DISTRICT COURT OF QUEENSLAND

CITATION:	*Smith v Moore & Anor* [2014] QDC 273
PARTIES:	**AARON CHRISTOPHER SMITH** (Plaintiff) **v** **ANDREW JAMES BLIGH MOORE** (First Defendant) **AND** **AAI LIMITED (ABN 48 005 297 807)** (Second Defendant)
FILE NO/S:	DIS 831/13
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court, Brisbane
DELIVERED ON:	3 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	3-5th November 2014 inclusive
JUDGE:	Ryrie DCJ
ORDER:	**1. Judgment for the Plaintiff in the sum of $66,962.45** **2. The parties are to provide written submissions (maximum 6 pages) as to costs after the expiration of 28 days from the date of publication of this judgment unless the parties otherwise agree.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – assessment of damages pursuant to the *Civil Liability Act 2003* (Qld) *Motor Accident Insurance Act 1994* (Qld) s 52 *Civil Liability Act 2003* (Qld) ss 55, 61, 62 *Civil Liability Regulation 2014* (Qld) s 2(b), sch 7

Allianz Australia Insurance Ltd v McCarthy [2012] QCA 312 – applied

Heywood v Commercial Electrical Pty Ltd [2013] QCA 270 - applied

Malec v J C Hutton Pty Ltd (1990) 169 CLR 638 - applied

Medlin v State of Queensland (1995) 182 CLR 1 - applied

COUNSEL:	P. Rashleigh (for the plaintiff)
	K. Howe with C. Job (for the 1st and 2nd defendants)
SOLICITORS:	McInnes Wilson Lawyers (for the plaintiff)
	Quinlan Miller & Treston Lawyers (for the 1st and 2nd defendants)

Introduction

[1] Mr Smith, the plaintiff in this matter, claims damages for personal injuries and consequential loss suffered by him as a result of a motor vehicle accident which occurred on 8th May 2011. Mr Smith had been riding his pushbike along Boundary Road in West End when a motorist, without looking, opened his parked car driver's side door into Mr Smith's path. Mr Smith swerved unsuccessfully to avoid collision, and was thrown from his bike over the handlebars whereupon he landed on the road. Mr Smith was 26 years old at the time of the accident. He is presently 29 years of age.

[2] Liability being admitted, quantum with respect to damages was the only contest at trial.

[3] It is accepted by the 2nd defendant that the plaintiff suffered an injury to his left index finger. The 2nd defendant does not accept however that the plaintiff suffered an injury to his lumbar spine as pleaded, or at all. The 2nd defendant accepts that Mr Smith has suffered some loss and damage as a consequence of the 1st defendant's negligence. However, the 2nd defendant does not accept that any such loss and damage should include an assessment of any amount for future economic loss and/or impairment of earning capacity in respect of either alleged injury or for that matter, any amount for any future care or treatment.

The Law

[4] The 2nd defendant, being the relevant CTP insurer of the motor vehicle driven by the 1st defendant at the material time, is also responsible pursuant to s 52 of the *Motor Accident Insurance Act 1994* (Qld). The assessment of damages is governed by the provisions of the *Civil Liability Act 2003* (Qld) ('*CLA*') and the *Civil Liability Regulation 2014* (Qld) ('*the regulation'*).

The relevant injuries

[5] The plaintiff's case is that as a consequence of the accident, Mr Smith has suffered two injuries, a fracture to his left index finger including ligament damage to his left index finger and a lower back injury (an aggravation of a pre-existing underlying condition). The 2nd defendant contends even though it is accepted that Mr Smith has in fact suffered a finger injury, it was only minor with minimal residual symptoms. The 2nd defendant also says that there is no causal link at all that can be established, on the balance of probabilities, between any alleged back injury and the subject accident.

[6] Two orthopaedic specialists were called to give evidence at trial, Dr Pentis on behalf of the plaintiff and Dr Journeaux on behalf of the 2nd defendant. Mr Hoey (Occupational Therapist) and Ms Faulks (Bowen Therapist) also gave evidence in the plaintiff's case at trial.

The plaintiff's evidence at trial

The subject accident, the alleged injuries and reported symptomatology

[7] Mr Smith described the impact which his bike had with the car door. He described being dislodged from his cleats and bike, going over the handlebars, landing in the traffic lane and bouncing on one side of his body and then again onto his back (T1-32). He remembered his left index finger and his shin hitting the car door. He thought he was propelled forward about 6 feet. He was taken to the Mater Hospital where he remained for 4 days and surgery was performed on his finger. He was discharged with a cast. He described being sore everywhere while in hospital. He stated his back, body, shoulders and neck were sore (T1-33). He said that he consulted Desley Faulks (Bowen Therapist) regarding his back (first consultation: 12th July 2011) and has continued to undertake a maintenance treatment plan with her in regards to his back. He told the court that he finds her treatment to be the best way to get him back to full mobility as quickly as possible (T1-49).

[8] He described how the pain and the ability to use his hand since the accident has been variable. 'Some days it hurts, some days it's okay' (T1-52**).** If he hits it on something or he bumps it, it flares up**.** He has noticed difficulty in swimming if he hits the pool lane divider, with some household chores that now caused him discomfort and he reports it can get sore after a long day writing (typing)**.** He is dominant right handed**.** He described that when riding his bike he has suffered 'white knuckle fever' where his hands are just constantly vibrating. He stated he got pain and discomfort usually from the roads if their surface was bad enough but now he really feels it in his finger (T1-45)**.**

[9] He also described how the pain in his back was aggravated by long periods of sitting, and that he tries to get relief from Nurofen (tablets or gel) if it gets really bad and if it gets tight he goes to see Desley (Ms Faulks, Bowen Therapist). His main way to cope with his back, he says, has been by exercising.

Sporting Pursuits

[10] Mr Smith told the court that he had started doing triathlons in 2010. He said that he had continued to do both triathlons and ironman events socially ever since (see

Exhibit 7 Sporting Pursuits Chronology). A great deal of evidence was taken up with Mr Smith describing those events to the court, the times which he managed to achieve and the training which goes into preparing for such events. In short, he stated that even though he had continued to perform those events post accident, he had nevertheless experienced difficulty in completing most of the events. He referred to the 'running leg' of the event where he would usually have to walk because of his back causing him problems, or on occasion, not finishing the event at all. During cross examination, Mr Smith nevertheless conceded that notwithstanding those difficulties, a great deal of his spare time still went into training in order to prepare for such events, especially an Ironman event (T2-25). He also confirmed during evidence in chief that he had played touch football from 2004/5 and refereed in this sport a lot as well. He gave evidence that initially after the accident, he was very restricted in what he could do in the way of exercise and that it was only after about two to two and half months after the accident that he was given the all clear and was able to get back initially to refereeing a couple of games.

The Touch Football incident (11 July 2011)

[11] He stated that after he returned to playing his first touch football match on the 14th July 2011 (it was agreed between the parties that it was in fact 11th July 2011) that when diving for a try, something akin to what he had known his back felt like in 2006, let go and at that point, he knew something wasn't right then. He told the court that he had dived for tries like that before (pre-accident presumably) and had not suffered any similar difficulty. He got himself home but needed help and assistance to get out of his car. He went to Desley Faulks (Bowen Therapist) for treatment the next day. He stated that his last treatment between attending upon her that day (12th July 2011) and when he had seen her before that for treatment was 'a couple of years'. He stated that he believed that his last visit to her was for an ankle injury in 2009. He also said that he had not received any treatment for a back injury between finishing with Desley Faulks in 2009 and then suffering the injury in July 2011 (T1-39).

[12] During cross-examination Mr Smith admitted the following salient points. He had not sought treatment for any back complaint between the subject accident occurring up until the time he saw Ms Faulks on 12th July 2011. He believed any 'error' regarding how he had hurt himself during the touch football match the day before (as recorded by Ms Faulks as occurring while running backwards when refereeing, see Ex 4) was her error and not what he had told her. He had suffered excruciating pain as a result of that touch football incident. He maintained that he had mentioned his back pain to the nurses when he was in hospital after the subject accident, even though there was no record of it. He admitted that he had told Dr Journeaux that he couldn't remember having suffered any back pain after the subject accident. Indeed, the medical records available show that Mr Smith made no complaint regarding his back to anyone notwithstanding that he had seen many medical practitioners in the intervening period between the subject accident and the touch football incident. Mr Smith also conceded that he has not had any days off from work at all relating to his back specifically related to the subject accident other than an initial few days immediately after the subject accident.

[13] Exhibit 7 shows the extent and degree that Mr Smith has continued to participate in his sporting pursuits post accident. Within a month he was back to refereeing. Within two months he was playing touch football. He has also continued to pursue

both triathlons and Ironman events which include an extensive weekly fitness program. He has managed to perform these events even post accident, albeit with some difficulty which he described. Nevertheless, as time has gone on, his participation cannot be said to have reduced generally or if at all. Indeed, he recently completed a full Ironman event in Cairns on the 8th June 2014 (T1-80**)**.

[14] The description which Mr Smith gave to both Drs Journeaux and Pentis regarding his continued sporting pursuits after the accident does not sit well with the sporting events he was actually involved in. He told Dr Pentis that he had not returned seriously to triathlons when he saw him on the 16th July 2012 (T2-82). He did not mention the Cairns Ironman event (8th June 2014) at all to him when he saw Dr Pentis again on 14th July 2014. He also told Dr Journeaux during the 22nd June 2012 consultation that he was slowly getting back to triathlons. Dr Journeaux gave evidence that if he was participating in an Ironman event this year, to the magnitude of the Cairns Ironman event, then he believed it would indicate he was functioning at a high level but it was dependant upon an individual's pain tolerance and the like (T2-89).

[15] <u>Pre-Accident reported back complaints</u>

2006 (Ex 6) 2 reported work related claims (involving lower back).

2007 (Ex 6) 13 attendances for lower back complaints.

2008 (Ex 4) Ms Faulks attendances (13 lower back complaints including coccyx).

2009 (Ex 4) Ms Faulks attendances (4 lower back complaints)

2010 (Ex 5) Allsports Physio and Sports Medicine Centre (Red Hill) (1 attendance lower back complaint)

[16] Mr Smith gave evidence relating to the two work related claims which had involved his lower back. He said that the treatment which he received for the latter 2006 injury had continued into 2007. He stated during evidence in chief that he had not had any difficulties completing his duties as an aircraft maintenance engineer since that time (2007) up until the 8th May 2011 (the subject accident) as it related to his back (T1-31). During cross examination on this issue, Mr Smith again stated that he hadn't received any treatment for his back from 2007 onwards. He later conceded however that he had been earlier mistaken in his evidence and that he had in fact been to Ms Faulks for treatment for his lower back during 2008 and 2009 and as such, he had meant to say 2009 to 2011 rather than from 2007 to 2011. He could not explain why he had also told Dr Journeaux that he had had no problems with his back at all from 2007 onwards, particularly when he in fact had been experiencing problems with his back in the many years prior to the subject accident even occurring (T1-78). Mr Smith disagreed with the proposition put to him that he had had a 'grumbling' back in the past even before the subject accident. He pointed that since 2009 onwards it had been fine. In this regard, Mr Smith referred to the fact that he had been doing strenuous activities and performing work without problems since that time (up until the subject accident) (T2-6). When questioned about the entry at the Red Hill Allsports Centre (Ex 5 entry 7/12/2010) regarding a complaint of back pain, Mr Smith stated he simply could not recall it (T2-16).

[17] Mr Smith also conceded during cross examination that he had told Drs Journeaux, Pentis and Mr Hoey that he had only developed back pain some four months after the accident. When asked why he didn't mention to any of the medical practitioners who he had seen after the accident and before the touch football incident regarding any problems with his back, he replied that he 'just didn't' (T2-39).

Working History

[18] Mr Smith's potential working life to age 70 is 41 years. At the time of the accident, Mr Smith was studying full time for a Bachelor of Urban Development which he had commenced in 2009. Mr Smith, who was qualified as an Aircraft Maintenance Engineer, was also working in that field part time. He stated that once he had started his university studies in 2009, he only carried out his aircraft maintenance engineering work part time (T2-44). He described how he would work on weekends and/or during the university holiday periods, in order to provide himself an income. Mr Smith had in fact worked as an aircraft maintenance engineer full time prior to that time. In 2006, he worked full time while he completed his apprenticeship and after he trade qualified in 2008, he began working as a sole trader on a full time basis, contracting for Australian Aerospace doing various contract jobs for them. He subsequently started to work for Aircraft Structural Contractors, where he continued to carry out the same type of work for them on a contract basis as an Aircraft Maintenance Engineer with part time work beginning in 2009.

[19] Mr Smith described in detail to the court what was involved in his actual work as an aircraft maintenance engineer. He stated that his work involved predominantly working with sheet metal, and that it was an all encompassing role for the structural side of the aircraft. His work included having to physically work in the inside of the fuselage, bulkheads, in the fuel tanks, on the tail or inside the wings and the like (T1-28) and therefore a great deal of work involved being in confined spaces (T1-30). He also described having to use various tools of his trade, which included the use of rivet guns and 'dollys' (T1-29). That description was confirmed by other witnesses who gave evidence (Mr McKenzie T2-65 and Mr Scott T2-70). Mr McKenzie was also a licensed aircraft maintenance engineer by trade, confirmed the use of rivet guns, dollys and the general nature of the work itself required the use of both hands, was 'heavy' in nature and that the work required the use of fine motor functions with yours fingers in order to get into confined spaces. That was also confirmed by Mr Scott (who was also a aircraft maintenance engineer, but not licensed) who described a structural aircraft maintenance engineer as 'like a panel beater to the airplane' (T2-70).

[20] At the time of the accident, Mr Smith had been working part time (as a self employed contractor) on the 'MRTT' at the Brisbane airport (an Australian Defense Force project) which required a complete structural modification to a standard A330 in order to transform it into an 'air to air refueler' (T1-31). Mr Smith gave evidence that he had been working on that project as far as he could recall since 2008/2009 and was still doing that work part time up until the point he was injured on the 8th May 2011 (T1-31).

[21] After the accident, Mr Smith had some time off before returning to work at which time he did 2 or maybe 3 shifts prior to going back 'full time' on the MRTT project. Two of those shifts included training for the MRTT project which was essentially completing online programs to keep up to date regarding occupational health and

safety requirements required. The third included working for Toll Aviation doing some light duties. He returned to work in mid July 2011 again on the MRTT project but stated the project had by that time changed, moving from the structural modification stage to the cabin refit stage. That stage involved refitting seats, carpets, floorboards, side panels and the decals. Mr McKenzie who was also working on the same project couldn't remember what stage it was at when Mr Smith returned to work after the subject accident and he was also unable to say what Mr Smith was actually doing because he was working elsewhere. Mr Smith gave evidence that he believed that he only returned to this work for several weeks full time during the July semester in 2011 before commencing a cadet valuership with Asset Val Pty Ltd in August of that year (which was essentially 'unpaid'). He described his working hours at that time to be from 8am to 2pm (with Asset Val Pty Ltd) after which he would continue to work on the MRTT project from 2pm to 10pm but on light duties only and not of the type of work that he was doing before the accident. He stated that because he couldn't commit to the hours required at that stage, he wasn't able to continue his work on the MRTT project as he had done before, so he went to Alliance Airways to work on weekends. That work however again only involved light duties, such as mechanical based checks such as tyre pressure measures, changing emergency exit seats placards and just relatively simple maintenance procedures which sometimes included changing the oil (T1-36). He described how his work at Alliance Airways was a lot more upright and it was different from what he had been previously doing on the MRTT project before the accident, which had required heavy bending and work in strenuous confined spaces.

[22] He told the court of his concerns regarding his prospects of returning now to the type of work which he did before the accident as an aircraft maintenance engineer. He stated that he felt his back and hand would both cause him difficulties now as being able to rivet (and hold a 'dolly') is a fundamental skill for a tradesman (a sheet metal worker) in that industry. He described how he hasn't tested his hand out yet since the subject accident insofar as actually using the rivet gun and dolly but stated that even cutting on a guillotine for invitations for his upcoming wedding or holding something tight hurts his hand. He expressed concerns about having to hold onto a dolly for seven or eight hours at a time and what damage those activities may do to his hand or the likelihood of injury if involved with working in confined spaces (T1-50). Mr Smith said that post the accident, up until December 2011, the weekend work that he had been doing was perfect. It didn't put any pressure on his hand or back and it was fundamentally easy work that involved mundane tasks (T1-51)

[23] Mr Smith told the court how he had travelled overseas from the end of December 2011 until he returned to work in February 2012 for Asset Val Pty Ltd. From that time onwards, Mr Smith then worked full time for Asset Val Pty Ltd as a valuer before taking up full time employment with Hymans Valuers and Auctioneers Pty Ltd in July 2013, also as a valuer. He has continued to remain working full time with Hymans Valuers and Auctioneers Pty Ltd to the present time. During cross examination, Mr Smith admitted that he was working long hours with his current employer (in excess of 100 hours per fortnight on many occasions) and that he had indicated that he wanted to continue working for them full time as a valuer (T1-57). He agreed that once he commenced working full time as a valuer, he could only fit in part time work as an aircraft maintenance engineer. He stated however that even though he had secured full time work with Asset Val Pty Ltd initially as a valuer, he had still put his name down for weekend work in the aircraft maintenance area but

that none was available at that time. That fact was confirmed by Ms Bolton (T3-37) who confirmed that Mr Smith was on the company's books as being available for part time work from November 2011. Ms Bolton also confirmed that Mr Smith had indicated that over the past several years he was not available to do full time aircraft maintenance work as he was working full time elsewhere, thus why he could only manage to do weekend or night shift work if any became available.

[24] Mr Smith confirmed that his current salary as a valuer with Hymans was $65,000 per annum including superannuation, but that he was only working in plant and equipment at this stage. This is because he is not yet qualified as a property valuer, and he will need to undergo further qualification before he can do that. He hopes to get qualified in March 2015 (that is, registered) however rejected the suggestion made under cross examination to him, that once qualified that would mean better remuneration with his current employer.

[25] Mr Smith told the court that the reason he had initially gone back to university in 2009 was to try and open up more options in order to earn an income outside of 'aircraft'. He stated however that it was always his full intention that he would maintain a presence in that field as it was a lot more lucrative than plant, equipment and property valuation. He stated that his ultimate future goal was to set up two companies where he could contract out for plant, equipment and property valuations after he was registered and be certified for that work, enabling him to contract out of Brisbane. He stated he had about another 6 to 12 months to go before he could be fully certified for both property and plant and equipment valuation work. Mr Smith then described how he had also wanted to set up a company (because he and others can no longer trade as a sole trader like before) in order to facilitate his aircraft maintenance engineering work, and that because of the added expense associated with doing so, he could not justify going into that at the moment, but it was something he wanted to set up, going forward into the future (T1-49).

[26] Mr Smith also told the court that his recently changed circumstances had also caused him to consider going back into more aircraft maintenance engineering work (presumably full time or even part time, though the evidence was not clear on this point) in addition to what he was presently doing full time as a valuer. He told the court that he was getting married in 4 weeks and that finances were tight and that his fiancée has been the main breadwinner since the accident, so extra income would be helpful to the family (consisting of himself and his fiancée). He also stated that his fiancée was looking at moving out of her job next year and the uncertainty relating to that, taken with the contingencies involved if she had a child in the next year or the year after, was going to place more financial pressure on the family as a whole and he wanted to take up that slack. He stated that he would do that by finding more aircraft work (T1-52).

[27] During cross examination, Mr Smith reaffirmed his desire to always have his aircraft work available to him as an option, that he had not elected to get out of it for good and that having a second option was not a bad thing and that his intention was always to go back to that industry even after earning his valuer qualifications (T1-84). He rejected the suggestion that he wouldn't have time in his current employment coupled with his sporting pursuits to manage currently doing any weekend aircraft work at all. Mr Smith stated that in his current employment he very rarely did weekend work at all (T2-28).

The medical evidence

[28] Exhibit 1, tendered by consent between the parties, contains the various medical records relevant to Mr Smith's medical history (both past and present). Included in that exhibit are the medical reports provided by Drs Pentis and Journeaux and Mr Hoey. Ms Faulks did not provide a report but nevertheless gave evidence. As part of her evidence, her consultation notes were prepared and tendered (exhibit 4).

[29] The relevant medical evidence may be summarised as follows.

The back injury

[30] Mr Smith did not consult any medical practitioner in respect on any ongoing pain or symptoms relating to his back until he saw Ms Faulks on the 12th July 2011. It was at this time that he also mentioned to her the subject accident. He had however mentioned the subject accident to Physio Feel Fit on the 5th July 2011 but does not relevantly make mention of any lower back pain. There is no record of any reported record of complaint of back pain or symptoms arising as a result of the accident either at the hospital or even subsequently.

[31] Exhibit 4 demonstrates that Mr Smith consulted Ms Faulks during the course of 2008 many times in respect of lower back pain. Some of the entries recorded included references to incidents arising at work at the time he was working as an aircraft maintenance engineer (full time). There were entries again recorded in 2009 involving his back. There were no incidents relating to his lower back again recorded by Ms Faulks after that time until she then sees Mr Smith on the 12th July 2011 in respect of the touch football incident. The entry on that date suggests that Mr Smith was running backwards refereeing when the injury occurred. There is no mention of diving for a try as Mr Smith stated. There is also another entry recorded at the Red Hill Allsports Physio and Sports Medicine Centre on 7th December 2010 (Exhibit 5). Pain in the lumbar spine region was noted. Past history included a notation of chronic lumbar episodes and a reference to an injury to a 'disc at work'. Exhibit 6 confirms treatment at Allsports Physio and Sports Medicine Centre for a back related incident on 25th January 2006 with continued treatment. There was another back related incident at work in September 2006 with continued treatment which extended into 2007. It was noted his back problem only improved when doing light duties such as being moved to a workbench job. His back was again noted as having 'gone out' after Mr Smith bent over to fix a bin bag.

[32] Mr Smith told the court that if his pain or discomfort (to any part of his body) is bad enough he will seek out treatment for it, usually with Ms Faulks (T2-22). The absence of any significant or reported ongoing back pain after the early part of 2009 up until July 2011 in respect of his pre-existing underlying back condition is therefore, in my mind, readily explicable when one has regard to his work history. By 2009, Mr Smith was only ever performing part time work as an aircraft maintenance engineer (with the occasional full time work during university vacation) which in my mind, provides some tangible explanation as to why his pre existing back pathology was being less aggravated by the aircraft work activities he was performing during that period. He also admitted that he would only seek out treatment if it was 'bad enough' which may also explain the absence of attendances.

[33] Dr Journeaux could find no causal connection between the subject accident and Mr Smith's subsequent reported onset of acute lower pain after the touch football match on the 11th July 2011. He confirmed as much in his written reports and again in his evidence to the court (T2-89). Dr Pentis on the other hand opined that Mr Smith had suffered a soft tissue musculoligamentous injury to the region of his thoraco lumbar spine and believed that he had aggravated a pre-existing degeneration and congenital problem with residual impairment. Dr Pentis stated in evidence that sometimes the onset of back pain some months after a subject accident can be masked by other injuries suffered (T2-83). Dr Pentis also proffered that after having regard to the lapse in time between the subject accident, the lack of any reported back pain in the intervening period by Mr Smith and the onset of the reported acute lumbar pain on the 11th July 2011 following the touch football match, then it was possible that either (that is, the subject accident or the touch football incident) could have caused the onset of his current problem, being an aggravation of what was already there.

[34] Having regard to that evidence alone and other factors which I shall soon mention, I am unable to be satisfied on the balance of probabilities that the onset of reported acute lumbar pain on the 11th July 2011 was as a consequence of the subject accident.

[35] In this regard, I have preferred the opinion of Dr Journeaux. Dr Journeaux' opinion accords with the available objective medical evidence that Mr Smith's lumbar back pain only came on months after the subject accident and only as a result of a far more significant injurious event, namely the touch football injury on the 11th July 2011. Mr Smith's own account of his acute pain felt after that incident also accords with that incident having more of a temporal relationship than the subject accident. The lack of reported back pain between the subject accident and the incident of the 11th July 2011 also did little to assist Mr Smith's case. There was simply no evidence to conclude that any other injuries suffered by Mr Smith (namely his finger injury) had 'masked' any lumbar pain that he may have also been suffering. While it was true that Dr Pentis also thought that Mr Smith may have simply been coping before the subject accident in respect of his pre-existing condition, that the subject accident may well have then weakened any underlying pathology and that Mr Smith only then subsequently developed acute pain once he returned to his 'normal' activities such as touch football several months later, I am unable to be satisfied to the requisite standard required that that was in fact what has occurred here. Both Drs Journeaux and Pentis agreed that typically an aggravation of a pre-existing underlying condition such as spondylolisthesis usually caused back pain or symptomatology within a matter of days or at worst within the first six weeks (T2-77).

[36] Dr Journeaux also had conducted a more comprehensive review of the available medical evidence which included past history of back complaints. Dr Pentis admitted that he had scant evidence from Mr Smith regarding any back problems he had in the past. Dr Pentis stated in evidence that he had believed that it was not anything major and that he had got that information directly from Mr Smith. Dr Pentis also did not review the available past medical records (T2-77). Dr Journeaux did. Dr Journeaux also has more current practical experience in the field of trauma orthopaedics whereas Dr Pentis does not. Both Drs Pentis and Journeaux were not given an entirely accurate picture by Mr Smith regarding the first onset of acute pain after the subject accident. Both have recorded it as 4 months based on what Mr

Smith told them. Indeed, Dr Pentis believed that the 4 months related to a touch football incident which had actually involved Mr Smith' hip. He had no record of an incident at touch football occurring on the 11th July 2011 (T2-86).

[37] Mr Smith had also in any event been performing at a high level in his sporting pursuits; a fact which Dr Journeaux felt was significant insofar as any residual ongoing disability or incapacity. Dr Pentis was also of the view that participating at such an intensive level in sporting pursuits could indeed continue to aggravate any underlying pre-existing pathology and was of the view that it could indeed make it worse. Dr Pentis also initially assessed Mr Smith as having impairment attributable to his back injury as only one third and two thirds due to his pre existing pathology respectively when having regard to the AMA 5th edition guidelines. His subsequent change (in which he reversed those assessments) was not entirely persuasive (T2-79). The explanation for doing so, namely that he had simply given Mr Smith the benefit of the doubt with what he thought his (continuing) problems were, is difficult to reconcile given the history of complaint given to Dr Pentis during his consultations 16th July 2012 and 14th July 2014. While it is accepted that Dr Pentis had the benefit of time on his 2nd consultation, he nevertheless noted on that occasion that Mr Smith was still experiencing similar problems with his lower back and his findings on examination were not necessarily dissimilar in nature to when he had seen Mr Smith initially.

[38] For the reasons just stated, I therefore cannot be satisfied, on the balance of probabilities, that Mr Smith has in fact suffered any back injury as a result of the subject accident. I am also not satisfied that even if he did, that it has resulted in any ongoing disability or impairment.

Finger injury

[39] Both Drs Journeaux and Pentis agree that Mr Smith has suffered a left index finger injury, namely a fracture of that finger near his left knuckle. Dr Journeaux also accepted that injury also involved the ligament around the joint (T2-94). Dr Pentis assessed Mr Smith as having a 3-5% whole person impairment using the AMA 5 whereas Dr Journeaux could find no impairment using the same assessment methodology. He did consider however that as a consequence of the injury, Mr Smith had what he regarded as minor residual ongoing symptoms and minor residual functional incapacity (T2-90).

[40] Dr Journeaux accepted however that not being able to measure impairment per se did not mean to say that he had not been having ongoing problems with his finger (T2-92). Curiously, Dr Journeaux stated that it was only through his own experience of life that he knew the sort of duties that Mr Smith performed as an aircraft maintenance engineer. This is notwithstanding that he had noted in his first report that Mr Smith was in fact performing that work part time when the subject accident occurred yet did not consider that there was any restriction in his employment either in tasks or opportunity. Indeed, Dr Journeaux told the court when he came to give evidence that he felt he needed to have a significant amount of detail regarding Mr Smith's work duties as an aircraft maintenance engineer in order to ascertain where he was having problems (T2-93).

[41] Once he was provided with that requisite detail, it is evident Dr Journeaux then accepted that certain tasks performed by an aircraft maintenance engineer would

cause Mr Smith to have some difficulty and soreness related to his left index finger (T2-93, 94). He nevertheless, in re examination, still considered that any such difficulties to do those tasks did not equate to an inability to perform such tasks per se (T2-101). Dr Journeaux however also conceded that if in fact Mr Smith's duties had changed upon his return to aircraft work post accident from what he had previously been doing, then he would presume that he had had a sympathetic employer and good working colleagues who were able to support and help him out (T2-107). That evidence is again consistent with Mr Smith's own evidence that his work duties had in fact changed, that his employer at MRTT project had accommodated his injuries and that he had subsequently obtained work himself which was 'perfect' because it was far less onerous on his back and hand.

[42] Dr Pentis also noted pain upon stressing the metacarpophalangeal joint of his second index left finger in his consultation on 16th July 2012. He again noted that the finger had left Mr Smith with a residual weakness, a soreness and a stiffness in the region and some slight decreased strength. He considered that he has been left with residual weakness that will affect strength, pinch and grip in the use of the finger (Report 26th July 2012) which would impact on his ability to return to aircraft maintenance engineer in that certain activities may aggravate it to an extent and it would tire somewhat quicker and cause pain. In his second consultation with Dr Pentis on 14th July 2014, Mr Smith continued to report soreness if bumped or knocked. Tenderness on range and strength was also noted upon examination. That evidence is also consistent, in my mind, with the continued reported difficulties which Mr Smith spoke about in his evidence to the court regarding his left index finger and what he told Mr Hoey during his consultation with him on the 9th October 2013 (para 5). Mr Hoey (Occupational Therapist) also accepted that there was likely to be reduced dexterity of the left hand which would then more likely than not cause Mr Smith to struggle maintaining a full time workload as an aircraft maintenance engineer. Mr Hoey also considered that even a return to casual work in his trade would be an aggravator to both his lumbar spine and finger hand injuries (para 25)

Assessment of General Damages

[43] Section 61 of the *CLA* requires the court to assess an Injury Scale Value ('ISV') for the injury suffered. The *Regulation* prescribes rules for the court to assess the ISV for a particular injury according to a table set out in Schedule 4.[1]

The finger injury

[44] The parties agree that Item 116.3 of the *Regulation* (Moderate injury to 1 or more of the fingers or the thumb) (ISV range 6 to 10) is the appropriate item number in Schedule 4 however they disagree on the appropriate ISV. The plaintiff contends for 10 and the 2nd defendant submits 6. Counsel has provided helpful submissions on this issue in their outlines, marked Exhibit 9 and 10 respectively. I have taken those factors into account when making my determination.

[45] I assess an ISV of 7. Mr Smith has continued to suffer from pain and soreness related to his left index finger. I accept his evidence on this issue. He suffered a fracture to his finger involving the ligaments around the joint. Dr Journeaux pointed

[1] *Civil Liability Regulation 2014* (Qld) sch 4.

out during his evidence that your index finger and thumb are important insofar as pinch grip. This is significant insofar as it concerns the work which Mr Smith hopes to continue to perform in his aircraft work which requires fine motor hand skill. That is confirmed by Mr Hoey who noted that Mr Smith has already experienced difficulty at work with even positioning bolts and nuts and the like. Additionally, he was required to undergo surgical procedures and fixation and was required to wear a cast with ongoing physiotherapy. He was also restricted in his sporting pursuits during his convalescence and required the assistance of his fiancée in the short term to assist him with general domestic duties, which is not surprising considering he was wearing a cast.

[46] It is nevertheless accepted that the relevant example contained in the item refers at or near the top of the range as appropriate if there is a whole person impairment for the injury of 8% and the injury is to the dominant hand. Mr Smith's injury does not fall within the category. Dr Pentis even says so as his assessment using the AMA 5 was 3–5%.

[47] I assess general damages at **$8,720**.[2]

The Back Injury

[48] Having regard to my findings relating to any alleged back injury, no award can follow insofar as it relates to that injury.

Assessment of Future Economic Loss

[49] This was the major point of contention between the parties at trial.

[50] The only relevant injury for consideration under this head of damages is the injury to the left index finger in light of my earlier determination.

[51] The 2nd defendant contends that there should be no amount of damages awarded under this heading. In effect, the 2nd defendant says that the finger injury of itself is minor with only a very mild residual impairment. The 2nd defendant also points to the lack of complaint made by Mr Smith relating to his hand except during the initial convalescence period and during the assessments by the relevant medico-legal doctors. That submission in my mind overlooks the evidence which Mr Smith gave at trial and what Ms Faulks said regarding references in her notes to treatment to the wrist and elbow area, which includes the hand. Mr Smith gave evidence, which I have no reason to reject, that he has continued to have difficulty and soreness with his 'hand' when he recently used a guillotine to cut his wedding invitations, when he swam or rode his bike as described. While he may not have sought treatment from any other medical practitioners specifically in relation to his hand, any such failure to seek treatment in those circumstances does not in my mind mean that his difficulties and soreness are not present. Mr Smith always went to Ms Faulks for treatment in respect of the whole of his body because he said it was the only thing that usually worked for him treatment wise and that he only went when things were 'bad enough'.

[52] The 2nd defendant also submits that Mr Smith has in fact been able to return to his usual employment and work significant hours in aircraft employment in any event

[2] $5900 + (2x $1410) $2820 = $8720

since the subject accident. That submission however overlooks the following evidence. That evidence includes Mr Smith initially returning to work on the MRTT project after the subject accident, but only performing light duties. It also ignores the stage of work that the project was at when Mr Smith returned to that employment post accident. Mr Smith gave evidence, which I accept, that the project had changed and the duties he was then given by his employer, who was sympathetic, were not of the same type which he was previously doing before. This is particularly so in light of the evidence which was that he had not returned to heavy strenuous work, nor had he returned to using rivet guns and/or dolly work. While it is accepted that he has certainly worked long hours post the accident in his aircraft work, it simply was not of the same type. The evidence which he gave regarding his work at Alliance Airways was also only light duties. He was not doing the same type of onerous tasks which he had been previously performing on the MRTT project. He was not using the same type of tools, such as rivet guns or dollys and the like nor was he working in confined spaces.

[53] The available objective medical evidence available also supports a finding that Mr Smith will more likely encounter difficulty and soreness in carrying out his role as an aircraft maintenance engineer in respect to fine motor hand skill work in the future. Both orthopaedic specialists said as much and indeed, so did Mr Hoey. The 2nd defendant submits that Mr Hoey found only a very mild impairment at paragraph 29 of his report. However, Mr Hoey also noted in that same report that even a return to casual work in his trade would be an aggravator to both his lumbar spine and finger hand injuries (para 25). Mr Hoey was well aware of the tools of trade which Mr Smith was working with at the time of the subject accident. There was no suggestion however that Mr Smith had in fact been carrying out work with those heavy tools upon his return to aircraft work post accident.

[54] The 2nd defendant also submits that both Dr Journeaux and Mr Hoey did not find measurable impairment and only minor residual symptoms associated with the finger injury. That submission overlooks however the following evidence. Dr Journeaux conceded that a finding of no measurable impairment does not equate to not ever experiencing ongoing difficulties or soreness as it relates to Mr Smith's left index finger. He also accepted during the course of his evidence that Mr Smith will most likely experience difficulties returning to aircraft work even though his injury per se will not prevent him from doing so. Mr Hoey also agreed with this view. Dr Pentis was also of the same view, that Mr Smith would encounter difficulties in performing aircraft work notwithstanding only a small impairment being assessed in respect of the injury by him. There was also other evidence which was confirmed independently by other witnesses who gave evidence in any event that the tasks required of an aircraft maintenance engineer are both heavy in nature and that the tools of the trade (the use of rivet guns, heavy tool equipment and dollys) are a necessary part of performing structural work on the airplane. There was also the evidence regarding working in confined spaces and the likelihood of encountering difficulties as it usually requires the use both hands in order to perform a task.

[55] For the reasons stated, I am unable to accept the submission made by the 2nd defendant, that the evidence on this issue does not demonstrate any loss. In this regard, the 2nd defendant refers to the fact there is no evidence that Mr Smith's finger injury has stopped him from applying for work, affected him in believing that he can obtain that work or that he has had to work less hours. That submission in my mind overlooks the following relevant matters. While it is true that Mr Smith

has managed to work many long hours in aircraft work since the subject accident, he nevertheless was not doing the same type of work as he had done before. He said as much in his evidence. There is also no tangible evidence available to find otherwise. The fact that he put his name down to return to part time aircraft work around December 2011 and/or applied for work in the aircraft industry is, in my view, of no real moment when one has regard to the available evidence which was that Mr Smith has always supplemented his income since 2009 by carrying out his aircraft work whenever he could. It is also significant that at no stage prior to putting down his name again with Ms Bolton's company for weekend or night shift work in November 2011, has he in fact ever returned to full and complete core duties required of a structural aircraft engineer which includes the use of both hands when using rivet guns and dollys and working in confined spaces where fine motor (both) hand skills are essential.

[56] The 2nd defendant also submits that at best, the plaintiff's case is a loss of opportunity to do weekend work insofar as any future economic loss. The 2nd defendant submits that once Mr Smith started full time with valuing work in February 2012, there is no other basis for his future loss claim as pleaded. The plaintiff is seeking however much more than that. That is evident from the Outline of Submissions marked exhibit 10. In effect, the claim for the plaintiff includes a loss of opportunity and loss of earning capacity as a consequence of the injury suffered relating to his ability to carry out aircraft work in the future.

[57] On this issue, the 2nd defendant submits that it is clear in any event from the evidence available that there is now little or no weekend work available in the industry. The 2nd defendant referred to Ms Bolton and Ms Scott's evidence in this regard. The 2nd defendant also referred to the fact that there was evidence to suggest (from witness Mr Soer-Reime) that when Mr Smith might be able to do weekend work while working as a full time valuer, it would only arise within the quiet period of the aircraft industry, namely over the Christmas/New year period. Mr Soer-Reime had given evidence that the busy time for valuers was generally during the February to August period.

What is the availability of aircraft work?

[58] Mr McKenzie, an employee for Virgin earns $102,000 per annum. He told the court that he had to move to Perth at the end of 2011 in order to secure some more permanent work when the project he had been working as an aircraft maintenance engineer came to an end in Queensland. He confirmed that he was paid $52 per hour gross as a licensed aircraft maintenance engineer when performing contract work for Virgin Australia.

[59] Mr Scott gave evidence that in the last couple of years several of the big airlines had posted losses and the defence industry, as one of the bigger employers, is now smaller insofar as work available due in part to having new airplanes. Mr Scott felt that the industry would pick up again in 10 years or so when the new airplanes got older and needed more maintenance work. Mr Scott also commented on the fact that fly in fly out miners had also reduced the aircraft maintenance work as a result of the drop in mining industry work. He also mentioned the F-111 aircraft retirement also impacting upon the availability of work at present within the industry including Boeing which had also shed all their contractors with only limited aircraft maintenance engineers performing aircraft work for them now (T2-73, 74).

[60] Ms Bolton, a recruitment officer at Aircraft Structural Engineers also gave evidence on this issue. She confirmed the contract rate was between $40 and $50 gross per hour. She gave evidence however, contrary to Mr Scott in a sense, that there was quite a demand for work especially at military bases at present because the military is overseas at the moment and therefore there is a higher demand for maintenance on planes. She told the court that a project in fact would be starting in the next three weeks which would last a year or possibly longer in relation to the Boeing 737 wedgetails. She opined however that the workers who performed full time work would more likely be offered any available weekend work first before anyone else, such as part-time workers on the companies books (T3-31). She acknowledged that aircraft work had been 'down' this year up until the past couple of weeks.

[61] Ms Bolton also confirmed that the availability of weekend work really depended on the facility, however she considered it to be nevertheless quite rare. She did however believe that work can spontaneously arise such as 'aircraft on ground' work or in the event of a plane being struck by lightning and the like in circumstances where planes are then in need of immediate repairs. She was also of the view that the work currently available is usually for full time contract aircraft maintenance engineers. Ms Bolton also confirmed that aircraft work in general usually wound down over the Christmas break into early to mid January but that again was dependant upon a facility's own shut down operation periods.

[62] Mr Smith also confirmed in his own evidence that there had been no weekend work available when he had put his name down again post accident for aircraft work with Aircraft Structural Engineers in November 2011 and again in February 2012 after he had returned from his holiday overseas, a fact which he also communicated to Mr Hoey when he saw him.

[63] Mr Soer-Reime (Sales and Marketing Manager at Transmax Pty Ltd) also provided some evidence on this issue. He considered that a registered valuer could earn usually somewhere between $60,000 and $100,000 per annum with a potential top range that can even extend to $160,000 per annum. He also considered that Mr Smith certainly had the potential to go in the top end of what Asset Val Pty Ltd would pay their registered valuers having worked with him. Mr Soer-Reime also confirmed that the working hours for even a full time cadet valuer could be anywhere between 50 to 60 hours a week and that he believed that it would be difficult to do those hours and also do weekend work elsewhere for another employer. He also confirmed that weekend work was generally part of the job of a valuer insofar as if the work was required to be done, then it was expected that it could include working over the weekend especially through the busy period of February to August (T3-19) or if a particular job was on foot. Mr Soer-Reime also confirmed that outside that period there may be some potential for weekend work with another employer, though working every weekend on this basis he thought would be difficult to achieve. Mr Soer-Reime conceded however that he had not worked with other property valuers at any stage other than at Asset Val Pty Ltd during the period May 2010 and 9th May 2014 and that he was not a registered valuer himself.

[64] Having regard to that evidence, I am unable to accept the submission made on behalf of the 2nd defendant that the prospect of any part time work in the aircraft industry in the future is scant so as to be speculative. That submission in my mind overlooks the following evidence. Ms Bolton confirmed that even though this year

had been 'down' in terms of aircraft work in past years, it had picked up in recent times. She said as much in her evidence. She also confirmed that while weekend work at present was rare she did not rule out that weekend work may well become available again as it had in the past or once the Boeing wedgetail project commences. While it is accepted that any full time employees would probably be offered that work first, it does not follow in my mind that no work would not ever become available to casual workers such as Mr Smith if the full time workers chose not to work weekends, went on holidays and/or the demand for further work from others was also required on that project or by other aircraft facilities also looking for part time aircraft workers.

[65] There is also ample opportunity in my mind for Mr Smith, even notwithstanding that he is working full time as a valuer, to work some weekends contrary to the submission made if work became available. He had in fact done so before even while working long hours as a cadet valuer for Asset Val Pty Ltd. Mr Soer-Reime had in my mind, very little actual knowledge regarding the attitudes of other similar employers insofar as their employees' need for weekend work because he had only ever worked for Asset Val Pty Ltd. Mr Soer-Reime admitted as much in his evidence to the court. Indeed, Mr Smith's own evidence was that he was not required to work weekends where he was currently employed as a valuer. In any event, the busy time according to Mr Soer-Reime for a valuer is usually February to August, which allows at the very least 4 months outside that period, even after taking into account also the aircraft industry's traditional closing period over the Christmas/new year. The 2nd defendant submission also overlooks any vacation entitlements which may accrue to Mr Smith while employed as a full time valuer, registered or otherwise. Those periods may also allow him to work full time over his holidays in aircraft work if he had chosen to do so, just like he has done before when he was undertaking university studies where he worked during the holiday periods. (Ex 11, and 8).

[66] The 2nd defendant also submits that Mr Smith would not in event have enough time available to him to work weekends in aircraft work. The 2nd defendant refers to the fact that he is not only working fulltime as a valuer but he also has a rigorous weekly training program relating to his very active various sporting pursuits. The submission made by the 2nd defendant on this issue has some force. Nevertheless, it must be remembered that Mr Smith has not been involved in his sporting pursuits at a time when he has other family responsibilities. Mr Smith is getting married soon and is hoping to start a family within the next year or two. His wife is moving from her current employment next year and he intends to take up more of the financial responsibility, if he can, for the family as a whole. Those factors will in my mind impact on his ability to maintain his sporting pursuits to the degree which he has done so in the past. I also note in any event that he is not in fact doing either triathlons or Ironman events every weekend (see Exhibit 7).

[67] The 2nd defendant also submits that 'it is clear' that the aircraft work was giving Mr Smith a problem in the past and that he had wanted to leave employment in that field. It is submitted that his numerous back problems from simple tasks, such as bending and lifting a bin, and the like, had meant that he would have had to have switched to lighter work in any event. That fact, taken with his intention to get out and pursue another career in the valuation, and the fact that he said himself he was adverse to the carcinogenic (aircraft) environment (to Mr Hoey), the 2nd defendant submits there is no basis at all to justify any award of damages under this head as

his injury may or will not be productive of any financial loss. There is some real merit in the submission made. It is certainly evident from the medical records available that Mr Smith has had difficulties in the past relating to his back, even well before the subject accident, when performing his full time core duties as an aircraft maintenance engineer. He commenced his apprenticeship in the trade in 2006 but during the course of that year, he had two WorkCover claims which continued over a long period collectively speaking. He has also had other various occasions relating to back problems consequent upon his work during 2008. Those problems have only since dropped off once it seems he went back into part time work at the time he commenced full time university in 2009. There is no dispute that Mr Smith has a pre existing condition related to his spine which can be aggravated by something that he may be doing at the time if indeed it leads to a flare up. Dr Pentis said as much in his evidence. The records of Ms Faulks also confirm that fact. Indeed, Dr Pentis was of the view that Mr Smith should not be doing the level of triathlons and Ironman events that he has been doing as he was of the view that it would be more likely than not aggravating an already problematic back (T2-78, 79 and 80). Dr Pentis even went so far as to say that if you get symptoms in your back such as after a prolonged period of sitting (Ex 4 entry 25/2/2009), then it would be best to stay away from anything that involved heavy lifting, bending repetitively or bending and lifting combined (T2-81). That evidence in my mind certainly has some real significance in respect of any determination by me on the question of any future claim for loss of earning capacity over the course of Mr Smith potential working life which is currently 41 years (to age 70) which is what in effect the plaintiff is seeking.

[68] Finally, the 2nd defendant referred to the wages which Mr Smith is in fact currently earning as a valuer full time and what in effect he may be able to earn if he remains working in the valuation industry especially upon obtaining registration. The 2nd defendant points to the fact that Mr Smith is exceeding at his work as a valuer and has good prospects of remaining employed in that industry and that Mr Smith aspires to be a registered valuer and therefore will be able to earn more once he gets the necessary qualifications. In other words, he will probably have available to him a more lucrative job in the future and the finger injury suffered will have no impact at all on him being able to perform his current work in the future.

[69] The 2nd defendant's ultimate submission was that even though it is accepted that Mr Smith has suffered a finger injury as a consequence of the subject accident with ongoing residual impairment, it cannot be demonstrated that it may or will be productive of any financial loss.

[70] The plaintiff, on the other hand, submits that it was always the intention of Mr Smith to undertake his degree in order to give him some flexibility in respect of his future earning capacity. The plaintiff intention was, it was submitted, that he eventually wanted to be able to contract in both industries by setting up his own companies to facilitate that. The plaintiff submits that if Mr Smith could have returned to aircraft maintenance engineering work full time in the future as he planned, he could have earned anywhere in the order of $117,000 per annum compared to his current wage as a valuer of $65,000 per annum including super. The plaintiff submits that in addition to that expectation, Mr Smith had always wanted to return to doing weekend work in the aircraft industry as evidenced by his return to it part time while studying as well as his indication to do that work again in November 2011 and February 2012 to Ms Bolton. It was submitted that the plaintiff

also wanted to bear some of the future financial burden in respect of his family as it developed.

[71] The plaintiff submitted that there was ample evidence to support a finding that the finger injury which Mr Smith has suffered will have an impact on his ability to now performing the core duties associated with that of an aircraft maintenance engineer. The plaintiff seeks in the order of $180,000 to $200,000 assessed on a global basis or alternatively, $180,000 to $630,000 or so if assessed with any calculable precision.

[72] Given the various imponderables which I have already referred to at length as it relates to this particularly case, it is immediately apparent and would be trite to say that any assessment for future economic loss simply cannot be precisely calculated to any defined weekly loss.

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

> "(1) This section applies if a court is considering making an award of damages for loss of earnings that are unable to be precisely calculated by reference to a defined weekly loss.
> (2) The court may only award damages if it is satisfied that the person has suffered or will suffer loss having regard to the person's age, work history, actual loss of earnings, any permanent impairment and any other relevant matters.
> (3) If the court awards damages, the court must state the assumptions on which the award is based and the methodology it used to arrive at the award. …"

[74] It is trite law to say that any future economic loss assessment if made must be determined by reference to the facts of the particular case at hand and not through simple regard to other decisions in which courts have made awards of damages in broadly similar circumstances. Accordingly, it follows that an examination of the facts of the case at hand is necessary when determining any assessment or otherwise.[3] It is also trite to say that even if it is found to be that a plaintiff has suffered a diminution of his or her earning capacity as a result of the injury, it nevertheless must still be shown, on the balance of probabilities, that it will or may be productive of financial loss before any award can be made.[4]

[75] I am also cognizant of the relevant authorities and assisted by the Court of Appeal in *Allianz Australia Insurance Limited v McCarthy*,[5] which helpfully sets out that where a claim for future economic loss is being made, then this court must set out the assumptions made and the methodology applied as best as one can, in order to properly articulate how any assessment for future economic loss has been made, even if it cannot be precise.

[76] Having regard to the matters already canvassed by me and bearing those matters in mind, I now turn to the question of whether or not any assessment of damages for future economic loss ought to be made in this case with reference to the principles

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[3] *Heywood v Commercial Electrical Pty Ltd* [2013] QCA 270 [53].
[4] *Medlin v State of Queensland* (1995) 182 CLR 1.
[5] [2012] QCA 312.

observed in *Malec*. As observed by the President of the Court of Appeal in *Allianz Australia Insurance Limited v McCarthy*,[6], I shall now set out my assumptions and methodology.

[77] It is apparent from the medical evidence to which I have already referred, that Mr Smith has suffered an injury which more likely than not, will have impact upon his ability to carry out the full time core duties associated with his work as an aircraft maintenance engineer. The doctors all said as much in their evidence. While it is accepted that it will not prevent Mr Smith from ever doing aircraft work altogether, as Dr Journeaux said, it nevertheless will still have an impact upon his ability to do his work as he did before, as he is likely to experience real difficulty and soreness when using his hand when performing certain tasks. While it is true that Mr Smith has not yet returned to full time core duties in aircraft work since the subject accident, such as using rivet guns and dollys and the like, and has not yet returned to working with his hands in confined spaces where fine motor hand skills are required, I am nevertheless satisfied on the balance of probabilities that Mr Smith will suffer a diminution of his earning capacity as a consequence of the finger injury he suffered. However, as quite properly pointed out by counsel for the 2nd defendant, I am also required to be satisfied, on the balance of probabilities, that any such diminution of any earning capacity will *or* may be productive of financial loss before any assessment as to future loss may be made.[7]

[78] The plaintiff is seeking loss of earning capacity over the course of the whole of Mr Smith's potential working life. It is difficult to accept that submission in light of the available evidence to which I shall now refer. This is especially so when regard is had to Mr Smith's previous history of back complaints directly related to his full time employment as an aircraft maintenance engineer. They cannot be regarded as insignificant especially in 2006 and 2007 where treatment was received and alternative arrangements were made at his workplace to accommodate him and his complaints while he was working full time.

[79] In those circumstances, I find that there is a very real chance, not so remote as to be speculative, that even if Mr Smith did not suffer his finger injury as a consequence of the subject accident, that he would not have been able in any event to have worked in a full time capacity as an aircraft maintenance engineer as he had hoped to in the future. The evidence which supports such a finding being made is that Mr Smith was already suffering from bouts of problems related to back (his underlying pathology) as a consequence of the heavy work that he was performing as a full time aircraft maintenance engineer well before the subject accident. Dr Pentis also confirmed that Mr Smith's current strenuous sporting activities which Mr Smith is currently doing, and did not suggest that he intended to stop, will continue to have an adverse impact on his underlying pathology in the future. There was also the evidence regarding what Mr Smith himself told Mr Hoey during his consultation on 9th October 2013. His concern regarding exposure to environment carcinogens and that fact that he relayed to Mr Hoey only a 'loose interest in subcontracting from time to time to supplement his income as a valuer (weekends or holidays)' in my mind also supports the finding which I have just made. As such I find, having regard to the matters I have just outlined, that Mr Smith's potential working life would have been significantly reduced in the aircraft industry in any event. This is

[6] [2012] QCA 312.
[7] *Medlin v State of Queensland* (1995) 182 CLR 1.

especially so when regard is had to the objective medical evidence available for consideration. I accept however that Mr Smith will still need to set up a company in order to carry out any aircraft work he might secure in the future. However, I find having regard to what I have just outlined, that Mr Smith would have only ever competed or been able to compete (due to his underlying back pathology unrelated to the subject accident) for part time work and then only in the short term of the remainder of his potential working life. I have assumed however that Mr Smith would have nevertheless even taking those matters I have just outlined in account, still have been able to manage to work occasionally part time in the aircraft industry even notwithstanding the probable impact which his underlying pre-existing condition will have upon him in the future, but only while he remains fit and young. As such, I am sure as to be virtually certain that Mr Smith's potential working life in the aircraft industry would have been significantly reduced in any event because of the reasons just outlined, regardless of whether he had suffered the finger injury or not.

[80] I am also certain there is a very real rather than a remote chance, that Mr Smith would not have been able to secure the aircraft work hours like he has done so in the past. That is because he is now more likely to remain committed to his current employment as a valuer in the future. He said as much to Mr Hoey. This is particularly so when regard is also had to the fact that he had already started upon that career change prior to the subject accident occurring, has an underlying back condition would will impact upon his future ability to have been able to continue to carry out full time core duties as an aircraft maintenance engineer in any event.

[81] I have assumed however that Mr Smith would have nevertheless continued to work, at least in the short term, as an aircraft maintenance engineer, had he not suffered the finger injury. I find that he would have done so however only part time and then only occasionally in the future. The evidence shows that he has only chosen to work part time in the aircraft industry since he commenced university in 2009 which in my mind also evidenced an intention to work part time in that industry in the future. He has also commenced working full time employee in the role of a valuer since February 2012 and aspires to obtain further qualifications in that field. I have therefore assumed that in those circumstances Mr Smith will only have performed less weekend work in the future given his demonstrated commitment to his current career path.

[82] Notwithstanding that most likely scenario, I nevertheless find so as to be virtually sure, that Mr Smith would have, but for the finger injury suffered, still nevertheless competed for at least the occasional part time work in the aircraft industry notwithstanding his chosen career path. I have assumed, and the medical evidence supports such a finding, that he is now much less able bodied on the open labour market than he was before as a consequence of his finger injury. Mr Smith has also able to manage to secure part time work since 2009 in the aircraft industry prior to the subject accident occurring, even notwithstanding his underlying pre existing back condition. That work was in addition to the full time work he was performing as a valuer during that time. Accordingly, in those circumstances I find that Mr Smith has suffered a diminution of his earning capacity which will be productive of financial loss in the future. While it cannot be determined with any certainty at this point what part time work Mr Smith may well have been able to secure in the future had he not suffered his finger injury, it cannot be said that there was simply no chance at all so as to be considered negligible that he would not have been able to

secure at least some of that work on the occasional weekend or carried out some short term full time work over some of his own vacation holiday period like he has done before.

[83] In those circumstances, the chance to secure part time work performing full core duties as an aircraft maintenance engineer even occasionally or even short term performing full time work over his vacation, which may well have been available for him at least in his short term working future has now been lost. While not significant, I still consider, on the balance of probabilities, that such a scenario will nevertheless still be productive of financial loss.

[84] The 2nd defendant says that he is already working full time as a valuer and may have continued to remain there indefinitely. That is so. That Mr Smith may in fact be able to return to full core duties as an aircraft maintenance worker in any event once he secures work again and attempts to use the whole of the tools required (rivet guns and the like). That is also true. However, as already explained by me, those prospects must be weighed in balance with what I see as a very real chance that Mr Smith will not be able to return to occasional part time weekend work and/or any occasional vacation work now like he had done in the past as a consequence of having suffered the finger injury.

[85] As already noted, it is said on the 2nd defendant's behalf that Mr Smith may be able to earn the same or even better remuneration once registered if he stays within the valuation industry than he would have earned as a full time aircraft maintenance engineer. That may be so. However, even if that scenario was proved to be true, Mr Smith has nevertheless still lost the additional chance of having the opportunity to have utilised his aircraft trade skills to earn further income on the occasional weekend or any occasional vacation work that may have been offered to him like he has done in the past. There is also a chance of another less likely scenario. There may be a downturn in his valuation industry and he may be out of employment for short periods while obtaining other employment. While the chance of this happening is very low, nevertheless it is a possibility and Mr Smith may not be able to seek work in the aircraft industry as an alternative source of employment in the interim because of his injury.

[86] I therefore rate the chances of this plaintiff suffering financial loss of earnings over at least some of the remainder of his potential working life, due to the continuing effect and risk associated with his finger injury caused by the subject accident upon ability to carry out his aircraft work, as virtually certain and any chance of him getting by through his potential working life at least in the short term, without any financial loss or problems arising as very low.

[87] Mr Smith has potentially 41 years remaining in his working life. As already explained, I consider that a significant adjustment must be made to recognise the problems which Mr Smith has already encountered in his working life that is directly attributable to his (unrelated) underlying pre-existing back pathology. The medical evidence to which I have already referred supports such a finding being made in this particular case. As such, doing the best I can, I have assumed that Mr Smith would have continued to work part time but only occasionally on weekends and during part of his holidays had that work been offered to him over the next 10 years. Such an estimate can never be precise, however I have taken into account that Mr Smith is still a very young and very fit man who has already demonstrated, that

even notwithstanding his underlying pre-existing back pathology which had caused him problems in the past, he has nevertheless still managed to work at least part time over the course of several years even prior to the subject accident occurring.

[88] I consider an amount of **$50,000** calculated on a global basis is appropriate. In order that my methodology may be more readily understood in understanding how I have come to that figure, I shall now set out my calculations, which are indicative only.

[89] I have arrived at that figure by assuming Mr Smith would have been able to secure some occasional weekend work and very occasional full time vacation work notwithstanding that he would have remained in full time employment as a valuer. It is true that it may be far more likely that he will remain working as a full time valuer in which he will manage to work with little effect from his injury. However, Mr Smith has in addition to that employment always maintained a presence in the aircraft industry at least part time and as such, I am sure as to be virtually certain that the loss of opportunity to supplement his income on a part time basis now as a consequence of the injury suffered, will be productive of financial loss over the course of his potential working life.

[90] Nevertheless, his underlying back pathology unrelated to the subject accident cannot be ignored. I have therefore taken that fact into account when arriving at what I consider is potentially some 10 years remaining of working life as a part time aircraft maintenance engineer before Mr Smith would probably have been unable to continue doing even that work in any event, irrespective of the finger injury which he has suffered.

[91] I have also assumed that over the next 10 years, the work available in the aircraft industry would have in any event fluctuated. That is evident from the evidence available on this point from the various witnesses which I have already outlined. I have assumed that in those circumstances Mr Smith would not have secured weekend work every weekend or indeed would have even been able to be available for weekend work every weekend because of his full time employment as a valuer. He also will in addition to his sporting activities soon have other family responsibilities that will arise once he is married. I have already outlined what those responsibilities may be in the future.

[92] I have also taken into account Mr Smith's intended future desire which was that he never intended to fully remove himself from the aircraft work as it was more lucrative for him. While it may be that Mr Smith may have never returned to the aircraft industry full time in the future as he communicated to Mr Hoey and simply will remain working in the valuation industry, which he is more than suitably qualified himself to do, I nevertheless consider it a far more likely scenario that Mr Smith would have, but for the injury suffered, still have continued to work part time as an aircraft maintenance engineer at least over some weekends and during at least part of his vacation period (the latter of which at least in the short term of his potential working life) in order to supplement his income and support his family life which is only just beginning. That opportunity has now been lost and as such, will be productive of financial loss, albeit a modest one.

[93] In my view, I should therefore make some allowance for an award of damages for future economic loss to take into account those factors and the general disadvantage which Mr Smith will now suffer as a consequence of the finger injury which has

caused him ongoing difficulty and soreness and the real rather than a remote possibility that such problems will impact upon his ability to carry out the core duties even part time as an aircraft maintenance engineer in the future.

[94] In order to do justice to this case, to take into account the parties' respective contentions and to reflect the principles of *Malec*, I consider that this is a case that deserves only a relatively modest global award being made. In arriving at my figure, I have assumed that Mr Smith would have managed to secure an average of approximately one full weekend of part time work (that is 2 x 10 hour days at present day value $35 net per hour) each month for approximately 5 months of every year over the course of 10 years.[8] I have also allowed for 2 x 50 hour working week of every year over the course of the next 10 years which is half of any vacation he may accrue as a full time employee working as a valuer.[9] As I have already indicated, any award for future economic loss cannot be precisely mathematically calculated, nevertheless, I have used the 5% tables multiplier of 413 as a reference tool only in order to demonstrate my methodology as to calculation, imprecise but indicative, adjusting any sum assessed in order to also reflect the normal contingencies of life by about 10%.

Past Economic Loss

[95] Mr Smith gave evidence that between the subject accident and until he went back 'full time' to aircraft maintenance engineering work, he lost 'quite a bit'. He described how he usually did one or two days during the week while he was studying and then during his university semester breaks he would work 60 to 70 hours to try and pay his way through university (T1-37). He thought he had lost about $10,000 as he was able to usually earn about $900 - $1000 gross a week (over 2 days) which he had missed out on over approximately a 10 week period (T1-39). Mr Smith explained that the figure was around that mark because he had missed out on several weeks of full time work during the university holidays, after the exam period was over, because he wasn't able to work before he had got his (medical) clearance. Mr Smith conceded however that sometimes he would pick up two days work but other weeks he was only be able to pick up one (T2-38).

[96] The plaintiff contends for $7400 net inclusive of interest. That has been calculated by reference to the hours which Mr Smith was actually working during the period December 2010 to May 2011 and the period between the date of the accident and when Mr Smith actually returned to work on or about 14 July 2011 (8 weeks). The plaintiff submits that given Mr Smith was away from his employment over the university break (where he could have in fact earned money but for the subject accident) an allowance for past economic loss should be calculated in that amount accordingly.

[97] The 2nd defendant on the other hand contends for an amount of $5500 net inclusive of interest. That has been calculated by reference to the plaintiff's financial records for the year ending 2011 (exhibit 8).The 2nd defendant has allowed for a sum of gross loss of $7,300 over a period of 10 weeks which equates to a net overall loss of $5110 exclusive of interest.

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[8] $700 nett per month x 5 months = $3500 p/a net ÷52 weeks = $67.30 pw net x 413 = $27798 – 10%($2779) = $25,000 rounded down.

[9] $3500 p/a net ÷52 weeks = $67.30 pw net x 413 = $27,798 – 10%($2779) = $25,000 rounded down.

[98] I agree with the plaintiff's submission on this issue. A review of Exhibit 11 shows that during the university holidays Mr Smith was working extensive hours (January/February) on the MRTT project. I have no reason to think that he would not have been offered similar work during the mid-semester university break and would have worked similar if not more hours over the period as he had done so before.

[99] I therefore assess an award of $**7400 nett inclusive of interest.**

Future Treatment

[100] Mr Smith gave evidence that he used Nurofen tablets and/or gel for his back only occasionally and therefore no allowance is made for medication.

[101] There was insufficient evidence to support a conclusion that future treatment, such as any surgical intervention, will be required for Mr Smith's hand. Dr Pentis opined that there had been no deterioration in his finger between his first and last consultation. Dr Journeaux did not consider that there was a future necessity at all and Mr Smith has been left with only a small residual impairment which may not necessitate the need for any future surgery such as a fusion.

[102] Accordingly, I make no allowance under this head of damages.

Future Care and Assistance

[103] The evidence available shows that Mr Smith did not even himself consider that he now needed future care and assistance (T2-28) Rather, he had stated he had had some difficulties with some domestic activities in the past which his fiancée helpfully did for him. In any event, as I understood it, no claim is now pursued for future care and assistance in any event.

Special Damages

[104] Special damages have been agreed in the amount of $**842.45**

Summary

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

Pain, suffering and loss of amenities of life	$8,720
Special damages	$842.45
Future economic loss	$50,000
Past economic loss (inclusive of interest)	$7,400
Total	**$66,962.45**

Judgment

[106] There will be judgment for the plaintiff in the sum of $**66,962.45**

[107] I will receive written submissions as to costs (maximum 6 pages) after the expiration of 28 days from the date of publication of this judgment unless the parties otherwise agree.