SUPREME COURT OF QUEENSLAND

CITATION:	*Snell v BP Refinery (Bulwer Island) Pty Ltd* [2013] QSC 284
PARTIES:	**GRAEME MARK SNELL** (plaintiff) **v** **BP REFINERY (BULWER ISLAND) PTY LTD** **(ABN 99 008 422 115)** (defendant)
FILE NO/S:	BS 9589 of 2012
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	30 September, 1 October 2013
JUDGE:	Ann Lyons J
ORDER:	**I give judgment for the plaintiff in the amount of $578,139.74**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT AND/OR BREACH OF CONTRACT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – where the plaintiff was employed by the defendant as a process technician – where the plaintiff was injured at his workplace – where the plaintiff lost his footing trying to avoid a fire extinguisher that had been left on a pedestrian pathway and fell into a 2.7 metre trench – where liability was admitted – where medical evidence suggested that the plaintiff had a pre-existing back condition which would have led him to develop similar pain symptoms by the age of 60 – where the amount of future economic loss in particular was disputed – whether the plaintiff was entitled to damages in the amount claimed *Cameron v Foster & Anor* [2010] QSC 372 *Clark v Hall & Anor* [2006] QSC 274 *Corkery & Ors v Kingfisher Bay Resort Village Pty Ltd & Anor* [2010] QSC 161 *Jones v Mollking Holdings Pty Ltd* [2010] QSC 134 *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 *Scott v Musial* [1959] 2 QB 429

Smith v Topp & Anor [2003] QCA 397
State of New South Wales v Burton [2006] NSWCA 12
Taylor v Invitro Technologies Pty Ltd [2010] QSC 282

COUNSEL: M Grant-Taylor QC for the plaintiff
R Morton for the defendant

SOLICITORS: Carew Lawyers for the plaintiff
Gadens Lawyers for the defendant

Background

[1] Graeme Snell has been employed as a process technician for the last 18 years by BP at the Bulwer Island refinery. On Saturday, 19 June 2010 he was injured in a workplace accident at the refinery. At about 7.45 pm he was on a pedestrian pathway in the vicinity of the production terminal inspecting a section of the refinery and fell 2.7 metres into an excavation which had been dug to the side of the pathway. He had stumbled into the trench in his efforts to avoid a fire extinguisher which had been left on the path at a point adjacent to where the trench had been dug. Mr Snell fell headfirst into the trench and was unconscious for a short period before he was able to radio for assistance.

[2] Mr Snell immediately experienced pain to his back, right side and forehead. There is no doubt he sustained injuries to his forehead, shoulder and back. The evidence indicates that he suffered considerable bruising to the left shoulder, right knee and back and bruising involving the right forehead and an area around the right eye. Whilst there was a superficial laceration above the right eye, it did not require suturing. He was hospitalised overnight and returned home the following day. His treatment initially consisted of bed rest and pain relief, followed by gradual mobilisation. Mr Snell was 48 years of age at the time of the accident and will turn 52 in December 2013.

[3] He continued to suffer pain after the accident and took part in the nine-day Back Rehabilitation Program at the Wesley Hospital from 23 August 2010 to 3 September 2010. It was noted that Mr Snell "was committed to his rehabilitation and approached the physical and psychological component of the program with a high degree of effort."[1]

[4] On 10 September 2010 he saw a neurosurgeon, Dr Frank Tomlinson, who undertook a series of investigations including an MRI scan and an EMG/nerve conduction study. On 30 September 2010 he underwent orthopaedic procedures at the Wesley Hospital including laminectomies and a spinal fusion. Mr Snell was discharged on 8 October 2010, 10 days after the operation. He indicated there had been some improvement to his leg and back pain. He continued to receive physiotherapy. He also consulted an upper limb surgeon and had a series of four injections into the left shoulder.

[5] Mr Snell was off work after the accident for many months but continued to receive his base rate wage direct from BP and BP was subsequently reimbursed by WorkCover for amounts due to Mr Snell under his workers' compensation claim.

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1 Exhibit 10, tendered on 1 October 2013, at p 1.

Periodic payments of workers' compensation commenced on 20 June 2010 and ceased on 19 November 2011. Mr Snell has continued in employment at BP but has suffered an ongoing loss in his wages due to the fact that he cannot access overtime and other benefits.

The medical evidence

[6] The medical evidence, particularly the reports of Dr McPhee and Dr Morgan, confirms the injuries outlined above. Those reports also confirm that on 30 September 2010 Mr Snell underwent an L5/L6 decompression with bilateral L5 and S1 rhizolysis, an L5/L6 discectomy, an L5/L6 transforaminal lumbar interbody fusion and an L5/L6 intersegmental fixation with posterolateral grafting and bone harvested from the local area.

[7] There is no doubt that the injuries suffered by Mr Snell were serious as Dr Morgan quantified a 15% whole person impairment solely attributed to the injury to the lumbar spine with an additional 7% whole person impairment attributable to the left shoulder injury which is essentially a 21% whole person impairment. Dr McPhee quantified the whole person impairment at 22% for the spinal injury with an additional 8% for the shoulder.

[8] I accept Mr Snell's evidence that he continues to experience significant pain and continues to ingest Panadol Osteo at the rate of six per day as well as Voltaren, Brufen and Endone.

Dr McPhee's report

[9] In a report dated 1 March 2012, Dr McPhee indicated that the principal complaints arising from the accident were back pain and pain in Mr Snell's left shoulder, with the back pain being dominant. In terms of the back pain, Dr McPhee referred to Mr Snell's experiencing constant low back pain at a level of 5 to 6 on a 10 point scale which was aggravated by walking down steps, prolonged sitting for more than 20 minutes or walking longer than 30 minutes. Bending was also noted as being painful and restricted. Dr McPhee also referred to chronic anterior left shoulder pain at a level of 4 on a 10 point scale. Whilst the arm was comfortable when resting and the sensation in the left arm and hand was unaffected, the symptoms were worse with activity. Dr McPhee noted that an MRI of the left shoulder on 2 March 2011 showed degenerative changes in the acromioclavicular joint with reactive oedema in the adjacent bone and synovial hypertrophy. He also noted some minor degenerative changes in the glenoid labrum.

[10] Significantly Dr McPhee noted that there was radiological evidence of degenerative changes in the L5/6 intervertebral disc and that there was evidence of canal stenosis secondary to this degeneration. Dr McPhee stated:

> "These changes are longstanding and predate the incident on 19th June 2010. As a result of the fall Mr Snell has suffered a contusion to his lower back causing aggravation of pre-existing disc degeneration and canal stenosis."[2]

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2 Exhibit 1, tendered on 30 September 2013, at p 4.

[11] Dr McPhee also noted that the injury to the left shoulder was a soft tissue injury and that there was evidence of impingement syndrome. He considered that on the basis of the clinical evidence, impingement was most likely due to the biceps tendon anterior to the shoulder joint. He stated:

> "Nonetheless his symptoms could be arising from the degenerative changes in the acromioclavicular joint. As a result of the fall Mr Snell has suffered aggravation of pre-existing degeneration of his left shoulder."[3]

[12] Dr McPhee concluded:

> "Both conditions will not respond to physical treatments which are unlikely to result in any substantial or sustained improvement to either the current back problem or left shoulder conditions."[4]

[13] Dr McPhee indicated that pain was to be managed by analgesia and that Mr Snell's condition should be considered to have reached its maximum medical improvement. He considered that Mr Snell's functional incapacities were related to reduced tolerances and pain. Dr McPhee indicated that Mr Snell had functional limitations for handling heavy material and prolonged periods of standing and walking. He noted that Mr Snell had previously been employed as a process technician and that ongoing pain and functional limitations had prevented him from returning to his former work. He noted that Mr Snell was employed in an office capacity on a part time basis.

[14] Dr McPhee concluded, "There is nothing on clinical presentation that should preclude Mr Snell from undertaking semi-sedentary work in a full time capacity."[5] He considered however that the range of suitable employment would be limited and that, given his age, Mr Snell would have difficulty in finding suitable, alternative employment on the open market. He also considered that Mr Snell may be predisposed to recurrent episodes of back and left shoulder pain, requiring periods off work. He stated that this may limit Mr Snell's career progression in earnings and that his future employment may be dependent on an empathetic employer. Dr McPhee stated that Mr Snell had shown a limited capacity to return to part time sedentary duties and that the prospect of returning to full time sedentary duties in the foreseeable future was guarded. Dr McPhee noted that Mr Snell's presentation was consistent with the history and the radiological findings and there was no clinical evidence of functional overlay or over presentation.

[15] In terms of the evidence of moderate degenerative disc disease at L5/L6 with moderate canal stenosis, Dr McPhee noted that this was due to age related changes and that the accident had brought the condition to light at an earlier stage than might be expected. He stated:

> "Nonetheless Mr Snell is only 50 years of age and it is probable that had he not suffered the fall on 19th June 2010 that he would have developed similar symptoms of back and leg pain due to the spinal stenosis within 10 years. It is unlikely that he would have got

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3 Ibid, at p 4.
4 Ibid, at p 4.
5 Ibid, at p 5.

> to normal retirement age without requiring decompressive surgery to rectify his canal stenosis and relieve his leg pain.
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> Similarly there are degenerative changes in the rotator cuff and particularly the acromioclavicular joint. It is likely that with a passage of time and ongoing age related changes that this condition would have come to light merely as a result of natural history. Again it is likely that Mr Snell would have had symptoms in about 10 years. Once present then it would likely affect his capabilities of undertaking manual tasks and restriction of shoulder movements was likely."[6]

Dr Morgan's report

[16] Dr Morgan, in a report dated 21 February 2012, also noted that there was a past history of antecedent intermittent lumbar discomfort and that there was evidence of both a clinical and radiographic nature, of antecedent degenerative disease in the lumbar spine. He considered however that it was possible that the symptoms were of a relatively minor nature and were specific for L4 and L5. He considered that the forces applied at the time of the accident may have given rise to a further aggravation of the abnormality, heightening the symptoms and potentiating the effects of his lumbar spine pathology.

[17] Dr Morgan also noted that Mr Snell's remunerative prospects had been severely diminished and that he would have difficulty in standing, walking, bending, lifting or carrying heavy objects. He considered that some of the duties required of him as a process technician would remain within his functional limits but other tasks would not and would further compromise his remunerative prospects. He would have difficulty with sporting activities such as golf, tennis and swimming.

Mr Snell's evidence

[18] Mr Snell gave evidence that he was born in the United Kingdom and trained as a fitter and turner and completed his apprenticeship in that trade. He then gained qualifications through positions working in oil refineries in the UK prior to moving to Australia. He commenced with BP at Bulwer Island in March 1995 as an operations technician. He stated that he usually worked four, 12 hour shifts every ten days. He would work two days on a 6 am to 6 pm day shift and two 6 pm to 6 am night shifts. He stated that he would work those four days over a five day period with a rest day in between and then he would have six days off. Mr Snell stated that it was an excellent working arrangement which allowed him to spend time at home and to become involved in sport. He stated that BP had been an excellent employer and that very few people leave BP because they treat their employees so well. He also stated that the level of pay was "outstanding".[7] He stated it was his intention to work until he was 65.

[19] Mr Snell confirmed that he was off work for a considerable period of time after the accident. Whilst he stated that he did not return to work until late 2012, it would seem that he in fact returned on work in late 2011. He indicated that when he did

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6 Ibid, at p 6.

7 T1-16, at line 27.

return to work he was given part time work in the training department and worked from home. He stated that technically he is still in the operations department but has been "seconded" to the training department.[8] He indicated that he has never returned to full time work. Mr Snell stated that whilst his base rate of pay has not gone down since the accident, he is not able to access overtime or other similar benefits and has suffered a considerable loss of income during this period.

[20] Mr Snell gave evidence of a conversation he had with Mr Chris Lynch who was a HR advisor at BP and said that in mid-2011, he had a conversation with him in the following terms, "He basically said where do we go from here. May I suggest to you that we can't support you indefinitely. Time is running out and I would suggest to you that you look at this particular contract and when you've done the signatures, send it to me."[9]

[21] Mr Snell indicated that he has not been at work since March 2013 as he decided to "try and buy some time, basically, and take long service leave and holidays that I'm owed".[10] When he was asked if he was going to return to work at the end of that period of leave he indicated "probably not".[11]

[22] Mr Snell referred to the email dated 27 March 2013 which he sent to the HR Department in which he indicated that he would be taking leave until January 2014.[12] His email continued, "I do believe I will have a definitive direction before then and some decisions can be made about my future around that time."[13] The response from Ms Alison Roe in HR dated 3 April 2013 was as follows:

> "Can you let me know your expected return date in January?
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> My expectation is that in January, unless you are cleared medically fit to go back on shift, you will come back under the day workers provisions in the EA and we will find you suitable office based duties."[14]

[23] Mr Snell indicated that prior to the accident in June 2010, he was not conscious of a lower back disorder. He had periods of pain after he had overexerted himself but stated that he had never taken any time off work on account of a lower back pain. He also stated he was not on any medication for a lower back condition. He also indicated that he had never had any difficulties with his left shoulder prior to June 2010.

[24] Mr Snell indicated that he previously would wash his own car but has not been able to do so since the accident. Rather, he now uses a hand car wash facility in a car park which usually costs him $35 or $40 every five or six weeks. He also gave evidence that previously he would wash the windows at his home every three months, with the downstairs being washed more regularly. Subsequently, he has had to engage commercial operators to do the window cleaning. Mr Snell gave evidence

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8 T1-18, at line 22.
9 T1-46, at lines 1-4.
10 T1-18, at lines 39-40.
11 T1-18, at line 42.
12 Exhibit 6, tendered on 30 September 2013.
13 Ibid.
14 Ibid.

that since the accident, he has been taking medications to relieve his symptoms, in particular, Panadol Osteo and Voltaren Rapid. He spends about $40 or $50 a month on his medications.

[25] Mr Snell currently experiences pain 24 hours a day in his lumbar spine. He stated that if his pain is un-medicated, it is at a level of 8 out of 10. He also stated that he is unable to continue golf and he was previously a "DIY" enthusiast. He has also been unable to return to gardening, the gym, tennis or cycling since the accident. He also stated that his injury has interfered with his marital relations in both frequency and quality.

[26] Mr Snell acknowledged that prior to his injury he had been treated for depression by his doctors at the Cleveland Central Medical Centre and that aspects of that condition included anxiety and panic attacks. He indicated he was given varying medications over the years and eventually came to be prescribed Pristiq. He was also referred to a specialist psychiatrist. Mr Snell stated that he has a longstanding condition of high cholesterol and was prescribed Lipitor. At times he has had side effects from his medications as well as other physical problems, including heart palpitations.

[27] In cross examination Mr Snell was taken through his medical records from the Cleveland Medical Centre. He confirmed that the medical records indicate that in May 2003, he saw his general practitioner and complained of back pain in the six weeks prior to that consultation. The records also noted that in December 2003 he had complained of lower back pain. He confirmed that he did have recurrent pain in his back but that it had never progressed to pain in his leg.

[28] Mr Snell also confirmed that in August 2004 his general practitioner noted that he was under considerable stress at home. His wife was unwell and he was anxious due to the stress with his children. The medical records noted "anxiety plus".[15]

[29] Mr Snell agreed with Counsel for the defendant that the medical records indicated that in October 2004 he had experienced dizziness and poor balance over a six week period and that he had muscular headaches and was "Also stressed and possibly depressed".[16] Mr Snell said he had been prescribed Voltaren Rapid before the accident for "sporadic muscular problems", particularly regarding his shoulder and neck.[17]

[30] Mr Snell agreed with Counsel for the defendant that in January 2005 the medical records noted chest pains and on 10 November 2005 a note recorded recurrent lower back pain as well as: "Sacroiliac joint region. Noted radiation to the right side. Lateral aspect of the lower leg".[18] He confirmed that he was experiencing pain in his lower back which radiated down his right leg. Mr Snell gave evidence that he had some assessments for cardiovascular problems in June 2006, including a holter monitor assessment, and on 7 September 2006, the medical centre notes recorded that "palpitations persist" and there was reference to "had panic attack plus plus".[19]

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15 T1-29, at line 3.
16 T1-29, at line 21.
17 T1-29, at line 30.
18 T1-29, at line 47 to T1-30, at line 1.
19 T1-30, at lines 28-32.

[31] Mr Snell indicated that he had a reaction to medication in 2007 which had resulted in a change of his medication. He was weaned off Lexapro, given difficulties with side effects, and in May 2008, he was tried on Valium. Pain in his right shoulder was also noted over the six week period before a medical consultation on 7 May 2008. He was prescribed Voltaren Rapid for his shoulder pain and in June 2008 he attended on his general practitioner who noted, "Worsening depression over last two weeks. Poor concentration. Short-fused. Swinging moods".[20] At that point, the Valium was changed to a medication called Lovan, but he had a side-effect. In September 2008, he was referred to a psychiatrist, Dr Mayze, in relation to problems that had resurfaced from his childhood.

[32] In May 2009 there was a record that Mr Snell told Dr To he had difficulty raising his right arm and that around that time he was taken off Lexapro, which had been recommenced in August 2008, and was started on Pristiq. On 30 October 2009 Mr Snell was recorded as complaining of lower back pain. In February 2010, given he was feeling increased agitation and anxiety, his dosage of Pristiq was increased. The medical notes record that on 7 April 2010 he saw Dr Mitchell at the Cleveland Central Medical Centre who wrote, "Long discussion re depression and treatment and testing for fatigue and impairment at work. Depression has increased last couple of days. Missed work".[21] It would seem that around that time BP had introduced a drug and alcohol policy which required testing for medication. Because of that policy, Mr Snell had decreased his level of medication and had essentially "fallen in a heap".[22] Eventually the matter was discussed with BP who accepted that he was someone who needed to have an exception under the drug and alcohol policy. His need to take antidepressant medication was accordingly accommodated. Mr Snell stated that his depressive symptoms have continued but that he no longer has anxiety attacks. He also confirmed that he has sleep apnoea which was discovered earlier this year.

[33] Mr Snell confirmed that at the Wesley Hospital pain management program he was seen by a number of professionals including doctors, an exercise physiologist, an occupational therapist and the psychologist Elizabeth Lovett. He stated that the program had resulted in his having an increased understanding of pain and more confidence in managing his back condition. He confirmed that he had an interview with Ms Lovett. Mr Snell was asked about Ms Lovett's report which recorded that he had indicated he wished to "live a full and vital life when [he] retired in five years".[23] Mr Snell confirmed his interview with Ms Lovett and many of the aspects of her report but denied that he said that he wanted to retire in late 2015, five years after he spoke to her.

Evidence of Mr Gordon Siebel, Occupational Therapist

[34] Mr Siebel indicated that he had prepared a report dated 12 April 2012. He stated that Mr Snell's duties essentially had been to operate, control and monitor equipment used to process, manufacture and blend refined oil products and to operate and control pumping equipment to transfer oil within the refinery to storage facilities and to collect, process and analyse samples for recording.

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20 T1-32, at lines 6-7.
21 T1-33, at lines 20-22.
22 T1-33, at line 35.
23 T1-37, at line 41.

[35] Mr Siebel indicated that Mr Snell had returned to work on a suitable duties program in a learning and development specialist position, averaging about four self paced hours a week from home in November 2011. He stated that Mr Snell had progressively increased his hours to about eight a week and indicated that when he saw him in April 2012, Mr Snell was hopeful of gradually increasing his hours towards part time employment. Mr Siebel said that at the time of his interview, Mr Snell was limited in relation to his domestic responsibilities and could only perform some of the lighter housekeeping, meal preparation, shopping, and yard maintenance tasks. He noted that Mr Snell previously played golf off a handicap of nine but had been unable to resume golf or any of his sporting activities since the accident.

[36] Mr Siebel indicated that Mr Snell was cooperative and provided a consistent effort during assessment. He stated that his current functional capacities equated to "light" duties.[24] Mr Siebel indicated that he had rated Mr Snell's capacity to perform the jobs of project administrator and motor vehicle sales person and indicated that Mr Snell would be able to perform the physical demands of those occupations with difficulties. However, he considered Mr Snell was commercially unable to return to his occupation as a process technician or as a fitter and turner. He indicated that Mr Snell therefore had the functional capacity to work as a project administrator and motor vehicle sales person. He indicated that Mr Snell would however find the volume of sitting, standing and driving painful and difficult to endure and that he had little demonstrated project experience outside petroleum operations and was not interested in motor vehicle sales. He considered Mr Snell was not able to work in his present occupation. He stated:

> "32. There are a few variables in favour of this man remaining at work. He seems to be in good general health and is motivated to exercise regularly to improve his physical fitness. He is determined and has established some effective coping strategies to regain his independence in some of his home affairs. He has accumulated a broad range of skills and experiences and a continuous work history over 30 years which is characteristic of an excellent work ethic. He is fortunate to be employed within a large international organisation where relatively more resources are available to accommodate his functional restrictions (at this stage).
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> 33. There are impediments. He is in chronic pain and is reliant on regular medication to manage same. He has adopted a less active lifestyle and gained some weight. He also has to endure elevated pain and be conscientious with his work practices to manage his lower back problem in his new project role. His opportunities to work in most other jobs that he is reasonably skilled and experienced are lessened as a consequence of his residual functional capacities. His functional restrictions, time off from work and injury history will unfortunately make him susceptible to prejudice, with future job seeking within BP and on the open labour market.

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[24] Exhibit 4, tendered on 30 September 2013, at p 7.

> 34. He will realistically find it very challenging to return to work. His reasonable work direction would be in a project administrator related role with his present employer. He will be capable of working up to 12 hours per week provided the duties and physical demands of same remain in proportion to his assessed functional capacities. He is unlikely to find suitable employment outside of BP."[25]

[37] Liability has been admitted.

[38] The only outstanding issues relate to the calculation of damages.

General Damages

[39] I accept that Mr Snell has experienced pain, suffering and loss of amenities of life. I also note that he has some scarring at the site of the operation but it is not suggested that it is visible or of any particular concern or significance to Mr Snell. Whilst I accept that the pain has abated to some extent, it is not disputed that he still experiences considerable pain. It is also not disputed that Mr Snell has been well motivated to return to work and that he has not exaggerated his symptoms.

[40] The plaintiff claimed an amount of $110,000 in the Statement of Claim for general damages and currently argues that an amount of at least $85,000 should be awarded based on comparable awards for similar injuries. Particular reliance is placed on a number of decisions including *Jones v Mollking Holdings Pty Ltd*[26] where a 33 year old woman was awarded general damages of $60,000 where the injuries were confined to a fracture of the sacrum and a chronic soft tissue musculoligamentous injury to the lumbar spine which had only warranted an assessment of between 5% and 10% permanent functional impairment. Similarly, in *Taylor v Invitro Technologies Pty Ltd*,[27] an award of $60,000 was given to a 41 year old woman who had a fracture of the sacrum and a permanent psychiatric injury. The sacral injury had only warranted an assessment of a whole person impairment of between 10% and 11%.

[41] In the present case the plaintiff is considerably older, being almost 52 years of age. However the whole of person impairment is considered to be, at the very minimum, 21%.[28] It would seem to me that the major ongoing issue for Mr Snell is indeed his back pain as the post surgery scarring is of no real concern. The left shoulder injury does cause pain but not to the same degree as his back pain. In this regard I note that in *Corkery & Ors v Kingfisher Bay Resort Village Pty Ltd & Anor*,[29] which involved a 50 year old male with back and shoulder injuries with a high level of initial pain but less long term pain, the award of general damages was $60,000. I also note that in *Cameron v Foster & Anor*,[30] Douglas J awarded $80,000 to a 56 year old man who suffered orthopaedic and psychiatric disability to the extent that

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25 Exhibit 4, tendered 30 September 2013, at p 9.
26 [2010] QSC 134.
27 [2010] QSC 282.
28 Although no actual rating needs to be assigned as the injury occurred 12 days prior to the amendments to the *Workers' Compensation and Rehabilitation Act* 2003 (Qld).
29 [2010] QSC 161.
30 [2010] QSC 372.

"the effects of his physical injuries establishe[d] that he [was] in constant and extreme discomfort which intrude[d] into every facet of his life. His enjoyment of life ha[d] been very significantly impaired".[31]

[42] Having considered the relevant authorities, in my view an award of **$80,000** is appropriate to take into account the level of Mr Snell's whole person impairment and the constant pain he now finds himself in but with due consideration for his age.

Interest on general damages

[43] I will allow interest at the standard rate of 2% on a figure of $40,000 for 1,214 days between 19 June 2010 and 14 October 2013, which is an amount of **$2,660.82.**

Past Economic Loss

[44] There is no doubt that at the time of the accident the plaintiff was in secure and longstanding employment as a process technician with the defendant and had been employed in that position since March 1995.

[45] In the years both prior and subsequent to the date of accident, the plaintiff generated the following taxable earnings in his employment with BP Refinery:

Financial Year	Gross Income	Income Tax	Nett Income
2005-2006	117,472.00	40,947.00	76,525.00
2006-2007	114,462.00	35,894.00	78,568.00
2007-2008	122,249.00	38,436.00	83,813.00
2008-2009	119,777.00	35,842.00	83,935.00
2009-2010	129,856.00	38,928.00	90,928.00
2010-2011	124,596.00	35,738.00	88,858.00
2011-2012	129,253.00	38,488.00	90,765.00

[46] In the period of 26 fortnights prior to the accident the plaintiff had generated gross earnings, which included both taxable and non taxable amounts, of $145,784.03. Included in that were $16,549.94 of non-taxable earnings which yields a figure of taxable earnings of $129,234.09 as set out below.

PPE	Gross	Non-taxable	Taxable
25.06.09	5,052.90	638.25	4,414.65
09.07.09	3,961.43	638.25	3,323.18
23.07.09	7,737.74	638.25	7,099.49
06.08.09	4,469.09	638.25	3,830.84
20.08.09	4,976.75	638.25	4,338.50
03.09.09	3,961.43	638.25	3,323.18
17.09.09	4,976.75	593.69	4,383.06
01.10.09	5,653.63	638.25	5,015.38

[31] Ibid, at [29].

15.10.09	10,793.83	638.25	10,155.58
29.10.09	4,138.35	638.25	3,500.10
12.11.09	5,199.01	638.25	4,560.76
26.11.09	6,195.82	638.25	5,557.57
10.12.09	4,345.27	638.25	3,707.02
24.12.09	6,201.43	638.25	5,563.18
07.01.10	5,928.52	638.25	5,290.27
21.01.10	5,762.18	638.25	5,123.93
04.02.10	6,460.57	638.25	5,822.32
18.02.10	6,881.42	638.25	6,243.17
04.03.10	4,517.50	638.25	3,879.25
18.03.10	4,517.50	638.25	3,879.25
01.04.10	7,267.37	638.25	6,629.12
15.04.10	5,675.34	638.25	5,037.09
29.04.10	6,399.86	638.25	5,761.61
13.05.10	4,517.50	638.25	3,879.25
27.05.10	5,675.34	638.25	5,037.09
10.06.10	4,517.50	638.25	3,879.25
	$145,784.03	**$16,549.94**	**$129,234.09**

[47] The plaintiff's past economic loss has been agreed as between the parties at a figure of $155,000. I accept the basis for that calculation of loss as set out above.

[48] Counsel for the defendant however argued that the plaintiff made significant savings in his travelling to work costs during this period. In particular it is argued that as it is approximately 43.5 kilometres from his residence to his work one way he saves about 60 cents per kilometre or $52.20 a shift. To that needs to be added the amount of $8 for Gateway Bridge tolls per shift. Counsel for the defendant argued therefore that there is a saving of $60 per shift and at four shifts every 10 days, assuming four weeks annual leave, it would equate to 135 shifts per year or $8,100 per year. The defendant argued that those savings significantly reduce the plaintiff's actual losses and that for the 3.33 years from the date of the accident to now the saving would be in the order of $25,000. The defendant argued, therefore, that the agreed loss of $155,000 should be reduced to $130,000.

[49] There is no doubt that in a calculation of past economic loss, the cost of travelling to work in that period ought to be deducted. However, I accept the principle enunciated by White J in *Clark v Hall & Anor*[32] where her Honour said:

> "Many people take the opportunity to do non-work related tasks when travelling to and from employment to save making other journeys either to save fuel or effort or both and that deduction ought to be allowed …"[33]

Her Honour then reduced the amount of past economic loss accordingly.

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32 [2006] QSC 274.

33 Ibid, at [78].

[50] It would seem that in his calculation, counsel for the defendant did not include the annualised public holidays of 11 days.[34] Accordingly, I accept that the number of days which should be used in the calculation is 130 days. I will accept a figure of 86 kilometres per round trip at a cost of 60 cents per kilometre. I also accept that the Gateway tolls should be added at a cost of $8 per round trip. I consider therefore that a figure per year of $7,748 is the amount by which the past economic loss should be reduced. If one uses the same proportional reduction as White J allowed in *Clark v Hall & Anor*, then the annualised saving is $90 per week for 173 weeks between 19 June 2010 and 14 October 2013, which is $15,570. Therefore $155,000 should be reduced by $15,570. I will therefore allow **$139,430** for past economic loss.

Interest on past economic loss

[51] In terms of interest on past economic loss, the recognised rate is 5% per annum and the 5% should be calculated on the difference between $113,057.72, the actual amount reimbursed by WorkCover to BP Refinery, and $139,430, which is $26,372.28. Therefore, 5% of $26,372.28 over 1,214 days between 19 June 2010 and 14 October 2013 amounts to $4,385.75. I allow **$4,385.75** for interest on past economic loss.

Past loss of employer's contribution to Superannuation

[52] I accept that the plaintiff's loss of those contributions to his superannuation which would otherwise have been made by BP should be calculated at 18% on the difference between his agreed past economic loss, before deductions for travel costs, which is $155,000, and the amount actually paid by Workers' Compensation payments of $113,057.72, which is $41,942.28. Therefore, 18% of $41,942.28, is $7549.61, I will allow **$7,550.**

Interest on past superannuation contributions

[53] I also accept that interest on past superannuation contributions should be calculated at 5% of $7,550 over 1,214 days between 19 June 2010 and 14 October 2013 which yields $1,257.08**.** I allow **$1,255.58** interest on past superannuation contributions.

Future Economic Loss

[54] I accept that the plaintiff's taxable earnings would have increased each year from 1 November, in accordance with the following schedule:

Financial Year	Basis of Calculation	Taxable Income
2009-2010	Actual	129,856.00
2010-2011	105.0% of $129,856.00	136,349.00
2011-2012	105.0% of $136,349.00	143,166.00
2012-2013	105.0% of $143,166.00	150,324.00
2013-2014	105.0% of $150,324.00	157,840.00

[34] Exhibit 9, Contract of Employment, tendered 30 September 2013. Clauses 7.1 and 7.5 indicate an entitlement to public holidays.

[55] I accept that, in accordance with that calculation, the following income tax would have been deducted from that income:

Year	Gross Income	Income Tax	Nett Income	Non Taxable	Received Income
2010-11	136,349.00	40,444.00	95,905.00	16,595.00	112,500.00
2011-12	143,166.00	44,501.00	98,665.00	17,789.00	116,454.00
2012-13	150,324.00	45,822.00	104,502.00	18,982.00	123,484.00
2013-14	157,840.00	48,715.00	109,125.00	18,982.00	128,107.00

The plaintiff's submission

[56] Counsel for the plaintiff submits that had he not been injured the plaintiff would have continued to be employed at BP as a process technician (with promotions) until his retirement on 28 December 2026 at age 65 years. It is argued that in that employment he would have received an income of $128,107 after tax which, once divided by 52.14 weeks, is $2,456.99 per week in the 2013-14 financial year.

Economic loss for the 2013-2014 Tax Year

[57] Counsel for the plaintiff argues that his future economic loss and the impairment of his earning capacity are compensable in accordance with those calculations. It is argued that for the rest of the 2013-2014 financial year there has been an actual loss of $381.94 per week. Therefore, for the remaining 37 weeks from 15 October 2013 to 30 June 2014, after a discount of 5% has been applied (multiplier 36.14), the future economic loss for this period is in the order of $13,803.31. Whilst Counsel for the defendant argues for a loss of $337 per week I will accept the plaintiff's calculation of $381.94 per week and allow **$13,803.31,** as the economic loss for this period, after a 5% discount has been applied.

Economic loss for the balance of the period

[58] Counsel for the plaintiff argued that for the period from July 2014 to December 2026, a period of 14.5 years, the figure of $381.94 per week should be allowed for that period, also discounted at 5%, giving a figure of $190,168, which is a total of $204,834.50 for the entire period.

[59] To this figure, counsel argued, that a number of amounts should be added. It was argued that there should be an allowance for loss of promotional opportunities beyond his position as a process technician. It was also argued that an amount for the prospect of a reduction in his paid working hours for BP into the future should also be added. Reliance in this regard was placed on the following assessment in the report of the Occupational Therapist, Mr Gordon Siebel.

> "He will realistically find it very challenging to return to work. His reasonable work direction would be in a project administrator role related to his present employment. He will be capable of working up to 12 hours per week provided the duties and physical demands of

> same remain in proportion to his assessed function capacities. He is unlikely to find suitable employment outside of BP."[35]

[60] Counsel also submits that an award should be added for his disadvantage on the open labour market and in the event of enforced premature retirement. Overall counsel for the plaintiff submits that a figure of $450,000 should be added to the future economic loss of $204,834.50, making a total of $654,834. Counsel submits that this uplift can be tested by considering the figure Mr Snell would be entitled to should he not return to work. Counsel argues that a loss of $2,456.39 nett per week discounted at 5% per annum over the next 13 ¼ years discounted at 10% for contingencies, less an allowance for future travelling expenses is in fact $1,082,580. The amount being sought by way of an uplift is 51% of that total figure.

The defendant's submissions

[61] Counsel for the defendant relies on Dr McPhee's evidence that within 10 years of the date of injury Mr Snell would have been in the same position as he is now and would have needed decompressive surgery due to his pre-existing degenerative conditions in both his spine and left shoulder. Counsel also relies on the radiology which shows that significant pre-existing degeneration, as well as the medical records of his general practitioner which indicate that he suffered from episodic prior back pain, which at times radiated into his right leg.

[62] Counsel for the defendant also submits that those medical records indicate that Mr Snell suffered from other health problems which included depression and anxiety as well as family stressors. Counsel argues that, given those factors, it is unlikely that Mr Snell would have worked to age 65. Counsel submits that the plaintiff's current weekly loss is in the order of $337 which should be allowed for the next seven years which is the balance of the 10 years predicted by Dr McPhee and it should then be discounted by 15% which would be in the order of $88,500.

[63] Alternatively, counsel argues that the loss for the next seven years should be allowed, but not discounted, which would mean that $100,000 should be awarded.

[64] The third submission is that the economic loss should be allowed until age 65 but there should be a discount of 35% because of the risk of the onset of symptomatology in any event, together with the other health problems. Counsel submits that this would produce about $110,000. Overall, it is submitted that $100,000 adequately compensates the plaintiff for the risks that he is at in the future. Counsel argues that there is no suggestion that his employment with the defendant is not secure.

[65] Counsel for the defendant also argues that no amount should be allowed for any of the four factors referred to by the plaintiff, namely, loss of promotional opportunities beyond his position as a process technician, the prospect of a reduction in paid working hours, the disadvantage on the open labour market and the prospect of enforced premature retirement. In particular, counsel for the defendant argues that there is no evidence to support a finding that the plaintiff is not capable of continuing in his current workplace and argues that even though the plaintiff does not think he will return to work in January 2014, there is no evidence

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35 Exhibit 4, Report of Gordon Siebel dated 12 April 2012, tendered on 30 September 2013, at p 1.

to support such a finding. The defendant relies on Mr Snell's evidence that BP was a good employer and was a company which showed compassion and understanding. Counsel also argues that Mr Snell's evidence indicated that he enjoyed working for the defendant because of the way he was treated.

What are the plaintiff's prospects of future full time employment?

[66] I accept that there was no evidence that the plaintiff said that he could not continue at work at all because of his back or his shoulder and neither did he say that he was being pressured at work or that he was being set up to fail. The current evidence is that if he returns to work in January 2014 he will go back to "suitable office based duties".[36] Mr Siebel states that Mr Snell is only capable of working up to 12 hours per week provided the duties and physical demands remain in proportion to his assessed functional capacities. Does that mean that Mr Snell will only be expected to work 12 hours a week on his return to work? I note that the evidence indicates that has been the maximum working week Mr Snell has achieved since the accident.

[67] If he is only able to work 12 hours per week, there was no evidence before me that he would continue to be paid his full time base rate wage long term. Neither was there evidence that would allow me to conclude that his employment at BP is "secure" into the future. There is simply no evidence as to how long he will be employed to do "suitable office based duties" or how many hours a week he is expected to work. There was certainly no evidence that he would be paid a full time wage to work part time until age 65.

[68] Whilst Dr McPhee states that there was nothing on "clinical presentation" to prevent Mr Snell undertaking semi sedentary work on a full time basis, I note that his conclusion was heavily qualified by his view that "his ability to return to work is dependent on his ability to tolerate pain and other confounding factors."[37] He also indicated that Mr Snell would have recurrent episodes of pain, that he would need periods of time off work and that he would need an empathetic employer.

[69] When Dr McPhee prepared the report 18 months ago, he was obviously hopeful that there was some prospect of Mr Snell returning to full time employment. What is abundantly clear is that in the three plus years post accident, Mr Snell has not been able to work full time at all. The maximum period per week Mr Snell has been able to work has been 12 hours and that has not been sustained for any length of time. Mr Siebel's opinion was that Mr Snell had a limited capacity to return to part time sedentary duties and that the prospect of returning to full time sedentary duties in the foreseeable future was guarded. Mr Snell has obviously struggled to even maintain a 12 hour working week and was very forthright in stating that that he will "probably not" return to work in January 2014 when his leave ceases.

[70] The views of Drs Morgan and McPhee are that he has reached his optimum level of recovery and he will not improve. I accept that evidence. I also accept the evidence that Mr Snell was well motivated to recover and, despite genuine efforts, he has not recovered. Mr Snell had a continuous work history of more than 30 years prior to the accident and was considered to have a good work ethic.

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36 Exhibit 6, Email from Alison Roe to Graeme Snell dated 3 April 2013, sent 4.51pm.

37 Exhibit 1, Report of Dr McPhee dated 1 March 2012, at p 5.

[71] In relation to Mr Snell's future economic loss, I consider that the following factual matters have been established on the evidence:

- He is now in constant pain.
- He can only assume light duties.
- He cannot return to work as a fitter and turner or a process technician.
- He has not returned to full time work since 2010.
- He has achieved his maximum improvement.
- Mr Siebel's opinion is that Mr Snell can only work 12 hours per week in a semi sedentary role.
- Mr Snell has not worked more than 12 hours per week in the last three years.

[72] That is Mr Snell's current position. What position would Mr Snell have been in had he not been injured in June 2010?

How long would the plaintiff have continued to work if he had not been injured?

[73] I note that the report of Dr Goode indicated that "The only definite pre-existing condition was the mild lumbar spondylosis"[38]. The evidence of both Dr McPhee and Dr Morgan however was that at the time of the injury Mr Snell was suffering from pre-existing degenerative changes in both his back and left shoulder. Significantly the clear evidence was that Mr Snell would be experiencing similar pain within 10 years of the accident in any event at least in relation to his back injury. Dr McPhee's very clear evidence was that he would have experienced pain, similar to that which he is currently experiencing, by June 2020 due to the pre-existing degenerative condition. I note that the medical records indicate a history of back pain consistent with this pre-existing back condition. In this regard, I am particularly persuaded by the evidence of Dr McPhee during cross examination by Mr Morton, in the following terms.

> "You there give a view that both in respect of - or, sorry, let's start with the back. That he would have developed similar symptoms of back and leg pain due to the spinal stenosis within 10 years and it's unlikely he would have got to normal retirement age without requiring decompressive surgery. The 10-year period, when does that, in your opinion, commence from, Doctor?---I put it as from the date of injury, June 2010…"[39]

And later:

> "Doctor, I want to just ask you about that last point but before I do, can I ask you to take into account two facts, please, in answering my question. On the 15th of May 2003 he presented to his general

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38 Exhibit 8, Report of Dr Steven Goode dated 7 November 2011, tendered on 30 September 2013, at p 4.

39 T2-4, at lines 45-47 to T2-5, at lines 1-3.

> practitioner complaining of pain in the back for six weeks. Secondly, on the 10th of November 2005, he presented to his general practitioner. The note reads, "Recurrent lower back pain today. Lower back," and then the word "apin", "Sacroiliac joint region. Noted radiation to the right side. Lateral aspect of the lower leg. Nil power loss. Nil sensation loss. SLR with pain on the right leg. Power normal. Reflexes normal. Sensation normal." Doctor, you said to my learned friend, on the balance of probabilities this man - better than 50 per cent, as I understand what you said, this man would have developed symptomatology within 10 years. What does that history I've just given you say about that - a balance of probabilities?---Well, firstly, the interpretation of recurrent back pain is consistent with any degenerative process that goes on in the lower back. Secondly, when you start talking about pain that goes down into a leg, particularly where it was sighted over the lateral aspect, then we're starting to talk about radicular pain, which means that this has got a neurological component to it. Now, it mightn't be severe enough that it actually causes the nerve to reduce function or lose some function - in other words, there's no permanent sensory loss and there's no weakness - but it's certainly sufficient to interfere with the conduction going down a particular nerve root, which would be L5 from the sound of it, which is the level that was operated on. So I think this is the first symptom that suggests at least a temporary period of neurological compromise from his degenerative process and, therefore, from his stenosis.
>
> Now, Doctor, as my learned friend cross-examined you, we can't foretell the future but, on the balance of probabilities, does your opinion remain that he would have had these difficulties within 10 years?---Well, I think that that last history at 2005 is certainly a reinforcement of that statement."[40]

[74] I also accept that there is evidence that he had been struggling with depression for about 10 years and that this had been compounded by family stressors. In his email to HR on 27 March 2013 Mr Snell stated that, "issues that are hanging over me are weighing heavy and these things are out of my control at present and time will heal".[41]

[75] The legal principles which need to be considered when there are pre-existing conditions affecting future economic loss are well known and are set out in the 2003 Queensland Court of Appeal decision of *Smith v Topp & Anor*:[42]

> "[29] The appellant argues also that the evidence fails to establish that at any relevant time the appellant's incapacity would, in any event, have resulted from her pre-existing degenerative condition and that, in consequence, her

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40 T2-7, at lines 42-47 to T2-8, at lines 1-22.

41 Exhibit 6, Email from Graeme Snell to Yolanda Sarich and Corin Rowe dated 27 March 2013, sent 12.08pm, tendered 30 September 2013.

42 [2003] QCA 397 at [29]-[30].

damages cannot be reduced by reference to that condition. Alternatively, it is submitted that any reduction must be effected by reference to the principles relating to the assessment of loss of a chance stated in *Malec v J C Hutton Pty Ltd*.[43]

[30] In the following passage from their reasons in *Purkess v Crittenden*, Barwick CJ, Kitto and Taylor JJ, referring to a discussion in *Phipson on Evidence* concerning the 'distinct and frequently confused meanings' of the onus of proof, namely '(1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of *establishing a case*, whether by preponderance of evidence, or beyond a reasonable doubt; and (2) the burden of proof in the sense of *introducing evidence*' said –

> 'We understand that case to proceed upon the basis that where a plaintiff has, by direct or circumstantial evidence, made out a prima facie case that incapacity has resulted from the defendant's negligence, the onus of adducing evidence that his incapacity is wholly or partly the result of some pre-existing condition or that incapacity, either total or partial, would, in any event, have resulted from a pre-existing condition, rests upon the defendant. In other words, in the absence of such evidence the plaintiff, if his evidence be accepted, will be entitled to succeed on the issue of damages and no issue will arise as to the existence of any pre-existing abnormality or its prospective results, or as to the relationship of any such abnormality to the disabilities of which he complains at the trial. It was, we think, with the character and quality of the evidence required to displace a plaintiff's prima facie case that *Watts v. Rake* (1960) 108 CLR 158 was essentially concerned. It was, in effect, pointed out that it is not enough for the defendant merely to suggest the existence of a progressive pre-existing condition in the plaintiff or a relationship between any such condition and the plaintiff's present incapacity. On the contrary it was stressed that both the pre-existing condition and its future probable effects or its actual relationship to that incapacity must be the subject of evidence (i.e. either substantive evidence in the defendant's case or evidence extracted by cross-examination in the plaintiff's case) which, if accepted, would establish with some reasonable measure of precision, what the pre-existing condition was and what its future effects, both as to their nature and their future development and progress, were likely to be. That being done, it is for the plaintiff upon the whole of the evidence to satisfy the tribunal of fact of the extent of the injury caused by the defendant's negligence.'"

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43 (1990) 169 CLR 638.

[76] I also note the analysis of principles in the 2006 New South Wales Court of Appeal decision in *State of New South Wales v Burton*.[44]

> "[69] There may be a difficulty in reconciling the application of the principles stated in *Watts* and *Purkess* and those in *Malec*, as explained by this Court in *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208 at [101]-[112] (Ipp JA, Mason P agreeing). The concurrent operation of *Watts* and *Purkess*, with *Malec*, is succinctly stated by Professor Luntz, *Assessment of Damages for Personal Injury and Death* (4th ed, 2002) at [1.9.14]:
>
> > "Neither *Watts v Rake* nor *Purkess v Crittenden* was referred to in *Malec v J C Hutton Pty Ltd*. To reconcile these different lines of authority, it is necessary to say that the plaintiff must prove on the balance of probabilities that the defendant's negligence did contribute materially to the present symptoms (this is the legal onus that rests on the plaintiff). Once that is satisfied, there is an evidential onus on the defendant of proving that the alleged pre-existing or subsequent natural condition did exist and that this condition in its natural progression would have produced similar symptoms. If the defendant is unable to satisfy the evidential burden, the court will reduce the plaintiff's damages for contingencies to no greater extent than in the ordinary case. If, however, the defendant shows that there was a real chance that the plaintiff would have developed similar symptoms from a natural condition attaching to the plaintiff, the court will make a greater reduction than normal to reflect this increased chance."

[77] On the balance of probabilities, I am satisfied that the plaintiff had a pre-existing back condition and that, together with his depressive condition, unaccelerated by the injury in June 2010, would have reached such a level that he would have been unable to continue to work for much more than 10 years after June 2010. I consider that even allowing for his excellent work history and work ethic, by age 60 years, which is some 11½ years post-accident, it is more probable than not that Mr Snell would have retired due to the combination of pain from his degenerative changes and his ongoing depression.

[78] Accordingly, I consider that an award of damages for future economic loss should cease at age 60, which is approximately another eight years.

[79] I consider that his loss per week would be as contended for by plaintiff's Counsel but be calculated from July 2014 to December 2021, a period of 7.5 years. The figure of $381.94 per week should be allowed for that period, also discounted at 5% (multiplier 327.7), giving a figure of **$125,161.73.**

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44 [2006] NSWCA 12 at 69

[80] In my view, however, there should be an allowance for some of the factors referred to by Counsel for the plaintiff. I consider however that there is no factual basis for a view that Mr Snell would have been promoted in the next decade. His evidence was clear that he wanted to continue doing what he had been doing. His evidence at trial was:

> "What was [sic] your intentions as at mid-2010 in terms of your future working life?---Just proceed exactly as I was going. I was happy with the position that I was in - - - Did you - - -?--- - - - and quite happy to say [sic] there."[45]

Accordingly, I do not consider that there was any evidence that he would have sought a promotion within the next decade.

[81] There should however be an allowance for other factors. In my view there is a very real prospect that in the near future there would be a reduction in Mr Snell's paid working hours with BP. I consider that this would be particularly so after the resolution of this action and his return to work next January following a significant period of leave or by the end of the 2014 financial year, which would be four years post injury. The reality is he is being paid for working the equivalent of one shift per week but being paid for four shifts. I do not consider that there is any certainty that BP would continue to pay him a full time wage for part time work and that his paid hours would be reduced to the hours actually worked. In this regard I note what Morris LJ said in *Scott v Musial*:[46]

> "The jury heard all that evidence, and it seems to me that all that the learned judge was telling the jury was that, *though The Nestle Co Ltd had treated the plaintiff very well, it did not follow that his income was safe* – '"For a reasonable time' was the evidence, and after that he has to shift for himself.' It does not seem to me that these words were out of conformity with the evidence given, which showed that The Nestle Co Ltd were behaving most generously; they had promised to keep him on for a reasonable time, and they were keeping him on. *But was his employment safe? Other people might become in authority in the company who were not able to behave so generously; the fortunes of the company might be different; the necessities might change*." (my emphasis)

[82] I also consider that there may well be a forced early retirement in the next eight years given the hours he was actually capable of working. Furthermore, given his documented back injuries I accept that he would find it difficult to obtain any employment outside of BP. In this regard, I note the analysis by Luntz[47] as follows:

> "[5.3.7] **Resumption of employment after injury.** It sometimes happens that a plaintiff who has suffered a permanent disability nevertheless returns to the same job as before, or obtains other employment at the same or even higher remuneration.[48] This does

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45 T1-16, at lines 29-32.

46 [1959] 2 QB 429, at p 439; [1959] 3 All ER 193.

47 "*Assessment of Damages for Personal Injury and Death*" (4th ed), at [5.3.7], pp 327-328.

48 A plaintiff who earns more as the result of taking a different job does not have to give credit for the increased earnings against any that are lost: *GMH Ltd v Whetstone* (1988) 50 SASR 199 (FC); *Tucker v Westfield Design and Construction Pty Ltd* (1993) 46 FCR 20 (FC) at 27

> not necessarily mean that there will be no loss of income in the future; it all depends on the particular occupation of the plaintiff. Thus a solicitor who suffers a permanent injury to a hand or a leg, but resumes the former employment, is not likely ever to be out of a job because of the injury;[49] whereas a manual worker who similarly injures a limb, even if able to find employment thereafter, is more vulnerable to dismissal than would have been the case and alternative opportunities will be more difficult to obtain.[50] *Even in days when some employers had a settled practice of re-employing people injured at work, the court had to consider the chances that that practice would not be adhered to indefinitely,[51] or that the plaintiff would have to or want to leave the place where the work would be available, and that the earnings might be less thereafter*.[52]" (my emphasis)

[83] Counsel for the plaintiff has submitted that a figure of $450,000 is appropriate given his actual loss of wages to age 65 would be in excess of one million dollars. It is always hard to calculate an appropriate figure in circumstances such as this, however, it would seem to me that in broad terms, a way of testing this is to consider that his total loss of income over the next eight years, even with a discount of 5% and deducting the travel costs, would roughly be in the order of $500,000. Given that he is still capable to work 12 hours per week I consider that the sum of **$300,000** is a more realistic figure as an allowance for future loss of full time employment, enforced retirement and disadvantage in the open labour market given the period of eight years which is involved.

[84] Accordingly the total for future economic loss is calculated by adding $13,803.31 for 2013-2014 plus $125,161.73 for the period July 2014 to December 2021 ($381.94 x 7.5 years (using 5% tables multiplier of 327.7) plus $300,000 which is discounted by 10% for contingencies which is $395,068.54 minus future travel at $77.32 per week discounted at 5% per annum over 7.5 years (multiplier of 327.7) which is $25,337.76. That is a total of $**369,730.78.**

Future loss of employers' contributions to superannuation

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49 Cf the doctor in *Capponi v The Commonwealth of Australia* (1970) 44 ALJR 226, who, forced to abandon surgery, was said to be able to turn to consulting work.

50 Eg, *Cochiara v Woolcock* [1967] SASR 332 (FC) (arc welder); *Rudken v Rickman* [1967] QWN 6 (FC) (builder's labourer), *Clark v Wilson* [1926] SASR 342 (trainee journeyman fitter and turner), *Gordon v Lyne* [1965-66] PNGLR *303* (refrigeration mechanic), *Dodson v Georgeakis* (1968) 13 FLR 26 (NT) (stockman), *Cheesman v Furness W, thy & Co Ltd* [1969] 1 Lloyd's Rep 315 (stevedore); *Wright v Atkins* (1980) 88 LSJS 426 (FC) (front-end loader driver).

51 As happened in *Murphy v Stone-Wallwork (Charlton) Ltd* [1969] 2 All ER 949 (HL) Although workers' compensation legislation may provide incentives or sanctions to encourage employers to re-employ injured workers (cf K Purse, 'Employment Security, Vocational Rehabilitation and Workers' Compensation Arrangements' (1999) 7 *TLJ* 203), the success of such schemes is doubtful.

52 See, eg, *Australian Iron & Steel Ltd v Greenwood* (1962) 107 CLR 308 at 312; *Breska v Lysaghts Works Pry Ltd* (1956) 74 WN (NSW) 168 (FC); *Smith v Australian Iron & Steel Ltd* [1960] NSWR 501 (FC); *Peluchetti v Warringah Brick & Pipe Works Pry Ltd* [1961] NSWR 259 (FC); *Azzopardiv Nicholson Bros* [1962] NSWR 1270 (FC), affirmed (1962) 36 ALJR 185n; *Ivkovic v Australian Iron & Steel Ltd* [1963] SR (NSW) 598 (FC) at 601-2 per Sugerman J; *Falcon Joinery Co v Maher* [1963] NSWR 354 (FC).

[85] The future loss of the contributions to superannuation which would otherwise have been made by BP should be calculated as 18% of $395,068.54 (the total future economic loss before deduction of travelling costs) which is **$71,112.34.**

Future paid services and assistance

[86] The plaintiff claims for having his vehicle cleaned at commercial service outlets, spending $35 every six weeks, or $5.84 per week. I allow $5.84 per week, discounted at 5% per annum over eight years (multiplier 345.6.0) to age 60 years. This is calculated to be **$2,018.30.** I will allow that figure as it is reasonable.

[87] The plaintiff claims for window and driveway cleaning $94.94 per week, discounted at 5% per annum over 30 years (multiplier 822.0) to age 82 years, which amounts to $78,040.68. This has been calculated on the basis that the evidence indicates that he has paid those amounts for window cleaning and the cleaning of his driveways. The plaintiff is entitled to be paid his reasonable costs but I do not consider the amounts claimed to be reasonable. Such a figure cannot be justified. I consider he should be allowed window cleaning at no more than twice a year at $255 per cleaning charge. Therefore, $510 per year or $9.80 per week discounted at 5% per annum over eight years (multiplier 345.6) to age 60 gives a figure of $3,386.88. I will allow **$3,386.88** for window/driveway cleaning.

[88] Those two figures total $5,405.18, and after being discounted at 10% for contingencies, I allow **$4,864.66** for future paid services.

Future pharmaceutical expenses

[89] The plaintiff claims future pharmaceutical expenses (Panadol Osteo, Voltaren, Brufen and Endone) of $9,437 ($50 per month = $11.48 per week discounted at 5% per annum over 30 years (multiplier 822.0) to age 82 or $9,437. Given he would have experienced similar pain level by age 60 due to his pre existing back condition I will allow $50 per month ($11.48 per week) for eight years, discounted at 5% per annum (multiplier 345.6) which is **$3,967.48**.

Special damages

[90] The plaintiff incurred hospital, medical, travelling, pharmaceutical and other expenses, in the amounts particularised in the schedule below.

Head of Claim	**Amount**
WorkCover Queensland hospital expenses	14,786.50
WorkCover Queensland medical expenses	63,324.48
WorkCover Queensland rehabilitation expenses	12,352.35
Medicare Australia charge (benefits calculated to 12.09.13)	658.75
Window cleaning 10.12.10 to 03.07.13	2,794.00
Pharmaceutical expenses	1,000.00
Travelling expenses	1,000.00
Total	**$95,916.08**

[91] The figure of **$95,916.08** has been agreed and I allow this amount.

Fox v Wood

[92] This component has been agreed at a figure of **$46,160.93,** which I allow.

General damages		80,000.00
Interest on general damages (2% x $40,000 x 1,214 ÷ 365)		2,660.82
Past Economic Loss		139,430
Interest on past economic loss (5% x $26,372.28 x 1,214 ÷ 365)		4,385.75
Past loss of employer's contribution to Superannuation		7,550.00
Interest on past superannuation contributions		1,251.44
Future loss of employer's superannuation contributions		71,112.34
Future Economic Loss • 2013-2014 • Future Economic Loss: July 2014 to December 2021: $381.94 x 7.5 years (using 5% tables multiplier of 327.7) • Allowance for future loss of full time employment, enforced retirement and disadvantage in the open labour market. *Discounted* by 10% for contingencies *Less* future travel $77.32 per week discounted at 5% per annum over 7.5 years (327.7)	13,803.31 125,161.73 300,000.00 438,965.04 -43,896.50 395,068.54 25,337.76 369,730.78	369,730.78
Future Paid Services • Car Cleaning: $5.84 per week, discounted at 5% per annum over 8 years (multiplier 345.6) to age 60 years • Window cleaning: $9.80 per wk, discounted at 5% per annum over 8 years (multiplier 345.6) to age 60 years. *Discounted* by 10% for contingencies	2,018.30 3,386.88 5,405.18 540.52 4,864.66	4,864.66
Future pharmaceutical expenses		3,967.88
Special damages		95,916.08

Fox v Wood		46,160.93
Sub Total		**827,030.68**
Less WorkCover refund		-248,890.94
TOTAL		**578,139.74**

[93] I give judgment for the plaintiff in the amount of $578,139.74.