

SUPREME COURT OF QUEENSLAND

CITATION: *Taylor v Invitro Technologies Pty Ltd* [2010] QSC

PARTIES: **BENITA CAROL TAYLOR**
(Plaintiff)

v

INVITRO TECHNOLOGIES PTY LTD
(ABN 27 102 379 895)
(Defendant)

FILE NO/S: 7039 of 2009

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 30 July 2010

DELIVERED AT: Brisbane

HEARING DATE: 14-15 July 2010

JUDGE: Boddice J

ORDER: **Judgment for the plaintiff against the defendant in the sum of \$419,461.36.**

CATCHWORDS: TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – IN GENERAL – where the plaintiff was employed by the defendant and worked at a work station comprised of a partitioned area containing a desk and a chair – where the defendant instructed all employees, including the plaintiff, to place a plastic mat under their chair – where the plaintiff complained to the office manager that the mat was slippery and dangerous but was told to leave the mat at her work station – where the plaintiff fell at her work station, landing on her tail bone and fracturing her sacrum – where the plaintiff claims that when she stood up at her work station the chair slid backwards so that when she went to sit down again the chair was no longer behind her and she fell to the floor – whether the defendant has breached its duty of care.

Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2010 (Qld)
Workplace Health & Safety Act 1995 (Qld) s 197

Jones v Mollking Holdings Pty Ltd [2010] QSC 134

COUNSEL: M Grant-Taylor SC with L Barnes for the plaintiff
R Morton for the defendant

SOLICITORS: Romans & Romans Lawyers for the plaintiff
MacDonnells Law for the defendant

- [1] The plaintiff alleges she sustained personal injuries when she fell whilst working at her place of employment with the defendant. She claims these personal injuries were caused by the defendant's negligence and/or breach of contract of employment and/or breach of statutory duty. The defendant denies liability and asserts that any action for breach of statutory duty does not exist by reason of retrospective amendments to the *Workplace Health & Safety Act 1995* (Qld).
- [2] The plaintiff commenced employment with the defendant on 13 June 2006. Her workplace was located at premises at 5 Grant Street, Cleveland. These premises were divided into a number of work stations, one of which was occupied by the plaintiff. Her work station comprised of a partitioned area containing a desk and chair. To the left were overhead shelves and to the right, on the partitioned wall, was located a map. When the plaintiff first commenced work, the chair was positioned on the carpeted floor. However, some weeks after commencing employment, plastic mats were provided and placed under the chair in each work station. In the case of the plaintiff's work station, the mat remained in that position thereafter and was in place on the day of the incident.
- [3] The plaintiff gave evidence that when the mats arrived the office manager, Helen Henderson, instructed staff to retrieve a mat and place one at every work station.¹ The plaintiff complied with that instruction but found the mat "extremely, extremely slippery"² and "whenever you stood up or just touched the chair it was very surprising to see how far it would actually move".³ The plaintiff and another employee, Sylvia Penhaligon, went to Ms Henderson a matter of days after the arrival of the mats, to complain about them. In this conversation, Ms Penhaligon indicated she did not want her mat as its "really dangerous" and "so slippery".⁴ The plaintiff agreed with Ms Penhaligon. In response, Ms Henderson indicated that "orders" were that all work stations are to be the same and that they had to use the mat. Ms Penhaligon asked Ms Henderson to see if they could be rid of the mats and Ms Henderson said she would enquire for them.
- [4] After that conversation Ms Penhaligon removed her mat but the plaintiff did not as Ms Henderson said they were to remain and they were her instructions. Subsequently, Ms Penhaligon was instructed to return her mat to below her chair, an instruction which she complied with, although she was unhappy to be using the mat.
- [5] Ms Henderson was not called to give evidence by either the plaintiff or the defendant, although she had been served with a subpoena by the plaintiff.⁵

¹ Transcript 1-16/40.

² Transcript 1-17/1.

³ Transcript 1-17/15.

⁴ Transcript 1-17/50.

⁵ Exhibit 15.

The incident

- [6] The plaintiff gave evidence that at around 11.00am on 8 May 2007 she was at her work station planning a sales trip to be undertaken in approximately a fortnight. She stood up from her chair to retrieve a book from the top shelf of the bookcases to the left hand side of her work station and then turned to look at the map on the right hand side of the work station. As she commenced to sit back down she found the chair wasn't there and she fell to the floor. She hit her face in the process of the fall, although she was unable to recall what object she collided with at that time.⁶ In cross-examination, the plaintiff agreed she had her knees under the desk before she stood up to obtain the book and that it is "obvious" the chair would move backwards.⁷ When pressed as to precisely what manoeuvre she had undertaken, the plaintiff gave the following evidence:

... I reached out to sit down on my chair. ...

... Whenever you stand up like that to sit down, you've got to make sure the chair – it has no arms, but you've got to make sure the chair's there. I know – I know I bent to reach back because I was – it wasn't there and I was committed to continue falling. ...

I didn't do anything else. I just went to sit back on – there was nothing else I needed to do.⁸

- [7] The plaintiff gave a demonstration to the effect that she initially turned to the left and then to the right, but that her left leg may not have actually moved much at all. She then came back into a position where she put her weight back onto her left foot and reached out with her hands behind her as she commenced to sit down on the chair.⁹ The plaintiff accepted she gave a version of what happened to her general practitioner, Dr Kumar, when she attended on the day of the incident. Dr Kumar recorded the plaintiff had "slipped bum off edge of chair and landed on tail bone".¹⁰
- [8] After the plaintiff fell to the ground, she called Ms Penhaligon, who was in the adjoining work cubicle. Ms Penhaligon gave evidence she heard the plaintiff call out and found the plaintiff sitting on the ground with her hands under her backside. The plaintiff's chair was "out of the way in that it was pushed out of the cubicle". In cross-examination, Ms Penhaligon said the plaintiff was located on the floor close to the bottom of the partition with the map on it, with the chair located a bit further out than the plaintiff. She thought it was off the plastic mat. As far as she could remember, the plaintiff was still located on the mat.¹¹

Breach of duty

- [9] The plaintiff relies on the following particulars in support of her allegations of negligence and/or breach of duty and/or breach of contract of employment:

⁶ Transcript 1-19/10.

⁷ Transcript 1-37/20.

⁸ Transcript 1-38/50-1-39/1

⁹ Transcript 1-42/30.

¹⁰ Transcript 1-39/40.

¹¹ Transcript 1-81/30.

- (a) Failing to take any or any adequate precautions for the safety of the plaintiff whilst she was engaged in carrying out his [sic] assigned work;
- (b) Exposing the plaintiff to a risk of damage or injury of which it knew or ought to have known;
- (c) Failing to provide safe and adequate plant and equipment for the plaintiff's use;
- (d) Failing to provide and maintain any or any safe or proper system at work;
- (e) Failing to adequately or at all instruct the plaintiff in the safe performance of her duties;
- (f) Failing to adequately or at all supervise the plaintiff in the safe performance of her duties;
- (g) Failing to give the plaintiff any or any proper, adequate or timely warning as to the dangers associated with her employment when a reasonably prudent employer would have done so;
- (h) Instructing and/or requiring the plaintiff to use the chair whilst it was positioned on the said plastic mat, when it knew or ought to have known that the chair moved very easily and was slippery when used in conjunction with the plastic mat and in circumstances where the defendant knew or ought to have known that the plaintiff had to frequently get up and down from the said chair and when a reasonably prudent employer would not have done so;
- (i) Failing to act on complaints that the chair was slippery when used in conjunction with the said plastic mat and when a reasonable prudent employer would have done so;
- (j) Failing to remove the said plastic mat despite requests to do so and when a reasonably prudent employer would have done so;
- (k) Failing to provide a floor mat with appropriate non-slip or slip resistant characteristics and when a reasonable prudent employer would have done so;
- (l) Failing to give any proper consideration to the risks associated with the plaintiff's workstation, including in particular that the chair tended to slip too easily on the said plastic mat and that the said plastic mat was too slippery generally, and when a reasonably prudent employer would have done so.

- [10] In support of these allegations, the plaintiff relied on her evidence, together with evidence from Ms Penhaligon. No expert evidence was called or relied upon in relation to the level of friction generated between mat and chair. The mat was not tendered in evidence at trial.
- [11] The plaintiff's evidence in respect of her experience with the chair was in short compass: the chair was extremely slippery and would move a considerable distance when just touched and there was nothing to stop it from sliding off the mat. In cross-examination, she conceded she could not remember what was on the upper surface of the mat, but said the chairs "moved extremely quickly".¹² She also said there had been near incidents and that is why complaints had been made to management. Apart from the complaint to Ms Henderson, the plaintiff told her overall supervisor, Ms Burchardt "several times" that she hated the mats. The plaintiff stated that had she not been instructed to keep the mat, she would have taken it away. She had not had any problem using the chair on the carpet prior to the mat arriving.¹³ She described the carpet as very flat and hard. It wasn't thick.¹⁴
- [12] Ms Penhaligon gave evidence she immediately complained when instructed to use the mat as she had previously worked in a medical practice where a doctor "was on his chair and – on one of those mats in his consulting room, and he almost – he got caught – his chair caught – the wheel got caught on the side of the mat somehow and he almost toppled over".¹⁵ She told Ms Henderson she thought the mats were "dangerous and hazardous".¹⁶ Prior to being instructed to use the mats, she had not had any difficulty manoeuvring the chair on the carpet. She described the chair as "a light, cheap chair".¹⁷ Her experience with the chair after the installation of the mat was that it made the chair "easier to glide around" but that "can also be detrimental because the chairs can just slip quite easily. It's quite – if you don't sit on your chair properly, just flick out from underneath you".¹⁸ In cross-examination, Ms Penhaligon conceded that in the time period she did use the mat, she did so without incident on her part, although she was "quite conscious" of the fact that the light chairs would just glide around on those mats.¹⁹
- [13] The defendant called three witnesses who had experience with the use of mats similar to those used by the plaintiff. Hayden Forster, the national manager of an associated company to the defendant, gave evidence she had had a mat at her desk for "at least 10 years". The mat had a "sort of a rippled effect" which allowed you to roll around. She had not had any mishap with chairs over the years when using the mat and was unaware of any complaint about using the mats.²⁰
- [14] Sally Burchardt gave evidence she had never had a problem or untoward incident involving use of the mat. She denied the plaintiff had ever made a complaint to her in relation to use of the mats. After the incident, she asked people in the workplace about the use of the mats and one employee had requested she not take it away

12 Transcript 1-40/30.
13 Transcript 1-57/50.
14 Transcript 1-36/50.
15 Transcript 1-75/40.
16 Transcript 1-75/50.
17 Transcript 1-76/30.
18 Transcript 1-78/30.
19 Transcript 1-79/20.
20 Transcript 1-91/40.

because she was worried that "if she had to pull the chair in and against the carpet all the time ... this would hurt her back".²¹ She had never had a request to remove the mats before or after the incident and had not had a complaint from anybody about the mats. She described the carpet as fairly new carpet and as being a nylon work surface carpet.

- [15] Rhonda Bain also worked in the head office of the associated company to the defendant. She gave evidence she had never received any complaint in relation to the use of the plastic mats, the only complaint being from people who didn't have them as it was difficult to move the chairs around without the mat.²² She has used similar mats in other workplaces and has never been aware of anyone suffering injuries because of the use of those mats.
- [16] No expert evidence was called by the defendant in relation to the friction between the mat and chair. Again, the mat was not tendered into evidence.
- [17] The defendant contends the plaintiff's version of events as to the circumstances in which she fell to the ground ought not to be accepted by the Court. It contends the mat had no causal relationship with the plaintiff's fall as the plaintiff simply slipped from her chair as she attempted to resume her seat, a scenario consistent with the version given by the plaintiff to Dr Kumar. Such a fall was not due to any negligence on the defendant's part and was not as a consequence of any other breach of duty by it. The defendant also submits the Court would not accept the plaintiff's evidence of near misses and would not accept her evidence of complaints to Ms Burchardt. Even if complaints were made, a reasonable employer must balance the various risks in the workplace and the evidence given in the defendant's case establishes there were no other incidents involving the mats and provision of the mats overcame difficulties using the chair directly on the carpet floor.
- [18] I do not accept the defendant's contention that the plaintiff's evidence as to the circumstances of the fall should be rejected by the Court. I found the plaintiff to be a credible and reliable witness and found her evidence to be consistent and truthful. It was, in my view, supported by Ms Penhaligon's evidence as to the position of the plaintiff and the chair when she first arrived at the scene of the incident.
- [19] I accept the plaintiff sustained personal injury when she, as part of her normal duties of employment, attempted to resume her seat on a chair located on the plastic mat. In so doing, the chair rapidly and suddenly moved from under her body causing her to fall to the floor. I accept this rapid movement was as a result of the mat located underneath that chair being dangerously slippery. That conclusion is supported by Ms Penhaligon's evidence that the chair would just "flick" out from under you. I accept that evidence.
- [20] I do not accept the defendant's submission that the plaintiff simply slipped off her chair. If, as the defendant contends, the mat's rippled effect had the effect of preventing the chair from rapidly sliding across it, it would be expected the chair would have been located more proximate to the plaintiff if the plaintiff had simply slipped off her chair. Further, I do not accept Dr Kumar's note is inconsistent with

²¹ Transcript 1-96/35.

²² Transcript 2-4/10.

the plaintiff's evidence that she was trying to resume her seat. Dr Kumar's note must be viewed in context. It is his précis of history given by the plaintiff.

- [21] I accept the plaintiff's evidence that the chair moved very quickly and suddenly on the mat, and that she had had near "misses". I also accept that the plaintiff and Ms Penhaligon complained about the mats "extreme" slipperiness to Ms Henderson and that the plaintiff was directed to retain the mat in its position notwithstanding the concerns expressed by her and by Ms Penhaligon. The fact that they both complained to Ms Henderson was not the subject of contrary evidence from the defendant. I do not accept the defendant's contention that the onus was on the plaintiff to call Ms Henderson. Whilst the plaintiff may have subpoenaed Ms Henderson, unless and until the fact of a complaint being made to Ms Henderson was squarely put in issue, the plaintiff was not required or obliged to call Ms Henderson in her case.
- [22] I do not accept the defendant's contention that, even though complaints were made to it, it was reasonable for it, as the employer, to insist on use of the mats. An employer is obliged to provide a safe workplace. In satisfying its obligation in this regard, a reasonable employer ought to have regard to complaints made by employees as to the safety of equipment they are directed to use in the course of their employment. Despite receiving complaints from two employees as to the use of the mats, and requests from those employees that they not be required to use those mats, the defendant directed those employees, including the plaintiff, to continue to use those mats. No evidence was led to suggest any investigation of the complaints was undertaken at all. No reason was given to either complainant as to why they were required to use the mats. According to the plaintiff, Ms Henderson simply indicated her orders were that all work stations were to be "the same".
- [23] In my view, the stance adopted by the defendant was an unreasonable stance having regard the risks associated with the continued use of the mat in circumstances where the plaintiff had expressly complained that it was "extremely slippery". Evidence that other employees had indicated, after the event, a preference for use of the mats on the basis it rendered it easier to move a chair rather than having the chair placed directly on the carpeted floor, was of no forensic weight. Those particular employees were not called, their particular circumstances were not known, and that evidence was inconsistent with the evidence of both the plaintiff and Ms Penhaligon that they had no difficulty moving the chair across the carpet. I accept and prefer the evidence of the plaintiff and Ms Penhaligon on that matter.
- [24] I accept the defendant breached its duty of care by:
- (h) Instructing and/or requiring the plaintiff to use the chair whilst it was positioned on the said plastic mat, when it knew or ought to have known that the chair moved very easily and was slippery when used in conjunction with the plastic mat and in circumstances where the defendant knew or ought to have known that the plaintiff had to frequently get up and down from the said chair and when a reasonably prudent employer would not have done so;
 - (i) Failing to act on complaints that the chair was slippery when used in conjunction with the said plastic mat and when a reasonable prudent employer would have done so;

- (j) Failing to remove the said plastic mat despite requests to do so and when a reasonably prudent employer would have done so.

The breach of duty on the part of the defendant also amounted to a breach of its contract of employment for the reasons outlined above.

- [25] In the circumstances, it is unnecessary to consider the plaintiff's claim that the defendant's conduct also constituted a breach of its statutory duty. The recent amendments to the *Workplace Health & Safety Act 1995* (Qld) would appear to have had the effect of abolishing such a claim in any event.²³
- [26] Whilst the defendant pleaded contributory negligence, it conceded at trial that the plaintiff's conduct, should it be accepted that she suffered the injuries in the circumstances alleged by her, amounted to no more than mere inadvertence and would not justify a finding of contributory negligence.

Quantum

- [27] The plaintiff was born on 4 January 1969. She is presently aged 41. She was aged 38 at the time of the incident.
- [28] The plaintiff attended her general practitioner on the day of the incident. X-rays did not reveal any fracture and her injuries were initially treated conservatively. However, the pain and disability continued and she was referred by Dr Kumar to an orthopaedic surgeon. He arranged for a bone scan which confirmed a fractured sacrum. The plaintiff was subsequently admitted to the Brisbane Private Hospital for conservative treatment. Whilst there, she suffered an anaphylactic reaction to narcotic analgesia administered to her. Thereafter, she attended the Greenslopes Pain Clinic and underwent rehabilitation, including physiotherapy and hydrotherapy. She also came under the care of Dr Watson, a musculoskeletal specialist.
- [29] The plaintiff remained off work for approximately nine months. During this time she began to feel depressed and developed "dark thoughts". She was subsequently placed on anti-depressant medication and underwent counselling. Notwithstanding this counselling and ongoing medication, her mood continued to be depressed. She found that it pervaded her relationship with her husband and children, as well as her ability to undertake day to day activities.
- [30] The plaintiff's injuries and ongoing difficulties have been the subject of assessment by two orthopaedic surgeons, Dr Malcolm Wallace and Dr Peter Steadman, and two psychiatrists, Dr Andrew Byth and Dr John Chalk. Reports from each of these practitioners were tendered by consent at the hearing. No expert was required for cross-examination.
- [31] Dr Wallace notes the plaintiff continues to suffer from mechanical lower back pain with the pain being worse with any bending, lifting and twisting. It radiates into her right lower limb with dysaesthesia in both legs. She also has problems with sitting and has a sleep disturbance, and complains of difficulty when driving and in

²³ *Workplace Health and Safety Act 1995* (Qld) s 197 and *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2010* (Qld).

managing some housework. Gardening causes her pain and she has problems sitting for continued periods. A bone scan undertaken on 22 May 2007 revealed an acute sacral fracture, although an x-ray of the lumbosacral spine undertaken on 12 September 2007 shows evidence of union. Examination of the lumbar spine revealed tenderness over the lumbosacral junction and in the right buttock. The plaintiff had demonstrable spasm in the lumbar spine and difficulties with flexion. She also had some difficulty getting on and off the examination table. In his opinion, the plaintiff's employability in the open labour market has been significantly and adversely affected by her injuries. She would not be able to return to work as a hairdresser. He assesses the plaintiff as having an 8% whole person impairment due to the injury to her lumbar spine and a further 3% whole person impairment as a result of the injury to her sacrum. Her condition has reached maximum medical improvement and is unlikely to change in the foreseeable future.

- [32] Associate Professor Steadman considered the plaintiff's presentation on clinical examination as "somewhat theatrical" and noted she complained of pain throughout. Examination revealed she was neurologically normal in her lower limbs, although there was tenderness in the sacrum. There was no swelling and no palpable deformity. In his opinion, there was no high level support or plausibility objectively for the severity of her presentation, although a sacral fracture undoubtedly had occurred which he best described as a musculoligamentous injury of the lumbar spine. The plaintiff's condition has stabilised and it is unlikely further medical treatment will help. Whilst the plaintiff is employable in the future, her ongoing difficulties relate to capacities to sit and stand. There also appears to be a continuing impact on her activities of daily living, in particular personal needs, although the situation sounds "quite dysfunctional". He assessed the plaintiff as having a 10% whole person impairment as a consequence of the fractured sacrum.
- [33] Dr Byth interviewed the plaintiff on 20 February 2009. At that time, the plaintiff complained of having become depressed in the months after her injury, due to her inability to undertake her previous employment and her worries as to how her injuries would impact on her physical relations with her husband and her participation with her children. Despite having counselling and taking anti-depressant medication, the plaintiff continued to complain of depressed moods and a battle with negative thoughts and of feeling morose, resentful and disappointed with herself. She considered her self-esteem to be low and noticed she had reduced energy and motivation. Dr Byth's clinical impression was of some mildly obsessive-compulsive personality traits, without personality disorder. Her emotional state was moderately depressed and mildly anxious. There were no psychotic features. He diagnosed the plaintiff as having an adjustment disorder with depressed mood. He assessed her permanent psychiatric impairment as 10%-20% impairment and considered she would have been unlikely to have developed these ongoing depressive features but for her injuries at work in 2007. He recommended referral to a specialist psychiatrist for treatment over the next two years consisting of monthly individual consultations for supportive counselling, review of her anti-depressant medication and cognitive behaviour therapy. He estimated the total cost of the specialist treatment as being in the order of \$6,000.
- [34] Dr Chalk interviewed the plaintiff on 18 May 2009. At that time, the plaintiff complained of ongoing sleep disturbance and pain. Her appetite had increased, her energy levels were at best average, her concentration was indifferent and her libido had been compromised subsequent to the incident. She complained of being

irritable and at times indecisive and of feeling sad and angry about her predicament. In Dr Chalk's opinion, the plaintiff had developed a chronic adjustment disorder with depressed mood in the setting of chronic pain caused by the physical injury sustained in May 2007. He considers her condition to have now stabilised and did not think further treatment is likely to materially assist her level of impairment, although she would benefit from ongoing use of anti-depressants for at least the next 12 months. Her psychological symptoms continued to impact upon her daily life in the sense of her perseverance and enjoyment for life. Dr Chalk rated her degree of permanent impairment at 5% whole person impairment. He did not consider her psychological symptoms would prevent her from working in the future.

[35] The plaintiff continues to complain of pain and disability as a consequence of the injuries sustained by her in the incident at her workplace on 8 May 2007. This pain and disability impacts on her ability to undertake employment as well as her ability to undertake household tasks and other daily activities. The plaintiff also complains of ongoing psychological sequelae. I accept the plaintiff's evidence as to her continuing pain and disability and ongoing psychological sequelae. Her responses to the psychiatrists as to her ongoing relationship with her husband were understandable, particularly as she had no complaint about his treatment of her.

[36] Prior to her employment with the defendant, the plaintiff had undertaken duties as a hairdresser. She obtained her employment with the defendant as a result of an approach from a customer, Ms Burchardt. The plaintiff said she thoroughly enjoyed her employment with the defendant and intended making it her career. I accept that evidence. That evidence is consistent with the plaintiff's actions in seeking employment in a similar field prior to leaving the defendant's employment.

[37] The plaintiff left the defendant's employ on 11 January 2008. She commenced employment with Fujinon Pty Ltd in February 2008 and remained in its employ until she resigned on 5 December 2008. The plaintiff said she found it difficult to fulfil her duties of employment as it involved standing for long periods in operating theatres. Shortly thereafter, she moved to Cairns. Her husband had been offered a transfer within the Queensland Police Service. In Cairns, she obtained employment as a sales assistant. The plaintiff left Cairns in or about June 2009 and returned to Brisbane. At that time, her marriage had broken down. She formed a new relationship and is now employed in her new partner's business. That employment is in the nature of an administrative assistant.

[38] I accept the plaintiff's evidence as to the circumstances in which she left the defendant's employment. Having regard to the nature of her injuries, it is understandable the plaintiff would find continued employment with the defendant difficult, particularly having regard to the travel involved in it and the wide territory she was required to cover in that employment. I do not accept that the notes of her conversation with Ms Forster on 11 January 2008²⁴ are inconsistent with the plaintiff's submissions. Her injuries, including her psychological sequelae, were referred to in her decision to make a fresh start.

[39] The defendant submits I should not accept the plaintiff's evidence as to the reasons for leaving her subsequent employment with Fujinon for essentially two reasons. First, her evidence as to the requirements to stand for long periods in an operating

²⁴

Exhibit 19.

theatre was inherently improbable. Second, the cessation of that employment corresponded with the transfer of her husband to Cairns. Whilst I do not accept the first contention of the defendant, I do accept a significant factor in the plaintiff's decision to leave that employment was her husband's transfer and the opportunity to make a "fresh start" in North Queensland. I find those changed circumstances materially affected the plaintiff's decision and must be taken into account when considering the extent of her past loss of income. Similarly, I accept the plaintiff's present employment is one she has engaged in having regard to the family friendly hours associated with it, and her new relationship. Whilst the plaintiff's ongoing disabilities will limit her employability on the open labour market, I do not accept the plaintiff's ongoing injuries prevent her from undertaking employment for a significant number of hours each week. As such, she would be able to generate significantly more remuneration than that achieved in her current employment

General damages

- [40] The plaintiff submitted the award for general damages should be no less than \$60,000 and when there is added on the contribution of a psychiatric injury should be \$75,000 with interest on \$30,000 thereof from the date of the accident to the date of judgment. The plaintiff relied on *Jones v Mollking Holdings Pty Ltd.*²⁵ In that case, a female plaintiff aged 28 years at the date of accident and 33 years at the date of judgment was awarded \$60,000 for general damages in circumstances where she had sustained a fracture of the sacrum and a chronic soft tissue musculo-ligamentous injury to the lumbar spine which warranted a permanent functional impairment of between 5% and 7%. The defendant contended for an award of general damages of \$40,000.
- [41] Whilst the plaintiff has a permanent impairment assessment in the order of 10%-11% and an additional permanent impairment as a consequence of psychiatric sequelae, she is older than the plaintiff in *Jones*. I award general damages of \$60,000. I allow interest at 2% per annum on \$30,000 of that award from the date of the incident to the date hereof. This yields a figure of \$61,980.26.

Past economic loss

- [42] The plaintiff contends for past economic loss in the sum of \$77,669, net of the amount received from WorkCover. She also claims interest at 5% per annum, together with past loss of superannuation and interest on that past loss of superannuation. The defendant contends the past loss of income is no more than the amount refundable to WorkCover and that accordingly there is no loss of interest and no loss of superannuation.
- [43] The plaintiff's asserted loss is premised on an assertion that but for the incident she would have continued her career as a medical sales representative, either with the defendant or with some other comparable employer. The plaintiff concedes there must be a discount on that figure to reflect the fact she voluntarily travelled to Cairns with her husband and undertook employment there as a sales assistant. The defendant contends the plaintiff voluntarily left employment with Fujinon in order to travel to Cairns and that her income with Fujinon was comparable to that which she would have received with the defendant.

²⁵ [2010] QSC 134.

- [44] Whilst I have accepted the plaintiff's evidence as to her reasons for leaving the defendant's employ, there is also merit in the defendant's assertion the income she would have generated with the defendant was not substantially greater than the income she obtained at Fujinon. That employment ceased when she decided to travel to Cairns with her husband. Past economic loss is properly assessed on a global basis to have regard for the fact that the restrictions on her employability caused by her personal injuries denied her the opportunity to obtain employment at a greater income than that obtained in Cairns, and since. In my view, this loss is no more than \$400.00 per week.
- [45] I award past economic loss in the sum of \$55,000. The plaintiff is also entitled to superannuation on past economic loss (less the WorkCover reimbursement of \$30,638.56). This amounts to \$2,192.53. She is also entitled to interest at 5% per annum²⁶ on both the balance and the superannuation in the sum of \$3,156.18 and \$284.06, respectively. That gives a total of \$60,632.77.

Future economic loss

- [46] The plaintiff claims \$500,000 under this head on the basis her employability on the open labour market has been significantly adversely affected. The defendant contends future economic loss should be assessed on a global basis, having regard to the plaintiff's residual ability to undertake employment in the medical sales representative field and to obtain similar income in the future.
- [47] I accept the evidence of the medical witnesses that the plaintiff does have significant restrictions on her abilities to undertake various tasks and that these restrictions will substantially affect her employability in the open labour market. Where there is a difference between Dr Wallace and Associate Professor Steadman, I prefer to accept Dr Wallace's view as to restrictions on her future employability. However, I accept the plaintiff's residual work capacity allows her to generate significantly more income than she is presently generating from her employment in her new partner's business. In my view, her residual earning capacity is significantly more than the 40% contended for by the plaintiff. I assess her weekly loss at no more than \$400.00 per week.
- [48] Allowing for these matters, future economic loss should be assessed on a global basis. Allowing such loss for a further 24 years (age 65) and discounting for contingencies of 10% I award the sum of \$265,644 by way of future loss of income. I also award future loss of contributions to her superannuation of 9% of that award, yielding a further \$23,907.96.

Future expenses

- [49] I accept the plaintiff will have ongoing pharmaceutical, medical and travelling expenses. The plaintiff assesses these at \$20,780.22. This figure includes a sum for psychiatric treatment as recommended by Dr Byth. Whilst Dr Chalk opines that no further treatment is required, he concedes she will benefit from ongoing anti-depressant medication. I accept and prefer the evidence of Dr Byth.

²⁶ From 30 January 2008 when WorkCover payments ceased, as per exhibit 19.

[50] In my view, the future expenses sought by the plaintiff are reasonable. There will be a need for travelling expenses in the future. In my view, the global sum of \$1,000 claimed for that item is reasonable in the circumstances.

[51] I allow future expenses in the sum of \$20,780.22.

Special damages and out-of-pocket expenses

[52] Both the plaintiff and the defendant submitted this amount is \$31,282.68. I allow that sum. The plaintiff also claimed interest of \$781 on amounts expended by her. I allow that interest.

Fox v Wood

[53] The plaintiff submits she is entitled to an amount of \$9,339.44 for this component. I award that sum. No submission was made by the defendant on this component.

[54] In summary, I assess the plaintiff's damages as follows:

General damages	\$61,980.26
Past economic loss (including superannuation and interest)	\$60,632.77
Future economic loss (including superannuation)	\$289,551.96
Future Expenses	\$20,780.22
Special damages and out-of-pocket expenses (including interest)	\$32,063.68
<i>Fox v Wood</i>	<u>\$9,339.44</u>
Sub-total	\$474,348.33
Less WorkCover refund	<u>\$54,886.97</u>
Total	<u>\$419,461.36</u>

[55] I give judgment for the plaintiff in the sum of \$419,461.36.

[56] I shall hear the parties as to costs.