# DISTRICT COURT OF QUEENSLAND

| CITATION: | *Tompkins v Kemp Meats Pty Ltd* [2013] QDC 184 |
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| PARTIES: | **Keith Louis Tompkins**<br><br>**(Plaintiff)**<br><br>**v**<br><br>**Kemp Meats Pty Ltd**<br>**ACN 088931024**<br>**as Trustee for the Kemp Meat Trust**<br><br>**(Defendant)** |
| FILE NO: | D294/12 |
| DIVISION: | Civil |
| PROCEEDING: | Trial |
| ORIGINATING COURT: | District Court, Townsville |
| DELIVERED ON: | 17 July, 2013 |
| DELIVERED AT: | Brisbane |
| HEARING DATES: | 27 and 28 February 2013, 01 March 2013 |
| JUDGE: | Durward SC DCJ |
| ORDERS: | **1. I give judgment for the plaintiff, in the sum of $337,113.55.**<br>**2. Defendant to pay plaintiff's costs on the standard basis as from the date of the final written offer on 16 July 2012.** |
| CATCHWORDS: | TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – Breach of duty of care – primary liability admitted – injury caused at work as a slaughterman in an abattoir – knife wound to tip of thumb that severed extensor tendon – whether any capacity to work in that occupation.<br><br>TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – GENERALLY – whether plaintiff liable by not wearing protective gloves – whether gloves supplied by employer – whether compulsory wearing of gloves within |

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| | scope of employer's system of work.<br><br>DAMAGES – GENERAL PRINCIPLES – MITIGATION OF DAMAGES – PLAINTIFF'S DUTY TO MITIGATE – whether plaintiff mitigated loss – whether plaintiff voluntarily resigned for reasons not associated with injury.<br><br>DAMAGES – GENERAL PRINCIPLES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURY – LOSS OF EARNINGS AND EARNING CAPACITY – whether any loss of income – inability to continue to earn income at optimal level in course of alternate employment - where plaintiff could not cope with loading and delivery driver work – part of work role taken over by another employee – financial loss to plaintiff.<br><br>DAMAGES – GENERAL PRINCIPLES - QUANTUM OF DAMAGES – COST OF EARNING INCOME – regional locality - where travel costs incurred in travelling to another town for alternative employment – where defendant did not challenge travel cost calculation but simply denied the head of damage – where specific calculations said to be made on assumptions and estimations – whether global assessment more appropriate basis of award.<br><br>DAMAGES – GENERAL PRINCIPLES - QUANTUM OF DAMAGES – LOSS OF HOUSING BENEFIT – whether recoverable – comparative evidence of value of housing supplied by defendant disputed – question of quantification of value of housing - where plaintiff had purchased a house in locality before resigning from defendant's employment.<br><br>DAMAGES – EVIDENCE BY QUANTUM STATEMENT – quantum statement prima facie admissible pursuant to s92 Evidence Act 1977 – admission of quantum statements a long standing practice in North Queensland. |
| LEGISLATION: | *Civil Liability Act* 2003 s11 ; *Civil Liability Regulation* 2003 Sch 4; *Workers Compensation and Rehabilitation Act 2003* Ch5 Pt9, ss306C-306P; *Law Reform Act 1995* s 10; *Uniform Civil Procedure Rules* 427, 429, Ch14 Pt2; *Evidence Act* 1977 s92. |
| CASES: | *McLean v Tedman* (1984) 155 CLR 306; *Davies v Adelaide Chemical & Fertilizer Co Ltd* (1946) 74 CLR 541; *Iwasaki Sangyo Co Pty Ltd v Manley* (1996) QCA 408; *Graham v Baker* (1961) 106 CLR 340; *Medlin v State Government Insurance Office* (1994-1995) 182 CLR 1; *Driver v Stewart and MMI* [2001] QCA 444; *Henderson v Dalrymple Bay Coal Terminal* [2005] QSC 124; *Meandarra Aerial Spraying Pty Ltd & Anor v GEJ Geldard Pty Ltd* [2012] QCA 315; |

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| | *Caltex refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258; *Hayles v Newlands Coal Pty Ltd* BC9704081 (unreported 1997, Demack J); *Hansen v BHP-Utah Coal Ltd* BC 9404589 (unreported 1994, Demack J); *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 AJLR 492; *Girone v Denholm and Allianz Australia Insurance Limited* [2010] QSC 420; *Hunt v Lemura & Anor* [2011] QSC 420; *Campbell v Jones* (2003) 1 QdR 630; *French v QBE Insurance (Australia) Ltd* [2007] QSC 105. |
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| COUNSEL: | G F Crow SC for the plaintiff<br>A W Collins for the defendant |
| SOLICITORS: | Macrossan and Amiet for the plaintiff<br>Bruce Thomas Lawyers for the defendant |

[1] The plaintiff, Keith Louis Tompkins, has claimed damages for personal injuries suffered on 09 August 2010 whilst working as a slaughterman in an abattoir operated by the defendant, Kemp Meats Pty Ltd, at Sarina.

**The incident**

[2] On 09 August 2010 the plaintiff was working in the course of his employment at the abattoir, processing pigs on the killing floor by performing a "fronting out" operation, which required him to make a knife incision down the centre of the stomach of a pig suspended from the chain to remove the gut. The task involved moving the stomach with the left hand and holding it to one side whilst concurrently using a knife in the right hand to cut the diaphragm so as to allow the stomach to fall out of the carcass. Whilst the plaintiff was performing this task, the knife he was using in his right hand cut into a bone and as he applied downward force it moved suddenly and cut the top of his left thumb ("the incident").

**Preliminary application**

[3] At the commencement of the trial, Mr Collins made an application to amend the defendant's pleadings in respect of the cessation of the slaughter operations of the defendant's business in October, 2012. The application was opposed by Mr Crow SC. I refused leave and gave reasons.

**The injuries**

[4] The plaintiff suffered lacerations to the dorsum of the left thumb that severed the extensor tendon. The plaintiff was right hand dominant. He was aged 44 years at the date of trial (DOB 21 July, 1968).

**The issues**

[5] The plaintiff alleges a breach of duty of care by the defendant in having failed to take all reasonable precautions for the safety of the plaintiff at work and in the performance of his assigned work tasks, which exposed him to unnecessary risks of damage or injury; and by failing to provide and maintain a safe system of work.

[6] The defendant has admitted primarily liability. The issues that require determination are contributory negligence and the quantum of damages.

**A. Liability: contributory negligence**

[7] The defendant alleged that the injury was caused or contributed to by the negligence of the plaintiff: by his failure to wear cut resistant gloves and to keep his unprotected left hand clear of the knife he was using in his right hand; and that the plaintiff was a supervisor on the slaughter floor and was responsible for ensuring cut resistant gloves were worn.

[8] The defendant alleged that the cut resistant gloves were provided to employees and that it required them to be worn by slaughtermen.

[9] The plaintiff says that the defendant did not require slaughtermen to wear such gloves; that it permitted him to work "fronting out" the pigs without wearing a cut resistant glove; and denied that prior to the incident there were cut resistant gloves provided by the defendant or any requirement to wear them.

[10] There were other duties referred to in the pleadings, but the supply of and wearing of cut resistant gloves was the critical issue in the liability case in the trial.

**Evidence:**

**The plaintiff**

[11] The plaintiff has been engaged in the meat processing industry since leaving school after finishing year 9, apart from about four years in his teens when he was a jockey. He was an A-grade slaughterman and worked at a number of abattoirs in Central Queensland and North Queensland. He had previously been employed by the defendant and in about 2001 he accepted an offer by Mr Andrew Kemp, a director of the defendant, to resume work at its abattoir. In 2003 he was appointed as leading hand. He completed a Level 4 meat safety officer course.

[12] After the incident happened the plaintiff washed up and then went to Mrs Brenda Kemp who cleaned and dressed the wound. He returned to work. The wound was dressed again during that day. He had shown the injury on his thumb to Mr Andrew Kemp but says nothing in particular was said to him by Mr Kemp about the incident. He worked the following day and the wound was again dressed, three times during the course of the day. On the next morning the plaintiff was experiencing pain and throbbing in his left thumb and sought medical attention. Mr Kemp had told him to do that.

[13] He returned to work with the defendant, but not initially as a slaughterman. He did other jobs. When he resumed working with carcases he wore a combination of a surgical glove and a cut resistant glove but found difficulty in maintaining an adequate grip on the carcase with his left hand. The wearing of gloves had become mandatory after he returned to work.

[14] He found the work difficult and painful. Eventually he was not able to continue to work and despite trying to raise the issue with Mr Kemp, he gave notice terminating this employment. He moved out of the house on the abattoir property that he and his wife occupied.

[15] There had been a trial of mesh protective gloves which the slaughtermen complained were awkward and unsatisfactory, because particles of fat and meat would embed in the gloves. None of the slaughtermen or trainers otherwise wore gloves prior to the incident. Boners in the boning room used the gloves to keep their hands warm.

[16] But for the injury that he suffered, the plaintiff said that he would not have ceased his employment with the defendant: he enjoyed the work and the company of the men that he worked with and the house provided to him rent free.

**Mr Little**

[17] Mr Little, a slaughterman at the abattoir, gave evidence that none of the slaughtermen liked working with cut resistant gloves because they interfered with efficiency, made a firm grip of the slippery meat harder to achieve and made awareness of the position of the knife whilst it was being worked, less reliable. He said that the non-dominant left hand was used to hold the meat with the same or more grip strength than the knife-hand. He said there were no gloves on the slaughter floor. Wearing of gloves was not mandatory prior to the incident. It was only after the incident that a requirement to wear the gloves was enforced by the defendant.

**Mr Andrew Kemp**

[18] Mr Kemp employed 13 workers in August 2010. The abattoir processed pigs and cattle. Mr Kemp described the pig processing operations from the stunning and bleeding of the pig, the hot water tub and aeration tumbling and the transfer of the carcasses to the rail or chain. The fronting out operation then followed.

[19] He said that the plaintiff was employed as a supervisor and that his Level 4 qualification included a workplace health and safety component. The plaintiff also trained other staff.

[20] The cut resistant gloves were not mandatory prior to the incident although subsequently and on receipt of legal advice, he made them mandatory. They were trialled prior to the incident but there was resistance from employees about wearing them.

**Liability - principles**

[21] The authoritative statement about liability of employers is expressed in *McLean v Tedman* (1984) 155 CLR 306 per Mason, Wilson, Brennan and Dawson JJ at pp 312-313:

> *"Many statements are to be found in the cases which give emphasis that in discharging his duty to take reasonable care to avoid injury to his employee, an employer is bound to have regard to any risk of injury that may occur by reason of an employee's inadvertence, inattention or misjudgement in performing his allotted task";*

and

> *"If there is a foreseeable risk of injury arising from the employee's negligence in carrying out his duties then this is a factor which the employer must take into account";*
>
> and
>
> *"The employer's obligation is not merely to provide a safe system of work; it has an obligation to establish, maintain and enforce such a system. Accident prevention is unquestionably one of the modern responsibilities of an employer ... And deciding whether an employer has discharged his common law obligation to his employees the Court must take into account that the power of the employer to prescribe, warn, command and enforce obedience to his commands."*

[22] I refer to those statements of principle in order to give some context to the apportionment issue that arises as a consequence of the defendant's pleading of contributory negligence in the incident.

**Submissions on contributory negligence**

[23] Mr Collins submitted that the plaintiff was an experienced meatworker and was well aware of the risks of cuts to the hand occurring in using a knife, including cuts to the non-dominant hand. That awareness in part was demonstrated by his history of workers compensation claims for knife cuts over several years. It was submitted that the plaintiff had consciously failed or refused to wear a protective glove, a decision that was not one of inattention, misjudgement or inadvertence.

[24] He submitted that a finding of contributory negligence should be made on the basis of section 305H of the *Workers' Compensation and Rehabilitation Act* 2003 (*"WCR Act"*), namely that a court may make a finding of contributory negligence if the worker relevantly:

> *"(b) failed at the material time to use, so far as was practicable, protective clothing and equipment provided, or provided for, by the worker's employer, in a way in which the worker had been properly instructed to use them; or*
>
> *(c) failed at the material time to use, so far as was practicable, anything provided that was designed to reduce the worker's exposure to risk of injury; or*
>
> *(f) undertook an activity involving obvious risk or failed, at the material time, so far as is practicable, to take account of obvious risk."*

[25] Mr Collins submitted that the plaintiff clearly foresaw the risk of injury by reason of the defendant having purchased cut resistant gloves prior to the incident, even though the employer had not made the wearing of the gloves mandatory at that time (the latter being the basis upon which primary liability was admitted). He submitted that liability should be apportioned 50:50.

[26] Mr Crow SC submitted that it was difficult to envisage that contributory negligence could be established when the plaintiff was merely working in the established system of work, that system being clearly deficient. It was submitted that where an employee is injured engaging in an accepted work practice known to the employer, then it is not possible for the employer to successfully argue that the injured employee is guilty of contributory negligence.

**Discussion: contributory negligence**

[27] Section 10 (1) (b) of the *Law Reform Act* 1995 requires that:

> *"The damages recoverable for the wrong are to be reduced to the extent the Court considers just and equitable having regard to the claimant's share in the responsibility for the damage."*

[28] Section 105G of the *WCR Act* provides that contributory negligence can defeat a claim in certain circumstances, if it is just and equitable so to find.

[29] The general principles in respect of contributory negligence are aptly set out in two cases:

[30] In *Davies v Adelaide Chemical & Fertilizer Co Ltd* (1946) 74 CLR 541, the plaintiff suffered a serious injury to his arm when he reached under a moving conveyor belt to lubricate rollers, a system of work known to the employer. The trial judge found contributory negligence. On appeal to the High Court, Dixon J, as he then was, wrote (at pp 552-553):

> *"It was open to the employer, the defendant, to take such measures as would ensure that the machinery was stopped on all occasions before greasing. Then the material parts of the machinery would not have been dangerous and the duty to safeguard would not have been broken. But so far from taking such measures, the defendant approved of the contrary practice; the participation of the employee in the practice cannot amount to contributory negligence relieving the employer of the liability for the breach of its result of duty to safeguard. That would mean the transfer to the employee of the employer's responsibility for ensuring that there was no greasing of the machinery in motion as an alternative to providing safeguards against the danger involved in so greasing it."*

[31] In *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492, the Court wrote (at pp 493-494):

> *"It was correctly submitted that the issue of contributory negligence had to be approached on the footing that the respondent had failed to discharge its obligation to take reasonable care, and that in considering whether there was contributory negligence on the part of the appellant, the circumstances and conditions which he had to do his work had to be taken into account. The question was whether, in those circumstances and under those conditions, the appellant's conduct*

*amounted to mere advertence, inattention or misjudgement, or to negligence.*

…

*The making of an apportionment as between a plaintiff and a defendant of the respective shares in the responsibility for the damage involves a comparison both of culpability, i.e. of the degree of departure from the standard of care of the reasonable man ... and of the relative importance of the acts of the parties in causing such damage ... it is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance"* (Case citations omitted).

[32] Section 305F of the *WCR Act* provides:

*"305F* ***Standard of care in relation to contributory negligence***

*(1) The principles that are applicable in deciding whether a person has breached a duty also apply in deciding whether the worker who sustained an injury has been guilty of contributory negligence in failing to take precautions against the risk of that injury.*

*(2) For that purpose –*

*(a) The standard of care required of the person who sustained an injury is that of a reasonable person in the position of that person; and*

*(b) The matter is to be decided on the basis of what that person knew or ought reasonably to have known at the time."*

[33] In his submissions Mr Collins had referred to *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258, in the context of the content of the duty of care and posited a number of propositions in support of the defendant's assertion of contributory negligence on the part of the plaintiff. See paragraph [37], infra.

[34] In *Caltex* Allsop P, (Simpson J agreeing) wrote in respect of determining the existence of a duty of care, if the posited duty is a novel one, that *"the proper approach is to undertake a close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by reference to the "salient features" or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury"*. His Honour referred at paragraph 103 to a 'non-exhaustive' list of seventeen, (a) to (q), salient features affecting the

appropriateness of imputing such a duty of care. That list was also referred to by Fryberg J in *French v QBE Insurance (Australia) Ltd* [2007] QSC 105, at [38].

[35] Mr Collins had also referred to *Meandarra Aerial Spraying Pty Ltd & Anor v GEJ Geldard Pty Ltd* [2012] QCA 315, particularly the discussion by Fraser JA at [22] to [26], in respect of the operation of the Civil Liability Act 2003 ("*CLA*"). His Honour wrote, at [26], in the context of the expression "not insignificant" in section 9 (1) (b) and the common law formulation of 'not far fetched or fanciful", that

> *"... the provision was designed to increase the degree of probability of harm which is required for a finding that a risk was foreseeable. I think it did produce some slight increase in the necessary degree of probability. A far fetched or fanciful risk is necessarily so glaringly improbable as to be insignificant, but the obverse proposition may not necessarily be true ... The difference is a subtle one. The increase in the necessary degree of probability is not quantifiable and it might be so minor as to make no difference to the result in most cases. Nevertheless, in deciding claims to which the act applies the "not insignificant" test must be applied instead of the somewhat less demanding test of "not farfetched or fanciful".*

[36] Section 11 of the *CLA* provides:

> *"11.* ***General principles***
>
> *(1) A decision that a breach of duty caused particular harm comprises the following elements -*
>
> *(a) The breach of duty was a necessary condition of the occurrence of the harm (factual causation);*
>
> *(b) It is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (scope of liability);*
>
> *(2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty – being a breach of duty that is established but which cannot be established as satisfying subsection (1)(a) – should be accepted as satisfying subsection (1)(a), the Court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.*
>
> *(3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who is in breach of duty had not been so in breach –*

> *(a) The matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and*
>
> *(b) Any statement made by the person after suffering the harm of about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.*
>
> *(4) For the purpose of deciding the scope of liability, the Court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who is breach of the duty."*

[37] There were six propositions posited by Mr Collins, which he characterised as being countervailing to the position of the defendant.

1 The plaintiff was an experienced meat worker.

2 The prior history of knife cuts evident on the plaintiff's left hand and arm (the first occurring in 1983).

[38] I agree that the plaintiff was an experienced meat worker. However, the propositions 1 and 2 are not a material consideration in my view, at least as far as the allegation of negligence against the plaintiff is concerned. The plaintiff was aware of such risks associated with the use of a knife. The defendant did not enforce the wearing of gloves. It was in control of the system of work.

3 Gloves had been supplied by the defendant.

4 The plaintiff was aware of their availability.

5 The plaintiff made a decision to work without a protective glove.

6 The plaintiff left employment with the defendant to pursue other employment opportunities.

[39] Insofar as propositions 3 to 5 are concerned, they are not made out on the evidence. The defendant relied on the alleged supply of gloves, together with his worker's compensation claim history, as a matter that supported the allegation of contributory negligence. I reject that proposition. The wearing of protective gloves may reduce the incidence of knife cuts, and employees may be aware of that fact, but the wearing of gloves is an incidence of the employer's system of work. The employer has the responsibility and capacity to enforce obedience to the system. The defendant did not do so until after the incident. Further, the evidence is clear that in the so-called trial of the gloves, only 3 pairs of gloves were made available: one each of three sizes, small, medium and large. There were 13 knife workers on the slaughter floor. There were insufficient gloves for all the employees. The employees had a meeting where gloves were discussed and rejected. Mr Kemp accepted the rejection, at the very least implicitly. He did not enforce the wearing of the gloves by the plaintiff or any other employee.

[40] With respect to proposition 6, I do not agree with it. The evidence does not support that proposition. The plaintiff left because he sustained the injury to his hand in the incident and could not continue to do the work of a slaughterman. The defendant did not offer him alternative duties.

**Findings and Determination on liability**

[41] I make the following findings on liability:

- I accept the evidence of the plaintiff as to how the injury was caused.
- I find that the defendant knew of the risk of injury to the non-dominant hand by use of the knife in the fronting out operation.
- I find that the trial of the wearing of cut-resistant gloves met resistance from employees and that the defendant acquiesced in the gloves not further being used prior to the incident.
- I find that the wearing of cut resistant gloves on the non-dominant hand by slaughtermen did have the effect of reducing efficiency and strength of grip in holding wet carcasses.
- I find that the fact that the plaintiff was a supervisor and trained in workplace health and safety was not material to the incident, given the attitude of the defendant in permitting employees, including the plaintiff, to not wear the cut resistant gloves.
- I find that the defendant consciously did not enforce the wearing of the cut resistant gloves by slaughterman, including the plaintiff, engaged in the fronting out operation.
- I find that the defendant made the wearing of cut resistant gloves mandatory only after being informed of a legal obligation to do so and post-incident.
- In the premises, I find that the plaintiff was not liable in contributory negligence.

[42] Accordingly, the plaintiff is entitled to succeed in the claim on the basis that the employer is 100% liable for the injury suffered by him.

**B. Damages: Quantum**

[43] The incident occurred after 01 July 2010. Hence the relevant legislative provisions in respect of quantum applicable in this case are sections 306C to 306P of the *WCR Act*; and the *Civil Liability Regulation* 2003, particularly Schedule 4.

**Objections to evidence**

[44] Mr Collins objected to some parts of the Quantum Statement of the plaintiff and to parts of the addendum Statement of Dr Cook. I resolved most of the initial objections to the quantum statement in the course of the trial, whilst leaving the few remaining in contention until after counsel had reached agreement on the

composition of the agreed book of documents. The final resolution was made on the following basis:

- A Quantum Statement is prima facie admissible pursuant to s92 of the Evidence Act 1977;
- The admission of Quantum Statements was a long-standing practice in North Queensland; and
- Evidence of what health and medical persons said to the plaintiff was directly relevant as a response to an allegation of failure to mitigate loss and admissible on the basis of what was said going to weight in respect of the plaintiff's response, and not as to the truth of what was said;

[45] The resolution of the objection as described above has support in a number of authorities, for example: *Girone v Denholm and Allianz Australia Insurance Limited* [2010] QSC 420; *Hunt v Lemura & anor* [2011] QSC 420.

[46] Mr Crow SC objected to the admission of evidence from Dr Green, which was obtained on the eve of the trial by the defendant and arguably traversed new ground. He referred to *Campbell v Jones* (2003) 1 QdR 630 in the context of special reasons for admission of the evidence. I gave leave to Mr Collins to lead the evidence and reserved my reasons for later in the trial. On reflection I do not think that I returned to that issue in the trial. I will do so briefly now.

[47] The defendant had not complied with the requirements of the rules with respect to expert evidence: UCPR 427, 429 and Chapter 14 Part 2. The evidence was a conference note of discussions between Mr Collins and Dr Green, purportedly for the purpose of adducing oral evidence of its content. However, the note had been adopted and signed by the doctor by the time of the commencement of the trial.

[48] Mr Collins submitted that the plaintiff's case, in an addendum statement of Dr Cook, had gone outside the parameters of the claim; that there were unforeseen delays through counsel's absence on leave through the vacation period; and inferentially, there were issues of the interests of justice to consider.

[49] The admission of the evidence is a matter for the exercise of a broad discretion by me, having regard to all the circumstances of the case. Whilst I did not need to find 'special reason' to permit departure from the rules in this case, being satisfied that the interests of justice warranted leave to adduce the evidence, I note that in *Campbell v Jones* (supra) the court wrote:

> "Special reason is not a term of art; it carries no [per]ceived technical connotations. What is special may be influenced by the context and flavour of the trial, a matter which the trial judge is in a particularly favourable position to assess".

My resolution of the objection reflects that statement.

[50] Finally, an agreed bundle of documents was tendered on the second day of the trial as exhibit 11. It included the historical health and medical records and the relevant conference note and Statement referred to above.

**Evidence:**

**The plaintiff**

[51] On 11 August, 2010, two days post-incident, the plaintiff found that his thumb was infected and consulted a general practitioner. He was treated and returned to work but suffered persistent stiffness of the left thumb and constant pain and discomfort. He saw the doctor again and then returned to work doing jobs other than work as a slaughterman, that were within his capacity. He was certified fit to return to normal duties on 23 September, 2010 but shortly thereafter consulted Dr Dorgeloh, orthopaedic surgeon, and the diagnosis of a severed extensor tendon was made. He continued to work as a slaughterman and complained to Mr Andrew Kemp that he could not do the work. His complaints elicited no response and he became concerned about his working future. In his complaints he had informed Mr Andrew Kemp that he had difficulty gripping the hide of the animals when he was working.

[52] He subsequently underwent an operation on his thumb and suffered post-operative infection. He consulted physiotherapist Mr Bella and discussed Mr Bella's recommendations with Mr Andrew Kemp in December 2010. He would place his hand under a running tap to try and ease the discomfort when he was at work. Finally he decided he could not continue to work as a slaughterman because of the pain and discomfort. Mr Andrew Kemp's non-communication about the difficulties led to the plaintiff giving notice of termination of his employment. He gave three weeks' notice and thereafter moved out of the house on the abattoir property to live in a house on acreage property in Andy Road, Sarina that he and his wife had purchased in November, 2011.

[53] The plaintiff still suffers from discomfort and stiffness in the left thumb and has a reduced range of movement. He believes that the way in which he has altered his grip with his left hand has led to discomfort in his left elbow. He no longer is capable of riding and shoeing horses. He maintains the house yard, although has difficulty using a whipper snipper, but no longer attends to fencing of the property. He has difficulty filleting fish because of the discomfort from gripping with his left thumb.

[54] The plaintiff sought alternative work after leaving the defendant's employment and took a position as a trainee dogman at Sarina Crane Hire. He worked there between late January and late July, 2011. He still suffered pain in his left thumb when he was required to lift chains or open hooks to sling loads. That employment was terminated after he attended at a mine site in the course of his employment and failed an alcohol test.

[55] Some five weeks later he took a position with Fresco's Quality Meats in Mackay. That employer took delivery of meat and then processed the meat into orders for delivery in cartons to customers. The plaintiff worked on the production floor but found work that involved gripping wet and slippery product caused discomfort in his left thumb. He subsequently was given a job as a meat truck delivery driver but found that he had to grip the strapping around cartons with only four fingers on each hand, to avoid pressure on his left thumb. He subsequently took a position as a storeman.

[56] In September, 2012 he was approached by Sarina Crane Hire and offered a job but he told that employer that he was still suffering from discomfort in his left thumb and had developed discomfort in his left elbow.

[57] At the time of the incident he was earning about $910.00 nett per week, plus had the advantage of the rent free accommodation. At Fresco's he was paid $24.50 per hour for a normal week of 44.5 hours, about $1,090.00 per week. He said that Mr Little now did the delivery runs that he had previously done and that he thus earned $332.00 per week less than Mr Little. His current earnings are about $1,027.00 per week. If he had been working now as a slaughterman for the defendant he believed his income would be in the order of $1,000.00 nett per week. The daily rate of pay for slaughterman at meatworks was $234.00 gross per 7.75 hours. He considered that in the future he would be limited to employment where he was not required to grip or hold objects with his left hand.

[58] He now is required to drive from his home in Sarina to Fresco's Quality Meats (about 40 kilometres) at a cost of about $90 per week on fuel. Of course, he previously was able to simply walk to work when he was living in the house on the defendant's abattoir property.

**Mrs Tompkins**

[59] Mrs Tompkins said she had no issue about living next door to the abattoir and referred to the convenience of doing so. She was only five minutes from her workplace and the plaintiff used to walk to his workplace. If he had still been employed by the defendant she would have continued to live in the house that had been provided by it.

[60] She said that after the previous shoulder operation the plaintiff did the domestic chores in a different way. She gave the example of doing fencing. After the incident she said there was a fair bit that he couldn't do and there were issues with his grip. She gave examples of filleting fish and using a whipper snipper. She said that he was "crankier" after the incident. She had cared for the plaintiff when he was recovering from previous injuries and she was aware of the medical advice that he may require a knee reconstruction by age 55 years.

**Medical history**

[61] Dr Dorgeloh, orthopaedic surgeon, reported that the extensor tendon of the thumb was not functioning and most probably had been severed. He subsequently performed a left thumb extensor tendon reconstruction on 01 November, 2010. There were post-operative issues of pain and swelling that required treatment.

[62] The plaintiff was referred to a physiotherapist, Mr Bella. He reported subsequently that the plaintiff lacked joint range due to both contracted joint structures and restriction of tendon movement. He expressed a view about the workplace activities that the plaintiff reported were required of him, and said that "his lack of functional movement coupled with the safety and hygiene equipment makes efficient functional use of the hand extremely difficult. I have grave doubts as to whether his coping strategies are not going to lead to overuse type injuries."

[63] The plaintiff had suffered previous knife lacerations to the left hand and there were multiple minor scars of the dorsum of the left hand. The plaintiff had arthroscopic bilateral carpal tunnel surgery performed by Dr Shaw, orthopaedic surgeon, many years previously and a right shoulder surgery acromiplasty for an impingement many years previously.

**Dr Green**

[64] Dr Green, a hand and microsurgeon, reviewed the plaintiff on behalf of WorkCover Queensland. She diagnosed a "secondary tendonitis post-trauma/swelling in thumb" and "possible recurrent carpal tunnel syndrome." She performed a steroid injection for early "trigger thumb" and referred the plaintiff for the supply of a thumb splint, which he wore for four weeks.

[65] In a Statement (exhibit 12) which recorded a discussion with Mr Collins, she expressed the view that:

1. the report of pain "was not explained by the original tendon injury";
2. the pain was most likely to be related to the recurrent carpal tunnel syndrome and tendonitis (trigger thumb), both of which were amenable to treatment;
3. the loss of range of motion from the tendon injury was minor and it would not prevent employment in any capacity; and
4. that the plaintiff appeared "more interested in seeking compensation than treatment given that he was assessed 18 months ago and despite ongoing symptoms has not returned for further investigation but instead sought impairment ratings".

[66] Not surprisingly, Mr Crow SC took issue with those statements. He put the evidence of Dr Cook about the pain and loss of grip strength. Dr Green did not accept that opinion and said that Dr Cook had not considered carpal tunnel syndrome or tendonitis.

[67] I thought Dr Green was very rigid and defensive in her evidence. For example, she was not open to making reasonable concessions and was unwilling to respond to propositions containing assumptions. I was not impressed with her evidence.

**Dr Cook**

[68] Dr Cook, an orthopaedic specialist called by the plaintiff, assessed - by reference to the AMA Guides - a permanent partial impairment of 10% for the left thumb as a whole, otherwise expressed as a 4% permanent partial impairment for the left hand as a whole and the left upper limb as a whole, which equated to a 2% whole of person impairment. He attributed the whole of that assessment to the incident.

[69] Dr Cook was asked in testimony to respond to the four matters raised in Dr Green's discussion with Mr Collins (exhibit 12). His evidence was as follows:

1. He disagreed with Dr Green's opinion and said that the pain was exclaimed by use, bumps and knocks and was evident at the end of the thumb;

2. With respect to the carpal tunnel syndrome, he had been told that the plaintiff had an excellent result from the surgery and no complaint was made to him about this. He said there was tenderness over the flexor tendon but it was moving quite well within its sheath. There was no trigger thumb. However, on subsequent consultation there was very restricted movement. He said the carpal tunnel syndrome and tendonitis were very amenable to surgical treatment. He described the operation and said that he had operated on thousands of patients over forty years of practice. He said that so far as pain from trigger thumb might exist, there was no pain in August 2012 but there was in February 2013. Surgery on that would not relieve the pain from the injury;

3. He disagreed with Dr Green's view. He said the plaintiff was not able to straighten his thumb. He was unable to get a 'position of function', that is to touch the ends of the thumb and index finger. In employment as a slaughterman it would be difficult to grip smooth and slippery surfaces. He said grip strength was mainly through the fingers or with the base of the thumb; and

4. As for Dr Green's view that if treatment was given there would be no pain, he disagreed. There was no carpal tunnel syndrome, the trigger thumb would be relieved at the base but not in the relevant joint. A trigger thumb involved tendons on the inside (palmar) aspect of the thumb. This condition was not related to the cut which was not at that aspect (it was at the dorsal aspect). He said there was no tendon left in the thumb below the last joint.

[70] I note that the plaintiff said in evidence that the previous carpal tunnel surgery had been successful: "it was like having two new hands" and he had no problems with the condition.

[71] Dr Cook confirmed that he had seen a number of other medical reports and also radiological reports. He described the range of grip tests that he applied (using two fingers placed in the palm of the patient's hand and being squeezed to grip). He said the difference in the grip strength test, in whichever method Dr Green may have used, was probably explicable simply by the difference between dominant (right) versus non-dominant (left) hand.

[72] He described a "whole hand" function and grip strength. Gripping a slippery item required a "pincer" movement. In saying that the plaintiff could not move his thumb into the 'position of function', the thumb and index finger in effect would be 'curled' to grip rather than being straighter and slightly apart.

[73] When asked in cross-examination whether a long term restriction on a capacity to work as a slaughterman could be a consequence of the other physical conditions, that is, the shoulder and knee conditions, Dr Cook responded that it was not necessarily the case.

[74] With respect to Dr Blenkin's opinion, he disagreed with that opinion**.** He agreed both had been given the same history but simply formed different opinions.

[75] He said degenerative change may occur but a person may still have normal function in a joint.

[76] Dr Cook understood the employment requirements of employees in abattoirs. He had visited and inspected such premises in the past and assessed work tasks involving meatworkers. He had performed numerous operations on meat workers and was familiar with the injuries they typically suffered.

[77] Dr Cook considered that work as a slaughterman - or as a butcher, slicer or boner for that matter – required the worker to have a particularly strong grip that allowed the non-dominant thumb to dig into and hold slippery meat products. He expressed the opinion that it was improbable that the plaintiff could do such work: he would not have an adequate grip, he would not be able to work efficiently, he would not be able to grip meat without suffering pain and he would be at risk of further injury, directly by cuts or lacerations or indirectly through altered use of the left hand, such as the plaintiff's development of a left medial epicondyle ("golfer's elbow").

**Dr Blenkin**

[78] Dr Blenkin, an orthopaedic specialist called by the defendant, assessed - by reference to the AMA Guides - a similar percentage permanent partial impairment, namely 7% (left thumb), equating to 3% (left hand and upper limb) and 2% for the whole person, respectively.

[79] He was asked about the adequacy of the thumb and referred to the injury being in the dorsal aspect of the thumb, just short of the end joint. There was stiffness in the joint as a consequence of healing scar tissue. The injury and repair had reduced the range of most motion of the interphalangeal joint but the plaintiff was able to move the thumb through the functional range of motion and he maintained the ability to grip.

[80] Dr Blenkin was asked about the shoulder surgery performed in 2008. He agreed that he had advised the plaintiff to work at his own pace and to avoid activities that caused pain, such advice being, in effect, unremarkable. However, he said that whilst the plaintiff presented in 2008 in a sincere fashion and did not exaggerate his situation, such was not his view at the consultation in 2012.

[81] He said that the injury to the thumb should not confer the degree of disability claimed. However, he was corrected about the history he was given: he agreed that the word pain was used in reference to the employment as a slaughterman and the word discomfort used in reference to the current employment. He could envisage where a large degree of force would be required through the end of the thumb to hold a large piece of meat.

[82] He said that he did not detect trigger thumb or carpal tunnel syndrome in the examination of the plaintiff in May 2012. Trigger thumb was surgically amenable.

[83] Dr Blenkin considered that the plaintiff's left thumb function was adequate to support him in work as a slaughterman until normal retirement age and without

difficulty. However, by contrast with Dr Cook, he did not have first hand knowledge of abattoirs or task specifics required of employees in such workplaces.

**Mr Little**

[84] Mr Little believed that Mr Andrew Kemp had been non-responsive to the plaintiff's complaints the day after the incident. He considered that the plaintiff was not as thorough in the work of a slaughterman post-injury. He agreed that strength was required in the slaughterman's job, including in the legs. However, he had not observed any issues regarding the plaintiff's shoulder and knee in the time that he worked with him.

[85] He now worked at Fresco's Quality Meats as a butcher and was paid $24.50 per hour with penalties. He spent three days in the plant and two days delivery driving. He had worked with the plaintiff delivering pallets of boxes of meat produce. He said that the plaintiff could only pick up one box by the straps, whereas he was able to pick up two boxes.

**Mr Bacon**

[86] Mr Bacon, the general manager of the plaintiff's current employer, had working experience as a slaughterman and butcher. He said that the non-dominant hand was required to take the weight of the meat. He said he would not employ a person with the plaintiff's disability (reduced grip strength) as a slaughterman.

[87] Mr Bacon considered the plaintiff to be a keen employee, reliable and punctual. He said that after about eight months of employment processing meat, the plaintiff was struggling physically and the use of his hands became less effective. He observed a left hand difficulty. He moved the plaintiff to driving on delivery jobs and worked with the plaintiff at the beginning of that role. He said the plaintiff had trouble with his shoulders and hands, so he moved him again, to a storeman role.

[88] He said that rate of pay for the plaintiff in the production area was $19.50 per hour and driving the delivery truck, $24.50 per hour. He had a practice of not reducing pay if an employee had to move from one position to another. The current hours per week were about 40 to 45, including overtime.

**Mr Neil Kemp**

[89] Mr Neil Kemp had previously worked with the plaintiff in abattoirs. His evidence was adduced by Statement. His daily rate of pay as a slaughterman as at 14 February, 2013 was $234.00 gross per 7.75 hour day (about $30.00 per hour). That figure, for a five day week, equates to about $1,170.00.

[90] In cross-examination by Mr Collins he said the movement of workers to the mining sector created vacancies in the meat processing industry, as did closures of plants. There was a need for visa and backpacker workers to be employed. He described the work of the slaughterman in simple terms: a requirement to take hides off beasts using both hands, standing, reaching up and bending, all at a speed commensurate with the speed of the chain.

[91] However, in re-examination he said that at Thomas Borthwick & Sons Abattoir where he worked as an A-grade slaughterman, there were 29 different slaughter

positions and only a small percentage of them – 3 to 4 - required reaching above the head.

**Rental appraisal of residential accommodation**

[92] One of the material issues in the trial was the provision of the residential accommodation by the defendant to the plaintiff. Two issues arose from this: a rental appraisal and the quantification of any loss as a consequence of the termination of the employment and the loss of free accommodation.

[93] So far as rental appraisal was concerned, there was evidence from Mr Kerrisk (called by the plaintiff) and Ms Connolly (called by the defendant).

[94] Mr Kerrisk, a real estate agent, valued the plaintiff's residential property at Andy Road, Sarina at between $365,000.00 and $385,000.00 as at February, 2013. He also assessed a $400.00 to $420.00 per week potential rental value.

[95] Mr Kerrisk conducted his first rental appraisal of the more substantial house on the abattoir property that had been occupied by the plaintiff, in October, 2012 without an inspection of the property. The second rental appraisal was done in February, 2013 with a viewing of the house. He agreed that its location next to the abattoir could affect its rental. He did not see any hazards in respect of the house and did not take into account any insurability issues. He said he would need to conduct an inspection to say whether it had become uninhabitable.

[96] Mr Kerrisk initially considered a rent of between $400.00 and $450.00 per week would have applicable in December 2010. There had been considerable demand for rental properties in the area as a consequence of the expansion of coal port facilities. However, in his second report he said there had been a downturn in the mining industry which had affected the rental market in Mackay and Sarina and he revised his rental appraisal to about $300.00 to $350.00 per week.

[97] Ms Connolly, a property consultant, inspected the house in February 2013. She gave evidence of the rentals in Mackay being between $350.00 and $700.00, and at Sarina being about $80.00 per week less than in Mackay. At Baker's Creek the rental was about $580.00 per week. As a property consultant she would insist on property owners' insurance. She denied that the appropriate rental was $300.00 to $350.00 per week, as was appraised by Mr Kerrisk. She gave evidence of the number of residential house vacancies in each of the above localities.

[98] In her report Ms Connolly believed the house was unsuitable for public rental: she doubted that it was insurable because of its location; she believed the property was a high security risk and potentially hazardous to a tenant; and its location next to the abattoir made the property unsuitable. She believed that the property could only be used as a worker's accommodation or a manager's house. She thought the current rental amount that could be charged to an employee would be $150.00 per week (there having been improvements made by the current occupants), but pre-improvement the rental would have been about $100.00 per week.

**Submissions on damages**

[99] Mr Crowe SC submitted that the plaintiff had suffered a severe injury. By reference to the *Civil Liability Regulation* 2003 in *Schedule 4* he submitted that the

appropriate assessment of the injury for general damages was either Item 116.2 (with an ISV of 11 or 12 in the range of 11 to 15) or Item 116.3 with an ISV of 10 (in a range of 6 to 10). Item 116.2 describes "an injury leaving a digit that interferes with the remaining function of the hand", whilst Item 116.3 describes a "moderate injury to the thumb or index finger causing loss of movement or dexterity". The assessment of general damages in the ISV's are not very different: namely, ISV 10 ($12,950), ISV 11 ($14,600) and ISV 12 ($16,250).

[100] Mr Crow submitted that the incident was directly responsible for the plaintiff's economic loss in the past – his inability to continue to earn the higher income available to a delivery driver.

[101] Mr Collins submitted that the injury was minor. He had suffered other knife cuts to his hand over a long period. The evidence from Dr Cook about a medial epicondylitis (elbow) was not connected to the incident and was irrelevant. He submitted that the primary reason the plaintiff terminated his employment was the requirement to wear the gloves. He submitted that the plaintiff's reference to a "burning sensation" on the back of the thumb was more readily explicable by recurrent carpal tunnel syndrome or tendonitis. He submitted that the grip strength measured by Dr Green showed little difference between the right hand (42 kg) and the left hand (39 kg).

[102] With respect to past economic loss he asserted that the plaintiff had reasons other than the effect of the injury for terminating the employment. He also referred to the plaintiff receiving a higher net per week wage in the alternative employment that he had found, both at Sarina Crane Hire and at Fresco's Quality Meats and referred to the loss of the job at Sarina Crane Hire because of a failed alcohol test.

[103] With respect to future economic loss, Mr Collins referred to evidence of the plaintiff's need for a knee reconstruction by 55 years of age and the pre-existing rotator cuff shoulder condition, as matters that diminished the plaintiff's future working life. He submitted that the plaintiff was precluded by reason of those other physical conditions from working to age 67 as a slaughterman. In any event, Dr Blenkin had given evidence that the plaintiff could continue to work as a slaughterman, the plaintiff had an acknowledged work ethic and was motivated and could find alternative employment. Hence a modest global sum only ought to be assessed.

[104] With respect to the loss of housing benefit, the defendant relied on Ms Connolly's appraisal of $100.00 per week. Mr Collins submitted that Mr Kerrisk's evidence was of little assistance because he had not inspected the property, although he had acknowledged a significant downturn in the rental market in the Sarina area.

[105] The plaintiff submitted that the rental history of the residence would suggest that the current market value is in excess of $100.00 per week. Hence Mr Crowe SC submitted that the proper finding of the value of the accommodation could be assessed at $300.00 nett per week, taking into account the rental history and the views expressed by Mr Kerrisk and Ms Connolly.

**Discussion on quantum:**

[106] I accept the evidence of the plaintiff and of Mrs Tompkins. They were reasonable and believable witnesses and there was nothing remarkable or out of the range of ordinary expectations about the evidence concerning the injury and its consequences. I accept that the plaintiff has the pain and discomfort in his thumb as described by him and that his ability to grip in a way required for the tasks of a slaughterman are limited as he has described. I accept that he suffered pain when repetitively and forcefully gripping carcasses or large pieces of meat, as was required in the employment as a slaughterman. The evidence supports the conclusion that he is a good employee and motivated to work. I accept that his termination of employment with the defendant was a direct consequence of his inability to continue to work as a slaughterman.

[107] I do not accept the defendant's assertion (Defence paragraph 9) that the plaintiff has failed to mitigate his damages. He has taken sufficient and appropriate steps to mitigate his loss. There was no 'specific course of action' that the plaintiff could have taken but failed to take that probably would have improved his position: See *Iwasaki Sangyo Pty Ltd v Manley* [1996] QCA 408. He tried to continue in his employment as a slaughterman. He left when nothing else was offered to him by the defendant and found alternative employment.

[108] I accept the evidence of Mr Little and Mr Bacon. I considered them to be reasonable in their testimony and truthful. I thought that Mr Andrew Kemp was measured in his testimony but he seemed to be supportive of the plaintiff generally and as an employee. I note that the assertion about the provision and wearing of gloves pre-incident, made in the pleadings, save for the fact of the trial of the use of them, was not borne out by the evidence.

[109] With respect to the medical evidence, I accept the evidence of Dr Cook in preference to that of Dr Green and Dr Belkin. I have made some observations about Dr Green's evidence. Her opinion about the existence of carpal tunnel syndrome was not supported by Dr Belkin or Dr Cook. Dr Belkin and Dr Cook differed in their opinions based on the same objective and historical material. That is not unusual in medical evidence. However, Dr Cook has greater experience of an abattoir workplace and the specific requirements of employee tasks. That experience was made readily apparent in the course of his testimony. The evidence of Dr Cook was also supported by his practical explanation of the tests he conducted and his conclusions about the limitations in thumb movement and grip ability of the plaintiff, and by contrast with Dr Belkin, his moderate and reasonable approach in his testimony and in his reports.

[110] I do not consider that the plaintiff's case agitated an injury that was not pleaded, namely a medial epicondyle (golfers elbow). Dr Cook's reference to that condition seemed to me to be made, in an holistic sense, to demonstrate that the plaintiffs hand was being used in a different way, as a consequence of the injury to the thumb, that impacted on the elbow. The condition certainly is not compensable and, despite Mr Collin's submission, I did not understand Mr Crow SC submitting that it was.

*General Damages*

[111] I do not agree with Mr Collins submission that the injury was minor. At first blush that might appear to be the case, but the severing of the extensor tendon is not a minor injury. On the evidence that I accept, I consider that the appropriate assessment in the Schedule is Item 116.3. and an ISV of 10. I assess general damages at $12,950.00.

*Economic loss*

[112] With respect to economic loss, the percentage impairment that is directly relevant to determining general damages is irrelevant to quantification of economic loss. That quantification is for a judge to determine upon an assessment of the degree of incapacity and discomfort caused by the injury: See *Driver v Stewart & MMI* [2001 QCA 444 per Douglas J at [13].

[113] In *Graham v Baker* (1961) 106 CLR 340, Kitto J wrote:

> "An injured plaintiff recovers not merely because his earning capacity has been diminished but because the diminution of his earning capacity is or may be productive of financial loss".

[114] That case was cited with approval and applied by the High Court in *Medlin v State Government Insurance Office* (1994-1995) 182 CLR 1. Deane, Dawson, Toohey and Gaudron JJ wrote, at page 11:

> "A plaintiff is not precluded from recovering damages for a loss of earning capacity merely by reason of the fact that he or she voluntarily left employment which was unsuitable or in which he or she was unhappy."

[115] The injury was the reason the plaintiff left the defendant's employment. He was no longer suited to work as a slaughterman. It has been productive of financial loss because he could not work as in the production work with his current employer. He started earning a higher wage as a delivery driver, but could not manage the work continuously. He now does fill-in work. He was unable to cope with the lifting and moving of cartons weighing about 10 to 30 kgs. He had to lift the cartons by grasping the strapping, using his four fingers and avoiding the use of his thumb. Mr Little now does that work. Hence the plaintiff has suffered financial loss.

[116] The defendant had submitted that the plaintiff had not demonstrated a loss of income. In other words, he was earning the same or more than he had earned with the defendant and his cessation of employment with Sarina Crane Hire was entirely his own fault.

[117] However, the plaintiff's claim is in respect of an actual loss of income in the balance of the 2010-2011 financial year and the loss of $332.00 net per week that he was paid for a particular delivery run that he did twice a week, in the 2012-2013 financial year and ongoing.

***Past economic loss***

[118] The claim is for the difference between his income as a leading hand slaughterman at the defendant's abattoir at $950.00 net pw, less his actual income of $20,992.11, in the period 11.08.10 – 30.06.11; and the difference in income currently earned in his employment with Fresco Quality Meats, compared with Mr Little, namely $332.00 net pw. There is no claim for the 2011 – 2012 financial year, because his actual income was slightly greater than $950.00 pw net.

***Future economic loss***

[119] Similarly, the loss of income claimed is $332.00 net per week, calculated as above. The plaintiff's claim under this heading is also predicated on his being at a disadvantage on the open labour market.

[120] However, I doubt on the evidence that the plaintiff could have continued working as a slaughterman until age 68, if that was his intention. He is now only a few days short of age 45 years. He has received advice (as Mrs Tompkins was aware) that he may require a knee operation by age 55 years. He had a previous shoulder operation. Whilst I accept that he has worked without interference or observable limitation from shoulder or knee issues, they nevertheless present as a matter of uncertainty in assessing his current working life expectation.

[121] Whilst I have for that reason contemplated making an award on a global basis (albeit in a much more substantial sum than submitted by Mr Collins), I consider that the appropriate basis of an award of future economic loss, on the evidence, is the sum of $332.00 per week for 15 years to age 60 years.

[122] I have dealt with the loss of housing benefit and the incidence of travel costs (both matters of economic loss, past and future), under the separate headings that follow.

***Loss of housing benefit***

[123] The plaintiff was provided free accommodation in the house on the abattoir property in 2003, in return for his checking cold room facilities at night and on weekends and public holidays. He also took delivery of livestock which arrived at night or on those non-working days. He was required to water the stock. He lived in the house on the property with his wife for about twelve months. He then moved to a second house on the property, which was a more substantial and tidy premises. This was the house that was the subject of the rental appraisal. He was also allowed to utilise about ten acres of the property to run a few cattle and a horse.

[124] The plaintiff had increases in his pay and conditions in 2007, 2008 and in 2010. His 'agreement' with the defendant in July 2010 also included the following:

> "Caretaking Allowance - $100/week – excluding when you are away on Leave (If on leave and you are home and still checking cold rooms it will be paid to you.)
>
> Rental of House - $100/week – to be direct debited from pay to Kemp Meat Holdings Trust Account."

[125] Hence the provision of the accommodation was at no cost to the plaintiff.

[126] The plaintiff seeks allowance in the quantum of damages for the loss of the benefit of housing provided by the defendant. The house on the abattoir property was prior to the plaintiff's occupation, rented through a real estate agent for $100.00 per week. Mr Andrew Kemp gave evidence that he currently rented the house to his daughter for $100.00 per week. That is, of course, the amount per week at which the provision of the accommodation was valued in the 2010 agreement between the plaintiff and the defendant. Ms Connolly referred to a current rental of $150.00 per week that took into account improvements to the house.

[127] However, the defendant submitted that the plaintiff had not demonstrated a loss of income or earning capacity even if his remuneration package was intended to include the abattoir property residence valued at $100.00 per week, because the plaintiff's nett wage with Sarina Crane Hire and his nett wage with Fresco's Quality Meats was greater than that which he had earned in his employment with the defendant. Hence it was submitted there should be no allowance for the benefit of subsidised housing.

[128] Mr Crow referred to *Hayles v Newlands Coal Pty Ltd* BC9704081 (unreported 1997, per Demack J), where his Honour said that a *"housing benefit is an incident of the contract of employment"* and that *"the loss is something which is intimately associated with his earning capacity and consequently has to be assessed at the place he exercised that earning capacity"*; and to *Hansen v BHP-Utah Coal Ltd* BC 9404589 (unreported 1994, per Demack J), where his Honour dealt with this issue of subsidised rental in terms of such advantage being a substantial item for employees engaged in Central Queensland coal fields. In that case he assessed their loss to be the difference between the rental paid pursuant to the employer's subsidy and the rental the plaintiff had to pay during his absence from that employment in another location. Mr Crow also referred to other similar authority.

[129] I do not consider that an arithmetical calculation of a loss of housing benefit is appropriate in the circumstances of this case. The evidence about this issue demonstrated that the market was a fluctuating one and much influenced by the mining economy in Central Queensland. The competing appraisals showed the uncertainties of such calculations. The plaintiff's occupation of the house on the abattoir property was convenient to both parties – they each derived a benefit. In 2010 the agreement was reduced to a form of writing which seemed to address concerns about the incidence of fringe benefit tax and it is not certain that the plaintiff necessarily agreed to the relevant terms in the agreement. The implication of that is that there seems to have been no certainty that he would have continued in occupation of the house. I infer that if the plaintiff had lived elsewhere, his net weekly wage would not in fact have been reduced by $100.00 per week.

[130] Whilst the plaintiff had done some work on the house, post incident and with help from others, he and his wife had purchased a home in Sarina on acreage shortly before he resigned the employment. They now reside there. Hence there are a number of factors that make the issue of the loss of benefit of the house uncertain. The cases relied on by Mr Crow SC seem to have involved housing subsidies that formed part of a formal remuneration package. The arrangement in this case was more informal.

[131] It is for those reasons that I do not accept that there is a loss in the calculated terms that the plaintiff contends for. I accept that the plaintiff may have remained in the house for a period of time. On the other hand he may have moved to live in the new home in Sarina. There is no evidence that the plaintiff had purchased the house in Sarina for investment purposes as distinct from his and his family's own residential purpose, even though Mr Kerrisk had appraised a potential rental value for it. That appraisal is influenced by the same market uncertainty that I have referred to.

[132] I assess a global sum for the past of $10,400.00 (the equivalent of $100.00 pw for two years) for this head of damage and nothing for the future.

***Travel costs***

[133] The plaintiff has incurred additional costs in finding employment after he left the defendant – That he was had to seek employment was an obligation imposed by his duty to mitigate his damages, an obligation he performed. See *Henderson v Dalrymple Bay Coal Terminal* [2005] QSC 124.

[134] Ms Lueg's report about travel costs is exhibit 8. She was not required as a witness. Hence her calculations were not challenged by Mr Collins, although liability for this head of damage was denied by the defendant. That denial I infer is predicated on Mr Collin's submission that the plaintiff was the maker of his own misfortune in losing his employment with Sarina Cranes and therefore if he had to travel further afield to find work the defendant should not have to bear the cost of that travel. The plaintiff was, as I have said above in respect of future economic loss, more recently offered employment in Sarina by the same employer, but he declined the offer.

[135] The calculations made by Ms Lueg are uncertain in this head of damage too: for example, the age of the plaintiff's vehicle and the recalculation required, which is said to be 'illustrative' and is based on assumptions which Ms Lueg describes as 'selective'; risk factors that are said to be 'average; the base kilometre cost of the ATO figure, where there is some uncertainty expressed as to how the ATO calculated it; and Ms Lueg's reference to the 2012 RACQ Report, which she also used as an information source, that gave an 'indicative' per kilometre cost.

[136] The plaintiff may have brought about, by his own error of judgment, the termination of his employment at Sarina Crane Hire. However, I do not consider that releases the defendant from liability per se for travel costs, because I have found that the defendant is liable for the incident and that the plaintiff resigned from his employment at the abattoir as a consequence of his injury and his inability to continue to work as a slaughterman.

[137] The issue is what quantum should be assessed for this head of damage. The uncertainty inherent in Ms Lueg's calculations, to which I have referred, even though the content of exhibit 8 was not challenged by Mr Collins, make an assessment on an arithmetical basis inappropriate. I assess a loss on the basis of $75.00 pw which I consider to be a more representative cost, in an holistic sense, but only for the past (that is, 2.9 years). I make no assessment for the future because the plaintiff, whilst he did not think he could return to do the work at Sarina Crane Hire, citing hand and shoulder issues, had been able to do that work,

with modifications as he does in his current employment, after leaving the defendant's employment.

***Other heads of damage***

[138] There is nothing controversial about the other heads of damage or quantum assessments and there is no reason not to award as special damages the modest sums expended by the plaintiff personally.

**Quantum assessment**

[139] I conclude the assessment of damages as follows:

| | | | |
|---|---|---|---|
| General Damages | | | $12,950.00 |
| Interest | | | nil |
| Special damages: | Workcover Queensland | | $17,227.25 |
| | Plaintiff | | $842.15 |
| Interest on $842.15 (x 1.7% x 2.9y) | | | $41.51 |
| Past economic loss: | | | |
| Income | | | |
| ($332pw x 127 w) | $43,635.89 | | |
| Housing benefit | | | |
| ($100pw x 2.9y) | $10,400.00 | | |
| Travel costs | | | |
| ($75 x 52w x 2.9y) | $11,310.00 | | $65,345.89 |
| Interest (1.7% x 2.9y) | | | $3,246.94 |
| Loss of superannuation (past) | | | |
| ($ $43,635.89 @ 9%) | | | $3,927.23 |
| Future economic loss: | | | |
| Income | | | |
| ($332pw x 15y–10%) | | | $233,064.00 |
| Loss of superannuation (future) | | | |
| (10% of $233,064.00) | | | $23,306.40 |
| Fox v Wood | | | $1,045.00 |

| | |
|---|---|
| Future Pharmaceutical expenses | |
| ($4.95pm/1.14pw x 41y) | $1,055.00 |
| G v K | nil |
| Total before refund | $360,051.37 |
| Less Workcover Queensland refund | $($22,937.82) |
| TOTAL | $337,113.55 |

**Orders**

1. I give judgment for the plaintiff, in the sum of $337,113.55.

2. Defendant to pay plaintiff's costs on the standard basis as from the date of the final written offer on 16 July 2012.