SUPREME COURT OF QUEENSLAND

CITATION:	*Perfect v MacDonald & Anor* [2012] QSC 11
PARTIES:	**STEVEN JOHN PERFECT** (plaintiff) **V** **HELENE DIANNE MACDONALD** (first defendant) **AND** **SUNCORP METWAY INSURANCE LTD** **ABN 83 075 695 966** (second defendant)
FILE NO/S:	S350 of 2011
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	10 February 2012
DELIVERED AT:	Rockhampton
HEARING DATE:	6 February 2012
JUDGE:	McMeekin J
ORDER:	**Judgment for the plaintiff in the sum of $123,813.10**
CATCHWORDS:	TORTS - NEGLIGENCE – ROAD ACCIDENT CASES – ACTIONS FOR NEGLIGENCE – APPORTIONMENT OF DAMAGES – GENERALLY – where motor vehicle accident – – where pedestrian struck by motor vehicle – where liability admitted – where contributory negligence is in issue – where plaintiff remained on the road surface as the vehicle approached - whether the plaintiff acted with reasonable care DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – assessment of damages pursuant to the *Civil Liability Act 2003* (Qld) - where the assessment of general damages and future economic loss is in issue – whether s 55 of the *Civil Liability Act 2003* (Qld) has altered the common law *Civil Liability Act* 2003 (Qld) *Civil Liability Regulation* 2003 (Qld)

Alldridge v Mulcahey (1950) 81 CLR 337

Allwood v Wilson & Anor [2011] QSC 180

Broadhurst v Millman [1976] VR 208

Brooks v Zammit & Anor [2011] QSC 181

Graham v Baker (1961) 106 CLR 340

Malec v JC Hutton Pty Ltd (1990) 169 CLR 638

McHale v Watson (1964) 115 CLR 199

COUNSEL: AM Arnold for the plaintiff

GF Crow SC for the second defendant

SOLICITORS: Rees R & Sydney Jones for the plaintiff

Grant & Simpson Lawyers for the second defendant

[1] **McMEEKIN J:** The plaintiff, Steven Perfect, claims damages for personal injuries suffered on the 2nd December 2009. He was struck when a pedestrian by the side mirror of a vehicle driven by the first defendant, Helene MacDonald.

[2] The second defendant admits negligence but argues that the plaintiff was contributorily negligent. The quantum of damages is also in issue.

[3] Mr Perfect was born on the 20th February 1995. He was 14 years old when injured and is now aged 16 years.

LIABILITY

[4] The subject accident occurred in Knutsford St near its intersection with North St. Knutsford St runs east-west, is undulating in character, and is located in a suburban built up area of South Rockhampton. The Traffic Crash Report has the accident as occurring at around 9.30am. It was a clear summer's day.

[5] Mr Perfect was walking in a westerly direction with two companions along Knutsford St. They were of an age, around 14 to 15 years old. The oldest of them, Mr O'Rourke, was walking a little ahead of the other two. They were heading off to go fishing. They were walking along the northern, or for their direction of travel, the right hand side of the road. Their precise location was the subject of some debate.

[6] Ms MacDonald was driving towards the three pedestrians. She was a cleaner heading to her next job. She had two passengers, neither of whom was called to give evidence. Her intention was to turn left into North St. A "Stop" sign faced her when she reached the intersection.

[7] The evidence is far from clear as to how far back the pedestrians were from the intersection as Ms MacDonald's vehicle, a Hiace van, passed them. The youngsters thought that they were only a few meters into Knutsford St. Ms MacDonald thought they were 50m from the intersection with North St.

[8] It seems clear enough that Ms MacDonald's recollections are inaccurate. The witnesses are agreed that the incident occurred after the van had passed over a small hill which is several house blocks back from the intersection. The van travelled some distance after that point before coming to the pedestrians.

[9] The only significance of the precise location of the incident is the adequacy of view that each had of the other. At best, and they would need to be looking, the pedestrians could see only the roof of the van as it approached that small hill. But once at the top of the hill they plainly had a clear view of the van, and conversely. It was no part of the defendants' case that the first defendant had insufficient time to adjust her management of the vehicle to allow for the presence of the pedestrians. Nor was it part of the defendants' case that Mr Perfect, wherever he was located on the road surface, moved further onto it as the vehicle approached.

[10] The pedestrians each thought that Ms MacDonald was travelling in excess of the speed limit which was 50 kph for the area. It is common enough for pedestrians to have that impression when a vehicle suddenly appears bearing down on them. But here Ms MacDonald faced a blind intersection a short distance ahead. It seems to me unlikely that she would not have been driving as she said – going through her gears and at no more than 40 kph as she approached the little group.

[11] One of the pedestrians, Mr O'Rourke, said that as the van approached he could see the driver and she was looking to the right as she approached the group. He was not challenged in respect of that evidence and indeed Ms MacDonald admitted looking to the right as she approached the intersection. She maintained that her attention was moving from ahead, to her mirrors, and to the right.

[12] It is common ground that the van had a side mirror on an extended metal bar. It stuck out about 30cms from the side of the van. While Ms MacDonald was unaware of the fact at the time it is common ground too that the mirror struck Mr Perfect on the left shoulder area. Plainly enough Ms MacDonald drove far to close to Mr Perfect, wherever he was on the road surface. Her negligence was not limited to the admission made – that she drove too close forgetting that the van had the extended mirror fitted. To deliberately drive within 30 cms of a pedestrian in plain view, with no contingency preventing a wider berth being given, and at some speed with or without such a mirror, is to take unjustifiable risks. As well, here it is plain that Ms MacDonald's attention was not on the pedestrians. I accept Mr O'Rourke's evidence that she was effectively looking away from the pedestrians as she neared them and for no good reason. No reasonable driver would have done so. So Ms MacDonald departed substantially from the standard expected of her for a number of reasons.

[13] The question here is whether Mr Perfect was also negligent for his own safety.

[14] The two crucial issues are – what was the path of the van and where was Mr Perfect in relation to the northern or (for him) right hand edge of the road?

[15] I say that the path of the van is crucial because if it veered towards the pedestrians, as Mr Perfect and his friend Ms Connors said it did, then the timing and extent of that change of course alters considerably the pedestrians' perception of the danger presented by the approaching car and their need to respond to it.

[16] Ms MacDonald maintained that she had her vehicle as close to the centre of the road as she could and at least a car width out from the gutter. I am satisfied that she is wrong in that recollection for a number of reasons. Her vehicle probably did start at about that point of the road as she topped the small rise but as she neared the group her attention was not on them but on the corner ahead. Her looking to the right makes plain that her mind was on the next turn. Her plan was to turn left. She positioned her vehicle for that turn. Two witnesses said so and they gave every appearance of giving credible testimony. Ms Connors particularly conceded matters that she must have appreciated had the capacity to adversely affect her credit. She was most impressive. Conversely Ms MacDonald was a most unimpressive witness. She was argumentative and defensive, and, perhaps unconsciously, plainly putting the best light on matters that she could.

[17] The result of this manoeuvre to the left was to alter considerably the risk to which the pedestrians were exposed. Where then was Mr Perfect at this time?

[18] The first defendant placed Mr Perfect well onto the bitumen surface. Mr Perfect said that he was in the gutter with one foot on the kerb. He was supported in that by Ms Connors. He said that he had moved his position slightly to the right as the car approached. Ms Connors said that she too moved - onto the grass footpath from the road surface. Mr O'Rourke thought that Mr Perfect had one foot in the gutter and one on the bitumen surface. Mr O'Rourke, it must be noted, was not in a position to see where Mr Perfect was at the crucial time. Mr O'Rourke was walking ahead of the other two. His last view of the two behind suggested to him that they were walking hand in hand. That they were close by to each other is clear.

[19] Two credible witnesses then have Mr Perfect well to the left and in the gutter. Mr O'Rourke's last view would place Mr Perfect not far to the left of Ms Connors, which is consistent with the accounts of the two others. A veering of the vehicle to the left would bring the vehicle close to Mr Perfect if he was in that position. A veering too could result in the vehicle missing Mr O'Rourke walking ahead yet striking Mr Perfect. All the evidence points to Mr Perfect being positioned as he said he was.

[20] The defendant's argument is that, acting reasonably, Mr Perfect was obliged to get off the road surface entirely – as Ms Connors did. That would have kept him safe. While the conclusion is undoubtedly true I am not persuaded that the exercise of reasonable care required so much.

[21] First, I observe that Mr Perfect had every right to walk on the road surface if he wished. In doing so he must exercise ordinary care and prudence but he does not do so at his peril: *Alldridge v Mulcahey*[1] per McTiernan J. Secondly, in deciding what ordinary care and prudence demanded the plaintiff's age is relevant: *McHale v Watson* (1964) 115 CLR 199 at 213-4 per Kitto J. He was then a minor, not quite 15 years of age. While there is no evidence about the matter it seems to me plain that a boy of not quite 15 does not have the same degree of "experience, understanding, judgment and thoughtfulness to be expected of an adult": *Broadhurst v Millman* [1976] VR 208 at 218 per Gowans and Menhennitt JJ. Thirdly, what is relevant in determining what is "just and equitable having regard to the extent of that person's responsibility for the

[1] [1950] HCA 31 at [31]; (1950) 81 CLR 337 at 345

damage"[2] requires consideration both of the degrees of departure from the standard of care expected of a reasonable man and the causative effect of the conduct of each party. By that latter statement it is meant that weight is to be given to the degree of danger created by the conduct in question.[3] Hence, in pedestrian cases, typically a heavier share of responsibility falls on the motorist even if the degrees of departure from the standard of reasonable care be more or less equal.[4] On any view the first defendant's departure from the standard expected of her was gross. Fourthly, the onus lies on the defendant on this issue.

[22] With those considerations in mind I turn to the facts here.

[23] There was nothing negligent in the plaintiff initially walking along the far right hand side of the road. When the vehicle first emerged over the brow of the small hill it was positioned sufficiently far out on the road surface that it represented no danger to the plaintiff if it maintained its course. The plaintiff was in clear view. He could expect that he would be seen by the driver. There was no traffic or other contingency that would require the driver to take her attention anywhere else or move her vehicle closer to the left side of the road. The vehicle then commenced to veer to the left. Mr Perfect was still in plain view. He remained safe so long as the driver did not move within say two feet of the kerb. There was no reason for the driver to move so far and the presence of three pedestrians provided good reason why she would not. Mr Perfect moved to his left to get a little further into the gutter and off the bitumen surface. In my view he was then acting reasonably and as a normal 14 year old was likely to do. That he did not move as far as Ms Connors is hardly unreasonable, but the counsel of perfection. He was not to know, and indeed remained completely unaware, that this vehicle had protruding from it an extended mirror that required him to get even further off the road to keep himself safe.

[24] At some point it should have become apparent that the driver was intending to pass very close to Mr Perfect and his companions. The danger was thus created. The issue is whether, at that point, Mr Perfect had time to react and remove himself. The onus lay on the defendant to show that he did have sufficient time. It is not possible to make a finding as to how much time elapsed between that point of time and the impact but it was very short. Mr Perfect in his evidence spoke of the "shock" of the car coming. That can readily be accepted. That he failed then to react sufficiently quickly involved no departure from the standard expected of him. And to have acted earlier would have required a superior level of vigilance. Ordinary care and prudence does not, in my judgment, call for the exercise of such vigilance.

[25] It is true that the plaintiff was not entitled to disregard the possibility of negligent acts on the part of an oncoming driver[5] but the defendant's submission would require the plaintiff to guard against the possibility that the defendant would not only not drive with due care but would drive as if the pedestrians were not there at all. The defendant's argument really amounted to this proposition – upon the approach of a

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2 Section 7 *Law Reform Act* 1995 (Qld). While the provisions of this statute are said to be subject to the provisions of the *Civil Liability Act* 2003 (Qld) no submission was made that the latter Act had any relevance here.

3 *The Law of Torts* Prof JG Fleming (7th edn) at p 248

4 *Pennington v Norris* (1956) 96 CLR 10 at 16; [1956] HCA 26 at [16]; *Teubner v Humble* (1962-63) 108 CLR 491 at 504. But see *Hobbelen v Nunn* [1965] Qd R 105 at 113-114 per Gibbs J

5 See *Tart v GW Chitty & Co Ltd* (1933) 2 KB 453 at 457-8; *Alldridge v Mulcahey* (supra) at 354 (CLR), [10] per Kitto J; *Purcell v Watson* (1979) 26 ALR 235

vehicle all pedestrians ought to remove themselves from the bitumen surface of the roadway until the vehicle has passed, irrespective of the margin for safety that might reasonably be thought to be present. That is not how citizens conduct themselves in daily life. If the proposition is right then other vulnerable road users, such as cyclists, have no business being upon the road surface. Such an approach effectively means that such vulnerable road users, pedestrians included, have only "a theoretical right to walk on the road: it could hardly ever not be rash for him to exercise his legal right".[6]

[26] I find that the plaintiff acted with all reasonable care for his own safety.

QUANTUM

The Civil Liability Act

[27] The assessment is governed by the provisions of the *Civil Liability Act 2003* (Qld) (*CLA*) and the *Civil Liability Regulation 2003* (Qld) ("the *Regulations*").

The Injuries

[28] Mr Perfect suffered multiple injuries as follows:

(a) A laceration to the left anterior aspect of the shoulder;
(b) Damage to the left deltoid muscle;
(c) A fracture to the upper left incisor tooth involving the labial, mesial palatal and incisal surface;
(d) An injury to the coccyx resulting in some continuing tenderness but no measurable impairment of function;
(e) Laceration to the lip with some minor scarring resulting.

The Consequences of the Injuries

[29] Mr Perfect was taken to the local hospital but discharged with his arm in a sling. He was considerably disabled for about a month. His mother took time off work to care for him. He initially took pain killers but does so rarely, if at all, now.

[30] He has been left with scarring to his lip and shoulder. Neither seems to worry him greatly although the scarring to the shoulder is obvious, keloid in nature and unsightly. Dr Gillett, an orthopaedic surgeon, thought that the scarring merited an impairment assessment of 3%.

[31] The damage to the deltoid muscle has resulted in muscle wasting and minor weakness. Dr Gillett, thought an impairment assessment of 2% of the left shoulder or 1% of the whole person appropriate.

[32] Mr Perfect has had trouble with heavy lifting in his casual work and the use of some tools such as a rattle gun when he performed work experience for Hastings Deering (Australia) Ltd ("Hastings Deering"). I note that he is right handed.

[33] The injury to the coccyx has caused problems only when Mr Perfect has been required to sit on a hard chair for a period.

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[6] *Alldridge v Mulcahey* (supra) at 347, [31] per McTiernan J

[34] Mr Perfect has been advised that he should have surgery described as a Class IV restoration to the fractured tooth but that he should delay that until he is aged 21 years. There is the possibility of pulp vitality being affected and of a consequent need for root canal treatment or extraction. No cost of the possible treatments or surgery is given by the dentist who has advised, but the defendant tendered a statement by the plaintiff's father which puts the cost of the surgery proposed at $1,300.[7]

[35] The plaintiff has restricted his sporting activities since the accident. The more passive sports such as golf cause him discomfort. His father thinks that his approach to his schooling has not been ideal as well.[8] His school reports tend to bear that out.

[36] The plaintiff has harboured an ambition to become a diesel fitter all his life. He has tailored his school subjects to that plan. He has just entered grade 12. His father is a mechanic and presently works for Hastings Deering looking after the first year apprentices. Mr Perfect (snr) thinks that his son will be physically able to cope with diesel fitting but with the potential for difficulties with the use of some equipment as he has in fact experienced. Dr Gillett too thinks that he could do the work of a diesel fitter but is likely to be a little slower, and likely to have some difficulties with "holding positions or under load, or repetition".[9]

[37] Mrs Coles, an occupational therapist, opined that Mr Perfect "could be expected to experience some limitations in the performance of work as a diesel fitter or work of a similar physical demand".[10] Further Mrs Coles points out that he is at potential "risk of strain and at worst damage to other body parts, particularly his lower back"[11] if he does not have appropriate material handling equipment as he is more likely to take any load through his uninjured right side. Because of his restrictions Mrs Coles concluded that Mr Perfect "could be expected to have need to modify his work procedures, to request assistance of others and/or to utilise materials handling equipment at times when otherwise he may not have done so. This could impact on his productivity and reliability..."[12]

Assessment of General Damages

[38] I have set out my understanding of the methodology required under the *CLA* to assess damages where multiple injuries have been suffered in *Allwood v Wilson & Anor* [2011] QSC 180. I will not repeat myself.

[39] The parties are agreed that the dominant injury is the shoulder injury. They agree that Item 97 (ISV range of 6 to 15) is the appropriate item number in Schedule 4 of the *Regulations*. They disagree on the appropriate ISV. The defendant contends for an ISV overall of 10 and the plaintiff for an ISV of 15, stressing the multiple injuries suffered. Without bringing into account the other injuries I would asses an ISV of 10. Mr Perfect has a permanent impairment. While it is assessed at a modest level it will have particular impact on him given the likely future career path he will follow. He will be conscious of the impact of that impairment for the rest of his working life. As well he has suffered the injury when only a boy and so must bear it for a very long time.

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7 Ex 7 at [13]
8 T1-83/35
9 Ex 2.3 at p 4
10 Ex 2.5 at p 4
11 *Ibid*
12 *Ibid* at p 5

[40] The remaining injuries merit very modest assessments. The coccygeal injury would fall in Item 128 (ISV range 0 - 10). I asses an ISV of 2. The damage to the tooth falls within Item 18.3 (0 – 2) and I assess an ISV of 2, given the need for future surgery and the risks in the meantime. The facial scarring falls within Item 22 (0 – 5) and I assess an ISV of 1. The shoulder scarring falls within Item 155.4 (0 – 3) and I would assess an ISV of 2.

[41] Bringing into account these various injuries I assess an ISV of 15. There is some overlap in these various injuries. An increase still within the ISV range for the dominant injury but at the top of it seems a fair reflection of the "level of adverse impact of the injury on the injured person" as the *Regulations* require.[13]

[42] I assess general damages at $18,000 pursuant to s 62 of the *CLA* and s 1(c) of Schedule 6A of the *Regulations*.

Future Economic Loss

[43] There is no claim for past economic loss.

[44] I have mentioned the evidence touching on Mr Perfect's physical restrictions and their probable impact on his future work above. The defendant contended that no amount of damages should be allowed. The plaintiff contended for $200,000 as a global sum reflecting the adverse contingencies. Given the plaintiff's age and stage of life – he still being at school – no precise calculation can be made.

[45] Section 55 of the *CLA* is relevant in these circumstances. It provides:

> **"When earnings can not be precisely calculated**
> (1) This section applies if a court is considering making an award of damages for loss of earnings that are unable to be precisely calculated by reference to a defined weekly loss.
> (2) The court may only award damages if it is satisfied that the person has suffered or will suffer loss having regard to the person's age, work history, actual loss of earnings, any permanent impairment and any other relevant matters.
> (3) If the court awards damages, the court must state the assumptions on which the award is based and the methodology it used to arrive at the award."

[46] Mr Crow of senior counsel for the defendant submitted that the section had altered the common law and where, as here, it was impossible to demonstrate that the plaintiff will, as opposed to may, suffer loss nothing could be allowed. I said of that proposition in *Brooks v Zammit & Anor* [2011] QSC 181 at [34] where I, not counsel, raised the issue:

> "Whether that section alters the common law was not debated. Arguably the restriction that damages should only be awarded "if [the court] is satisfied that the person has suffered or will suffer loss" means that the loss must be established on the balance of probabilities as more likely than not. Thus a loss of a chance that falls below 50% is not to be compensated. However no authority was cited where any court has taken that view and the matter, as I say, was not the subject of argument. Such a contention would run into the same difficulties as were raised in cases involving the interpretation of other provisions of the *CLA* such as *Kriz v King* [2006]

[13] Schedule 3, part 2, section 2(2)

> QCA 351 and *Grice v State of Queensland* [2005] QCA 272. It was there pointed out that if it was Parliament's intention to take away well established common law rights then it had to do so "clearly and unambiguously".[14] It has not done that here. I assume then that the common law applies."

[47] On further reflection I adhere to that view.

[48] Damages were awarded at common law for loss of or diminution in earning capacity only where it was established, on the balance of probabilities, that any demonstrated impairment "is **or may be** productive of financial loss": *Graham v Baker* (1961) 106 CLR 340 at 347 per Dixon CJ, Kitto and Taylor JJ (emphasis added). How one approached that question of "may be" was discussed in *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638. The reasoning of all the judges in *Malec* would require an assessment of damages for economic loss at common law where the chance of loss of earnings post accident was more than negligible but significantly less than 50%. That is the approach of the common law and remains the approach under the *CLA*.

[49] There is a further reason why that approach should be preferred. The defendants' submission would produce unfairness. As the majority in *Malec* at 643 explained:

> "But in the case of an event which it is alleged would or would not have occurred, or might or might not yet occur, the approach of the court is different. The future may be predicted and the hypothetical may be conjectured. But questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof. If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. The probability may be very high - 99.9 per cent - or very low - 0.1 per cent. **But unless the chance is so low as to be regarded as speculative - say less than 1 per cent - or so high as to be practically certain - say over 99 per cent - the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability.** The adjustment may increase or decrease the amount of damages otherwise to be awarded. See *Mallett v McMonagle* [1970] AC 166, at 174; *Davies v Taylor* [1974] AC 207, at 212, 219; *McIntosh v Williams* [1979] 2 NSWLR 543, at 550-551. The approach is the same whether it is alleged that the event would have occurred before or might occur after the assessment of damages takes place." (emphasis added)

[50] I would not readily impute to the legislature a readiness to work such unfairness without very clear words mandating that approach. Hence when the legislature uses the word "will" in s 55 in the phrase "will suffer loss", it is doing no more than asserting that these common law tests need to be satisfied.

[51] While the precise point may not have arisen in the past Mr Crow SC has referred me[15] to three decisions where the section has been considered, two of the Court of Appeal. In

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14 *Kriz* per McMurdo P at [18]

15 The submissions were received after reserving my decision, and indeed after preparation of the bulk of these reasons, but with the consent of the plaintiff's side. The supplementary submissions have been marked as part of Exhibit 8.

both of those latter decisions[16] the Court plainly accepted that it was appropriate to adopt the principles explained in *Malec* when arriving at a global assessment. There was no suggestion that there had been any alteration of the common law brought about by the enactment of s 55.

[52] I turn then to the facts here.

[53] It is hardly unreasonable for the plaintiff to follow his intended career path. The defendant did not contend otherwise. His school results show that he is not academically minded. He is apparently reasonably proficient with his hands. His manual arts teacher, Mr Acworth, thought well of him and would support his career choice. He has the support of his father who is particularly well placed to give him guidance. Assuming he pursues a career involving manual work then on any view the plaintiff runs a real risk of being disadvantaged through his life. Diesel fitting particularly may cause him significant problems. Mr Perfect (Snr) explained it can involve substantial demands:

> "…at certain times, you - you need a lot of lifting, heavy - heavy equipment, heavy tools, you need to be able to, you know, move pretty well. A lot of these machines, for example, might be two or three stories off the ground, you have to have good contact with the - with the ladder, or whatever, good three point contact all the time, and make sure that you don't fall off, obviously."[17]

[54] I will assume that the plaintiff will eventually qualify in his chosen field as the evidence supports that approach but I observe that the plaintiff may have trouble getting an apprenticeship, no matter how great the demand for apprentices, simply because he has a history of injury. If he is honest with prospective employers he will need to disclose his potential weaknesses. In a competitive market he will be less attractive as an employee. So if he finds himself out of work he may have difficulty getting re-employed. It is likely that his deficiencies will become perfectly obvious in a workplace over time. He is likely to be slower than an able-bodied man. If he chooses to operate his own business then he will need to work longer hours to achieve the same return and even so he may not satisfy his clients or customers with the speed with which he can attend to tasks. As well, as Mrs Coles pointed out, he has an increased risk of injuring himself.

[55] The plaintiff has reported suffering cramping and soreness after working for a very limited time. Full time work with the commercial demands of an employer is a very different thing to being given a "go" for 10 to 15 minutes as work experience.

[56] The parties agree that a self employed diesel fitter can presently earn between $90 and $120 per hour.[18] The current Hastings Deering Enterprise Bargaining Agreement provides for wages for a tradesman at $1,332 per week with substantial increases agreed for the year commencing 1 July 2012 to $1,412 and then $1,497 for 2013.[19] Overtime is available.

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16 *Ballestros v Chidlow* [2006] QCA 323; *Reardon-Smith v Allianz* [2007] QCA 211. The third decision was that of Britton SC DCJ in *Coop v Johnson* [2005] QDC 079 where his Honour correctly anticipated the approach of the Court of Appeal.

17 T1-80/14-20

18 Ex 9

19 See Appendix 4 to Ex 2.18

[57] The period for which compensation should be provided is in the order of 50 years – from age 18. The 5% discount tables must be applied in considering any future loss.[20]

[58] I observe that if the plaintiff is slower by only one hour in a 38 hour week – about 12 minutes a day - taken up with securing lifting devices, coping with awkward tools, resting a cramped arm, climbing two storey machines a little more carefully, seeking help and so on – a very modest allowance, then if he was self employed he could be losing $90 to $120 per week and the award would be approaching $50,000.[21] That allows nothing for the multiple other risks that ought to be accounted for.

[59] It is said on the defendants' side that he may get through without loss. That is so. He might never have wished to seek to be self employed, injured or not. He might have benevolent employers to whom time is not money and who will indulge his relative inefficiency. He might avoid injury. But that prospect must be weighed in the balance with the prospect of a very much worse future than my allowance assumes.

[60] That worse future could include various contingencies: most self employed people work a good deal longer than 38 hours and so the lost time might be much more than an hour a week; he will be less likely to pursue overtime if sore at the end of a day or week of work; if his reputation suffered because he was slower then he could lose whole contracts and so a great deal more than I have envisaged; there is presumably a reduced likelihood of obtaining promotions for the less efficient; and if he suffered injury for the reason Ms Coles envisaged then he could be disabled for weeks or permanently.

[61] I would rate the chances of the plaintiff suffering some loss of earnings over his lifetime due to the restrictions and weaknesses that his accident caused injuries have imposed as virtually certain. I would rate his chances of getting by without significant loss as very low and his chances of a worse future than I have assumed as significantly greater.

[62] Obviously I must assess the prospective loss on very imprecise materials. The nature of the case permits no more. Doing the best I can I assess the future loss at $100,000.

Miscellaneous Future Expenses

[63] The plaintiff seeks $5,000. The defendant concedes $2,000. There is the prospect of future surgery to the tooth, and the possibility of pain medication, particularly if the plaintiff engages in heavy manual work for his lifetime. He takes no or very little in the way of medication at present. But his present experience at school bears no resemblance to hours of daily manual labour. As well, if he suffers injury because of over reliance on his uninjured arm then he could incur significant expense. A packet of panadol a week over 50 years would result in an award of $2,400.

[64] In my view an award of $5,000 is appropriate.

Special Damages

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[20] Section 57(2) *CLA*

[21] $90 x 786 (976 – 190) = $70,740. I have allowed for a 4 year apprenticeship and adopted the lower end of the scale and discounted further to allow for tax and variable expenses – imprecise but indicative.

[65] I understand special damages to be agreed at $777.55.

Summary

[66] In summary I assess the damages as follows:

Pain, suffering and loss of amenities of life	$18,000.00
Future loss of earning capacity	$100,000.00
Miscellaneous future expenses	$5,000.00
Special damages	$775.55
Interest on special damages[22]	$37.55
Total Damages	**$123,813.10**

Orders

[67] There will be judgment for the plaintiff in the sum of $123,813.10.

[68] I will hear from counsel as to costs.[23]

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22 As submitted by the defendant.

23 Section 49 of the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act* 2010 (Qld) amended s 68 of the *District Court of Queensland Act* 1967 (Qld) by increasing the civil jurisdictional limit of the District Court to $750,000. The provisions had effect from 1 November 2010 and apply to proceedings commenced after that date (s 145 *District Court of Queensland Act*). The Claim and Statement of Claim in these proceedings were filed on 28 July 2011 and claimed damages of $305,615.55. In my judgment the matter properly fell in the Magistrates' Court jurisdiction. Irrespective of that, there was no good reason to commence this claim in the Supreme Court. This is not a matter of a litigant's choice. The legislature has sought to strike a balance between the workloads of the various courts. Save and unless good reason is shown proceedings should be commenced in the court of appropriate jurisdiction. There will be costs consequences, and not necessarily just for the litigants, where officers of the Court refuse to comply with these jurisdictional changes.