SUPREME COURT OF QUEENSLAND

CITATION:	*Kemp Meats Pty Ltd v Tompkins* [2014] QCA 125
PARTIES:	**KEMP MEATS PTY LTD** **ACN 088 931 024 as trustee for the** **KEMP MEAT TRUST** (appellant) **v** **KEITH LOUIS TOMPKINS** (respondent)
FILE NO/S:	Appeal No 7438 of 2013 DC No 294 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	30 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	4 March 2014
JUDGES:	Margaret McMurdo P and Holmes and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed.** **2. The judgment given below in the amount of $337,113.55 is set aside.** **3. The parties have leave to deliver written submissions (no longer than three pages) within fourteen days concerning the amount for which judgment should be given in conformity with the court's reasons and as to costs**.
CATCHWORDS:	TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – PARTICULAR CASES – OTHER CASES – where the respondent slaughterman sustained a workplace injury while employed at the appellant's abattoir – where the respondent was awarded judgment in the sum of $337,113.55 – where the appellant accepted liability for the respondent's injury but alleged that his negligence in failing to wear cut-resistant gloves provided to him contributed to the injury – whether the appellant had "properly instructed" its employees to use the gloves for the purposes of s 305H(1)(b) of the *Workers' Compensation and Rehabilitation Act* 2003 – whether the respondent was "provided" the gloves for the purposes of s 305H(1)(b) or s 305H(1)(c) of the *Workers' Compensation and Rehabilitation Act* – whether the trial judge erred in finding that the respondent had not contributed to his injury

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – METHOD OF ASSESSMENT – GENERALLY – where the respondent suffered personal injury in the course of his employment – where the respondent was awarded judgment in the sum of $337,113.55 – whether the respondent's pre-existing shoulder injury was properly taken into account in the award of damages for past and future economic loss – whether there was evidence justifying a finding of loss of income by virtue of his loss of the opportunity to carry out more highly-paid employment – whether there was error as to the period over which any such opportunity was lost – whether there was error as to the period over which the respondent was entitled to compensation for increased expenses

Civil Liability Act 2003 (Qld), s 55
Civil Proceedings Act 2011 (Qld), s 61
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 305F, s 305H

Ballesteros v Chidlow [2006] QCA 323, cited
Purkess v Crittenden (1965) 114 CLR 164; [1965] HCA 34, applied
Watts v Rake (1960) 108 CLR 158; [1960] HCA 58, applied

COUNSEL: R Treston QC for the appellant
G F Crow QC, with S J Deaves, for the respondent

SOLICITORS: BT Lawyers for the appellant
Macrossan & Amiet for the respondent

[1] **MARGARET McMURDO P:** I agree with Holmes JA's reasons for allowing this appeal and with the orders proposed.

[2] **HOLMES JA:** On 17 July 2013, the respondent, Mr Tompkins, received judgment in the sum of $337,113.55 for a workplace injury sustained in the course of his employment as a slaughterman in the appellant's abattoir at Sarina. The appellant, Kemp Meats Pty Ltd, appeals in relation to liability, on the ground that the trial judge erred in not finding that negligence on Mr Tompkins' part contributed to his injury, and in relation to quantum, on the basis of a number of findings said to be erroneous.

The accident and injury

[3] Mr Tompkins had spent his working life from the age of 14 in the meat-processing industry. He was 42 years old when he was injured on 9 August 2010. For the previous decade, he had worked as a slaughterman in Kemp Meats' abattoir, for most of that period as a leading hand, and at the time of his accident had a supervisory role on the slaughter floor. He was injured while he was using a knife to gut a pig suspended from a chain. He found that he needed extra force to detach the animal's lungs from its rib cavity. As he applied that force using his right hand,

his knife slipped and cut the extensor tendon of his left thumb. He was left with a limited capacity to bend the thumb, which affected his ability to grip.

[4] Dr Cook, an orthopaedic surgeon who had examined Mr Tompkins' hand, said that his inability to bend the thumb would

> "make it more difficult for him to grip any objects that are smooth or slippery because a large object sitting in the space between the thumb and the fingers tends to be pushed out rather than have the thumb and the fingers combine [to] curl around it".

In consequence, he was unlikely to be able to work efficiently as a slaughterman, slicer, boner or butcher, or in any other physical manual work which involved gripping and holding objects with the left hand. Mr Tompkins left his employment with Kemp Meats in February 2011 because of his difficulty gripping carcasses and the pain he experienced in his left hand when he did so.

Contributory negligence

[5] Mr Tompkins pleaded, in essence, that the injury was caused by Kemp Meats' negligence in not requiring slaughtermen to wear "cut-resistant" gloves. Kemp Meats accepted liability, but alleged that Mr Tompkins' negligence in failing to wear cut-resistant gloves provided to him contributed to his injury.

[6] Section 305H of the *Workers' Compensation and Rehabilitation Act* 2003, which deals with contributory negligence, provides, inter alia:

> "(1) 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…"

The relevant standard of care required of the injured worker is that of a reasonable person in his or her position[1] and the issue is to be decided on the basis of what he or she "knew or ought reasonably to have known at the time".[2] The legislation does not alter the common law position that the onus of proof in this respect rests with the employer.

[7] There had previously been a trial of cut-resistant gloves in the abattoir; the evidence was that the slaughtermen did not take up their use because they found they impeded the cutting process. This exchange took place between Mr Tompkins and counsel for the respondent on the subject:

> "See, what I'm going to suggest to you is that earlier than this time, earlier than the time you were cut, there was a meeting at the – at Kemp Meats where there was a discussion about wearing gloves and

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1 Section 305F(2)(a).
2 Section 305F(2)(b).

> most of the workers were opposed to wearing gloves; would you agree with that or not? - - Yeah, I do remember something about that, yeah.
>
> Okay. And were you part of that meeting? - - Yeah. We had a discussion about it because I said to Andrew that I think you'll find that it'll probably create other problems like, you know, like having to try and grip with a surgical glove, if you know what I mean.
>
> Yes. All right. Now, you were opposed to the notion of wearing gloves before this injury to your thumb, weren't you? - - Yeah. I wasn't – yeah. Only because – I tell you – I tell you one of the reasons, Mr Collins. I've had carpal tunnel - - - - -
>
> Mmm?- - - - - - -and I never want it back again."

Mr Tompkins' unchallenged evidence was that of the three sets of gloves bought for the trial, one was too small for use. After the failed trial, the gloves were kept in a cupboard in the boning room, where the boners used them to keep their hands warm.

[8] A director of Kemp Meat, Mr Andrew Kemp, explained that the abattoir's slaughtermen had expressed concerns about their ability to grip with the gloves on, because it was necessary to wear plastic gloves over them. They also complained that they risked developing repetitive strain injury. Because of the workers' objections, he had not made use of the gloves compulsory in the abattoir before Mr Tompkins' accident, but after it, on WorkCover's advice, wearing them became mandatory.

[9] The trial judge made these findings concerning the use and non-use of the cut-resistant gloves. When they were trialled at the abattoir, only three pairs, in three different sizes (small, medium and large), were made available for 13 knife workers on the slaughter floor. The slaughtermen had a meeting at which they discussed the gloves' use and decided against it, something which was accepted by Mr Kemp, who did not enforce their use. Kemp Meats knew of the risk of injury to the non-dominant hand of a slaughterman using a knife to perform the gutting operation. When employees indicated their opposition to wearing cut resistant gloves, Kemp Meats acquiesced. The wearing of the cut-resistant gloves did have the effect of reducing efficiency and strength of grip in holding wet carcasses. It was immaterial that Mr Tompkins was a supervisor trained in workplace health and safety, given Kemp Meats' attitude in not insisting on the wearing of the gloves. The wearing of the gloves was made mandatory only after the accident. On the basis of those findings, his Honour concluded that there was no contributory negligence on Mr Tompkins' part.

[10] Kemp Meats contended here that Mr Tompkins was aware of the risk of injury from knife cuts; his evidence was that he had worked in the meat industry for some 27 years by the time of his accident and had had a number of such cuts over the years. He knew the gloves, designed to reduce the risk of injury, were available but refused to wear them, although there was no practical reason why he could not do so, other than his notion of developing carpal tunnel syndrome. Section 305H(1)(c) and, "arguably", it was said, s 305H(1)(b) applied.

[11] There are, in my view, two flaws in Kemp Meats' argument. The first, which concerns s 305H(1)(b), is that it is clear from Mr Tompkins' evidence that it was not

simply a matter of his concern about developing carpal tunnel which had made him opposed to wearing the gloves; like the other workers, he had concerns about his capacity to grip. Those disadvantages founded the workers' resistance to wearing the gloves, which was, on Mr Kemp's evidence, something the employer accepted. It can hardly be said, then, that Kemp Meats had "properly instructed" its employees to use the gloves.

[12] Secondly, Mr Tompkins' evidence that there were only two sets of wearable gloves, both kept in the boning room and used by the boners, was not contradicted. In those circumstances, Mr Tompkins cannot be said to have been "provided" with the gloves for the purposes of either s 305H(1)(b) or s 305H(1)(c). There was no error in the trial judge's conclusion that Mr Tompkins had not contributed to his injury.

Mr Tompkins' post-injury work history

[13] After Mr Tompkins sustained the injury on 9 August 2010, and with a fortnight's interruption for surgery, he continued to work for Kemp Meats over the next few months. He eventually gave notice because of his pain and disability, receiving his last pay on 7 February 2011. On leaving Kemp Meats he immediately obtained employment at a Sarina crane hire company. For the first half of 2011, he trained as a dogman, but lost that employment when he failed an alcohol test. On 24 August 2011, he obtained a position in Fresco's Quality Meats' meat-processing plant at Glenella, about 40 kilometres from Sarina, where he continued to reside.

[14] Initially, Mr Tompkins worked on the production floor at the Glenella plant, but found that he had difficulty gripping. Recognising the problems he was experiencing, Fresco's moved him to a new position as a meat truck delivery driver. It seems that move took place in the early part of 2012; Mr Tompkins was able to maintain the new duties for only four months until about the middle of the year. He experienced increasing difficulty in carrying the cartons of meat, which weighed between 10 and 30 kilograms. (The cause of that inability was the subject of contention.) His employer again changed his duties, this time assigning him to a storeman's position at the plant, a job in which he remained at the time of trial. Fresco's had offered him an adult apprenticeship as a butcher, but because of the knife work involved, he felt unable to take it up. In September 2012, he was offered employment once again by the Sarina crane hire business, but declined because of difficulties with both his thumb and his elbow.

Loss of housing

[15] Mr Tompkins had lived in a house belonging to Kemp Meats at the abattoir until he gave up his employment there in early 2011. The loss of the benefit of that accommodation formed part of his claim for damages. In his evidence, Mr Kemp said that before Mr Tompkins had occupied the house, it had been rented for about $100 per week. The arrangement he reached with Mr Tompkins was that the latter would pay $100 per week for the property but would receive a caretaking allowance in the same amount, so that effectively he paid nothing. Mr Kemp's daughter currently rented the property for $100 per week.

[16] A number of real estate agents gave estimates of the rental value of the property. The evidence of two of them - one who put the value between $400 and $420 per week and another who estimated it at between $250 and $280 per week - was given only in the form of letters. Nothing indicates that either actually inspected the

property. The first made it clear that the estimate was based on rental rates for properties in the area, while the second referred to having had "the opportunity to appraise" the property, but did not say whether that was by inspection or simply by being provided with its details. A third agent, who put the property's rental value at between $300 and $350 per week, was called for Mr Tompkins and cross-examined. He had seen the property from the exterior only; he said that it would require an inspection to determine whether it was in fact rentable. He had seen it on a Sunday and could not say whether the abattoir was operating at the time.

[17] The remaining agent, who gave evidence in Kemp Meats' case, had inspected the house. She expressed her view that it was not suitable for general letting because of the "horrendous" noise and smell resulting from its proximity to the abattoir, because of its poor security and because she did not think it would be insurable. Its current residents had improved it to a condition in which she thought it could be rented to Kemp Meats' employees for $150 per week; prior to those improvements it would have been worth $100 per week. The agent identified the security risks as being the risk of theft and of injury to a tenant. She did not know whether in fact it had public liability insurance. (Mr Kemp, on the other hand, said that he had been able to get insurance.)

Travel costs

[18] Mr Tompkins claimed the cost of travel from his residence at Sarina to his workplace at Glenella on the basis of an actuary's report. The actuary relied on an RACQ table to arrive at an average running cost for an older Holden utility of the type Mr Tompkins drove of 89 cents per kilometre, giving a loss of $305.78 per week, calculated on the distance Mr Tompkins drove to his workplace. Those figures allowed for the costs of registration, insurance, depreciation, fuel costs, repairs and servicing.

The trial judge's quantum findings

[19] The trial judge calculated Mr Tompkins' past economic loss as including a loss of income of $332 per week over a period of 127 weeks; that is to say from the date he left Kemp Meats' employment until the date of judgment. The figure of $332 nett per week was based on the difference in income (as evidenced by a payslip for each) between what Mr Tompkins was presently earning as a storeman and what one of his co-workers, Mr Little, who now performed the delivery run, received.

[20] The trial judge assessed the loss of benefit in the form of the company-owned house at $10,400, which equated to an allowance of $100 per week for two years, presumably starting with Mr Tompkins' departure from the property when his employment with Kemp Meats ended. His Honour said that there were a number of uncertainties concerning Mr Tompkins' occupation of the house and its rental value. The market in central Queensland was a fluctuating one. There was no certainty that Mr Tompkins would have continued in occupation of the house; the arrangement with his employer was informal and Mr Tompkins had, shortly prior to his resignation from Kemp Meats' employment, bought a house in Sarina with his wife.

[21] His Honour allowed the additional travel costs Mr Tompkins had incurred at $75 per week over a period of 2.9 years (from the date of accident to trial). He made no award for the future on the basis that Mr Tompkins had been offered, but had refused, another job with the crane hire firm in Sarina, where he lived.

Although Mr Tompkins had said he did not think he could return to do that work, he had previously been able to undertake it.

[22] The trial judge made this finding in relation to Mr Tompkins' future working prospects:

> "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."

As he had for past loss, his Honour based the award for future economic loss on the figure of $332 per week, allowing that amount for 15 years (until Mr Tompkins reached age 60). He arrived at a total of $233,064 by multiplying the figure of $332 (per week) by 52 (weeks per year) by 15 (years to age 60) and then subtracting 10 per cent to allow for contingencies.

The delivery-driving income as the basis for the economic loss award

[23] Kemp Meats argued that the figure of $332 per week used to calculate past and future economic loss was untenable, as were the periods over which those losses were calculated. Firstly, Kemp Meats complained, there was no evidence to show what Mr Tompkins was actually paid for the delivery run. He and Mr Little each produced a single pay slip dated 18 February 2013, without evidence that either document was representative of the worker's hours of work.

[24] Secondly, the trial judge's finding that Mr Tompkins had lost the delivery-driving income because of the damage to his thumb was wrong; he would have been unable to maintain that employment because of a pre-existing shoulder injury. The trial judge had failed to give proper consideration to the report of an orthopaedic surgeon, Dr Shaw, admitted by consent. It related to a right shoulder injury which Mr Tompkins developed over some months in 2006 as a result of heavy lifting, shifting carcasses and offal tubs in the abattoir. After worsening pain, he sought medical treatment in late 2007, and rotator cuff impingement and a tear of the right supraspinatus tendon were diagnosed. In January 2008, he underwent a right shoulder acromioplasty, rotator cuff repair and excision of the outer clavicle.

[25] Dr Shaw gave a report on the injury on 9 September 2008. He gave this prognosis:

> "Mr Tompkins can expect some improvement in his pain in the right shoulder. However he is likely to experience a permanent restriction in motion in this shoulder. Future duties will be limited. I recommend that he not undertake heavy lifting greater than 15kg and should avoid lifting over head height. Unless Mr Tompkins can locate employment where these restrictions are adhered to it is unlikely that he will be able to continue heavier work beyond 45 years of age. If he continues in his current duties, he will need to leave his current employer within five years. If his duties can be permanently restricted to a lifting limit of 15kg and avoid lifting,

> pulling and pushing with his right arm away from the side or overhead, he should be able to continue in this occupation until 55 years of age. I anticipate he would then be permanently restricted to light physical and sedentary work."

[26] Elsewhere in the report, Dr Shaw assessed Mr Tompkins' whole person impairment from injury and surgery at 12 per cent. He observed that Mr Tompkins would be left with a functional incapacity so far as lifting and overhead activity with his right arm were concerned. He should minimise or avoid many of the activities involved in his occupation; "pulling or pushing weights with his right arm held forwards or outwards" and "lifting with the right arm high overhead" were specified. Dr Shaw concluded:

> "If Mr Tompkins needs to continue in his current duties, which require him to intermittently perform slaughterman duties, I anticipate he will need to leave this occupation in around five years.
>
> If Mr Tompkins is able to restrict his work duties to a lifting limit of 15kg and avoid pulling and pushing carcasses, carrying carcasses and heavy tubs of offal, I anticipate he would be able to continue working in this occupation until 55 years of age."

[27] Dr Cook, who gave evidence on behalf of Mr Tompkins, was asked about Dr Shaw's findings. He said that he could not respond to Dr Shaw's conclusions as to the effect of the shoulder injury without a history, an examination and x-rays. However, asked whether the physical difficulties Dr Shaw had identified would restrict Mr Tompkins' long term capacity to work as a slaughterman, he responded "not necessarily".

[28] Kemp Meats argued that the trial judge's finding that the "shoulder...issues" were a "matter of uncertainty in assessing [Mr Tompkins'] current working life expectation" was wrong, because Dr Shaw had described the condition's probable effect on future incapacity with reasonable precision.

[29] The manager of Fresco's meat-processing plant gave evidence about the period during which Mr Tompkins had worked as a delivery driver. He had started off driving a small truck, but with increases in orders and the volume of meat to be delivered, a bigger truck was bought and the number of days a week during which deliveries were made was increased from one to two. The manager observed that

> "...after a period of time [Mr Tompkins] - back - came back and was really, really struggling with the shoulders and his hands lifting and moving stuff from the truck. So I moved him into - I made an allowance and moved him into the warehouse - into a warehousing role position."

[30] For Mr Tompkins, it was pointed out that the plant manager had originally provided a letter which described Mr Tompkins' difficulties with the delivery job as resulting from his thumb injury. That letter had confirmed that he was working about 10 hours fewer per week in the storeman role than he had as a delivery driver. The trial judge was entitled to prefer that evidence to the manager's evidence at trial that Mr Tompkins was also having problems with his shoulders. It was up to Kemp Meats to disentangle Mr Tompkins' disabilities and their causes.[3]

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[3] *Watts v Rake* (1960) 108 CLR 158 at 160.

The submissions on past economic loss

[31] The trial judge awarded past economic loss at $332 per week over a period of 127 weeks, i.e. from the date Mr Tompkins left his employment with Kemp Meats in early February 2011 until judgment. However, the opportunity to work as a delivery truck driver only arose in early 2012 and Mr Tompkins was in that role for about four months. Indeed, his claim for loss between the date of the accident and 30 June 2011 was purely based on the difference between what he actually earned and his pre-accident income, and the trial judge had himself observed that Mr Tompkins made no claim for the following 2011/12 financial year, because he had earned more than he would have with Kemp Meats. Kemp Meats argued that Mr Tompkins could recover no more than the amount he had been paid by way of WorkCover compensation and a *Fox v Wood* component totalling $5,710. No amount should be awarded for the loss of work as a delivery driver because it was an occupation requiring heavy lifting of more than 15 kilograms, something which Dr Shaw had said he could not continue to do.

[32] Mr Tompkins conceded that there had been an error in the assessment of past economic loss. Nonetheless, he was entitled to an award representing the difference between what he would have earned as a Kemp Meats slaughterman and what he in fact earned in the 2011 financial year: a loss of some $8,168.39. For the 2013 financial year and the two weeks thereafter up to judgment, his loss was properly calculated at $332 nett per week, the difference between his actual income and what it was said he would have received delivery-driving.

The submissions on future economic loss

[33] Kemp Meats contended that the learned trial judge should not have assessed future economic loss by reference to delivery-driving, given Mr Tompkins' inability to lift weights. And it was clear from Dr Shaw's evidence that five years from the date of his first report (given in September 2008), Mr Tompkins would have had to give up work as a slaughterman in any event. There was a second aspect of error in his Honour's conclusions. Section 61 of the *Civil Proceedings Act* 2011 required that damages assessed for future loss represent the present value of the loss, calculated using a five per cent discount rate. Had the trial judge assessed the future loss according to that formula he would have arrived at a figure of $184,260, which, further discounted by ten per cent to allow for contingencies, would have resulted in an award of $165,834. The figure for future loss of superannuation, which represented ten per cent of the future economic loss award, would similarly require adjustment.

[34] Counsel for Mr Tompkins conceded that the judge erred in failing to apply a five per cent discount as required by s 61 of the *Civil Proceedings Act* in assessing his future loss of earnings, so that the figure for future economic loss should be reduced, with a consequential reduction in the amount allowed for future loss of superannuation benefits. He submitted that an amount for future loss of $184,260, calculated on the five per cent tables without any further deduction, or, alternatively, of $165,834, adopting the trial judge's further discount, represented in either case a modest allowance for the respondent's incapacity to continue to work in meat-processing. He had been employed in that industry since the age of 14 and had worked his way up to the position of supervisor. Before his accident, he had earned $910 nett per week and had lived in a house provided by Kemp Meats, whereas he had now to drive from his home in Sarina to his employment, his fuel alone costing about $90 per week.

[35] Kemp Meats took no issue with the awards for loss of the housing benefit and travel costs except as to the periods over which they extended. They coincided with the period for which Mr Tompkins was being compensated for loss of the delivery-driving income (which he could not have earned had he remained living and working on the abattoir premises and not journeyed to work); and the award of travel costs for 2.9 years failed to recognise that those expenses had only been incurred since 24 August 2011, when he began work at Glenella.

[36] Mr Tompkins, on the other hand, contended that although the period of the assessment was incorrect by some 12 months, the awards themselves were appropriate. The actuary had calculated his weekly travel costs at $305 per week. Over the 54 weeks which should have been allowed, the allowance at that rate would have been $16,512. No change, accordingly, should be made to that award. Mr Tompkins should have received compensation for the loss of his rental house for 127 weeks at $300 per week, rather than the $100 per week which the trial judge allowed. The evidence of the real estate agent on which his Honour had based that weekly figure should have been rejected in favour of the other agents' higher estimates, because she had wrongly supposed the property to be uninsurable.

The use of the pay slip evidence

[37] The two pay slips tendered as demonstrating the difference between the overtime earnings of Mr Little, in the delivery-driving job, and Mr Tompkins, once relegated to the storeman's role, certainly did not amount to extensive evidence. However, there was no objection to their admission, and it was not suggested to either man at the trial that the figures shown were not representative of his income.

[38] Mr Little gave evidence that on the two days he performed the delivery run, he worked 14 hour days. The pay slips indicate that the ordinary working week was 38 hours (i.e. 7.6 hours per day), so it can be assumed that on the two days in question, Mr Little was performing about 6.5 hours overtime each day. His pay slip shows that in all he worked 21 hours overtime in the week for which the pay advice was given. Mr Tompkins, on the other hand, worked 9.2 hours overtime. Given that they were being paid at the same hourly rate, the difference in their nett pay is consistent with its representing an extra 11.8 hours that Mr Little performed that week in overtime on the truck run. (Fresco's plant manager had estimated the overtime involved at about 10 hours.)

[39] However, the year-to-date earning figures on the pay slips showed that, averaged over a period of 33 weeks, Mr Tompkins had earned just $49 per week less than Mr Little. Kemp Meats sought to argue from that averaging process that the $332 figure was unreliable. Its reasoning was undermined, however, by the fact that there was no evidence that Mr Little had been performing the delivery run over the 33 week period, nor, indeed, any evidence at all as to when he had commenced to perform it. It was not a necessary inference that he had begun to do the run when Mr Tompkins ceased it.

[40] Mr Tompkins' quantum statement, which in accordance with northern custom was tendered as evidence, asserted a loss of $332 nett per week and claimed a loss for the 2012/13 financial year on that basis. Kemp Meats did not at trial take issue with the weekly figure, relying instead on a more general submission that his injury was not a significant one and did not prevent him continuing in his present occupation,

while any shortening of his working life was likely to be brought about by other conditions such as the shoulder injury. In circumstances where there was no challenge to the asserted significance of the pay slips, the trial judge could properly rely on them as evidence of the difference between what Mr Tompkins could have earned as a delivery driver and what he was earning as a storeman.

The effect of Dr Shaw's evidence

[41] To displace Mr Tompkins' case that the thumb injury had produced economic loss, Kemp Meats relied on the evidence of Dr Shaw. For it to succeed in that regard, it was necessary that:

> "both the pre-existing condition and its future probable effects or its actual relationship to that incapacity… be the subject of evidence… which, if accepted, would establish with some reasonable measure of precision, what the pre-existing condition was and what its future effects, both as to their nature and their future development and progress, were likely to be."[4]

[42] Kemp Meats' argument that Mr Tompkins would not have worked past 45 (five years from the date of Dr Shaw's report) as a slaughterman effectively proposes that the trial judge should have looked at the report in isolation from the evidence as to what Mr Tompkins' duties were and how he was actually managing them at the time he sustained the thumb injury. It was not suggested to Mr Tompkins that the shoulder injury was causing him difficulty in performing his duties as a slaughterman. Mr Little, who ultimately took his position as delivery driver at Fresco's, had also worked with him at Kemp Meats. He said that he had not been aware of Mr Tompkins' having any problems with his shoulders; similarly, Mr Kemp did not suggest any limitations on his capacity to work.

[43] It is to be noted that Dr Shaw considered that it was a combination of occupational activities – lifting weights greater than 15 kilograms and lifting, pulling and pushing with the right arm away from the side or overhead height – which would bring an end to Mr Tompkins' capacity to be employed as a slaughterman. Significantly, there was no evidence that in his work as a slaughterman at the time of his injury, Mr Tompkins was still required to lift carcasses or offal or more generally any item weighing more than 15 kilograms. His evidence was that the workplace had been mechanised so as to reduce the need for heavy manual work. It did not follow, therefore, that the shoulder injury would have cut short Mr Tompkins' working life as a slaughterman at 45 as foreshadowed by Dr Shaw, because the conditions he had identified as producing that result had not eventuated.

[44] But what Dr Shaw's report also established was that Mr Tompkins had a pre-existing shoulder condition which would make his capacity to persist with heavy lifting doubtful. In the circumstances, the trial judge's description of Mr Tompkins' shoulder problems as "a matter of uncertainty in assessing his current working life expectation" understated the issue. Fresco's plant manager's evidence that he was struggling with both his hands and his shoulders tended to confirm Dr Shaw's prognosis that the shoulder injury would interfere with his ability to continue in an occupation involving heavy lifting. It was unrealistic, therefore, to suppose that Mr Tompkins could, in the absence of the thumb injury, have continued in the delivery-driving job, lifting weights of ten to thirty kilograms, for fifteen years. In

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4 *Purkess v Crittenden* (1965) 114 CLR 164 at 168.

light of Dr Shaw's unchallenged opinion, it was an error to allow more than five years' loss in that regard.

Past economic loss

[45] Mr Tompkins was able to demonstrate a loss of $8,168.39 for the 2011 financial year as the difference between what he would have earned as a slaughterman (based on an average of six weeks' pay slips) and what he did earn that year. It was also reasonable that he recover the loss resulting from his inability to continue delivery-driving up to the date of trial; accepting that his employment in that capacity ended in mid-2012, the amount of $17,928.

[46] The figure of $100 per week allowed by the judge for the loss of the housing benefit accorded with what the property had been rented for and the estimate of the one real estate agent who had inspected it. Although the submissions for Mr Tompkins focussed on the estate agent's error about whether it could be insured, that aspect of her opinion would seem to have considerably less bearing on its rental value than questions of its noise, smell and lack of security. In light of the uncertainties identified by his Honour, it was appropriate that there be no award for future loss in that regard. However, the award for past loss contains error and requires adjustment, since it is evident that Mr Tompkins could not have earned the additional delivery driver's income and had the benefit of employee housing with Kemp Meats at the same time. It follows that any allowance for the loss of that accommodation should only be made from 8 February 2011, when Mr Tompkins left that housing, for another 55 weeks up to the beginning of March 2012, about when he commenced the delivery-driving role.

[47] Similarly, Mr Tompkins could not have had the benefit of the extra income from delivery-driving without also undertaking the travel from Sarina to Glenella. In this regard, I think there is something in Mr Tompkins' argument that the amount allowed for travel was inadequate as being less than what he actually expended on petrol. On the other hand, I do not consider the figures proposed by the actuary realistic. Mr Tompkins had plainly had his vehicle for some time. There is no reason to suppose that he would not have continued to own and maintain it in the ordinary course of events, incurring the usual costs of registration and insurance. It seems to me it would have been proper to allow a figure which took into account petrol costs and some proportion of depreciation and repair and servicing costs; say $150 per week. Again, that amount should be allowed only for the 27 week period between 24 August 2011, when Mr Tompkins began work at Glenella, and the beginning of March 2012.

Future economic loss

[48] As I have already indicated, it was an error to suppose that Mr Tompkins could have continued with the delivery-driving job for fifteen years and to award future economic loss on that basis. Given Dr Shaw's uncontested opinion, it would have been reasonable to allow economic loss on the basis of that lost income for the period of a little over a year to trial and thereafter for four years into the future. Using the five per cent table, one arrives at a present value for the loss of $332 per week over four years of $63,080. Given that the period of the award has already been limited by the prospect of physical inability to continue in the role, I see no reason to discount the figure further for contingencies. But while Kemp Meats has succeeded in demonstrating that the award of a weekly amount over fifteen years is

untenable, there is still to be taken into account the longer-term disadvantage to Mr Tompkins in competing on the labour market with the disability resulting from the thumb injury.

[49] Kemp Meats, while resisting any award based on the loss of the delivery-driving income, did not dispute that Mr Tompkins had more generally suffered an impairment of his capacity to earn income which should sound in a global award. At the time of trial he was in stable employment, but, it seems, with an unusually accommodating employer willing to make allowances for his difficulties in grip. Had it not been for his thumb injury, on Dr Shaw's prognosis he would have had a relatively assured future as a slaughterman at least to the age of fifty-five. Given his length of employment and position with Kemp Meats, there seems a strong prospect that he would have been kept on thereafter in physically lighter supervisory work. If, instead, he had to look elsewhere for lighter duties, he would still have been in a better position on the job market had he not sustained the thumb injury. It seems to me that a global award is the proper way to recognise that impairment of his earning capacity and the disadvantage he faces should he need to re-enter the job market in his fifties or sixties.

[50] I would award $75,000 for that loss of earning capacity. Section 55 of the Act stipulates that where an award is to be made for loss of earnings which cannot be "precisely calculated by reference to a defined weekly loss", the court must state "the assumptions on which the award is based and the methodology ... used to arrive at the award". It has been observed that

> "[b]ecause even judges cannot accurately predict the future, the calculation of such an award invariably involves informed guesses…"[5]

[51] The process of arriving at the figure of $75,000 by its nature does not admit of any precision, but my reasoning is as follows. As a storeman, Mr Tompkins presently earns something in the order of $50,000 nett per annum, similar to his previous income as a slaughterman. His claims for future loss were made on the basis that he would remain in the workforce until age 68. His consistent past work history supports a view that he would have sought to work at least until age 65. I assume that he will be able to retain his present employment for another five years, to age 50. Making an "informed guess" that over the decade and a half thereafter there is something in the order of a ten per cent chance that Mr Tompkins will be unable to earn income because his thumb injury prevents him from finding and maintaining employment, I arrive at the figure of $75,000 to represent that curtailment of his earning capacity.

[52] The trial judge's assessment of damages as adjusted in accordance with these reasons would be as follows:

General Damages		$12,950.00
Interest		nil
Special Damages WorkCover Queensland		$17,227.25
Plaintiff		$842.15
Interest on $842.14 (x 1.7% x 2.9 years)		$41.51

[5] *Ballesteros v Chidlow* [2006] QCA 323 at [41].

Past economic loss		
11/08/10-30/06/11 anticipated income $44,896.00 less actual income $36,547.61	$8,168.39	
1/07/12-17/07/13 Loss of delivery-driving income ($332 per week x 54 weeks)	$17,928.00	
Loss of housing benefit ($100 per week x 55 weeks)	$5,500.00	
Travel costs ($150 per week x 27 weeks)	$4,050.00	
Total past economic loss		$35,646.39
Interest (1.7% for 2.9 years)		$1,757.37
Loss of superannuation (past) ($26096.39 @ 9%)		$2,348.68
Loss of delivery-driving income for 4 years ($332 per week x 4 years on 5% table)	$63,080.00	
Global award for disadvantage on labour market	$75,000.00	
Future economic loss		$138,080.00
Loss of superannuation (future) ($138,080 @ 10%)		$13,808.00
Fox v Wood		$1,045.00
Future pharmaceutical expenses ($4.95 per month x 4l years)		$1,055.00
Total before refund		$224,801.35
Less WorkCover Queensland refund		$22,937.82
TOTAL		$201,863.53

[53] The parties should, however, have the opportunity to examine those figures and advise whether they require further adjustment. Submissions in that regard and as to costs should be made within 14 days of this judgment.

Orders

1. The appeal is allowed.

2. The judgment given below in the amount of $337,113.55 is set aside.

3. The parties have leave to deliver written submissions (no longer than three pages) within fourteen days concerning the amount for which judgment should be given in conformity with the court's reasons and as to costs.

[54] **FRASER JA:** I agree with the reasons for judgment of Holmes JA and the orders proposed by her Honour.