SUPREME COURT OF QUEENSLAND

CITATION:	*Twyford v Lakshmanan & Ors* [2002] QSC 063
PARTIES:	**MICHAEL WILLIAM TWYFORD** (plaintiff) **v** **ANAND LAKSHMANAN** (first defendant) **and** **NRMA INSURANCE LIMITED [ACN 000016722]** (second defendant)
FILE NO/S:	S161 of 1999
DIVISION:	Trial Division
DELIVERED ON:	21 March 2002
DELIVERED AT:	Brisbane
HEARING DATE:	26, 27 February 2002
JUDGE:	Mackenzie J
ORDER:	**1. That there be judgment for the plaintiff in the sum of $307,266.85.** **2. That, from that sum, the sum of $4,044 being items of special damages, payment of which has already been made by the second defendant, be repaid to the second defendant from the damages payable under order 1.** **3. That, unless an application to the contrary is made within seven days of the date of delivery of judgment, the defendant pay the plaintiff's costs of and incidental to the action, to be assessed on a standard basis.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTION FOR TORT – MEASUER OF DAMAGES – PERSONAL INJURIES – where plaintiff involved in car accident – whether plaintiff had pre-existing condition which became symptomatic after the accident – whether plaintiff presently suffers any significant disability – whether the plaintiff suffers from pain – medical and psychological evidence DAMAGES – MEASURE AND REMOTENESS OF

DAMAGES – PERSONAL INJURIES – LOSS OF EARNING AND EARNING CAPACITY – whether plaintiff unemployed at time of accident – where evidence plaintiff had been offered employment prior to the accident – whether this employment would have been long-term – where plaintiff claims he was attempting to set up a business – where no records available to support this claim – whether plaintiff had a viable business – whether plaintiff's credibility is in issue

COUNSEL: G Mullins for the plaintiff
D McMeekin SC for the defendant

SOLICITORS: Bill Cooper & Associates for the plaintiff
Sparke Helmore Solicitors for the defendant

[1] **MACKENZIE J:** On 23 March 1997 the plaintiff was involved in a collision in which his Toyota four wheel drive, which was stationary at traffic lights, was struck from behind by the defendant's vehicle. Liability is not in issue. However, some issues relating to quantum are complex.

Plaintiff's Personal and Work History

[2] It is convenient to start by making reference to the personal history of the plaintiff. The plaintiff is a single man now 33 years of age. He is the eldest of a family of ten children. As he grew up he lived mainly on farms conducted by his parents since his father at various times conducted a poultry farm, a cattle farm, a crop farm and a piggery. He left school, having completed Year 10. He had some difficulties at school as he had mild dyslexia and therefore preferred to work on his parents' farms. He said that he was better at practical hands-on subjects.

[3] He obtained an apprenticeship as a motor mechanic at a feed lot called Beef City near Toowoomba and completed his apprenticeship, specialising in heavy earth moving equipment, in October 1989. He continued working at Beef City for some time after completing his apprenticeship.

[4] Some time after his mother's death in a motor vehicle accident he went to work on his father's pig farm near Toowoomba for little or no payment out of a sense of family obligation. The farm was sold in 1990. The rest of the family returned to Sydney whilst he stayed in Toowoomba. In 1990 he went to St Vincent's Hospital in Toowoomba with a view to working in the engineering department and getting his boiler operator's certificate. However, he was asked if he wished to work as an orderly and worked in that capacity in operating theatres for about two years until 1992.

[5] He was then unemployed for about six months before getting a job on the Sunshine Coast as a waiter or "expediter" in a restaurant. He left that employment after a disagreement, but successfully applied for another position at the same restaurant. When he found out that the new position involved essentially the same work as before, he resigned almost immediately.

[6] After about six months unemployment he obtained a job as a storeman with Daystar Australia on the Sunshine Coast. Daystar was a fibreglass wholesaler and retailer and the work was quite heavy. It included manhandling drums of material and pallets, repacking the contents of large containers into smaller containers, driving a forklift, cleaning and delivering fibreglass materials in country areas. When the Caloundra warehouse was closed he moved to the Gold Coast where he performed similar work for the same employer. Later he was promoted to warehouse supervisor.

[7] One of the contentious issues is the extent to which the plaintiff had a viable business of fabricating parts for watercraft and repairing fibreglass boats. One of

the problems about this aspect of the case is that there are no records supporting the plaintiff's claims. He did not declare any income from these activities to the Taxation Commissioner, and there are some other difficulties about it to which reference will be made later. According to the plaintiff's quantum statement, he was attempting to set up the business from 1994 to 1997.

[8] In about April 1996 he moved to Richmond, New South Wales, to help his father who was at that time in financial difficulty with a chicken farm that he was conducting. Once again he worked unpaid. When he left the Gold Coast, he disposed of his fibreglassing equipment.

[9] Some time before Christmas 1996 he returned to the Gold Coast with a view to resuming work as a fibreglasser. He said that, although he was unemployed for some months, he had enquiries from people who wanted him to do fibreglassing work, and he had used his time to bring himself up to date with new legislation and insurance requirements in the industry. He gave evidence that shortly before the accident on 23 March 1997 he had an offer from Mr and Mrs James, who operated a business called "Mr Fibreglass", to work as a subcontractor laminating fibreglass parts and making moulds. However, before he could commence this work he was involved in the accident. It was Mrs James' evidence that the plaintiff was to be paid $20 per piece and that eight to ten moulds per day was achievable. Mrs James had seen the plaintiff doing laminating work, but not on a full time basis. She was unable to comment on his ability to work constantly throughout the week, week after week. She said that a subcontractor could gross between $800 and $1,200 per week working full time.

[10] However, when the plaintiff became unable to take advantage of the offer because of the accident Mr and Mrs James did not engage anyone else to work on a full time basis for them. They engaged a trainee and an apprentice at various times. Evidence was also given as to the variability of the fibreglassing industry. Further, about three years prior to the hearing Mr James had obtained a contract with Energex to do specialised fibreglassing for it. Although it was not directly stated in evidence, it is unlikely that a person of the plaintiff's background would have been immediately qualified to do this work. The long term nature of the arrangement with Mr and Mrs James would therefore have been somewhat speculative.

Medical Evidence

[11] The medical evidence establishes that the plaintiff suffered neck, shoulder and lower back pain following the accident. They were believed to be soft tissue injuries. The plaintiff was, however, found to have a condition of spondylolisthesis in the lumbar region. This condition can be caused by trauma, but can also be a developmental condition. On balance, I am satisfied that the evidence supports the conclusion that it is more likely that the condition was in the latter category. This pre-existing condition had, however, been rendered symptomatic when it had not been causing pain prior to the accident. The evidence establishes that the condition often remains symptomless until activated by some event. I accept that that is what occurred in the plaintiff's case.

[12] The major issue to be resolved is, conceding that the plaintiff suffered these consequences of the accident, whether he suffers any significant disability at present and, if not, when he ceased to do so. There are no recent reports from medical

practitioners and other experts. There was a cluster of examinations in late 2000 and early 2001 which demonstrate the nature of the disagreement on this issue.

[13] Dr Searle, a consultant orthopaedic surgeon, examined the plaintiff on 13 December 2000. He found tenderness in the mid region of the cervical spine and in some of the muscles in the upper back. Full forward flexion of his neck was complete and painless, extension was complete, but his other neck movements were slightly restricted. All the movements were said to cause the reported neck pain. There were no abnormal neurological signs in his upper limbs.

[14] The lumbo-sacral junction, indicated as the site of the plaintiff's main back pain, showed tenderness and there was also tenderness over each sacro-iliac region. His lumbar spine movements and straight leg raising were accepted in cross examination of the doctor to be "pretty good", although in some respects complaints of pain accompanied the tests. He found that the left shoulder joint was not tender. Internal rotation was complete but caused pain. Flexion was only slightly restricted and abduction stopped at 135 degrees. Both of those movements reproduced his shoulder pain. External rotation was complete and painless.

[15] Dr Searle was tested in cross examination as to whether variations in the levels of movement and reported pain were incongruous. The doctor was of opinion that pain of this kind could wax and wane considerably, depending on circumstances. He also remained of the opinion that, notwithstanding the absence of objective indicators of ongoing injuries, the plaintiff's description of his condition fitted into a pattern which confirmed his diagnosis that the symptoms from the injuries and the aggravation were permanent and caused a moderately severe degree of disability.

The plaintiff should not do work which required sustained neck flexion or extension, strong or repetitive movements of the upper limbs, working at or above shoulder level on the left side, prolonged sitting or prolonged standing, lifting or repeated bending or regular travelling over moderate to long distances. His prognosis was that there would probably be no change in those conditions, except for the possibility of the symptoms and disability at the lumbo-sacral junction increasing if the spondylolisthesis slipped further.

[16] Dr Buckley, a consultant physician in rehabilitation medicine, examined him on 15 December 2000. On examination he found that there was mild L5/S1 tenderness without muscle spasm. The plaintiff flexed to his ankles and had full range of movement in other directions. The range of movement of both hips was normal. Straight leg raising reached 80 degrees on both sides with back pain. There were no abnormal nerve root traction signs. Sitting straight leg raising was consistent.

[17] Examination of his shoulders revealed a reduction in external rotation on the right, but no other abnormality. The range of movement of his neck produced movements which were consistent, but with some restriction in flexion, extension and side flexion. He attributed the back pain to the defect at L5. He said that the plaintiff had neck pain without characteristics which led to a physical pathological diagnosis, consistent with a psychological component to his pain. He said that both back pain and neck pain of the characteristics described usually gradually resolve. However, the failure of either to resolve over nearly four years implied some psychological component to the disability.

[18] He considered that Mr Twyford was unemployable in heavy manual labour, but believed he was fit for light manual work such as shop assistant, warehouseman with appropriate lifting devices, car park attendant or similar occupations provided he was not required to work with his hands above his shoulders or below his knees for a prolonged period and, if his work was primarily sitting or primarily standing, a break of five minutes to every hour.

[19] In cross examination Dr Buckley said that he thought the spinal abnormality was quite consistent with the plaintiff's account of pain in his back. The consistency of his story and the findings on examination which produced pain led him to believe that the pain was caused by the defect in his back. The absence of verifiable abnormalities in his neck led him to believe that there was a psychological component. He did not consider the fact that the plaintiff could touch his toes meant that he was pain free. He expressed the conclusion that because of his back injury he was unfit for heavy manual work but would be fit for light work.

[20] Dr Bleasel examined him on 31 January 2001. He found that there was little ease of movement in the plaintiff's neck. Flexion was restricted and flexion and rotation caused neck pain. With regard to the left shoulder, he found a good range of movement but the plaintiff reported pain when the horizontal was reached. Without quantifying the extent exactly, he found that the plaintiff had a poor range of movement in his lumbar spine. Straight leg raising produced back pain on each side, although he believed that the leg raising demonstrated a good range. He found no neurological abnormalities. He concluded that the plaintiff was unfit for strenuous physical work.

[21] Dr Wearne, a consultant orthopaedic surgeon, had examined the plaintiff twice, somewhat earlier. The first occasion was on 4 June 1998. He reported that he had found full and free neck movement. The left shoulder was slightly restricted in its movements. The plaintiff had a full range of spinal movements, although he carried them out with care. Straight leg raising reached 70 degrees on both sides. With regard to the neck and shoulder problems, he predicted only mild residual disabilities. With regard to the back, he considered that the pre-existing spondylolisthesis was aggravated by the motor vehicle accident and that his recovery may be incomplete. He could not exclude the possibility that he would be left with mild to moderate disability.

[22] The second examination was on 24 June 1999. On this occasion he found a full range of movements in the neck, shoulder and spine. Straight leg raising reached 90 degrees on both sides. He concluded that:

> "Despite Mr Twyford's continuing complaints, I consider that he has now very largely recovered from injuries received in the alleged motor vehicle accident of 23 March 1997. Up until now, his main complaint has been of lower back pain where, I consider, he had aggravated a pre-existing spondylolisthesis. However, his description of his activities in his new abode and my failure to find any convincing evidence of any serious lesion in his lower back and lower limbs, leads me to consider that the effect of the aggravation has now subsided."

His prognosis was that from a physical point of view, Mr Twyford's prognosis was excellent. He expressed the conclusion that the only impediment to his returning to work was his tendency to exaggerate his symptoms and his search for sympathy.

[23] In his evidence he repeated that he did not believe that the plaintiff had any significant disability, although he had a condition in his spine which had the potential to give or produce further episodes of pain if he was injured or if he

undertook very heavy work in the future. He elaborated on the second occasion when he examined the plaintiff. He said that he could find nothing wrong with him clinically. He moved and undressed and redressed and did everything else as if he had no discomfort or pain at all. That caused him to question the history he was given on that occasion. The plaintiff showed no apprehension when moving his back. Dr Wearne summarised the situation by saying that he could not reconcile his clinical findings with the history that the plaintiff was continuing to experience constant low back pain. With regard to the neck, he said that most people who have soft tissue injury to their neck without severe trauma to the cervical spine itself cease to have ongoing symptoms. However, five to ten percent continue to do so and if there were a psychiatric component it would be a complicating problem.

[24] Dr Wearne believed that on the second occasion when he saw the plaintiff he exhibited bizarre behaviour. It appears that the plaintiff insisted on lying on a couch in the corridor outside the doctor's rooms and required settling down before the examination occurred.

[25] The plaintiff gave evidence that on the day of the examination by Dr Wearne he was vomiting frequently and therefore feeling ill. He had come from Mackay, notwithstanding this, because he wished to keep the appointment rather than have to come back at a later date. He also said that he was running a temperature and that his back was sore.

[26] There is corroborated evidence that on the way back to the airport in Brisbane he went to a medical centre at Ascot and was diagnosed as suffering from a viral infection and was given an injection to control his vomiting. Dr Wearne said that he

did not witness the plaintiff vomiting and that, while he did not use a thermometer, his skin was not abnormally hot to the touch. In view of the evidence suggesting that the plaintiff was genuinely ill on that day Dr Wearne's assessment of the plaintiff's behaviour as abnormal requires to be somewhat discounted, and allowance made for that in deciding the weight of his conclusion.

[27] There is also a video taken of the plaintiff on the day of this examination and the next day. In one passage photographed outside the building where the plaintiff was examined the plaintiff can be seen stretching and feeling his back. Other parts of the video do not suggest marked impairment in the freedom of movement of the plaintiff who appears to walk without apparent discomfort but not vigorously. There is also a passage where, it was submitted, he lifted a fairly large dog into a vehicle. Unfortunately, much of the event is obscured from view to such an extent that it is impossible to see everything that happened. However, on one view of the incident it appears that he was using one arm to hold papers, bent down and picked up a light travel bag and patted or pushed the dog, which had got into the vehicle, on the rump. It is not possible to draw any damaging inference against the plaintiff from the video. The first passage referred to at least suggests that the plaintiff was, on the day of the examination, suffering some discomfort from his back.

[28] Dr Robinson, an orthopaedic surgeon, saw the plaintiff on 2 February 1998. By the time he gave evidence he had access to the reports of the doctors whose evidence has been summarised above. On his examination he found mild tenderness in the lower cervical area with normal flexion but mild reduction in extension. Right and left lateral rotation were respectively reduced by 10 degrees and 15 degrees, and lateral flexion and rotation were each reduced by 10%. In his oral evidence he

described this as a mildly decreased range of movement in the cervical spine. There was no neurological deficit in the upper limbs and no radiological evidence of abnormality. Dr Robinson thought that his neck pain should settle with conservative measures.

[29] The left shoulder had decreased internal rotation but all other movements were satisfactory, although painful at the extremes. The right shoulder showed no abnormality. The lower spine and sacro iliac joints were tender. The range of movement in the spine was satisfactory with no apparent neurological deficit. There was evidence of spondylolisthesis.

[30] In his oral evidence Dr Robinson said that there was no objective impairment of the lower spine apart from the tenderness. He believed the symptoms in this region were subjective. With regard to the subsequent reports from the other doctors, he said they confirmed that the plaintiff had returned to good function without objective evidence of spinal problems. If he was feeling pain it was subjective. However, he concluded that it would be difficult for the plaintiff to return to his occupation of motor mechanic because it involved lifting and prolonged flexion of the spine. When questioned about whether a finding of normal range of movement was inconsistent with complaints of pain, he agreed that it was possible to have full range of extension and flexion even though pain was experienced in doing so. However, it would be unusual to achieve it without complaints of pain. He agreed that a proportion of patients with soft tissue injuries to the cervical spine does not become pain free. The same applied to patients with spondylolisthesis which had been aggravated by trauma.

[31] The weight of the evidence from the doctors discussed to this point supports the conclusion that the observable condition of the plaintiff's back, neck and shoulder do not demonstrate that he should be feeling significant pain. If such pain is subjectively being experienced, it is substantially caused by psychological or psychiatric mechanisms. It is then necessary to focus on the submission by the defence that the plaintiff's current complaints of pain should not be accepted. It was submitted by the defendant that the plaintiff's credibility was a critical issue and in addition to the medical facts there were a number of other matters affecting it. Before analysing that argument it is necessary to consider the evidence of the psychiatrist, Dr Mulholland, and the evidence of psychologists.

[32] Mr Holt, a psychologist, saw the plaintiff on 17 June 1998 and 6 July 1998. He concluded that the examination established moderate level anxiety and depression, moderate level chronic pain and high levels of confusion, anger and fatigue.

[33] Mr Salzman assessed him on 27 October 1999. Mr Salzman concluded that, based on his overall assessment, the plaintiff was suffering from depression and a somatoform disorder. His personality profile did not exclude the possibility of organic pain generators. However, if they were present his organic pain would be exacerbated by stress.

[34] Dr Mulholland, a psychiatrist, saw him on 31 January 2001. He had some pathology tests done. There were indications of excessive consumption of alcohol, although the plaintiff did not consider himself to drink to excess. Another test confirmed the presence of cannabinoids which was consistent with the plaintiff's history of use of cannabis. That was to the effect that since the accident he had used

cannabis regularly and on an increasing basis. Over the year preceding the examination he had used cannabis about three or four times a week. Prior to the accident he had been an occasional user of the drug. Although the plaintiff said that he had been using Panadeine Forte in a dosage of up to six per day, averaging two per day, no codeine or paracetamol was detected. It was reported by the pathologist that this was not consistent with the report of intake of Panadeine Forte. Dr Mulholland observed that the picture was suggestive that he was not taking Panadeine Forte as reported by the plaintiff.

[35] According to Dr Mulholland, the plaintiff thought he would get better and had no excess of emotional reactions to the accident until about six months following it when he gradually became depressed. The history given was of significant depression gradually developing from that time, and being fully developed by about April 1998. He reported taking anti depressants on and off since mid-1998 until the time of the examination, although the particular drug he said he was taking was not detected in his body. He had said that he had ceased taking it because the prescription had run out.

[36] Dr Mulholland concluded that the plaintiff did not appear to have a major depression at the interview and his predominant affect appeared to be that of chronic low grade depression-anger/resentment-frustration. His thought content included some features consistent with traffic related anxiety with some mild post traumatic features. In expressing his opinion in his written report, Dr Mulholland said that from a psychiatric aspect he had an adjustment disorder with depressed mood, a condition of substance abuse involving alcohol and cannabis and possible "psychological factors affecting medical condition". His being depressed was a

consequence of his being in chronic pain and of the various losses and limitations that had been placed on his life. There was nothing to indicate that he would have developed this depressive disorder if it had not been for the accident. He was precipitated into the depression by the indirect effects of the accident.

[37] Dr Mulholland said that the depression had been unduly prolonged because of ongoing physical symptomatology and also because the treatment of his depression had only been sporadic and may also have been adversely affected by using reasonably substantial doses of codeine containing substances, cannabis use and probably excessive intake of alcohol. Dr Mulholland said that while the clinical history is consistent with the problems being indirectly secondary to the motor vehicle accident, the issues were to a moderate extent under his personal control. If the plaintiff wished to get back into the mainstream of life he needed to take control over his substance abuse. He said it was possible that psychological factors, including depression and substance abuse, were complicating his experience of chronic pain and were resulting in an aggravation of it. He said it was impossible to be definite about it one way or the other. He found nothing to suggest that the plaintiff had a somatoform disorder. He also said that being involved in litigation was a prolonging and aggravating factor in respect of the plaintiff's emotional state and perhaps also in respect of his physical symptomatology.

[38] He concluded that at the time of examination from a psychiatric aspect the plaintiff was functioning within the moderate to minor symptoms range. He said that it could be expected with the passage of time, the conclusion of all litigation, appropriate psychiatric and psychological treatment, appropriate pain management input and appropriate rehabilitation, that his condition would improve so that he

would be functioning within the mild to minor symptoms range. He said that any long term prediction should be taken with extreme caution due to his condition not having stabilised and due to his not having had a full range of psychiatric and rehabilitation treatment. In his oral evidence Dr Mulholland said that the likelihood is that the level of depression is, of itself, causing aggravation of the experience of pain. Assistance from a psychiatrist would ensure that he took any necessary medication, that he had supportive counselling and that there was an attempt to limit his substance abuse. That was the basis for his conclusion that long term psychiatric impairment would be in the minor to mild range. At that level the plaintiff would be able to work. The treatment would be over a one to two year period with the concentration on the first six months.

Plaintiff's Credibility

[39] It was submitted by the defendant that the plaintiff's credibility was a critical issue and that there were a number of matters affecting it. It was submitted that a number of independent checks on the plaintiff's evidence struck false notes. The first was the issue of the taxation returns. As previously mentioned, the plaintiff gave evidence that he worked part time in his own fibreglass manufacturing and repair business. He declared no income from this activity in the taxation returns filed at the time. He gave an unconvincing explanation of the reason he did not declare the income. When his solicitors found out that his returns were inaccurate they were amended.

[40] It was submitted that the plaintiff's estimate of income, which was given to the solicitors and was not based on any records, had been pitched by him at a level that

suggested that he had a viable business. It was alleged that he had given an inflated estimate of the worth of the business for the purpose of inflating damages for economic loss. The period over which the business was conducted is inconsistent as between the quantum statement and the taxation returns eventually filed. The taxation return shows an estimated figure of $5,000 for the year ending 30 June 1994 and gross earnings of $12,966 in the year ending 30 June 1996. The quantum statement refers to attempting to set up part time in his own business in 1994, 1995, 1996 and 1997. Until 28 July 1995 he was working for Daystar. In about April 1996 he moved to Sydney.

[41] Failure to be frank about the level of his income to the Taxation Commissioner initially does him no credit. However, I am not persuaded that dishonesty in that respect necessarily wholly taints his evidence in other respects. However, the fact that the declared earnings from the business are unsubstantiated is a reason for treating such figures cautiously.

[42] Next, Mr McMeekin referred to four matters which may be described as indicia of the level of pain. One was the evidence in the video. Another was the pathological evidence that there was no Panadeine Forte derivative in his blood on the day he saw Dr Mulholland. The point was made that it had been necessary to travel to Brisbane from Mackay on that day and that if the plaintiff was in discomfort to the extent claimed he would, in all probability, have taken Panadeine Forte. Yet the evidence was that he had not. The plaintiff was at a loss to offer an explanation.

[43] The next was the absence of discomfort while the plaintiff was giving evidence. Allowance must be made for the fact that nothing was put to the plaintiff directly

about this while he was giving evidence. There was therefore no evidence given as to any pain relief measures taken before the plaintiff gave evidence. However, I should say that, independently of Mr McMeekin's submission, I had thought that the plaintiff's posture and movements in the witness box did not give the impression that he was then suffering substantial discomfort. Finally, it was submitted that the evidence of the medical practitioners as to the extent of the plaintiff's neck and back movements was inconsistent with his evidence.

[44] The next matter raised in this connection was the existence of a diary purporting to record events and pain levels from the day of the accident. It was plainly not a contemporaneous document insofar as it relates to entries at the beginning of the period it purported to cover. It was plainly a reconstruction. It was submitted that it had been prepared to appear as if it was a contemporaneous document and that creation of it in that form was deceptive. It should be noted that the document was not relied on by the plaintiff and came to light in cross examination.

[45] Mr McMeekin also commented on the fact that no-one associated with the plaintiff in his post accident life was called to give evidence as to his capabilities and activities in the period between the accident and trial. He advanced the hypothesis that no such evidence was called because to do so created a risk of inconsistencies with the plaintiff's own evidence.

[46] On the other side of the balance there were some matters which might be thought to be generally favourable to the plaintiff. One is his effort to rehabilitate himself. It was submitted on his behalf that it was not the characteristic of a man seeking to maximise his damages to engage in a course which would have the opposite effect if

completed. Secondly, there was a good deal of evidence, Dr Wearne's excepted, that at examinations by doctors and other health professionals the plaintiff seemed co-operative and not prone to exaggerate his symptoms. Thirdly, he did not seem evasive when giving evidence.

[47] Giving full weight to Mr McMeekin's criticisms of the plaintiff and the matters in his favour, I am satisfied the plaintiff has not engaged in a deliberate attempt to inflate the level of damages. I am satisfied that he suffered, and still suffers from, pain in consequence of the accident. In light of the medical evidence, the best view of it is that at the extremities of his movements he suffers pain. He will be prone to occasional flare ups related to his formerly non-symptomatic back which has been made symptomatic by the accident. Psychiatric or psychological factors have elevated the level of discomfort which would be expected on the basis of the orthopaedic findings alone. Nevertheless, I am satisfied that the pain is now low level, although discomforting to him. The prognosis in Dr Mulholland's evidence is that there are relatively short term prospects of reducing it further once the litigation is over. There is substantial evidence that, apart from that aspect of pain, there is no orthopaedic reason for it to be significant beyond that time. I will proceed to assess damages having regard to that finding.

Damages

[48] With regard to pain and suffering, the plaintiff was before the accident an active man who engaged in various sporting activities requiring physical exertion. He is now unable to engage in them. The physical pain was, in my view, greater at the

commencement of the period and has been tapering off as the years have passed. I will allow $30,000 for pain and suffering with interest at $2,000.

[49] With respect to past economic loss, it is five years since the accident. The plaintiff submitted that $475 net per week, being the average of the national average weekly earnings from 1995 to the present, as shown in Exhibit 13, should be used as the starting point for the assessment. This was on the basis that in the year ended 1995 the plaintiff was earning approximately the average weekly earnings. It was submitted that some allowance should be made for greater potential earning capacity as a fibreglasser. It was submitted that $550 per week was a fair assessment of the plaintiff's pre-accident earning capacity, averaged between 1997 and 2002.

[50] The evidence concerning earnings from fibreglassing came from Mrs James who gave evidence (consistent with what was opened) that the rate per mould to be paid was $20. Eight to ten per day could be made, which equated to up to 40 to 50 per week, depending on the weather. This would have equated to $800 to $1,000 per week gross. The plaintiff gave evidence, somewhat hesitantly, that he thought that he was to be paid $25 per mould, but I prefer the evidence of Mrs James on this. Further, Mrs James said at the present time a subcontractor fibreglasser could gross $800 to $1,200 per week from which he would have to meet his own expenses. That would yield substantially less income than the plaintiff was to be paid. Further, while other fibreglassing work would probably have been available, earnings of the order of $800 to $1,000 based on the $20 per mould using the James' material would probably have been dependent upon the continuation of the particular agreement with Mr and Mrs James. There was evidence that Mr James

went into a specialised kind of work for Energex about three years ago. It would therefore be speculative whether the arrangement would have continued. Further, when Mr Twyford became unavailable Mr and Mrs James did not feel it necessary to employ a similarly qualified person.

[51] In consequence, I am of the opinion that the figure of $550 proposed by the plaintiff as the weekly earning capacity is on the high side. I will adopt $500 which also makes allowance for the likelihood that the plaintiff had some small earning capacity for some of the period had such suitable work been available to him. The 256 weeks to trial produces past economic loss of $128,000. The plaintiff submitted that there should only be a 10% reduction for the prospect of periods of unemployment. Given that there is evidence of a pattern where the plaintiff did not fully exercise his earning capacity and the uncertainty with respect to continuity of fibreglassing employment, I consider that a 10% reduction is low. I will reduce the figure by 20% to reflect those factors. That produces a figure of $102,400. After subtracting earnings of $9,912 from work at TAFE and for stock checking, and $45,000 estimated to be the sum of social security payments, the amount upon which interest is payable is $47,488. Interest on that amount is $11,872. Loss of superannuation at 7% is $7,168.

[52] Future economic loss involves a rather complex equation. The case is different from the typical case where assessment for future economic loss is to be made. The plaintiff has lost the capacity to work in future in trades as a mechanic or a fibreglasser. Nor can he work in occupations requiring lifting, bending and twisting for fear of precipitating further episodes of pain in the nature of flare ups of the present residual pain. As a person with an unsymptomatic spondylolisthesis he

would have been at risk of rendering it symptomatic by some other incident entirely independent of the accident in the future. If that occurred, he would be potentially placed in the same situation as he has been in since the accident. That is a contingency that must be kept in mind.

[53] In the period before trial he began to undertake a course, albeit slowly, which he hopes will ultimately lead him to qualify as a TAFE teacher, the earnings for which would be no less and possibly more than he would derive from any other occupation for which he would be suitable. It is the evidence that it will take him five years to complete his studies. He has also engaged in part time work within his capacity which returns $164 per week. He has the capacity to do light work when available and compatible with the demands of his studies.

[54] There is a contingency that he will not finish the course successfully. Voluntary withdrawal is one possibility. That would be his own responsibility. Failure to pass, notwithstanding appropriate efforts to do so, is another. Another possibility is that if he does complete the course he will not get suitable employment in that field immediately or at all.

[55] However, he has demonstrated progress in the course which he has chosen to undertake. It is in relation to an area of interest of his. There is no obvious reason why he should not have the capacity to successfully complete it, given the fact that he has made some progress already. If future economic loss is to be calculated on the basis that there is a good degree of probability he will complete the studies in five years time and be at least restored to the financial position in which he would have been if he had followed other occupations of choice, a component of

compensation into the distant future to allow for the possibility that the consequences of the present accident have robbed him of earning capacity should be modest. On this basis of assessment the plaintiff should be compensated for loss of earning capacity in the period of study, with due regard to the competing contingencies. There is insufficient data to calculate future economic loss on any basis which compares unskilled work he could now do with the kind of work he could do before the accident. But on the view I have taken, even if he does not eventually work as a full time TAFE teacher, the range of work he can do and his earning capacity are diminished but not destroyed. Because of the variables involved, a lump sum award of $100,000 is in my opinion within range and appropriate to compensate for future economic loss. Loss of superannuation at 9% is $9,000.

[56] With regard to past care, on the view I take of the diminishing level of disability I allow $5,000. Interest is $1,250 on that sum.

[57] With regard to future care, given the evidence of the plaintiff about his capacity to do everything but the heaviest tasks, the claim for two hours per week for 50 years is not sustainable. The need for assistance with such tasks will be intermittent rather than regular. I allow $6,500 under this heading.

[58] So far as future treatment is concerned, I accept that there may be occasional flare ups of pain due to the ordinary incidents of living and attributable to the fact that the plaintiff's back was made symptomatic when before it was not. The evidence is that there will be occasions when physiotherapy may be necessary in this regard. $1,389 is claimed. I allow that sum.

[59] With regard to spinal fusion, the plaintiff says that he wishes to undergo that procedure. However, the weight of medical evidence suggests that such a procedure is not recommended in a case of his level. Given the medical evidence, it seems to me that irrespective of the plaintiff's wishes it is unlikely that he will be advised to undergo the operation. If circumstances arise in the future in which it is necessary or desirable to perform such an operation, the connection with the present incident is at this point speculative. On the state of the evidence the onus of proof in respect of this item has not been discharged.

[60] There is a claim for a rehabilitation programme and pain control recommended by Dr Salzman which will cost $7,500. If the plaintiff undergoes the treatment prescribed by Dr Mulholland it is questionable whether the rehabilitation and other procedures will be necessary. However, I should allow for the possibility that some rehabilitation may be necessary. I allow $5,000 in that regard. Consistent with the findings of fact, I allow $4,000 for treatment of the kind referred to by Dr Mulholland.

[61] There is a claim for visits to a general practitioner once every two months at $40 per visit, amounting to $4,381.34. Given the view accepted of the facts, the accident related visits to the general practitioner will not be of that level. I allow $1,200 under this heading.

[62] With regard to medication, the same comments apply. I allow $2,000 for future medication.

[63] There is also a claim for miscellaneous expenses such as visits to alternative medicine practitioners, travelling to appointments and the like. I allow $2,000 in that regard.

[64] With regard to special damages, the only contentious item is a sum of $1,290 for reflexology treatment. Since the evidentiary basis for treating this as an appropriate form of special damages is sparse, I do not propose to allow this item. Special damages are therefore $15,827.85. Of those, $4,044 were actually paid by the second defendant. They should be deducted from the judgment sum and repaid to the second defendant. Of the sum originally claimed, $3,970.80 was actually paid by the plaintiff. Deducting the claim for reflexology, the amount for calculation of interest is $2,680.80. I allow $660 interest on that sum. The damages payable are tabulated hereunder:-

Pain and suffering:	30,000.00
Interest:	2,000.00
Past economic loss:	102,400.00
Interest:	11,872.00
Loss of superannuation (7%):	7,168.00
Future economic loss:	100,000.00
Loss of superannuation (9%):	9,000.00
Past care:	5,000.00
Interest:	1,250.00
Future care:	6,500.00
Future treatment:	
▪ Physiotherapy	1,389.00
▪ Rehabilitation	5,000.00
▪ Specialist medical treatment	4,000.00
▪ General practitioner	1,200.00
▪ Medication	2,000.00
▪ Other treatment	2,000.00
Special damages:	15,827.85
Interest:	660.00
Total:	**$307,266.85**

[65] The orders are as follows:

1. That there be judgment for the plaintiff in the sum of $307,266.85.

2. That, from that sum, the sum of $4,044 being items of special damages, payment of which has already been made by the second defendant, be repaid to the second defendant from the damages payable under order 1.

3. That, unless an application to the contrary is made within seven days of the date of delivery of judgment, the defendant pay the plaintiff's costs of and incidental to the action, to be assessed on a standard basis.