodology derives the following components of this loss:

• At 9% on the first period loss of $36,383.85	$3,274.54
• Balance of loss ($46,544.15) was sustained over the second period. The weekly average is $325.48 ($46,544.15 ÷ 143). Applying this average arbitrarily over the second period:	
• To 30 June 2013 ($325.48 x 56 weeks) = $18,226.88 at 9%	$1,640.42
• To 30 June 2014 ($325.48 x 52 weeks) = $16,924.96 at 9.25%	$1,565.56
• On the balance ($46,544.15 – $35,151.84) = $11,392.31 at 9.5%	$1,082.27
• Total past superannuation loss	$**7,562.79**

[50] **Future economic loss:** The learned primary judge's assessment of damages for future economic loss at $50,000 was influenced by her acceptance of Dr Chalk's evidence to which I have referred. Her Honour observed that there are no indications that the appellant has long term physical problems. She recounted that he stated in evidence that he could continue to work in the asphalting industry and that his intention was to continue in it. She accepted that he would, at times, feel discomfort in that line of work because of the injuries he sustained.[42]

[51] Her Honour explained that the assessment was made on the following basis:

> "[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

42 Reasons [102]: AB690. Plaintiff's evidence at AB56; Tr1-56 ll19-47.

> at some point disadvantage him. I will allow a global figure of $50,000 in this regard."[43]

[52] In this appeal, the appellant has submitted that this head of damage should have been assessed at $100,000. It is said that the amount of $50,000 fails adequately to reflect difficulties that the appellant has with heavy lifting or gripping activities and the constraints that they may impose upon his employability in a competitive labour market.[44] However, no wage-rate based methodology is advanced to support the amount of $100,000.

[53] In my view, the sum of $50,000 adopted by her Honour adequately compensates for the appellant's general disadvantage in the labour market in the future. Moreover, the appellant has not proposed a persuasive set of assumptions or methodology which, for the purposes of s 55(3) of the *Civil Liability Act* 2003 (Qld), would justify an award of $100,000. The assessment made should be affirmed.

[54] **Assessment of damages:** When the components of the assessment made by the learned trial judge are adjusted in accordance with these reasons, the total of all components becomes $215,286.11. This is shown in the following table:

General damages for pain, suffering and loss of amenities of life	$21,850.00
Past economic loss	$82,928.00
Interest on past economic loss	$2,718.98
Past occupational superannuation	$7,562.79
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	**$215,286.11**

Disposition

[55] For these reasons, I would allow the appeal. In lieu of the order made on 12 June 2015, judgment for the plaintiff in the amount of $215,286.11 should be substituted. At the hearing of the appeal, the parties sought the opportunity to make submissions on costs of both the proceedings at first instance and the appeal, once reasons for judgment in the appeal were published.

---

43 AB690.

44 Written submissions, paragraph 35.

Orders

[56] I would propose the following orders:

1. Appeal allowed.
2. Set aside the order made on 12 June 2015.
3. In lieu thereof, order that there be judgment for the plaintiff in the amount of $215,286.11.
4. Direct that each party file and serve submissions with respect to costs of the proceedings at first instance and on appeal within seven days of the publication of these reasons, such submissions not to exceed four pages.

[57] **APPLEGARTH J:** I agree with the reasons of Gotterson JA and with the orders proposed by his Honour.