SUPREME COURT OF QUEENSLAND

CITATION:	*Land v Dhaliwal & Anor* [2012] QSC 360
PARTIES:	**GARY PETER LAND** (plaintiff) **v** **BIRKAMJIT SINGH DHALIWAL** (first defendant) and **QBE INSURANCE (AUSTRALIA) LIMITED** (second defendant)
FILE NO:	BS 6577 of 2010
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	16 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	2 April, 3 April and 4 April 2012
WRITTEN SUBMISIONS:	4 April 2012
JUDGE:	Daubney J
ORDERS:	**1. There will be judgment for the plaintiff in the sum of $382, 690.** **2. I will hear the parties as to costs.**
CATCHWORDS:	TORTS – NELIGENCE – APPORTIONMENT OF RESPONSIBILITY AND DAMAGES – GENERALLY – where plaintiff riding bicycle – where defendant driving taxi – where defendant veered taxi into path of plaintiff and stopped – where plaintiff unable to avoid taxi – where collision between taxi and plaintiff occurred – where plaintiff suffered personal injury – where defendants liability for incident admitted on pleadings – where defendants claim of contributory negligence abandoned at trial – what the appropriate quantum of damages is *Civil Liability Act* 2003 (Qld), s 51, 59, 61 *Civil liability Regulation* 2003 (Qld), sch 3, 7 *Bezant v Davis* [2010] QSC 229 *Collins v Carey & Anor* [2002] QSC 398 *CSR Limited v Eddy* (2005-2006) 226 CLR 1; [2005] HCA 64 *Hunt v Lemura & Anor* [2011] QSC 378

Husher v Husher (1999) 197 CLR 138; [1999] HCA 47
Kriz v King (2006) 1 Qd R 327; [2006] QCA 351
Leonardi v Payne & Anor [2009] QSC 382
Wilson v McLeay (1961) 106 CLR 523; [1961] HCA 56

COUNSEL: J W Lee for the plaintiff
R C Morton for the defendant

SOLICITORS: Craig Ray and Associates for the plaintiff
McInnes Wilson Lawyers for the defendants

Introduction

[1] On 1 July 2007, the plaintiff was riding his bicycle in an easterly direction along Airport Drive, Eagle Farm. He was riding at the head of a small group of cyclists. The others were roughly in single file behind him. They were riding their bicycles on the part of the roadway adjacent to the left hand shoulder of the road. At about 8.10 am, the first defendant, who was driving a taxi, veered into the lane directly in front of the plaintiff and stopped. This occurred almost directly in front of where the plaintiff was riding his bicycle, and the plaintiff was unable to avoid the taxi parked in front of him. The plaintiff collided with the rear of the taxi and suffered personal injury as a consequence.

[2] The first defendant's liability for the incident was admitted on the pleadings. When the matter came on for trial, a claim of contributory negligence by the plaintiff was initially maintained on behalf of the defendants. In closing submissions, however, counsel for the defendants quite properly conceded that, in light of the evidence at trial, there was no basis for a finding of contributory negligence against the plaintiff, and I was not asked to make any such finding.

[3] Accordingly, the issues outstanding concern the quantum of damages recoverable by the plaintiff. In that regard, I note that the assessment falls to be conducted pursuant to the *Civil Liability Act* 2003 ("*CLA*").

General damages

[4] The principal injuries suffered by the plaintiff in the incident were a back injury and aggravation of a pre-existing knee condition.

[5] The plaintiff had a pre-existing history of issues with his back and left knee.

[6] In relation to his left knee, the issues dated back to the 1980s. He suffered an injury to his left knee in 1987 in a motorcycle accident, as a consequence of which he developed symptoms of chronic instability, reflecting a combination of cruciate ligament deficiency and medial collateral ligament laxity. He underwent surgical treatment in 1988 and was subsequently reviewed on several occasions.

Notwithstanding those issues, at the time of the accident the plaintiff said that his left knee was asymptomatic and he was able to use it for normal activities and was able to cycle comfortably.

[7] The plaintiff's back issues dated back to about 2004. In June 2004, he underwent a discectomy and decompression of the L5/S1 level on the left side, and a disc fragment was removed. When he subsequently saw his specialist in May 2005, he continued to refer to back pain. Ongoing degeneration of the L5/S1 disc was noted together with mild degeneration at the L4/L5 level, which was considered to be the cause of the pain. His specialist considered that the plaintiff required a two-level fusion or disc replacement. The plaintiff ultimately underwent further surgery on 15 February 2006.

[8] The principal symptoms complained of by the plaintiff after the incident on 1 July 2007 related to his back and left knee. On 2 July 2007, he attended on his general practitioner complaining of pain and swelling of the left knee. His major complaint, however, related to his lower back.

[9] The plaintiff was subsequently referred to Dr Hayes, orthopaedic surgeon, for treatment of the complaints concerning his left knee. Dr Hayes subsequently performed a surgical procedure directed to degenerative changes within that knee. A medial femoral condylar staple (inserted in previous surgery) was removed and arthroscopic debridement of the joint was performed. It was noted that degenerative changes involving the patello femoral joint and medial femoral condyle of the left knee required attention.

[10] In relation to his back condition, the plaintiff was referred back to the orthopaedic surgeon who had previously treated his back, Dr Licina. Dr Licina diagnosed left L5 sciatica (in association with L4/5 discal degeneration). The plaintiff underwent cordal lumbar epidural injection on 12 September 2007. He continued to suffer pain, and on 19 October 2007 the plaintiff underwent decompression of the degenerative left L5 lateral recess stenosis. A left L4/5 laminotomy and nerve root decompression were also performed. The plaintiff continued to suffer mechanical low back pain and on 29 February 2008 he underwent further surgery by way of an L4/5 transforaminal interbody fusion.

[11] Evidence was led from a number of medical specialists at trial.

[12] Dr Greg Gillett, orthopaedic surgeon, provided reports dated 20 January 2009, 2 July 2009, and 18 July 2011, and also gave evidence before me. In his report dated 2 July 2009, Dr Gillett expressed the following opinion:

> "**OPINION**
>
> > In relation to this information, the pre-existing pathology of left knee did demonstrate clinical ligamentous instability when reviewed by Dr Myers in 1993 but there appears to be no ongoing consultation beyond that time to the index accident (subject of this report).

> The laxity findings would be regarded as related to the pre-existing pathology prior to the accident which then became more symptomatic because of the accident requiring surgical intervention as described. Of his current measured impairment of 12 percent impairment of whole-person function loss, I believe his impairment measured prior to this accident would be assessable as 7 percent impairment of whole-person function loss and therefore 5 percent of his current impairment reflects the sequelae of this accident and remainder of the pre-existing pathological process.
>
> In relation to his lumbar spine pathology, the evidence is that Dr Licinda was considering surgical treatment to the 4/5 level in the past but elected to only treat the 5/1 level and the documentation is that his pain of that time resolved and pain at the 4/5 level consequent to the injury of 1/7/2007. The 4/5 level was not normal prior to the injury of 1/7/2007.
>
> Of his current measured impairment regarding the spinal fusion surgical intervention at the 4/5 level (20 percent impairment of whole-person function) I think that 5 percent of that impairment reflects pre-existing pathological process and the remainder reflects the sequelae of the accident causing him to have surgical intervention. That is due to the accident 15 percent impairment of whole-person function is measured.
>
> In relation to both the pre-existing condition of the lumbar spine, in view of the fusion of the 5/1 level and pre-existing degeneration at 4/5 he was at risk in the long term that similar surgery may have been required. Time frame for that to occur would be in the order of 10 to 15 years from the 5/1 disc surgery. The overall risk would be in the order of 25 percent.
>
> With regards to the left knee, I do not believe he would have required any surgical treatment to the left knee from the point of view of ligamentous reconstruction had the bike accident not occurred. On the balance of probabilities his bike riding was protective in relation to good thigh function to control the degree of instability that he had in the knee related to the previous surgeries and injuries. However, the knee in the long term regardless of the bike accident was at risk of developing degenerative osteoarthritis.
>
> In the long term he was at risk of requiring total knee replacement and this risk remains at this time. This road traffic accident has probably brought to light the requirement of knee replacement slightly earlier than would have occurred had the accident not occurred. That period is three to five years. That is without the accident he was at risk of requiring knee replacement probably in his mid to late 60's and now in the early to mid 60's."

[13] Dr Don Todman, neurologist, provided reports dated 2 June 2009 and 15 June 2009, and also gave evidence before me. After reviewing his observations of the plaintiff on examination Dr Todman opined:

> "The current symptoms have stabilised and are likely to represent a permanent state of affairs. From AMA 5 Guidelines, Table 15.5, this is a DRE Category 2 injury; that is, *clinical history and examination findings are compatible with a specific injury*, namely chronic musculo-ligamentous strain to the cervical spine. This represents an eight percent whole person impairment which is the upper part of the range of five to eight percent based on the level of symptoms and effects on ADL's as well as noting muscle spasm, restricted movements and radicular complaints.

> The frequent post-traumatic headaches represent an additional three percent whole person impairment from AMA 5, Figure 18.1; that is, he has a *pain-related impairment which appears to increase the burden of the individual's condition substantially*. As note din Table 18.1 of the AMA 5, headache is in the illustrative list of well-established pain syndromes related to this assessment.
>
> The lumbar spine injury and impairment ratings are covered by the orthopaedic surgeon.
>
> ...
>
> In the home environment he requires assistance for heavier domestic activities and home maintenance of up to five hours per week."

[14] Dr Peter Boys, orthopaedic surgeon, provided reports dated 28 January 2009 and 29 April 2011 and gave evidence before me. In his later report, Dr Boys said:

> "**OPINION**
>
> The opinions previously expressed relating to Mr Land's longstanding lower back and left knee conditions and the soft tissue injuries and aggravation of these conditions sustained in the claimed bicycle accident on 01.07.2007 are unchanged by today's examination. Mr Land's current level of complaint would appear to be stable and permanent.
>
> I believe that this gentleman suffered symptoms associated with chronic instability of the left knee reflecting a combination of anterior and posterior cruciate ligament injury and deficiency and medial collateral ligament laxity occurring subsequent to the described motorcycle accident in 1987. This gentleman has, over a period of time, suffered ongoing disability referable to the left knee with surgical treatment directed to that articulation (Dr P Myers) noted. I believe that this gentleman suffered chronic instability of the knee and secondary patellofemoral osteoarthrosis as a consequence of the 1987 injury. It is reasonable to believe that this gentleman did suffer anterior trauma (soft tissue) to the left knee in the cycling accident on 01.07.2007. He has, in all probability, suffered aggravation of retropatellar degeneration. It is noted that at the time of my first examination (28.01.2009) Mr Land did not describe specific complaint or disability referable to the left knee associated with the claimed injury. Mr Land's complaints today, referable to the left knee, do include postural and activity related anterior knee strain reflecting the effects of retropatellar degeneration. It remains my opinion that Mr Land suffered a temporary aggravation of a degenerative condition of the patellofemoral joint reflecting the specific consequences of soft tissue injury to the left knee sustained in the claimed cycling accident.
>
> My assessment relating to this gentleman's lumbar condition is dictated by the methodology of the American Medical Association Guidelines to the Evaluation of Permanent Impairment (fifth edition) is unchanged. It is again noted surgical arthrodesis of the spine (L5/S1) occurring in 2006 predicates an assessment of permanent impairment within Diagnosis Related Estimate Lumbar category 4 (table 15.3) such that Mr Land suffered an assessable 20-23% impairment of the whole person pre-dating the cycling accident of 01.07.2007. The injury sustained by him to the

> lower back in the claimed injury reflects aggravation of discal degeneration at the L4/5 level which had been documented prior to the cycling accident of 01.07.2007. The symptoms experiences by this gentleman in the period subsequent to the claimed injury did give rise to a further fusion procedure at the L4/5 level in 2008. The presence of this further surgical arthrodesis does not change the Diagnosis Related Estimate category referable to the lower back and in this context Mr Land continues to be assessed within Diagnosis Related Estimate Lumbar category 4 (20-23% impairment of the whole person). The maximal additional impairment therefore, referable to the lumbar spine, which can be quantified specifically relating to the cycling accident on 01.07.2007 is 3% impairment of the whole person. As noted utilising the alternative range of motion method (table 15.7, criteria for rating whole person impairment percent due to specific spine disorders) would allow a similar assessment with the second operation attracting 2% whole person impairment."

[15] Dr Boys also expressed the opinion that it was reasonable to believe that the plaintiff's lower back condition precluded employment which would require stooping and bending, particularly of repetitious or heavier low level lifting.

[16] Dr John Cameron, neurologist, provided reports dated 23 February 2010 and 26 May 2010, and also gave evidence before me. In summary, Dr Cameron said that, on assessment, he could not find any evidence of neurological impairment in the plaintiff, apart from restricted lumbar back movements. He thought that the plaintiff had suffered an acute cervical strain injury in the accident on 1 July 2007 and that the acute affects of that injury had resolved. He also considered the plaintiff suffered an aggravation to a pre-existing lumbar back problem. He agreed with Dr Boys' assessment, and also agreed that, just prior to the accident, the plaintiff would have been assessed with a diagnosis related to Lumbar Category IV if an assessment had been made at that time, i.e. 20-23 per cent impairment of whole person function. Dr Cameron attributed half of that percentage, i.e. 10 per cent, to an aggravation caused to the plaintiff's lumbar spine by the accident on 1 July 2007 due to the aggravating affect of the injury on L4-5. Dr Cameron also noted, amongst other things, that the plaintiff's daily activities might possibly be restricted by his low back flexibility, but the doctor could not envisage any problems developing in the future with regard to his present injuries, particularly with his day-to-day working activities.

[17] I am required to assess general damages, as that term is defined in s 51 of the *CLA*. Such an assessment requires, in turn, reference to the *Civil Liability Regulation* 2003 (Qld) ("the Regulation"). Section 3 of Schedule 3 of the Regulation provides for the assessment of general damages where there are multiple injuries:

> "(i) Subject to s 4, for multiple injuries, the range of ISV's for the dominant injury of the multiple injuries is to be considered by a court in assessing the ISV for the multiple injuries.
>
> (ii) To reflect the level of adverse impact of multiple injuries on an injured person, the court may assess the ISV for the multiple injuries as being higher in the range of ISV's for the dominant injury of the multiple injuries than the ISV the court would assess for the dominant injury only."

[18] The term "dominant injury" is defined in Schedule 7 of the Regulation as meaning:

> "(a) If the highest range for two or more of the injuries of the multiple injuries is the same – the injury of those injuries selected as the dominant injury by a court assessing an ISV; or
>
> (b) Otherwise – the injury of the multiple injuries having the highest range."

[19] In *Allwood v Wilson*,[1] McMeekin J summarised the procedure to be followed on an assessment of damages for multiple injuries as follows:

> "[19] I am required to assess an injury scale value ("ISV") for the injuries from the range of injury scale values set out in Sch 4 of the *Regulation* in order to determine the level of general damages (as defined) in accordance with the rules laid down in Part 2 of Sch 3 of the *Regulation*.[2]
>
> [20] This case concerns multiple injuries. In such a case it is necessary to determine the dominant injury as it is defined[3], have regard to the range of ISVs applicable to that injury, determine where in the range of ISVs provided for that injury it should fall, and determine whether the maximum ISV in that range ('the maximum dominant ISV') adequately reflects the adverse impact of all the injuries.[4] If the maximum dominant ISV is not sufficient then the ISV may be higher but not more than 100 and only rarely more than 25% above the maximum dominant ISV selected.[5] In arriving at an appropriate ISV the court needs to bear in mind that the effects of multiple injuries commonly overlap.[6]
>
> [21] Whilst the regulations indicate that the purpose of the elaborate scheme set out there is to promote consistency in awards[7], sight must not be lost of the overriding purpose of the ISVs prescribed – to reflect the level of adverse impact of the injury on the injured person.[8]
>
> [22] The court is required to have regard to the guidance provided by the provisions in Schedule 4 concerning its use in so far as they are relevant to the particular case but is not necessarily limited to those factors: Sch 3 s. 8.
>
> [23] Additionally, in assessing an ISV, a court may have regard to other matters to the extent they are relevant in a particular case: Sch 3 s 9. The examples provided of other matters are the injured person's age, degree of insight, life expectancy, pain, suffering and loss of amenities of life. In assessing an ISV for multiple injuries, the range for, and other provisions of schedule 4 in relation to, an injury

---

1 [2011] QSC 180.
2 See s 61 CLA.
3 See Sch 7 of the *Regulation*.
4 Sch 3 s 3 and s 4.
5 Sch 3 s 4(3)(b).
6 See notes to Sch 3 s 3.
7 Sch 3 s 1(a).
8 Sch 3 s 2(2) and see the references to "the level of adverse impact" in ss 1(b), 3(s), 4(1), and 4(2).

> other than the dominant injury of the multiple injuries can be considered.
>
> [24] The extent of whole person impairment is an important consideration 'but not the only consideration affecting the assessment of an ISV': Sch 3 s 10. The dictionary defines 'whole person impairment' ('WPI') in relation to an injury as an estimate '... expressed as a percentage, of the impact of a permanent impairment caused by the injury on the injured person's overall ability to perform activities of daily living other than employment.'"

[20] See also his Honour's observations in *Munzer v Johnstone*[9] and *Armstrong v Mitchell-Smith*.[10]

[21] It was common ground between the parties that Item 91 in the Regulation ("Serious thoracic or lumbar spine injury") was the appropriate item referrable to the dominant injury suffered by the plaintiff in this incident, i.e. the injury to his back. I agree with that. The ISV scale under Item 91 is 16-35. It was also common ground that it was appropriate to have regard to the following comment in Item 91:

> "An ISV at or near the bottom of the range will be appropriate if –
>
> (a) the injured person has had surgery and symptoms persist; or
>
> (b) there was a fracture involving 25 per cent compression of one vertebral body."

[22] The commentary further provides that an ISV in the middle of the range (of 16-35) "will be appropriate if there is a fracture involving 50 per cent compression of a vertebral body, with ongoing pain".

[23] Having regard to the medical evidence concerning the degree of impairment suffered by this plaintiff, it seems to me that his dominant injury does not fall within the middle range, but can properly be categorised as falling at the top end of the lower range of ISV's provided for under Item 91. Accordingly, the starting point is an ISV of 22.

[24] Allowance then needs to be made for the impairment suffered as a result of the knee injury. Having regard in particular to Dr Gillett's assessment that the plaintiff has a 12 per cent whole person impairment as a result of the left knee injury, five per cent of which is referrable to the accident, but also acknowledging the force of Dr Boys' opinion that the plaintiff probably suffered aggravation of retro patella degeneration of the knee in the nature of a temporary aggravation of the degenerative condition, I consider it appropriate to increase the ISV to 25 to reflect the multiple injuries suffered by the plaintiff.

[25] On an ISV of 25, the amount of general damages recoverable is $35,000.

---

9 [2008] QSC 162.
10 [2012] QSC 334.

Economic loss

[26] An outline of the plaintiff's work history was in evidence before me.[11] Between 1981 and 1985, he undertook an apprenticeship as a fitter and turner at Weipa. Between 1985 and 2001 he had a varied work history, which included jobs working as a fitter and turner, working in a bar, working as a cleaner and owning a donut business. He also spent a couple of years travelling and in 1999-2000 undertook studies at QUT. Between 2001 and 2005 the plaintiff had a 50 per cent interest in a bicycle shop at The Gap, through his shareholding in the business owner Tiger Toms Pty Ltd. He left that business in 2005, and went to work as a bicycle mechanic at "Cycle Scene". In mid-2006, the plaintiff personally purchased the Cycle Scene business, conducted at Victoria Point. He paid $125,000 for the purchase of the business. According to the contract for the purchase of the business, this purchase price was completely attributable to stock in trade. Settlement of the acquisition of that business occurred in June 2006. As at the date of the accident (1 July 2007), the plaintiff had, therefore, been engaged in the Cycle Scene business for one year.

[27] He continued to own the Cycle Scene business after the accident, but sold the business in 2009. According to the contract of sale, the total estimated sale price was $153,500, broken down as $150,000 stock in trade (estimated), $3,000 for work in progress (estimated) and $500 for goodwill. Completion of the sale of the Cycle Scene business occurred on 31 March 2009.

[28] According to information given by the plaintiff to Mr Xavier Zietek, occupational therapist, who examined the plaintiff and provided a report dated 15 January 2010 for the trial, the plaintiff's occupation and duties at the time of the accident were as follows:

> "**8. Occupation at Time of Accident**
>
> a. At the time of the accident, Mr Land was the self employed proprietor of Cycle Scene at Victoria Point. His wife worked with him for in the order of four full days a week. There was another staff member working in the order of 28-38 hours per week. His duties involved the following:-
>
> - Completion of bookkeeping and MYOB;
> - Customer service;
> - Servicing and repairing of bicycles;
> - Banking;
> - Handling incoming stock and stocking shelves and stock display areas;
> - Building bicycles which are generally assembled on a stand or on a workshop bench which was described as being 950 millimetres high;
> - Performing ride tests."

[29] Prior to the accident, the plaintiff had a full-time employee in the business. In addition, the plaintiff's wife assisted in the business, at least until the birth of their

---

11 Exhibit 1.

first child. When the plaintiff gave evidence, he said that his wife worked four days a week in the business. The plaintiff's wife, however, said that she gave the plaintiff assistance in the shop "from time to time" and this occurred "for a short time when I wasn't working".[12] The plaintiff's wife was not, however, being paid for her attendances, and the plaintiff confirmed that the assistance she did provide was not such as to require replacement by an employee.

[30] After selling the "Cycle Scene" business, the plaintiff flew to the United States where he undertook some training for the purpose of commencing a new business in which he did specific fitting of people to their bicycles. The plaintiff apparently paid $20,000 to purchase the rights to use this particular system and, on his return to Australia, established a business called "Pro Bike Fit". He commenced that business in September 2009. He operates the business from his home.

[31] In June 2009, the plaintiff was seen by Ms Jackie Bentley, occupational therapist, for assessment. This assessment occurred before the plaintiff commenced his current "Pro Bike Fit" business. In terms of the plaintiff's post-injury work history (as at that time), Ms Bentley's report records the plaintiff providing the following information:

> "POST-INJURY WORK HISTORY
>
> Following the subject accident Mr. Land had to take some time off work so he employed another full-time staff member. He worked only 3 days/week until he sold this business in March 2009. He stated he 'struggled to get out of bed' during this time and required a back operation in 2009. He reported experiencing difficulties performing his work as a bicycle shop owner, including:-
>
> - Working more than 2-3 days/week
> - Sitting at a computer eg. Producing 'profit and loss' statements – felt 'unsure what to do'
> - Forecasting sales – to minimise overheads
> - Chronic pain – back and left knee pain
> - Becoming 'gruff' and talking loudly
> - Reduced tolerance of customers demands etc.
>
> Mr Land stated he could perform 'regimented' tasks, e.g. payroll but he 'struggled' with less routine/structured tasks e.g. much of the computer work and forecasting sales (significant contrast to pre-injury where he reportedly had no difficulties performing these tasks). Prior to the subject accident he considered he was 'good at sale' as he was enthusiastic about bicycles. He reportedly struggled with this aspect of work post-injury.
>
> During the assessment Mr. Land stated he hoped to commence a new business in the near future – one which allows him the 'luxury' of being able to change his posture as and when he requires. His new business idea would include 'fitting people with bicycles' in a 'studio' under his house. He hopes to have 6 clients/week spending a maximum of 2 hours with each client. At the time of the assessment he 1 confirmed client.

---

12 Transcript 1-54.

> The 'studio' is reportedly located under his house. The area has polished concrete floors and Mr. Land stated he has been performing the 'set-up' tasks for this business by 'working until I drop'."

[32] Ms Bentley's report outlines the various diagnostic tests and assessments she administered for the purposes of forming an opinion as to the plaintiff's capacity to work. She stated the following opinion:

> "It is considered Mr. Land would be unable to safely and reasonably perform work in a part-time or full-time capacity in any of his other pre-injury physically demanding types of work (eg. fitting and turning, machining, cleaning, bar worker and go-go dancing) associated with his reported and observed difficulties including:-
>
> - maintaining postures for long periods
> - squatting
> - kneeling
> - reduced range of movement – i.e. limited trunk flexion, reduced shoulder movement and reported discomfort with cervical flexion
> - reduced safe lifting and carrying ability
> - (some) memory/new learning difficulties which may have affected his ability to perform computer based work at his pre-injury level.
>
> It is considered Mr. Land could perform sedentary work e.g. retail, apprentice coordinating/teaching work on a part-time basis (up to 18 hours/week) provided he could:-
>
> - alternate postures as and when required,
> - include rest breaks as required,
> - minimise or delegate lifting and carrying tasks
> - implement the recommendations (below)"

[33] As already mentioned, the plaintiff was also seen by Mr Xavier Zietek, occupational therapist. Mr Zietek performed an assessment of the plaintiff on 15 January 2010. His description of the plaintiff's report as to his current occupation is as follows:

> "**10. Current Occupation**
>
> a. Mr Land is currently self employed as a bicycle fitter. His duties are associated with accepting of referrals from physiotherapists, bicycle retail shops and advertisement related referrals from cycling and triathlon websites. He generally will assess riders' riding position and perform setup adjustments of the bike stem length and height, handlebars and crank length and the seats. He performs this with a series of cameras which are attached to an external hard drive and this provides him with visual/graphical data which he refers to on a 32 inch LCD monitor. He will sit for the majority of the time whilst performing these assessments, however may stand at times. He indicated that these assessments may take 2-2½ hours to complete. He will perform two to three assessments per week. He indicated that as sometimes he cannot get out of bed and some afternoons 'I crash for no apparent reason' he has not proceeded to pursuing a retail space or pursued significant expansion of his work."

[34] Mr Zietek expressed the following relevant opinions in his report:

> "b. Based upon his presentation at assessment, Mr Land is physically suited to work in light to medium occupations. He needs to pay attention to appropriate manual handling techniques into the future. I consider that he has the physical capacities to undertake work as a bicycle mechanic. It appears that the difficulty managing his pain and described depressive symptoms have affected his ability to manage his discomfort and maintain this work in the past. With symptomatic improvement, similar to that as he has described recently once undertaking more bicycle riding; I consider that he may be able to undertake this work again. The majority of racing bikes are manufactured from light weight materials. He demonstrates the physical capacities to lift and position bicycles and related equipment without difficulty, particularly if working on appropriately positioned benches.
>
> c. He has the capacity to work on a full time basis in sedentary to light to medium work. He may be able to perform some intermittent periods of heavier work, however will need to vary his postures and may require more frequent rest breaks. He is not suited to running, repetitive walking on stairs, sustained or repetitive bending particularly under load or competitive mountain biking.
>
> d. Occupations that Mr Land is physically suited to completing in may situations includes the following:-
>
> - Retail Assistant;
> - Shop hand;
> - Bar attendant;
> - Shop manager – bicycle store;
> - Variety of sedentary and light clerical and administrative occupations;
> - Teacher (if successfully completing his training).
>
> e. Mr Land is not physically suited to working as a fitter and turner on a full time basis in heavy manual roles."

[35] Notes of a pre-trial telephone conference with Mr Zietek were also tendered. Mr Zietek confirmed the following opinions expressed in those notes:

- that the plaintiff is now capable of working as a bicycle mechanic on a full-time basis;

- the plaintiff will better manage his conditions when paying attention to appropriate workplace setup, including use of suitable equipment to facilitate more optimal posturing when discharging his work duties;

- specialist bike repair stands are available to assist in minimising the requirement for bending and prolonged working at lower levels;

- the plaintiff is not now suited to working as a fitter and turner. Having regard to his documented pre-existing medical history, it is unlikely the plaintiff would have been physically suited to the majority of fitting and turning roles, on a sustainable basis, prior to 1 July 2007;

- due to the plaintiff's pre-existing conditions "there is only the slimmest chance that the plaintiff could have ever resumed such work on a sustainable basis (without having a high risk of further injury) even had he not been injured on 1 July 2007".

[36] The plaintiff was cross-examined on the proposition that, having regard to his previous back symptoms, he would not have gone back to the occupation of fitter and turner in any event. The plaintiff hedged a little in responding to this proposition saying that "it would depend on the circumstances" and that "if I have no other way to support my family I'd do what it takes".[13] The plaintiff did, however, agree with the proposition that if he could continue running a bike shop, he would not return to being a fitter and turner.

[37] Ms Bentley, when cross-examined, confirmed that she had not seen the plaintiff since mid-2009, at which time he told her that he was basically self-sufficient in self-care tasks. She confirmed that her opinion as to the plaintiff's ability to work was necessarily limited to the time when she had made her assessment.[14]

[38] For the purposes of assessing both past and future economic loss, the plaintiff relied solely and completely on calculations undertaken and reported on by Mr Onus Maynes, chartered accountant. The plaintiff's submissions were:

> "The plaintiff has suffered economic loss, as set out in the report of Mr Onus Maynes, and assessed at $208,015 (past) plus $490,389 (future), plus superannuation of $56,402, a total of $754,806."[15]

[39] It is, therefore, necessary to have regard to the evidence of Mr Maynes, who provided four reports, dated 28 February 2010, 4 June 2010, 13 September 2011 and 27 March 2012. He also gave evidence and was cross-examined before me.

[40] In his original report (dated 28 February 2010) Mr Maynes stated his calculation of the plaintiff's past and future economic loss under two alternative occupational scenarios – Scenario A related to the plaintiff's past and future occupation of "bicycle shop owner"; Scenario B assumed work by the plaintiff as a fitter and turner.

[41] Under each of these, Mr Maynes then posited three further scenarios, namely with the plaintiff working to age 67, the plaintiff working to age 60, and the plaintiff working to age 55.

[42] At the heart of the methodology adopted by Mr Maynes was a series of calculations concerning the profits and losses of the three financial years during which the plaintiff conducted the "Cycle Scene" business. Mr Maynes adopted the financial year ended 30 June 2007 "as the last regular financial year of the business for the

---

13 Transcript 1-51.

14 Transcript 1-73.

15 Plaintiff's written outline of submissions.

purpose of assessing [the plaintiff's] notional earning capacity under Scenario A". According to the profit and loss statement of the business, a net profit of $47,629 was shown for the business, which Mr Maynes equated with the plaintiff's actual earnings from the business. Adopting that base figure of $47,629, Mr Maynes then increased that figure according to movements in the CPI. For the purposes of calculating past economic loss (in the scenario that the plaintiff remained a bike shop proprietor) Mr Maynes then effectively projected the net profit figure from the 2007 year forward. For the purposes of calculating past economic loss under this scenario, he deducted amounts actually earned by the plaintiff in his "Cycle Scene" business and later in his other business. Similarly, for the purposes of calculating future economic loss, Mr Maynes simply adopted a base figure of the $47,629 indexed to the relevant date from which calculations of future economic loss were to be performed, subject to offset for some residual earning from his new business.

[43] In respect of the alternative "fitter and turner scenario", Mr Maynes made calculations based on his research of average weekly earnings for the fitter and turner occupation, again indexed annually according to movement in the CPI, and also making allowance for residual earnings from the plaintiff's other businesses. I should say that I reject the notion that it is appropriate to calculate this plaintiff's past or future economic loss by reference to earning rates of the occupation of fitter and turner. It is, in my view, clear on the evidence that the plaintiff's pre-accident physical capacity was such that it was unlikely in the extreme that he would ever have returned to work in the occupation of fitter and turner. It is therefore inappropriate even to attempt to assess this plaintiff's damages by reference to earnings in that trade. For completeness, I note that the amounts claimed in the submissions by counsel for the plaintiff ($208,015 for the past and $490,389 for the future, plus superannuation of $56,402) are derived form Mr Maynes' calculations under the "fitter and turner" scenario, and ought not be accepted.

[44] Accordingly, it is necessary to consider the appropriateness of Mr Maynes' assessment on the basis of the plaintiff's capacity (past and future) to earn as a bicycle shop owner. As already noted, central to all of Mr Maynes' calculations under this scenario is the proposition that the net profits derived by the plaintiff's business as at 30 June 2007 is the benchmark which represents the plaintiff's earning capacity as at that date.

[45] Such an approach, however, is flawed in principle. In *Husher v Husher*,[16] Gleeson CJ, Gummow, Kirby and Hayne JJ said (omitting references):

> " ***Impairment of earning capacity productive of financial loss***
>
> 6 Before dealing with *Seymour v Gough* and some of the decisions in Queensland that preceded it, it is as well to recall some matters that are well settled. A person who is physically injured by the negligence of another may suffer damage in a number of ways. As has long been established, the damages to be awarded to the victim are 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. If the victim's pursuit of gainful employment is interrupted

[16] (1999) 197 CLR 138.

or affected because of the negligent infliction of physical injury, the victim is to be compensated by an amount that reflects the financial consequences that follow form the impairment.

7 Since at least Graham v Baker it has been recognised that it is convenient to assess an injured plaintiff's economic loss 'by reference to the actual loss of wages which occurs up to the time of trial and which can be more or less precisely ascertained and then, having regard to the plaintiff's proved condition at the time of trial, to attempt some assessment of his future loss'. **But damages for both past loss and future loss are allowed to an injured plaintiff 'because the diminution of his earning capacity is or may be productive of financial loss'. Both elements are important. It is necessary to identify both what capacity has been lost and what economic consequences will probably flow from that loss. Only then will it be possible to assess what sum will put the plaintiff in the same position as he or she would have been in if injury had not been sustained.**

8 No doubt the past may provide important evidence about the plaintiff's earning capacity and what economic consequences will probably flow form what has happened. What a worker earned in the past may provide very useful guidance about what would have been earned if that worker had not been injured. But the inquiry is an inquiry about the likely course of future events and evidence of past events does not always provide certain guidance about the future. There may be many reasons why an injured plaintiff's past work history provides no assistance in deciding what that plaintiff has lost through diminution of future earning capacity. The student who is yet to enter the workforce is an obvious case of that kind. That student may have no history of paid work. Important as evidence of past events may be, that evidence is not determinative of an issue about loss of future earning capacity."(emphasis added)

[46] In "Assessment of Damages for Personal Injury and Death" (4th edition), Professor Luntz highlighted the issues that arise in the assessment of past and future economic loss in a case such as the present in the following passage (omitting references):

> "[5.5.1] ***Factual difficulties***. Where someone is self-employed, or conducts a business through a company or partnership, ascertainment of the loss sustained as a result of injury to that person often presents considerable factual difficulty. Records of earnings are not always maintained in accordance with best accounting practices; annual income tax returns in previous years, if available, frequently show variations from year to year; rates of expansion are not easily predicted; losses could be due to a general economic downturn. The problem is aggravated where the plaintiff has not yet commenced the business, but intended to do so prior to the injury. Sometimes, notwithstanding the plaintiff's absence through injury, profits of an established business are not less than in previous years and it is impossible to say what difference, if any, the plaintiff's presence would have made. **The mere showing of a loss does not necessarily mean that it is recoverable by the plaintiff – or even by anyone else. The court has to do the best it can in such circumstances to measure the loss that is due to the injury.** The amount a self-employed person drew by way of salary from a business may not be a true reflection of earning capacity. The requirement to mitigate the loss would ordinarily mean that the

> damages under this head cannot exceed the cost of employing someone to do the work that the injured plaintiff is unable to do. In some instances, resort may be had to what the plaintiff could have earned as an employee elsewhere, particularly in relation to the future because the plaintiff's earning capacity would not necessarily be tied to a particular business. What the plaintiff could earn as an employee is no more than a guide, since, on the one hand, persons who devote themselves to unprofitable businesses apparently cannot recover more damages for loss of earning capacity than they would have derived from their businesses if they had not been injured, and, on the other, a business may produce extra profits for the proprietor." (emphasis added)

[47] The approach adopted by Mr Maynes is fraught with difficulties. He notes that the net profits for the financial years during which the plaintiff conducted the "Cycle Scene" business were:

- 2006-2007 $47,629 profit
- 2007-2008 $25,537 loss
- 2008-2009 $59,194 loss

[48] For the purposes of calculating the plaintiff's past economic loss up to the time of selling the "Cycle Scene" store, Mr Maynes' methodology is to start with the "indexed gross annual earnings" figure derived from the 2006-2007 year and account for tax on that sum, yielding an after-tax base figure for the 2007-2008 year of $39,399, and adding to that the losses incurred in the business in the 2007-2008 year of $25,537, yielding an "actual past loss" for that year of $64,936. Similarly, Mr Maynes uses the "indexed gross annual earning" figure for the 2008-2009 year to calculate an after-tax base figure of what the plaintiff would have earned but for the injury of $41,589 and then he adds back the $59,194 lost by the business in that year to posit "actual past loss" for the 2008-2009 year of $100,783.

[49] In his most recent report, Mr Maynes confirmed the basis for his method of calculating past economic loss:

> "3.3 I have again adopted as his notional earnings his actual earnings in the 2006/2007 year, the year immediately prior to his accident on 1 July 2007 of $47,629 per annum before income tax but indexed to movements in the CPI (Brisbane) from 1 July 2007 to the present time."

[50] Calculated to the date of his report (27 March 2012), this yielded "notional past earnings but for the injury" of $250,727 (before tax), which was calculated to be $201,921 (after tax).[17]

---

[17] See Schedule 2 to the report dated 27 March 2012.

[51] Mr Maynes then tabulated the annual profits and losses of the two businesses conducted by the plaintiff in each of the years since the accident. He calculated the after-tax "actual past net earnings" of the plaintiff to be[18]:

-	2007-2008	($25,537)
-	2008-2009	($59,194)
-	2009-2010	($10,755)
-	2010-2011	$15,218
-	1 July 2011-date of trial	$11,517
		($68,751)

[52] The accumulation of the lost net "potential past earnings" and the "actual past net earnings" yielded the conclusion that the plaintiff's past loss of net earnings to the date of trial was $270,671.

[53] For the purpose of calculating the plaintiff's future economic loss, Mr Maynes "adopted as the plaintiff's notional future net earning capacity per annum after income tax the amount of $44,304 assessed for the 2010/2011 year". This figure was nothing more than the 2006/2007 business profit of $47,629, adjusted by annual CPI increases and then recalculated to account for the deduction of income tax.[19] Mr Maynes applied the five per cent discount rate to that amount of $44,304 to derive what he described as "notional future earning capacity but for the injury" (on a net basis) of $547,488 to the age of 67.

[54] Mr Maynes then simply adopted the net amount of $15,218 profit from the "Pro Bike Fit" business for the 2010/2011 year to be representative of the plaintiff's "estimated actual future net earnings as a result of the injury". Again applying the five per cent discount rate to that number yielded a net present value of the "estimated future earnings" of $188,057 (to age 67), $140,710 (to age 60) and $95,496 (to age 55). Mr Maynes concluded:

> "3.19 Adopting his notional future earnings of $547,488 (paragraph 3.15) and his estimated actual future earnings assessed under each of the three alternative scenarios (paragraph 3.18), I have calculated the net present value of the Plaintiff's loss of future earning capacity under each scenario to be as follows:
>
> | | Scenario 1A $ | Scenario 2A $ | Scenario 3A $ |
> |---|---|---|---|
> | ➢ Notional Future Earning Capacity *(Sched 4)* | 547,488 | 547,488 | 547,488 |
> | Less | | | |
> | ➢ Actual Future Earnings *(Sched 5)* | (188,057) | (140,710) | (95,496) |
> | ➢ Loss of Future Earning Capacity (NPV) | $359,431 | $406,778 | $451,991 |
> | *(Assumed actual retirement age)* | (Age 67 years) | (Age 60 years) | (Age 55 years)" |

[18] See Schedule 3 to the report dated 27 March 2012.
[19] See Schedule 2 to the report dated 27 March 2012.

[55] The fundamental difficulty with the approach adopted by Mr Maynes is that it simply equates the plaintiff's pre-accident earning capacity with the net profit shown on the "Cycle Scene" profit and loss statement for the 2006/2007 year (even after "adding back" an extraordinary item for legal fees in that year). The calculation of net profit for that year was derived after accounting for expenditures which were completely unrelated to the plaintiff's personal earning capacity (such as advertising in the sum of $14,548, bank charges and interest paid).

[56] This problem was compounded by the notion that one then simply had regard to the difference between the net profit of that year and the net profit of succeeding years in the business. Such an approach does not take account of expenses completely unrelated to the plaintiff's earning capacity (including non-cash expenses such as depreciation), and also ignores important factors disclosed in the books for resulting losses. For example, bank charges increased from $2,248 in 2006/2007 to $11,048 in 2007/2008. Notably, expenditure on wages increased from $23,355 in 2006/2007 to $56,377 in 2007/2008. That increase was undoubtedly due to the need to engage extra labour in the business as a consequence of the plaintiff's injuries.

[57] In short, the calculations by Mr Maynes might tell me how much money the plaintiff's businesses have lost on paper since the date of the accident, but they do not inform me as to the degree to which a reduction in earning capacity as a consequence of the injuries was productive of financial loss to the plaintiff.

[58] The methodology adopted by Mr Maynes with respect to future economic loss suffers from similar difficulties. His base figure is simply derived from the 2006/2007 business profit. The value of the plaintiff's residual earning capacity is then equated to the book profit shown in the "Pro Bike Fit" business for the 2010/2011 year, without any explanation as to why this amount is an immutable representation of the plaintiff's residual earning capacity.

[59] Accordingly, I do not accept the bases advanced in the plaintiff's case for the calculation of either past or future economic loss.

Another basis for assessment of economic loss

[60] The defendants called evidence from a forensic accountant, Ms Aylen, who provided a written report dated 2 March 2011[20] and calculations updated to the date of trial[21]. Ms Aylen summarised her approach to the calculation of past and future economic loss as follows:

> "2.11 During the period to the sale of the business (i.e. the period from 01 July 2007 to 31 March 2009), I have undertaken my assessment of the Claimant's economic loss based on the cost of the additional labour engaged to undertake the duties the Claimant would have done himself, but for the accident.

---

20 Exhibit 11.

21 Exhibit 12.

2.12 Subsequent to the sale of the business (i.e. the period from 01 April 2009 until retirement), I have undertaken my assessment of the Claimant's economic loss based on the reduction in the commercial value of his labour.

2.13 Given the considerable uncertainty regarding the Claimant's residual earning capacity as a result of the injuries he sustained in the accident, I have undertaken by calculations during this period on the basis of three residual earnings capacities:

Residual A - There is no reduction in the Claimant's earning capacity as a result of the injuries he sustained (i.e. 100% residual capacity).

Residual B - The Claimant has sustained a 25% reduction in his earning capacity as a result of the injuries he sustained (i.e. a 75% residual capacity).

Residual C - The Claimant has sustained a 45% reduction in his earning capacity as a result of the injuries he sustained (i.e. a 55% residual capacity)."

[61] Ms Aylen's report contains an analysis of the plaintiff's personal tax returns and the profits and income derived from the "Gap Cycles" business in which the plaintiff was, effectively, a partner until 2005, the plaintiff's "Cycle Scene" business, and the plaintiff's "Pro Bike Fit" business, including an analysis of the labour costs (expressed ultimately as a percentage of gross income) for those businesses.

[62] For the purpose of calculating economic loss, Ms Aylen differentiated between the period 1 July 2007 – 31 March 2009 (i.e. the date of sale of the "Cycle Scene" business) and the period subsequent to the sale of that business.

[63] With respect to the period up to the sale of the business, Ms Aylen said:

"8.2 During the period prior to the sale of the business, I am of the opinion that the most appropriate measure of the Claimant's economic loss is either the increase in costs, or the reduction in gross profit the Claimant has sustained as a direct result of the injuries he sustained in the accident.

8.3 In this regard, I note that the Claimant alleges that he engaged additional employees to undertake the duties he would have done himself but for the accident. Accordingly, I have undertaken my assessment of the Claimant's economic loss during this period, based on the cost of replacement labour.

8.4 The additional labour costs incurred by the Claimant can be determined based on a comparison of the pre and post accident labour costs of the business. However, I refer to my review of the labour costs of the business as set out in paragraph 6.12.1 to this report and note that in relation to the current matter, this analysis is complicated by the financial records indicating that the Claimant's wife may not have been paid for her labour in the business prior to the accident.

8.5 In this regard, I note that during the year immediately prior to the accident, the Claimant allegedly employed his wife four days per week and another staff member 28 to 38 hours per week and yet, the labour costs of the business were only $23,355 for the year. Given that this level of expenses would appear to relate to only one of the two employees of the business, I have assumed that, but for the accident, the external labour costs of the business required to derive gross income of $542,670 would have been $46,710 (i.e. $23,355 x 2), which equates to a labour cost percentage of 8.6% of gross income."

[64] Applying this labour cost percentage across the period to calculate replacement labour cost yielded $29,805 (net), calculated as follows:

"

REPLACEMENT LABOUR – 01 JULY 2007 TO 31 MARCH 2009		
	2008	**2009**
Actual Gross Income	$477,121	$336,617
Notional Labour Cost Percentage	8.6%	8.6%
Notional Labour Costs	$41,032	$28,949
Actual Labour Costs	$56,377	$43,410
Additional Labour Costs (before tax)	$15,345	$14,461
Less: Income Tax	$ -	$ -
Additional Labour Costs (after tax)	$15,345	$14,461
PAST ECONOMIC LOSS (01.07.07 TO 31.03.09)		**$29,805**

"

[65] In relation to the period after the sale of the "Cycle Scene" business, Ms Aylen described her approach as follows:

"9.4 As previously detailed, I have undertaken by calculations of the Claimant's economic loss during the period from 01 April 2009 to retirement (i.e. subsequent to the sale of the business), based on the reduction in the commercial value of his earning capacity as a result of the injuries he sustained in the accident.

9.5 Given the uncertainty in relation to the Claimant's residual earning capacity as a result of the injuries he sustained, I have undertaken my assessment of his economic loss during this period on the basis of three residual earning capacities:

Residual A - 100% residual earning capacity
Residual B - 75% residual earning capacity
Residual C - 55% residual earning capacity"

[66] For the purpose of advancing a value of the plaintiff's labour "but for the accident", Ms Aylen had regard to the nature of the duties which were being performed by the plaintiff in the "Cycle Scene" business and said:

"8.8 Having regard to the above, it has been necessary to determine the commercial value of the Claimant's labour 'but for the accident'.

Given the Claimant's duties in employment and self employment over the five year period prior to the accident, I have determined the commercial value of his labour based on 50% of the commercial value of a retail manager and 50% of the commercial value of a bicycle mechanic.

8.9 I have determined the commercial value of the above positions based on the Archangel Job Markets Australia 2010-11 Survey, which I note is based on data produced by the Australian Bureau of Statistics, I set out below a summary of my calculations:

COMMERCIAL VALUE OF CLAIMANT'S LABOUR		
	100%	**50%**
Average Weekly Earnings – Retail Manager	$939.00	$469.50
Average Weekly Earnings – Bicycle Mechanic	$508.00	$254.00
Commercial Value of Labour (per week before tax)		**$723.50**
Commercial Value of Labour (per annum before tax)		**$37,766.70**

"

[67] As noted, for the purpose of completing the past economic loss calculation, Ms Aylen then applied this methodology up to the date of trial under three scenarios, namely that from 1 April 2009 the plaintiff had:

(a) 100 per cent of his pre-accident earning capacity;

(b) 75 per cent of his pre-accident earning capacity; and

(c) 55 per cent of his pre-accident earning capacity.

[68] To calculate future economic loss, Ms Aylen based her calculations again on her assessment of the commercial value of the plaintiff's pre-accident labour, and calculated, on the five per cent discount rate, the net present value on each of the 100 per cent, 75 per cent and 55 per cent scenarios.

[69] I note in passing that Mr Aylen's calculations also included claims for lost past and future superannuation. As submitted by counsel for the defendant, however, it is clear that these amounts are not compensable in a case such as the present, where the underlying assumption is that of a self-employed plaintiff.

Determination of the assessment of past and future economic loss

[70] In my opinion, the methodology employed by Ms Aylen is consistent, in general terms, with the relevant principles for the assessment of economic loss in a case such as the present (as discussed above).

[71] Before quantifying the damages recoverable in this case, however, two points need to be addressed.

[72] The first is to determine, for calculating both past and future economic loss, the relevant percentage of pre-accident earning capacity retained by the plaintiff in this case. As appears from the passage from *Husher v Husher* quoted above, it is necessary to identify both what capacity has been lost (or, conversely, the capacity which remains) and the economic consequences which will probably flow from that loss.

[73] It is patent that the plaintiff did not suffer complete extinguishment of his earning capacity, i.e. he was not left completely incapacitated. On the evidence as a whole, I am also satisfied that he did not suffer no diminution of his pre-accident earning capacity, i.e. I would reject any suggestion that his post-accident earning capacity was the same as it was pre-accident. The evidence, on the whole, supports a finding that, whilst not completely disabled, and indeed able to continue in gainful and remunerative activity, his capacity to earn has been significantly reduced as a consequence of the injuries suffered in this incident. The aggravation of his pre-existing knee condition plays some part in that – at least to the extent that the injuries accelerated the need for further surgical intervention. The principal contributor, however, is clearly the injury to his back and the sequelae of that injury. The back condition which resulted from this accident has, in my assessment, left the plaintiff with an ongoing incapacity which did not exist before the accident. This incapacity manifests itself in the plaintiff's inability to perform tasks which he could previously undertake, and also in its debilitating affect, which necessitates him having to take significant rest periods.

[74] Doing the best I can on the material before me, I find that the plaintiff's pre-accident capacity to earn has been reduced by 45 per cent as a consequence of the injuries suffered.

[75] The second point concerns the calculation of future economic loss. Notwithstanding the evidence of Ms Aylen, counsel for the defendants submitted that I ought simply make a global assessment of future economic loss. I was referred to a number of cases in which global awards were made, and it was submitted that, in this case, a global award of $80,000 would be appropriate. Global assessments may be appropriate, and indeed necessary, in cases where it is not possible for a judge to make a reasoned assessment because of, for example, a lack of relevant evidence, or in a case where a plaintiff has a diffident work history, or where there is an absence of a work history on which a reasoned assessment can be

made. This is not such a case, and I have already indicated my general approval of the methodology advanced by Ms Aylen.

[76] For past economic loss, therefore, I make the following assessment:

(a) Loss for the period 1 July 2007 – 31 March 2009 = $29,805 (as calculated in para [63] above;

(b) Loss for the period 1 April 2009 to judgment = $51,547, details of the calculation of which are in this table:

RESIDUAL C (55% capacity)
PAST ECONOMIC LOSS (01.04.09 TO JUDGMENT

	2009	**2010**	**2011**	**2012**	**1.7.2012 (to judgment)**
Commercial Value of Labour (before tax)	$723.50	$723.50	$723.50	$723.50	$723.50
Less: Income Tax	$119.38	$119.38	$119.38	$119.38	$119.38
Commercial Value of Labour (after tax)	$604.12	$604.12	$604.12	$604.12	$604.12
Reduction in Earning Capacity	45%	45%	45%	45%	45%
Weekly Loss (after tax)	$271.86	$271.86	$271.86	$272.00	$272.00
Number of weeks	13.0	52.2	52.2	52.2	20.0
Economic Loss (after tax)	$3,534	$14,191	$14,191	$14,191	$5,440
ECONOMIC LOSS (01.04.09 TO 16.11.2012					**$51,547**

[77] The total past economic loss, therefore, is $81,352. Interest thereon, at the rate of 1.9 per cent[22] amounts to $8,437.

[78] In terms of future economic loss, the plaintiff (born 19 December 1964) is nearly 48 years old. Whilst the case for the plaintiff was advanced on the basis that, but for the accident, he would have worked to age 67, when one has regard to his pre-existing back and knee conditions it is clear that this contention is optimistic in the extreme. But for the accident, the plaintiff would, it is clear on the evidence, have experienced increasing difficulties with both his back and his left knee. Dr Gillett thought that the risk of the plaintiff requiring knee replacement surgery had advanced from occurring in the plaintiff's mid to late 60's to his early to mid 60's. Dr Gillett also considered that the accident had advanced the risk of further back surgery, saying:

> "In relation to both the pre-existing condition of the lumbar spine, in view of the fusion of the 5/1 level and pre-existing degeneration at 4/5 he was at risk in the long term that similar surgery may have been required.

22 Being half of the 10 year bond rate.

> Timeframe for that to occur would be in the order of 10 to 15 years from the 5/1 disc surgery. The overall risk would be in the order of 25%."

[79] In all the circumstances, I therefore think it appropriate to allow future economic loss to be calculated to age 63, i.e. a further 15 years. Again, I adopt the approach that the plaintiff has lost 45 per cent of his pre-accident earning capacity, and also adopt the current allowance of $604.12 per week as the net commercial value of the plaintiff's labour, resulting in a net weekly loss for the plaintiff of $272. Applying the five per cent discount to that loss for 15 years yields $150,960.

[80] I do not propose discounting that allowance any further to account for vicissitudes. There are already two fractions built into this calculation, i.e. the 45 per cent reduction of earning capacity and the reduction of working life to age 63. It seems to me that any further reduction would run the real risk of amounting to a double, or even triple, discounting.

[81] Accordingly, the award for future economic loss will be $150,690.

Claim for gratuitous care

[82] The plaintiff has claimed to recover damages for past and future gratuitous care. In final submissions, counsel for the plaintiff advanced the submission that the damages ought be recovered in accordance with the schedule tendered through the plaintiff's wife, which she said contained details of work she did after the accident which was additional to that which she had performed before the accident.[23]

[83] As this claim is governed by the *CLA*, the recovery of damages for gratuitous service is limited by s 59:

> "**59 Damages for gratuitous services provided to an injured person**
>
> (1) Damages for gratuitous services provided to an injured person are not to be awarded unless –
>
> (a) the services are necessary; and
>
> (b) the need for the services arises solely out of the injury in relation to which damages are awarded; and
>
> (c) the services are provided, or are to be provided –
>
> (i) for at least 6 hours per week; and
> (ii) for at least 6 months.
>
> (2) Damages are not to be awarded for gratuitous services if gratuitous services of the same kind were being provided for the injured person before the breach of duty happened.

---

[23] Exhibit 11; T 1-55.28.

> (3) In assessing damages for gratuitous services, a court must take into account –
>
> (a) any offsetting benefit the service provider obtains through providing the services; and
>
> (b) periods for which the injured person has not required or is not likely to require the services because the injured person has been or is likely to be cared for in a hospital or other institution."

[84] When applying s 59, the following principles are relevant[24]:

(a) The term "gratuitous services" has the same meaning as at common law;

(b) Section 59 does not provide a statutory entitlement to damages for gratuitous services separate to the common law but rather modifies and restricts the common law entitlement to them;

(c) Section 59(1)(c) has the effect that such damages are not to be awarded unless the services have been provided or are to be provided both for six hours per week and for at least six months; once that threshold is met the damages for gratuitous care can be awarded even if the services thereafter are provided or are to be provided for less than six hours per week.

[85] The schedule (Exhibit 11) on which the plaintiff's claim was based specified the assistance provided by his wife under a number of general categories – "Domestic Work", "Post-Operative Care", "Assistance for attending of various medical procedures – including travel time", and "Ongoing assistance". Some detail of the claimed forms of assistance were provided under each of these categories.

[86] The plaintiff's evidence concerning the provision of gratuitous care was economical. He described difficulties he had playing with his children and referred to the fact that his wife had had to take up a more significant part of the housework. He also referred to the assistance she had given him in personal grooming and care during his post-operative periods, saying:

> "After my operations I was unable to do very many things, so it would befall [sic] upon her to do most things."[25]

[87] He also confirmed that information about his capacities which Ms Bentley had recorded in her report were accurate. Under cross-examination, he said that the household tasks with which he had assisted before the accident, but which were mostly done by his wife after the accident, were for the benefit of all members of the household.

---

24 See *Kriz v King* (2006) 1 Qd R 327 per McMurdo P (Jerrard JA and Helman J agreeing) at [12] and [18].

25 T 1-25.22.

[88] In her report, Ms Bentley noted (and this was confirmed in evidence by the plaintiff) that after the accident the plaintiff "remained independent in performance of most self-care tasks with minimal assistance provided by his wife for toenail cutting and occasionally for donning and doffing footwear". Ms Bentley's report of the information provided by the plaintiff with respect to domestic tasks recorded:

> "Prior to being injured Mr. Land performed the full range of home-making tasks (shared with his wife) including:-
>
> - Cleaning bathroom and toilet
> - Washing – occasionally
> - Pegging – occasionally
> - Grocery shopping
> - Bed making
> - (some) Cooking – though mostly performed by his wife
>
> Mr. Land took full responsibility for:-
>
> - Washing up
> - Taking out rubbish and wheelie bin
> - Mowing
> - Whipper snipping
> - Gardening
> - Changing kitty litter
> - Washing cars
> - Home maintenance
> - Renovating home
>
> Mr. Land stated that he was unable to perform any home-making tasks for almost 2 years post-injury so all were performed by his wife. Mr. Land then gradually returned to performing some home-making tasks by:-
>
> - Grading tasks
> - Including rest breaks
> - Performing tasks with reduced frequency
> - Performing tasks over one week rather than all in one day
> - 'Pushing myself until I conk out' or 'drops'"

[89] In evidence before me, Ms Bentley confirmed that she had not seen the plaintiff since preparing that report in June 2009.

[90] The report by Mr Zietek dated 15 January 2010 stated:

> "**13. Activities of Daily Living – Pre Accident**
>
> a. At the time of the accident, Mr Land was living with his wife and six week old daughter in a high set house, situated on a 415 square metre, flat, corner block. Tasks that Mr Land regularly completed prior to the accident and the estimated time taken to complete such tasks included the following:-
>
> - Vacuuming/Dusting/Sweeping/Mopping/Laundry – Up to 4 hours on weekend.
> - Cleaning bathroom – Up to 30-60 minutes per week.

- Washing dishes – nightly and occasional cooking up to two nights per week.
- Grocery shopping with his wife.
- Lawn mowing – Up to 2 hours however at the time of the accident as he was renovating his home there was no grass in the back yard. He was therefore not required to mow the lawn only maintain the nature strip.
- Occasional shrub trimming.
- Household maintenance.

14. Activities of Daily Living – Post Accident

a. Following the accident, Mr Land stated that he avoided all domestic tasks during the first two years. He described that his neighbour would mow the nature strip. His mother would come over to care for his daughter and to assist him on days that he was unable to get out of bed. She would bring food. His wife returned to part time work in an alternate capacity approximately 8-12 months following the accident.

b. Following a series of injections to his back (he was unable to recall the exact dates associated with these treatments) he stated 'my life got a whole lot better'. He paid a friend to undertake fencing, painting and guttering as part of his renovations as he was unable to undertake these duties himself. He began to ride his bicycle and began to feel better. He indicated that he was able to mow the lawn, vacuum, sweep and perform laundry tasks, however he lies down and rests more frequently. He does not clean the bath or perform house renovations. He has performed work at his parents' house, by m owing the lawn, sanding the floor with a floor sander and varnishing a small area of floor. He indicated that he rested afterwards and used medications to manage symptomatic exacerbation. He works for shorter periods and breaks up his tasks more regularly. He feels that he is not sufficiently stable to allow him to climb ladders to work on clearing gutters, however he will occasionally climb a ladder to check a gas meter. He described feeling that he is not up to performing domestic renovations, although sometimes he will '... just do things and just take drugs'.

c. Based on his presentation at assessment, he is physically capable of performing the majority of domestic tasks. His self report of difficulty is consistent with his presentation at assessment. I consider that occasional assistance with tasks such as clearing gutters, heavier/higher tree lopping and pruning or major clean ups following extreme weather will be required. If he is able to plan and complete his domestic duties with incorporation of task variation, appropriate working techniques and intermittent rest breaks he should be able to manage his normal day to day activities without excessive difficulty. He may experience difficulties with performing sustained periods of renovations, heavier landscaping or home improvement duties."

[91] The plaintiff's wife, Christina Yeates, gave evidence about the things the plaintiff could no longer do as much as he did before the accident. She said:

> "I guess several of the domestic chores. Cooking he used to be able to contribute. It wasn't exactly 50/50 but it was certainly more than he can now. He very rarely will cook now. Usually by the end of the day he is

> not feeling very well so those sort of things that happen at the end of the day is more of a burden on me, so I will always be cooking. Things like doing the dishes he will usually start doing the dishes and after standing at the sink for a period of time he can't finish, so I will do that. So it used to be something where he would do all the time and he can't complete these tasks like he used to. Vacuuming, he can't do vacuuming or cleaning the floors, so I will do that, whereas previously he would do that as well helping me out. Things like the laundry, that's predominantly me who does that. He does do that sometimes but he can't spend long periods of time standing up hanging up the washing, for instance. I can't really think of – certainly with looking after our daughter, she was four weeks old when the accident happened, most of the looking after her in those early stages when she was really young was pretty much predominantly myself with Gary not being able to help a lot at that stage."[26]

She confirmed the contents of the schedule (Exhibit 11) as representing her identification of work she did after the accident which was additional to that she did before.

[92] Under cross-examination, Ms Yeates confirmed that the various items listed under the "domestic work" part of the schedule were all matters which were done for the benefit of all members of the household.

[93] In respect of items claimed under the heading "post operative care", Ms Yeates said that she had included time that she spent looking after their daughter when the plaintiff was incapacitated, and confirmed that she had included in her assessments extra amounts of time that she spent looking after their daughter.[27]

[94] Ms Yeates was asked about items under the heading "assistance for attending of various medical procedures", and confirmed that the assessments in the schedule included time spent by her sitting with her husband while he was in hospital.

[95] She was also asked about the item "ongoing assistance" which is particularised in the schedule as "assistance provided to Gary, estimated at 30 hr/month" and said that this was her estimate of the time when her husband is lying down and she checks on him:

> "Well, as an adult, sure, he doesn't need to be checked on, but I like to check that he is actually okay during that time period that he is lying down."[28]

[96] Turning, then, to the particulars of the schedule on which the plaintiff's claim was founded, the claim for "Domestic Work" for assistance provided by the plaintiff's wife spanned the period 1 July 2007 – 16 June 2009, and was detailed as:

- cooking meals – one hour, three times per week, i.e. three hours per week

---

26 T 1-54.58 – 1-55.18.
27 T 1-62.30.
28 T 1-64.17.

- vacuuming, dusting and sweeping – one hour, once per fortnight, i.e. 0.5 hours per week

- washing, hanging, ironing, folding and putting away clothes – 1.5 hours, once per fortnight, i.e. 0.75 hours per week

- washing dishes and cleaning kitchen – 30 minutes, four times per week, i.e. two hours per week

- cleaning bathrooms – one hour, once per fortnight, i.e. 0.5 hours per week

- grocery shopping – one hour, once per fortnight, i.e. 0.5 hours per week

- care of infant daughter (born 28 May 2007) – 12 hours per week, said to be "based on assistance expected to be provided by secondary carer but was lacking due to incapacity".

[97] This final item, i.e. infant care provided by the plaintiff's wife to their daughter, is not compensable to the plaintiff as damages for gratuitous needs. If authority be needed for that proposition, it is sufficient to refer to *CSR Limited v Eddy*[29].

[98] As to the balance of the items claimed under "Domestic Work", it is clear on the evidence that all of the items referred to were tasks performed by the plaintiff's wife for the benefit of the household as a whole. It is not possible, on the evidence, to discern the extent to which the work the plaintiff's wife undertook was directed to meeting needs which the plaintiff had as a consequence of having been injured in the incident. I therefore find myself in the same position as Henry J when considering *Hunt v Lemura & Anor* [30]. In that case, his Honour said:

> "In my view it can reasonably be inferred on the evidence that some gratuitous services were necessary, at least until the injury resolved. However the lack of detail in the evidence on this subject heralds a different, more significant problem for Mrs Hunt in complying with s 59, namely the exclusion by s 59(3) of damages for gratuitous services replacing services provided by the injured person. The defendants contend in effect that the services claimed included, contrary to s 59(3), mostly services which she had provided to the household and that there is really no evidence of what the hours per week of the allowable component were, let alone that those hours were for at least six hours per week as is required in s 59(1)(c)."

[99] In *Leonardi v Payne*[31], Cullinane J said:

> "[61] In the course of addresses it was submitted that I could make my own assessment and that matters would be adequately covered if I simply halved Ms Purse's assessment. It is however not possible in my view for the Court to take such an approach. The evidence does not permit a finding of the plaintiff's needs if the matter were considered by reference only to the plaintiff's needs for such

---

29 (2005-2006) 226 CLR 1.
30 [2011] QSC 378.
31 [2009] QSC 382.

> assistance as opposed to the needs of all members of the family which were previously provided by the plaintiff.
>
> [62] The plaintiff is therefore faced, it seems to me, with an insurmountable obstacle to the claim which she makes for care and assistance both past and present."

[100] On the evidence before me, I am simply unable to make a finding as to the extent that the assistance described as "Domestic Work" responded to the plaintiff's needs created as a consequence of the injuries suffered. Even less am I able to make a determination that the statutory prerequisite of six hours per week for at least six months, as specified in s 59(1)(c) was satisfied.

[101] Under the heading "Post Operative Care", claim was made for six instances of the provision of assistance by the plaintiff's wife in periods following the various surgical procedures undergone by the plaintiff as a consequence of the injuries suffered. It is sufficient to refer to one example, namely a claim of 360 hours following the vertebral fusion operation in February 2008. The particulars of the assistance given are stated as:

> "Fusion of L4-L5 vertebrae – unable to drive to four weeks, required assistance with dressing and unable to help around the house or with daughter, unable to return to work with light duties until 14/4/08 = total 45 days of care."

[102] I have no doubt that the plaintiff's wife provided gratuitous assistance to him in the period following this operation. What I am not, however, able to determine on the evidence is a proper estimate of the hours actually expended by her in providing that assistance. It is clear that time spent by the plaintiff's wife in providing care for their daughter is not able to be taken into account. Nor is it at all helpful for this claim to be cast globally as simply one for "45 days of care".

[103] Once again, the evidence does not enable me either to make any proper assessment for the items in this category of the time actually spent by the plaintiff's wife in providing him with "gratuitous care" (as that term is properly understood) or to be satisfied that the statutory prerequisite imposed by s 59(1)(c) is satisfied.

[104] Under the heading "Assistance for Attending of Various Medical Procedures", claim is made for the attendance by the plaintiff's wife on diverse occasions between June 2008 and December 2009. As appeared from the evidence, some of the time referred to in those claims related to driving time, when the plaintiff's wife clearly was providing a service to her husband. Much of the time, however, appears to have been occupied with her simply attending with him at medical appointments or sitting at his bedside. In *Collins v Carey & Anor* [32], Philippides J cited, *inter alia*, *Wilson v McLeay*[33] when stating at [80]:

> "Whilst compensation is not provided where a relative attends on a loved one at hospital because of a desire to be close to the loved one, an

---

32 [2002] QSC 398.

33 (1961) 106 CLR 523.

> allowance is permitted to reflect the therapeutic value of the presence of a family member."

[105] Once again, there was no detailed evidence before me from which I could even start to make an assessment of the extent to which the hours claimed related to a need created as a consequence of the plaintiff's injuries. Nor does the evidence allow me to assess whether the statutory prerequisite under s 59(1)(c) has been met.

[106] The final item, which was also the basis for the claim for future gratuitous care, was the "Ongoing Assistance". That was described in evidence by the plaintiff's wife as consisting of the time when she looks in on the plaintiff to check on him while he is resting. I acknowledge that this is a caring thing to do. It is not, however, the provision of a "gratuitous service" to meet a need which arises solely from the injuries suffered by the plaintiff.

[107] Accordingly, I am unable to make any assessment on the plaintiff's claims for past and future gratuitous care.

Out of pocket expenses

[108] The plaintiff's claim for a net amount of $13,157 for past medication and out of pocket expenses was not in issue. Interest should be allowed on that at 1.9 per cent to the date of judgment, yielding $1,350.

[109] I will also allow a global sum of $10,000 for future medication. This accounts for the fact that the plaintiff suffered injuries in this accident which are over and above his pre-existing conditions for which he otherwise would have required medication.

[110] The refund to the private health insurer (NIB) is $70,197. That claim was not in issue.

[111] According to Exhibit 9, the amount of benefits paid by Medicare totalled $6,304.80. That amount will be allowed.

[112] It was not in issue that the plaintiff had travelled 4,935.5 kilometres for the purposes of medical appointments. The evidence was that this travel occurred in a four cylinder motor vehicle. Having regard to the rate per kilometre allowed by the Australian Taxation Office for a vehicle with an engine of that size, I will allow 75 cents per kilometre, yielding $3,702.

[113] Some small allowance should be made for the acceleration of the knee replacement surgery referred to by Dr Gillett. It will be recalled that, if this occurs, Dr Gillett expects it to occur when the plaintiff is in his early to mid 60's rather than his late 60's. I will allow $2,500 for that.

[114] The plaintiff also claimed for massage services. His evidence was that he has had massages – sometimes from a friend who does them for free, and otherwise when he can afford them. He said that his health insurer paid for some of the costs, but he still incurs some out of pocket expense in the order of $30. He said he has these massages "as often as possible". There was, however, no evidence to support the proposition that these, or indeed any other, massages were or are of any therapeutic benefit to the plaintiff. The mere fact that the plaintiff might enjoy them does not justify the making of an allowance in damages.[34]

Conclusion

[115] In summary, my assessment of the damages recoverable by the plaintiff is as follows:

General damages	$35,000
Past economic loss	81,352
Interest on past economic loss	8,437
Future economic loss	150,690
Past and future gratuitous care	Nil
Past out-of-pocket expenses	13,157
Interest	1,350
Future medication	10,000
NIB refund	70,197
Medicare refund (rounded)	6,305
Travel	3,702
Future surgery	2,500
	$382,690

[116] There will be judgment for the plaintiff in the sum of $382,690.

[117] I will hear the parties as to costs.

---

[34] *Bezant v Davis* [2010] QSC 229 at [73] – [82].