SUPREME COURT OF QUEENSLAND

CITATION:	*Cameron v Foster & Anor* [2010] QSC 372
PARTIES:	**DONALD ROLAND CAMERON** (plaintiff) v **RODNEY LYLE FOSTER** (first defendant) **KAY LETTSOME LAHEY** (second defendant)
FILE NO/S:	BS11262 of 2008
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	29 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	13 – 14 September 2010
JUDGE:	Douglas J
ORDER:	**Judgment for the plaintiff for damages in the sum of $434,715.16.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – METHOD OF ASSESSMENT – OTHER MATTERS – where it was agreed that the plaintiff's actuarial life expectancy is 29 years – where it was agreed that future general practitioner expenses are limited to the preclusion period applicable under the *Social Security Act 1991* (Cth) – by what method the preclusion period should be calculated under the *Social Security Act* STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – CONSIDERATION OF EXTRINSIC MATTERS – OTHER MATTERS – whether an allowance can be made under s 308E of the *Workers' Compensation and Rehabilitation Act 2003* ("the WCRA") for services which had partly been paid for after the accident and before the trial and partly been provided gratuitously *Social Security Act* 1991 (Cth), s 17(3)(b) *Workers' Compensation and Rehabilitation Act* 2003, s 308B, s 308C, s 308D, s 308E *Karanfilov v Inghams Enterprises Pty Ltd* [2004] 2 Qd R 139;

[2003] QCA 242, considered
Kerr v Queensland Rail [2007] QSC 402, applied

COUNSEL: P V Ambrose SC with S Farrell for the plaintiff

R C Morton for the defendants

SOLICITORS: Gabriel Ruddy & Garrett for the plaintiff

McCullough Robertson Lawyers for the defendants

[1] **Douglas J**: The plaintiff was a furniture removalist injured in an accident at work on 18 November 2005. A walk board in the truck he was using was released accidentally by a fellow worker as the plaintiff was standing at the rear of the truck. The board fell, pivoting on its base, and its top struck him heavily on the head. The board weighed somewhere between 30 and 40 kgs.

[2] The plaintiff was born on 15 February 1954 and is 56 years of age. His life expectancy has been agreed at 29 years. The defendant has admitted that the circumstances of the incident in which the plaintiff was injured were caused by its breach of duty. The amount of his damages remains in issue.

Summary of the evidence

[3] When the plaintiff was struck he fell to his knees and saw stars. He was bleeding and was taken to a medical clinic, then to the Royal Brisbane Hospital. He was discharged later that day, and returned to the truck. He did no more work that day. When the truck returned to Maryborough he remained in the sleeping compartment. His symptoms became worse over the following weekend. He suffered from severe headaches, neck and shoulder pain, and deadness in his fingers. On the following Monday he attended his general practitioner, Dr Ogunseye, who prescribed pain medication.

[4] The plaintiff gave evidence of having been referred to various specialists and radiological investigations. He said he received physiotherapy, but thought that this made matters worse. He was treated at the Gregory Terrace Pain Clinic for two weeks. He gave evidence that he suffered flashbacks and nightmares about the accident and said that he was no longer seeing a psychiatrist, but this was only because he could not afford it. He would see one if he could.

[5] He said he was depressed and unhappy, less tolerant in his relationships and cranky. His memory had deteriorated and his concentration was not very good at all. He suffers periodically from anxiety attacks in public which have involved pains in his chest with him not being able to breathe properly. He finds hydrotherapy beneficial, continues to suffer from constant headaches, and has continual neck symptoms. The pain in his neck radiates down to his shoulders, causing a lot of discomfort in his shoulders and pins and needles in his fingers. He suffers from nausea quite a bit, as a side effect of the medication he takes. He takes Maxalon to stop this nausea, however that causes constipation.

[6] The plaintiff's psychiatric condition has significantly interfered with his sexual relationship with his wife. He does not really socialise much any more. He will go to a club and to dinner occasionally but generally he does not really go out. He has

unsuccessfully attempted mowing, by buying an electric mower, but that did not work because of the vibration. He has had to pay a commercial mowing operator to mow his lawn on occasions. He has not been able to afford this on an ongoing basis however, and has otherwise had to rely on his grandchildren and son to do it. If he had the money the plaintiff would have his lawn mown commercially.

[7] He has to visit his general practitioner regularly and the defendants agreed that it was a 10 km round trip. They also agreed that it is a 2 km round trip for the plaintiff to visit his pharmacist.

[8] The plaintiff gave evidence of being able to drive a car, but that he prefers to do so with his wife. When he drives it causes him extra pain in his neck. The reason is that he is unable to rotate his neck and therefore feels more comfortable with someone who can check for him. He said that before the accident he got on well with people. Since that time he finds it difficult to socialise and to get pleasure out of life.

[9] He was educated to the second year of secondary school at Cabramatta High School and left school to find employment. Apart from a period of about nine years between 1993 and 2002 when he ran a restaurant, called Dolly's, in partnership with his wife he has worked in physical occupations his entire life. In the course of operating that business he obtained a bus licence, which he used to transport restaurant customers.

[10] During the time they owned the restaurant he and his wife purchased two investment homes. When the restaurant business ceased to operate these were sold to pay off business debts. Importantly, however, his house remains the subject of a mortgage. For this reason the plaintiff's evidence was that he would have continued to work until age of 70.

[11] After Dolly's closed in 2002 he had difficulty in obtaining work for some years. He obtained an endorsement on his bus licence to permit him to carry paying customers. He also undertook about five lessons towards obtaining his heavy combination licence, to permit him to drive heavy trucks. He only needed an additional two to three lessons to complete this. He obtained work with the defendants in mid-2005. It was for this reason that he stopped his truck driving lessons. His evidence was that he would have continued to work as a furniture removalist as long as he could. If work as a furniture removalist was not available he would have tried to find work as a bus or heavy truck driver.

[12] The plaintiff's evidence was that he enjoyed working as a removalist. He agreed that he had occasional lower back discomfort before the accident, but said he never took any medication for this and that it did not interfere with his work. He said that the lower back pain had never stopped him from doing anything. He also said that if all he suffered from was the lower back pain then it would not have limited his capacity to do removalist's work. He rejected the proposition that he was too old to continue working as a removalist. His evidence was that there were a couple of older workers with the defendant company.

[13] Because of the evidence of Dr Jennifer Gunn, a psychiatrist who gave evidence for the defendants, it became relevant for him to address the question whether he was an alcoholic. He said that he was not a heavy drinker and that, since Christmas

2009, he may have had three or four stubbies of beer only. He strongly denied having drunk more in previous years. When he worked at the restaurant he said he might have had half a dozen drinks with the customers on occasion but that since he left that scene he had hardly drunk at all.

[14] Dr Morgan, the orthopaedic surgeon, in his report dated 2 April 2009 considered that, as a consequence of his physical injuries, Mr Cameron had sustained a loss of between 7 per cent and 8 per cent of whole person function. He said that radiology demonstrated a pre-existing degenerative disease of the cervical spine which was previously of little significance. The injury gave rise to a significant aggravation of this pre-existing underlying discal disease. He noted that, although Mr Cameron's restrictions on movement appeared to be quite severe, his performance during the entire examination was consistent. He was of the view that the plaintiff was genuine and that there was a real link between the accident and his ongoing clinical circumstances.

[15] He also considered that the plaintiff's future earning prospects had been very severely limited. He eliminated as an occupational possibility both truck driving and furniture removal. He thought that the plaintiff would be capable of limited part-time sedentary work only, such as telemarketing and call centre sales. This opinion, however, did not take into account Mr Cameron's psychiatric injury and the defendants did not press the view that the plaintiff could do such work.

[16] Based on those assumptions and the evidence of Dr Byth, a psychiatrist called by the plaintiff, he will be restricted to part-time work without responsibility or stress. The defendants did not identify any sedentary or light work within the plaintiff's residual working capacity. Dr Morgan considered that Mr Cameron will require ongoing analgesics and anti-inflammatory agents for his physical injuries.

[17] Dr Byth diagnosed the plaintiff as suffering from a major depressive disorder. He rated it as being a "moderate impairment" under the AMA 5 guidelines. He considered this equated to a permanent psychiatric impairment of 25 per cent to 50 per cent. His opinion was that the psychiatric condition was caused by the plaintiff's difficulty in coping with pain, insomnia, and restriction of physical activity from his neck injury at work.

[18] He believed that the plaintiff's usual work as a removalist, and his previous work running a restaurant, would be moderately impaired by his current mental state. Even with treatment Dr Byth thought that the plaintiff would be left with a chronic moderately severe depression and considered that there was no evidence of psychosis, substance abuse disorder, factitious disorder or malingering.

[19] Dr Byth considered that the plaintiff would benefit from three years of specialist psychiatric treatment with appropriate pharmaceutical support. He costed this at $9,000.00. He was not asked whether that was the expected cost over the whole period at current charging rates or whether it had been discounted to represent the current cost of such future treatment.

[20] Dr Byth also addressed the issue raised in Dr Gunn's report whether the plaintiff was an alcoholic and whether such a condition would affect his diagnosis of depression. Dr Gunn's view, based on her observations of the plaintiff, including his stating to her that his brother owned and ran a couple of hotels and that the

plaintiff had a few drinks "here and there", but principally on the results of "GGT" blood tests and a "carbohydrate deficient transferrin" test, was that half of the major depressive disorder, which she agreed the plaintiff suffered from, was related to the excessive use of alcohol.

[21] The other medical evidence from Dr Byth and the general practitioner, Dr Ogunseye, was that such test results could be caused by other conditions such as obesity, a fatty liver, cholesterol lowering medication, gall bladder distension and gall bladder stones. An ultrasound of the plaintiff taken on 10 May 2010 disclosed gall bladder distension and mobile gall bladder sludge which Dr Ogunseye said could explain the elevated blood test results. He had never had any concern about high alcohol use by the plaintiff since he first saw him in 2004 nor had Dr Byth heard of any such issue when he interviewed the plaintiff's wife. Dr Byth's evidence was that the elevated GGT results found in some of the blood pathology reports in the general practitioner's notes were not significant. He also said that it was possible, but not probable, that the use of alcohol could aggravate depression.

[22] In the circumstances it seems clear to me that I should accept the plaintiff's evidence about his alcohol intake and conclude that it has not affected the severity of the depression from which he suffers. Mr Morton did not try to persuade me to the contrary in his submissions for the defendant.

[23] Dr Byth said that the plaintiff's prognosis was quite poor given his history and the fact that he is being tried on three different medications. He agreed that, after the three-year treatment regime recommended by him, one could expect some partial recovery but he thought that any work capacity would be restricted to part-time work. This opinion did not take into account the plaintiff's physical symptoms nor his education, experience and training. Dr Byth also said that monthly general practitioner attendances were reasonable for the purposes of monitoring the plaintiff's pain relief.

[24] Ms Lesley Stephenson, an occupational therapist, noted severe restriction in respect to the plaintiff's rotation of the neck. She also noted severe restriction of rotation in the trunk, and in respect to extension of the shoulder. All other tested ranges of movement were also restricted to some extent. She noted that he could sit for 20 minutes and could not sit through a film, or for a long flight. He had to get up and move about. He could only stand for 30 minutes if he could move around. He had very limited overhead reach, and suffered pain in the shoulders and locking pain in the neck when reaching. He avoided pushing a mower and suffered from aggravation of the shoulder, back and neck pain on climbing stairs. He needed assistance, she said, with mowing and gardening. He was very restricted in lifting, his grip strength was weak on testing and he suffered worsening pain and shoulder pain on tight gripping.

[25] The plaintiff reported to her that he has broken sleep every night. Her opinion was that he required an electric bed to permit him to position himself more easily and to get in and out of bed.

[26] In terms of occupational limitations Ms Stephenson noted that the pain caused poor concentration. She noted very low capacities for physical activity, neck stiffness, shoulder stiffness, back stiffness and referred to his depression. She said that the plaintiff was a poor candidate for retraining as he had problems with concentration

because of chronic pain. She thought that he had a poor capacity for future employment because of chronic pain and low functional tolerances for activity. In a supplementary report, dated 20 May 2010, Ms Stephenson provided the costs and lifespan for an adjustable bed/mattress, and a massage machine consisting of a vibrating platform on which the patient could stand. When challenged about the need for the massage machine, Ms Stephenson gave evidence that it provided superior relief. Her evidence was that the machines were very good for people with chronic pain problems. She thought the machine proposed was more effective than the handheld one the plaintiff currently used. It is apparent from her evidence and that of the plaintiff himself that he suffers from chronically strong pain pretty well constantly.

[27] When challenged about the effect of the plaintiff's history of intermittent and mild lower back pain Ms Stephenson rejected the proposition that this would preclude him from continuing to work as a furniture removalist. Her evidence was that it was common for removalists to experience lower back pain at the end of the day. She said such pain could be treated with rest. She stated that she would only counsel a person to move to another job if the lower back pain was moderate to severe. The plaintiff's evidence was that his back pain had not caused him to receive treatment or lose time from work previously.

[28] Dr Ogunseye also gave evidence that, if the plaintiff did not possess a health care card, he would charge him $64.30 per session. The Medicare rebate in that case would be $34.30, giving a net cost of $30.00. His evidence was that if a patient has a health care card he would bulk bill. His evidence was also that the plaintiff would be required to attend a general practitioner approximately once per month in the future for monitoring of his condition and medications. He rejected the proposition that fewer attendances would be sufficient. His evidence was that Mogadon, and indeed all sleeping medications, are addictive because they were narcotic in nature. He emphasised that such medications therefore required very close monitoring by the patient's general practitioner. Dr Ogunseye said that the plaintiff's current pharmaceutical requirements were for Tramadol, Effexor, Panadol Osteo, Mogadon, and Lactocur, the cost of which was proved by agreement.

General Damages

[29] The claim is not subject to the *Civil Liability Act* 2003. The assessment of damages for pain and suffering and loss of amenities therefore proceeds on a common law basis. Dr Morgan assessed the plaintiff as suffering from a 7 per cent to 8 per cent whole person impairment. His opinions were not challenged by the defendant. The plaintiff's evidence of the effects of his physical injuries establishes that he is in constant and extreme discomfort which intrudes into every facet of his life. His enjoyment of life has been very significantly impaired.

[30] The effect of his physical injuries is compounded by his psychiatric injury. There is a consensus that he suffers from a major depressive disorder. Dr Byth assesses that as a 25 per cent to 50 per cent whole person impairment as a result of that condition. Whatever figure one attaches to the impairment, the plaintiff is clearly significantly psychiatrically disabled.

[31] In their submissions the plaintiffs relied on assessments by me in *Kerr v Queensland Rail* [2007] QSC 402, P Lyons J in *Corkery v Kingfisher Bay Resort*

Village Pty Ltd [2010] QSC 161 and White J in *Suna v Bridgestone Australia Ltd* [2008] QSC 125 to lay the foundation for an argument that the plaintiff's general damages should be assessed at $80,000.00.

[32] In *Kerr v Queensland Rail* the plaintiff was aged 26 at the time that he sustained an injury from an earth compactor. He was a track worker with Queensland Rail at the time of the injury. As a result of the injury the plaintiff continued to suffer pain in the mid-back level, with radiating symptoms into his left leg. The evidence was that the plaintiff was depressed for a while following the accident, however this condition was in remission by the time of trial. The plaintiff agreed that his comfortable driving tolerance was about an hour, but under cross-examination admitted to long trips on two occasions in North Queensland. I assessed his injury as major, affecting a young man's life significantly and leaving him in pain checked by recourse to strong analgesics. I went on to say at [42]:

> "It has affected his sporting activities significantly and he has also suffered a psychiatric disorder diagnosed as an adjustment disorder which was more severe after his injury and has gone into remission. The video evidence and the evidence of his ability to travel long distances by car suggest, however, that his disabilities do not interfere with his life at home very severely. The plaintiff's counsel argued that an appropriate award was $60,000 and the defendants that $40,000 was appropriate, partly based on decisions such as *Smith v Topp* [2002] QSC 341 and *Calvert [v] Mayne Nickless Ltd* [2004] QSC 449. In my view an appropriate award under this head is $50,000."

[33] The plaintiff's counsel submitted that the present case was significantly more serious because every aspect of Mr Cameron's life has been fundamentally affected by his injuries. He is in constant pain of a severe nature. Further, and compellingly they submitted, unlike the plaintiff in *Kerr*, Mr Cameron continues to suffer from a symptomatic major depressive disorder. He is, however, an older man than Mr Kerr was.

[34] The plaintiff in *Corkery v Kingfisher Bay Resort Village Pty Ltd* was similar in age to Mr Cameron. He was a 58 year old man who was injured shortly before his 50th birthday when he fell down a flight of steps. He sustained fractures of the transverse processes on the right side of L3 and L4 and a right shoulder injury and had ongoing difficulties with his back. It ached on long car trips. He described no longer being capable of doing some heavy tasks associated with aspects of his professional work as a geologist. An orthopaedic surgeon considered, however, that with regular exercise the plaintiff would be able to cope with most of his work activities "in a modified sense". He returned to work not long after the accident, although there were some tasks that he was unable to perform. P Lyons J allowed general damages in the sum of $60,000.00. Again, the plaintiff's counsel submitted, Mr Cameron, was in a significantly more serious category than that plaintiff. In that case there was no evidence of any psychiatric injury, nor does the judgment suggest that the plaintiff suffered continuous pain in the order of that found in the present case. That the plaintiff in *Corkery* was functioning at a higher level than Mr Cameron, they submitted, was evident from the fact that the plaintiff there was able to return to work.

[35] The plaintiff in *Suna v Bridgestone Australia Ltd* was a 40 year old male who sustained cervical injuries working as a storeman. His injuries caused him neck and right arm pain. The plaintiff described neck pain radiating down into his right arm and pins and needles in his hand. White J said:

> "[48] The plaintiff relied on his physical skills to engage in satisfactory remunerative employment which supported his young family. That important role has been lost to him. The plaintiff has been deprived of the 'rough and tumble' of life with his children. Recreationally, he enjoyed camping, motor bike riding, driving distances and the mutual satisfaction of marital life and they have all been curtailed or come to an end. He has been worried about spinal surgery and its outcome. These are ongoing losses for a relatively young man. If he has successful spinal surgery that is a good outcome but he may not. Mr Lynch referred to *Kerr v Queensland Rail*, a case with many similarities to the present, where $50,000 was awarded to a plaintiff. Mr Lynch contended that the present plaintiff ought to be awarded $60,000 because he is likely to undergo surgery, whereas in Kerr's case the plaintiff's spinal condition resolved. That plaintiff also suffered from depression not here present. Mr Morton has submitted for $40,000 based on the plaintiff's naturally occurring degenerative condition being accelerated by five years. That is a contention that I have rejected. Taking into account the chance that the plaintiff will have surgery and that it will be successful and the converse, that either the CT induced disc block outcome will not dictate surgery or, that the surgery will not be successful, I assess the plaintiff's general damage under this head in the amount of $55,000."

[36] I was also referred to the recent decision of Boddice J in *Taylor v Invitro Technologies Pty Ltd* [2010] QSC 282 where the 41 year old plaintiff suffered similarly significant orthopaedic injuries to this plaintiff when she was 38 but with more moderate psychiatric consequences than have occurred with Mr Cameron which left her employable although suffering from an adjustment disorder with depressed mood on top of her physical injuries. His Honour assessed general damages in that case at $60,000.00.

[37] The plaintiff's counsel submitted that, in the present case, the plaintiff suffers both from continuous and severe pain, and from a major depressive disorder of moderately severe magnitude. He has attended numerous doctors, and the Gregory Terrace Pain Clinic, to no avail. Both his physical and his psychiatric injuries are permanent conditions with the psychiatric condition subject to a possible slight improvement to "moderate" rather than "major" in diagnostic terms. He is significantly incapacitated in respect to almost every facet of his life. He has difficulty finding pleasure and he is acutely aware of this limitation. In terms of someone for whom the pleading is made that "he has lost the enjoyment of the amenities of life" this plaintiff, they submitted, is an unfortunate exemplar.

[38] Those submissions seem to me to be accurate and, in spite of Mr Morton's submission that the prospects of the plaintiff partially improving with psychiatric treatment warranted an award of $45,000.00, it seems to me that the matters emphasised for the plaintiff do place him in a more serious category than the cases to which I was referred. In my view an award of general damages in the order of

$80,000.00 is appropriate. Interest, computed at the rate of 2 per cent per annum, on one third of this sum ($25,000.00) from the date of the accident until today comes to $2,602.20.

Special Damages

[39] The parties agreed the amount of special damages as $51,357.89, of which $43,447.29 is refundable to WorkCover and $4,183.20 is refundable to HIC. Actual out of pocket expenses therefore total $3,727.40. Interest on this sum for the period from 18 November 2005 to 29 September 2010 (253.71 weeks) at 5 per cent per annum comes to $909.32.

Past Economic Loss

[40] The plaintiff has not worked since his accident as a consequence of his physical and psychological injuries. The plaintiff's counsel's submission was that the combination of a serious physical injury (and its associated symptomatology), with a moderately severe psychiatric injury, has rendered the plaintiff commercially unemployable and no significant attempt was made to dissuade me from that conclusion for the defendant. Mr Morton simply pointed to the possibility that he may be able to perform light work in the future. He is further limited by his modest education and the fact that he is now a poor candidate for retraining because of the difficulty he has with concentration.

[41] According to the report of Mr Dooley, an accountant who prepared a report of matters relevant to his loss of earning capacity, the plaintiff was earning an average of $491.43 net per week as a removalist at the time of his accident. The parties agreed that this figure was accurate and that, if he had continued to work casually as a furniture removalist he would have been earning $677.20 net per week by the time of the trial. The plaintiff's evidence is that he would have remained in employment as long as he could.

[42] Except for the period of unemployment of about three and a half years between the closure of the restaurant business towards the end of 2002, and the plaintiff's commencement with the defendants in 2005, the plaintiff had a solid work history. Dr Gunn described it as a full working history. At the time of his accident the plaintiff had been working with the defendants for approximately 5 months. There is no evidence that the plaintiff was anything other than a diligent and hard-working employee. The defendants led no evidence in any way impugning the plaintiff's performance as a worker. The plaintiff's counsel argued therefore that it was reasonable to assume, therefore, that the plaintiff would have progressed in that or a similar business probably eventually to a full-time position.

[43] The plaintiff's evidence was that he had to work until age 70. If he found working as a removalist too arduous, his evidence was that he would have commenced working as a truck or bus driver. The practical steps that the plaintiff had taken prior to the accident towards obtaining a heavy combination licence demonstrate his commitment to this possibility.

[44] His counsel's submission was that, given his age, and the steps that he had taken to obtain a truck licence, I should prefer Scenario 2 in Mr Dooley's report: a progression from part-time work as a removalist to full-time employment as a heavy

vehicle driver in the five-year period leading up to trial. There was no real evidence of the availability of such work in Hervey Bay, however, where the plaintiff lives and where he appears to wish to continue to live.

[45] Given the difficulty he had in obtaining the work as a removalist, it seems to me that the more realistic approach to his past economic loss is to assume that he would have continued to earn something like the money he had been earning during the period up to the accident for his part time work, discounted for the cost of his travel to the work and the probability that his increasing age coupled with his pre-existing back and heart conditions would have decreased the likelihood that he would have been able to work full time as a removalist up until the present to some extent and that he would have had difficulty in obtaining other appropriate work. By the same token I believe I should take the view that he had a reasonable chance of increasing the hours of his work, his rate of pay over time and thus the level of his income had the accident not happened.

[46] The cost of his travel to work[1] was calculated at $109.00 per week which brings the past loss based on his earnings at the time of the accident back to approximately $383.00 per week. Taking into account, however, the parties agreement that his average net weekly income as a casual furniture removalist would have been $581.06 over the period from the accident until the present, I would assess his past loss of earning capacity as $472.06 per week on average, which I would discount by a further 10 per cent taking into account the normal exigencies of life discussed helpfully by Martin J in *Waller v McGrath*[2] by reference to Professor Luntz's text, *Assessment of Damage for Personal Injury and Death*.[3] Mr Morton submitted that a discount of 30 per cent was more appropriate given the plaintiff's previous back problems, his minor heart condition and the difficulty he experienced in finding work but I have decided to use the lower figure because his pre-existing conditions were not shown to be particularly significant. For the period of the past loss of 253.71 weeks the calculation results in a figure of $107,791.53.

[47] The plaintiff has received weekly net statutory benefits of $35,888.00 (total refundable weekly benefits are $43,024.00, of which *Fox v Wood* damages constitute $7,136.00). From 24 May 2007 to the present he has received Centrelink payments at an agreed average rate of $225.00 per week. Centrelink payments therefore total 175.29 weeks by $225.00 per week, giving $39,440.25. Interest is therefore assessable on $32,463.28. Interest on this sum over 4.88 years at 5 per cent per annum comes to $7,921.04.

Future Economic Loss

[48] The plaintiff's evidence is that he could not afford, because of mortgage commitments, to retire before the age of 70. His counsel argued that such a motivation was a reasonable basis for acceptance of an intention to work beyond the perhaps for some, more usual 65 years. His evidence was that he would have remained a removalist as long as he could, but would then have obtained work if necessary as a bus or truck driver. Having regard to the steps actively taken by him

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1 See *Winn v NSW Insurance Ministerial Corporation* (1995) 133 ALR 154 at 156, 160; *Judd v McLean* [1996] QSC 240; *Delaney v Shepherd* [2000] QCA 107.

2 [2009] QSC 158 at [50]-[53].

3 (4th ed), at 6.4.5-6.4.17.

to obtain a heavy truck licence, there was no compelling reason, it was submitted, to conclude that he would not have pursued a career in this field. For these reasons counsel submitted that Scenario 2 of Mr Dooley's report should be accepted, namely that the plaintiff would have earned $50,000.00 gross per year. Allowing for retirement at age 70 the total future economic loss was submitted to be $405,005.00. It was also submitted that, because of the comparatively short duration of the relevant period, and for the reasons explored by Martin J in *Waller v McGrath*[4], the appropriate discount for vicissitudes in the present case is 10 per cent. Accordingly the appropriate allowance for future economic loss was submitted to be $364,505.00.

[49] Mr Morton's submissions were that the plaintiff's work history and earnings did not show significant earnings in the last nine years of his working life and that it was very easy for him to say that he would work to age 70 but the reality is that few people do that. Additionally, he submitted that the questions of the plaintiff's back and heart condition loomed large in this context. The plaintiff was aging and, he submitted, was unlikely to continue to work in heavy manual work. Again he would have had significant difficulty obtaining employment as demonstrated by his recent history. In addition, with treatment, he submitted that there was a prospect, if not a great one, of future employment in some capacity. Accordingly, the defendant's submissions were that the plaintiff's future economic loss should be calculated as $450.00 per week, to allow for an increase in wages, multiplied by 363 as the five per cent multiplier to age 65 discounted by 50 per cent to account for the matters referred to above. That gives a total of $81,675.00.

[50] Having regard to the plaintiff's age, his modest earnings during the years before the accident, his pre-existing health and the fact that most of his experience lay in the field of manual work, it seems more realistic to me to assume that he would not have worked beyond the age of 65. The parties agreed that, had he continued to work as a casual furniture removalist, his current net earnings would have been $677.20 per week. On those assumptions, reduced by $109.00 as the expense of his driving to work, I have adopted a future earnings level of $568.20 per week. I would not discount the result by as much as 50 per cent, however, as some of the contingencies of life are built into my assumption that he would be more likely to cease work by 65 and the evidence of his state of health was not so strong as to suggest that he would necessarily have been off work for significant periods. Instead it seems to me appropriate to discount his future loss of earning capacity by 15 per cent based on the considerations expressed by Professor Luntz adapted to this particular plaintiff's circumstances. Accordingly I would assess his future loss of earning capacity as $175,318.11.

Superannuation Benefits Foregone

[51] The parties agreed that the appropriate superannuation rate was 9 per cent. Based on my calculation of past and future economic loss this comes to $25,479.87.

Fox v Wood

[52] The parties have agreed *Fox v Wood* damages at $7,136.00.

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4 [2009] QSC 158 at [50]-[53].

Future Out-of-Pocket Expenses

[53] The parties have agreed that the Plaintiff's actuarial life expectancy is 29 years. The appropriate 5 per cent multiplier for this period is 810. The parties also agree that future general practitioner expenses will be limited to the preclusion period applicable under the *Social Security Act* 1991 (Cth), that, once that period ends, the plaintiff will be bulk billed and full pharmaceutical expenses will only apply during the preclusion period. Once that period ends, the plaintiff will pay $5.40 per script only. They were not agreed about how to calculate the preclusion period.

[54] The plaintiff's submissions were that the period is to be computed by adding future economic loss, past economic loss, interest on past economic loss, past superannuation foregone, and future superannuation foregone together, and then dividing the total by 774.10. The resulting figure was said to be the preclusion period in weeks, starting from the date of cessation of WorkCover weekly benefits. The argument was based on s 17(3)(b) of the *Social Security Act* which deals with compensation recovery in cases other than settlements where the compensation part of a lump sum compensation payment is said to be "so much of the payment as is, *in the Secretary's opinion*, in respect of lost earnings or lost capacity to earn, or both." (Emphasis added.) The Secretary's opinion was proved before me by means of a printout from the relevant departmental website which takes the approach advanced by the plaintiff.

[55] The defendant's argument was, essentially, that the Secretary's opinion was wrong and that all that should be allowed was past and future economic loss without the elements of interest on past loss and loss of superannuation. Whatever the merits of that argument it seems to me that it is one the defendants, or perhaps their compulsory insurer, should take up with the Secretary rather than this individual plaintiff. He will be bound by the Secretary's administration of that Act even if I had concluded that the Secretary's opinion had been formed wrongly and should not be applied in determining the preclusion period. The Secretary's position seems to me to be, prima facie, a rational one and he or she has not been heard on the defendants' argument. I believe, therefore, I should assess the damages based on the published opinion.

[56] In this case the WorkCover benefits ceased on 21 May 2007. The plaintiff's approach to the calculation base on my findings about those components of his damages therefore computes the relevant preclusion period as follows:

Future economic loss	$175,318.11
Past economic loss	$107,791.53
Interest on past loss	$7,921.04
Superannuation loss past and future	$25,479.87
Total	**$316,510.55**
$316,510.55 divided by 774.10 for the preclusion period in weeks	408.88
21 May 2007 + 408.88 weeks	22 March 2015

[57] Accordingly the future preclusion period is 7.86 years, expiring on 22 March 2015.

Future hydrotherapy

[58] The future expenses and future recurring costs were set out in a schedule in ex 3. Ms Stephenson recommended that the plaintiff have one session of hydrotherapy per week. The parties agreed that this will cost $18.00 per session. Discounted at 5 per cent over 29 years, this comes to $14,580.00.

Future psychiatric treatment

[59] Dr Byth's view was that the plaintiff needed further psychiatric treatment over the next three years which he costed at $9,000.00. This figure is inclusive of the cost of the drug Efexor for that period. As there was no examination of whether this was the discounted present value of the cost of that treatment or whether it was the likely cost at present values extrapolated into the future and the difference between those two possibilities was not great I have chosen to use that figure without discounting it as the evidence of the measure of the damages under this heading.

Future consultations with general practitioner

[60] Dr Ogunseye has stated that he considers that he will need to review the plaintiff on a monthly basis to control the doses of the potentially addictive drugs prescribed for the plaintiff. Dr Byth agreed that this is reasonable. It seems so to me also. Dr Ogunseye's evidence is that he will charge $64.30 per consultation for this service. The Medicare rebate is, however, $34.30, leaving a net cost to Mr Cameron of $30.00 per consultation. Dr Ogunseye's evidence was also, however, that this would apply only while the plaintiff does not have a health care card. Accordingly the full cost of general practitioner attendances should be limited to the preclusion period. On the plaintiff's counsel's calculation $30.00 per monthly consultation equates to $6.92 per week. That figure discounted at 5 per cent over 7.86 years (multiplier 347) comes to $2,401.24.

Future mowing

[61] The parties have agreed that the commercial rate for mowing the Plaintiff's yard is $50.00. They have also agreed that the yard requires mowing on average every three weeks. This gives a weekly net cost of $16.66. This future loss was calculated to be $13,495.00. There was an issue, however, as to whether the sum was recoverable based on s 308E of the *Workers' Compensation and Rehabilitation Act* 2003 ("the WCRA")[5]. It seems to me that s 308B, s 308C and s 308D may also be relevant to the debate. The sections provide:

> "**308B Paid services provided to worker before injury**
> (1) This section applies if—
> (a) before the worker sustained the injury, the worker was usually provided with particular services that were paid services; and
> (b) after the worker sustains the injury—
> (i) the worker is, or is to be, provided with paid services that are substantially of the same kind; or
> (ii) the worker is, or is to be, provided with gratuitous services that are substantially of the same kind.

[5] See Reprint 2F.

(2) A court can not award damages for the cost or value of the services that have been provided to the worker after the worker sustained the injury or that are to be provided to the worker in the future.

308C Worker performed services before injury
(1) This section applies if, before the worker sustained the injury, the worker usually performed particular services.
(2) A court can not award damages for the cost or value of services of substantially the same type that have been provided to the worker after the worker sustained the injury, or that are to be provided to the worker in the future as either gratuitous services or paid services, if the services that have been provided to the worker after the worker sustained the injury are gratuitous services.

308D Gratuitous services provided to worker before injury
(1) This section applies if—
(a) before the worker sustained the injury, the worker was usually provided with particular services that were gratuitous services; and
(b) after the worker sustains the injury—
(i) the worker is, or is to be, provided with paid services of substantially the same type; or
(ii) the worker is, or is to be, provided with gratuitous services of substantially the same type.
(2) A court can not award damages for the cost or value of the services that have been provided to the worker after the worker sustained the injury or that are to be provided to the worker in the future.

308E Services not required by or provided to worker before injury
(1) This section applies if the worker usually did not require or was not provided with particular services before the worker sustained the injury.
(2) A court can not award damages for the cost or value of any services provided to the worker after the worker sustained the injury, or that are to be provided to the worker in the future as either gratuitous services or paid services, if the services that have been provided to the worker after the worker sustained the injury are gratuitous services."

[62] The defendants submit that no allowance for mowing should be made. Before the accident the plaintiff mowed his own lawn. The evidence is, however, that he has paid a commercial mowing operator to mow his lawn after the accident on occasions and wishes to do so in the future if he had the money. He could not afford this on an ongoing basis before the trial, however, and has otherwise had to rely on his grandchildren and son to do it. The plaintiff's evidence was that it had been mostly done by members of his family and probably seven or eight times commercially.[6] In those circumstances it is clear that the services were gratuitous only some of the time.

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[6] See T1-38 ll 50-60.

[63] The sections were introduced into the Act by the *Workers' Compensation and Rehabilitation and Other Acts Amendment Act* 2004 which, the defendants submitted, was designed to get around the anomalies identified by the Court of Appeal in *Karanfilov v Inghams Enterprises Pty Ltd.*[7] In that case the plaintiff had not paid for any services up to the date of trial but at trial said that she would pay for them thereafter if she had the money to do so. That evidence was accepted by the trial judge and an award was made for future paid care.

[64] On the legislation as it stood at the time the Court of Appeal upheld that approach. Subsequently the Act was amended by introducing s 308E among other sections. It was submitted the amendment was designed to prevent what occurred in *Karanfilov v Inghams Enterprises Pty Ltd*. An extract from the Queensland Hansard relied on for the defendants to help identify the purpose of the legislation reads as follows:[8]

> "The Bill adopts the Queensland Court of Appeal recommendation to clarify when an award of damages for gratuitous care is prohibited.
>
> A Court is prevented from awarding damages for the value of domestic services where these services have been, are to be, or *ordinarily* would be provided gratuitously to the worker by a member of the worker's family or household. In line with the original policy intention of the Act, this also clarifies that where gratuitous care has previously been provided to a worker, the worker is not entitled to damages for paid future care." (Emphasis added.)

[65] The plaintiff here, it was submitted, seeks to do exactly what parliament intended he should not, namely say that although the services had been largely gratuitous in the past, if he had the money he would seek to have them provided at a cost.

[66] It seems to me to be fairly arguable, however, that s 308E is aimed at the precise set of facts that occurred in *Karanfilov v Inghams Enterprises Pty Ltd*, namely that, if the services had all been supplied gratuitously before the trial then the plaintiff is not entitled to damages for paid future care. It does not deal precisely with the situation where some of the services had been paid for after the accident and before the trial and some had been provided gratuitously.

[67] The reference in Hansard to the situation where services have been or *ordinarily* would be provided gratuitously does not resolve the problem here to my satisfaction. In this case, not all of the relevant services have been provided gratuitously and it is difficult to conclude on the evidence that the plaintiff's family would ordinarily continue to provide them. It may well be that that passage in Hansard dealing with the ordinary provision of services is meant as a collective reference to each of the first subsections of the sections I have set out above. For example, s 308C and s 308E deal only with the *usual* performance or need for services before the injury. Section 308B(1) and s 308D(1), however, when referring to the usual provision of services, distinguish in their terms between the situations that apply before and after the worker sustained the injury.

[68] Section 308C is also similar to s 308E structurally and may be applicable here too. Before the injury, the plaintiff provided the service of mowing the lawn for himself

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7 [2004] 2 Qd R 139; [2003] QCA 242.

8 See *Queensland Parliamentary Debates*, 19 October 2004, p. 2931.

and his wife. Section 308C(2) in then prohibiting the award of damages for services that are provided to him after the injury as either gratuitous services or paid services, if the services that have been provided to him after he sustained the injury are gratuitous services, draws the same distinction as s 308E(2) between paid and gratuitous services and only prohibits their recovery if they are gratuitous services.

[69] If parliament had truly intended to prevent plaintiffs from recovering damages for services, for which they had paid in the past after and because of the injury and before the trial, and would pay in the future, simply because they could obtain them gratuitously sometimes, it could have done so clearly. It does not seem to me that it has done that and, in my view s 308E should not be construed so as to detract from the plaintiff's personal common law rights unless that consequence is clear. I shall allow the recovery of damages of $13,495.00 under this head.

Future aids and equipment

[70] Ms Stephenson's view was that the plaintiff needed an electric bed to permit him to position himself properly. The plaintiff's evidence is that he would find this beneficial. That need was therefore established with some credit for the fact that he would have needed to replace his own bed at some stage in the future, as argued for the defendant. The amount of the credit was not established and I shall, therefore, deduct only a modest amount. The plaintiff also derives comfort currently from a massage machine. Given his severe neck symptoms this is a reasonable expense. Ms Stephenson also recommended a vibrating platform massager to help provide him with relief which, given his injuries and her uncontradicted evidence, seems to me to be a reasonable expense.

[71] The total present value of the recurring cost for the bed was calculated to be $5863.00. This allows for the initial purchase, plus a replacement at 10 years and 20 years, in each case appropriately deferred and discounted on the 5 per cent tables. I shall reduce that to $5,000.00 taking into account the likely need he would have had to buy a new bed in any event. The total present value of the massage machine, replaced at five-year intervals, comes to $2,287.00. This gives a total claim for future aids and equipment of $7,287.00.

Future pharmaceuticals

[72] The total weekly cost of the pharmaceuticals the plaintiff needs is $42.06. The Pharmaceutical Benefit Scheme safety-net is activated at $1,281.30, each script thereafter is $5.40 only. Dr Byth has included the cost of Effexor in his assessment of the plaintiff's future psychiatric costs over three years of $9,000.00. This means that the weekly cost for the first three years should be computed on the basis of $25.41 only. This is a total annual cost of $1,321.32. The total number of scripts per year for that first three-year period should also be adjusted from 92.79 downwards to 66.79. On this basis the average cost per script for the first three-year period was calculated for the plaintiff to be $19.78 ($1,321.23/66.79). The difference between the PBS threshold ($1,281.30) and the total cost otherwise ($1,321.32) is therefore $40.02. At an average script cost of $19.78, this means that approximately 2.02 scripts per year in the first three years will be above the PBS threshold. This means that the total cost per year to the Plaintiff for the first three years will be the PBS cap of $1,281.30 plus 2.02 scrips at $5.40 per script, giving a total annual cost of $1,292.21. This equates with a weekly figure of $24.85.

Discounting this figure on the 5 per cent tables over a three-year period (multiplier 146) gives a future pharmaceuticals expense for that period of $3,628.10.

[73] For the period after the first three years up to the end of the preclusion period, 22 March 2015, the additional cost of Efexor needs to be taken into account. As I have already said, the total cost per week comes to $42.06 including Efexor. Again, allowing for the PBS cap, the plaintiff's future annual cost will be $1,281.30 plus $5.40 per script thereafter. The average cost per script was calculated to be $23.57 ($2,187.12/92.79). The average number of scripts per year *above* the safety net was said, therefore, to be 38.43 ($905.82/$23.57). Allowing $5.40 for each of these, the additional cost (after the safety net is triggered) would be $207.52. The total annual cost to the plaintiff will therefore be $1,281.30 plus $207.52, giving $1,488.82 per annum. This is a weekly expense of $28.63. This figure discounted on the 5 per cent tables for 4.86 years (the difference between the preclusion period and 3 years), deferred for three years, comes to $5,698.36.

[74] After the preclusion period finishes on 22 March 2015, the cost reverts to $5.40 per script. The plaintiff goes through 92.79 scripts per year, giving a total annual cost of $501.00. This equates to $9.63 per week. Discounting this figure at 5 per cent over 22.14 years (the balance of the plaintiff's life expectancy after the end of the preclusion period) deferred for 7.86 years, comes to $5,445.34. Adding these three periods together gives a total claim for future pharmaceuticals of $14,801.80.

Future travel

[75] The plaintiff gave evidence that he lives approximately 5 km from his general practitioner (a 10 km round trip). Dr Ogunseye confirmed a requirement for monthly appointments. The plaintiff's evidence was also that he lives approximately 1 km from his pharmacist (a 2 km round trip). He is required to visit the pharmacy at least once per month. The parties agreed a rate for the computation of travel, being $50.00 per kilometre. Future travel was calculated, therefore, as $1,105.45. Accordingly, the total of future expenses comes to:

Future hydrotherapy	$14,580.00
Future psychiatric treatment	$9,000.00
Future consultations with general practitioner	$2,401.24
Future moving	$13,495.00
Future aids and equipment	$7,287.00
Future pharmaceuticals	$14,801.80
Future travel	$1,105.45
Total future expenses	**$62,670.49**

Conclusion

[76] In my assessment, therefore, the plaintiff's damages should be assessed as follows:

General damages	$80,000.00
Interest on general damages – 2 per cent per annum on 1/3	$2,602.20
Special damages including WorkCover expenses	$51,357.89
Interest on actual out of pockets at 5 per cent per annum	$909.32
Past economic loss	$107,791.53
Interest on net past economic loss at 5 per cent per annum	$7,921.04
Future economic loss	$175,318.11
Past and future superannuation benefits foregone	$25,479.87
Fox v Wood	$7,136.00
Future expenses	$62,670.49
Total:	**$521,186.45**
LESS WorkCover refund	$86,471.29
Net judgment to plaintiff	**$434,715.16**

Judgment

[77] Accordingly I shall give judgment for the plaintiff for damages assessed at $434,715.16 and hear the parties further as to costs.