DISTRICT COURT OF QUEENSLAND

CITATION:	*Min v Huang & Ors* [2016] QDC 116
PARTIES:	**SUNGKI MIN** **(plaintiff)** **v** **CHENG-YUAN HUANG** **(first defendant)** **&** **AAI LIMITED** **(second defendant)** **&** **JEREMY TAYLOR WITTKOPP** **(third defendant)** **&** **RACQ INSURANCE LIMITED** **(fourth defendant)**
FILE NO/S:	BD 3033/2015
DIVISION:	Civil
PROCEEDING:	Claim
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	27 May 2016
DELIVERED AT:	Brisbane
HEARING DATES:	16, 17 May 2016
JUDGE:	Dorney QC DCJ
JUDGMENT AND ORDER:	**1. It is adjudged that the fourth defendant pay to the plaintiff the amount of $355,094.06 (inclusive of interest).**

2. It is ordered that each of the plaintiff and the fourth defendant have leave to file, and serve, a written submission on costs by 4pm on 3 June 2016.

CATCHWORDS:	Damages – loss of earning capacity – calculation of prospects where still on student visa at trial
LEGISLATION CITED:	*Civil Liability Act* 2003, s 54, s 55, s 59, s 60(1)(a), Sch 3 and Sch 4
	Superannuation Guarantee (Administration) Act 1992
CASES CITED:	*Allard v Jones Lang Lasalle (Vic) Pty Ltd* [2014] NSWCA 325
	ALDI Foods Pty Ltd v Young [2016] NSWCA 109
	Browne v Dunn (1893) 6 R 67 (HL)
	Malec v J C Hutton Pty Ltd (1990) 169 CLR 638
	Martin v Andrews & Anor [2016] QSC 20
	R v Birks (1990) 19 NSWLR 677
	Seltsam Pty Ltd v Ghaleb [2005] NSWCA 208
	Smith v Advanced Electrics Pty Ltd [2003] QCA 432
	Thomas v O'Shea (1989) Aust Torts Reports 80-251
COUNSEL:	M Grant-Taylor QC for the Plaintiff
	D J Schneidewin for the Fourth Defendant
SOLICITORS:	Littles Lawyers for the Plaintiff
	Quinlan Miller and Treston for the Fourth Defendant

Introduction

[1] Sungki Min, the plaintiff, came to Australia from South Korea on 5 September 2012 having obtained a working holiday visa. Some two years earlier, he had visited for one week as a tourist. His plans in September 2012 were to study at a business school, to get a proper qualification (such as a diploma), to do part time silicon sealing work and "possibly" get a sponsorship and live in Australia permanently. His plans received a significant setback when he was involved in a motor vehicle accident in Queensland on 22 January 2014.

[2] At the time of the accident, the plaintiff was aged 30 years, having been born on 11 October 1983. He is currently aged 32 years.

[3] Liability has been admitted by the fourth defendant, RACQ Insurance Limited. Accordingly, the case (limited to quantum) has proceeded against that defendant only. The *Civil Liability Act* 2003 ("*CLA*") is applicable. The fourth defendant's Outline of Submissions accepts that as a consequence of the accident the plaintiff suffered an injury to his lumbar spine (as alleged). That and the medico-legal experts' concurrence about the effects of the accident on the spine make it unnecessary to examine in any detail the photograph of the damage to the rear of the motor vehicle that the plaintiff was driving at that time: Exhibit 5.

[4] The written Outlines of Submissions of both the plaintiff and the fourth defendant show many areas of agreement. But it will be necessary to undertake some significant analysis of the factual background relevant to, for instance, forming an assessment of the loss of earning capacity which has been productive of financial loss.

Plaintiff's credibility

[5] It is necessary to address this issue even though I accept the submissions made on his behalf that, within the obvious limitations imposed by the interposition of an interpreter, the plaintiff impressed as an honest witness. I also accept that he gave a reliable account, particularly of those aspects dealing with his earning capacity as utilised by him in Australia. The reason for the need to canvass this matter of credibility is that there has been a failure to comply with the rule in *Browne v Dunn*[1] concerning an examination of the plaintiff's disclosed material, particularly with respect to invoices for the period before the accident and extending to the factual matters subsequent to it from which inferences are sought to be drawn in submissions about the extent of tax deductible expenses for the business of silicon sealing conducted by the plaintiff. I accept, in particular, the submission made on behalf of the plaintiff that it was never put to the plaintiff that anything in the relevant invoices or tax returns was incorrect and it was never put to the plaintiff that he had breached any condition to which the issue of his various Visas were subjected.

[1] (1893) 6 R 67 (HL).

[6] As extensively canvassed in *Smith v Advanced Electrics Pty Ltd*,[2] a breach of this rule will have consequences which will vary depending on the circumstances of the case, but they will usually be related to the central object of the rule, which is to secure fairness.[3] That fairness, in this case, requires that I accept that the plaintiff's financial documentation placed before this Court is reflective of an accurate detailing of earnings and expenses for the silicon sealing business conducted by him in Australia and that I reject the contention that an apparent increase in costs in the two latest financial years is necessarily reflective of what actual costs would have been incurred but for the accident. Furthermore, it requires that it cannot be inferred that the plaintiff did breach any of the conditions to which the grant of visas, both with respect to the 417 Working Holiday Visa and the various Student Visas, were subjected.

[7] Since it was only on those two matters that the fourth defendant's submissions descended on this question, it is unnecessary to extend such consequences to other matters which were not put to the plaintiff either, such as whether the plaintiff was asymptomatic in his lumbar spine prior to the accident or less than forthcoming in responding to answers posed by the examining medico-legal specialists.

Extent of injury

[8] In oral submissions, counsel for the fourth defendant did not seek to rely upon any part of the evidence given by Dr Cameron, a consultant neurologist, either through his report dated 20 March 2015 or through the relatively brief evidence that he gave. But for the sake of certainty, I express the following views concerning the medico-legal experts.

[9] Dr S F Campbell, a neurosurgeon, in his report of 2 February 2015 indicated that the plaintiff had suffered a musculo-skeletal injury to the lumbar spine. He opined that the complaints of pain and limitation of movement by the plaintiff were consistent with that diagnosis. With respect to the relevant AMA Guide, he stated that the plaintiff was suffering a 7% Whole Person Impairment ("WPI"). Dr M F Wallace, an orthopaedic surgeon, in his report of 21 February 2015 stated that the plaintiff had sustained an acceleration/deceleration injury to his lumbar spine. Again, there was no stated inconsistency between symptoms and physical restrictions under the diagnosis. His opinion as to the WPI was that it was 7%. Dr Wallace did advance the conclusion that the MRI scan of the lumbar spine dated 11 August 2014 showed "some degenerative changes". Nevertheless, he was not cross-examined on that conclusion and he expressed no opinion himself as to its effect either on his specific diagnosis or with respect to any future effect of it.

[10] Dr B Halliday, a consultant orthopaedic surgeon, whose report of 17 March 2015 was tendered by consent, made a diagnosis of a soft tissue injury to the lumbar spine, with evidence of an annular tear of the L5/S1 vertebrae (with some left sided posterior

[2] [2003] QCA 432.
[3] *R v Birks* (1990) 19 NSWLR 677 at 689.

central disk bulging). He indicated that there were no inconsistencies in the examination and that the WPI was 5%.

[11] Turning, lastly to Dr John Cameron, his report of 20 March 2015 – unlike the other three medico-legal experts – concluded that the plaintiff had suffered an aggravation of an underlying pre-existing degenerative back condition, which aggravation had been caused by the motor vehicle accident of 22 January 2014. With respect to the WPI assessment, although he stated that there was a 6% impairment, he attributed only a proportion of that (namely, 4%) as related to the accident and the aggravation caused by it. When cross-examined, he, quite reluctantly, agreed that if he had assessed the plaintiff on the day before the accident it would have been difficult to "allocate him an assessment other than within DRE 1", but added that it would be "just on hearsay". Purporting to rely on the fact that the plaintiff was not physically examined pre-accident, he refused to acknowledge that he knew that that determination would have given the plaintiff a "0% impairment" on that assumed basis. It is unnecessary to analyse this matter further, especially given the concession made in oral submissions by the fourth defendant. Even if it were a matter of contest, given that no other medico-legal expert was examined on this question and given the aspects of Dr Cameron's evidence that I have canvassed which undermine his initial conclusions, I would have preferred, on balance, the consistent diagnoses by the remaining experts.

Visas

[12] When the plaintiff came to Australia in September 2012 he had a Working Holiday Visa. That Visa lasted 12 months. The plaintiff, after his arrival, looked for work and obtained it. It was about August 2013 when the plaintiff changed the work that he had been doing prior to that time to the silicon sealing work. Around about the same time he applied for a Student Visa which he was granted on 12 September 2013 (which lasted for two years until 19 September 2015). He then began his studies at the Australian College of Technology and Business for a Certificate IV in Small Business Management, which he obtained on 10 December 2014.

[13] On 16 February 2015 he began another course of study for a Diploma of Business. On 14 September 2015 he was granted a new Student Visa in the "Vocational, Education and Training Sector". Not long after, on 17 December 2015, he was granted a Diploma of Business, again from the Australian College of Technology and Business.

[14] He has arranged for more studies, this time for an Advanced Diploma of Leadership and Management which he expects to start on 6 June 2016.

[15] The plaintiff acknowledged that there were work restrictions with respect to the granting of the Student Visas. Among the large number of documents in a folder which became Exhibit 4, there is an Australian Government Visa Grant Notice dated 12 September 2013. It refers to a "Stay Period" to 19 September 2015 and refers

specifically to one of the conditions as a "WORK LIMITATION". There is a similar Visa Grant Notice dated 14 September 2015.

[16] In a Bridging Visa Grant Notice dated 3 September 2015 – although not then in effect because of the earlier student visa – there is a reference to that Work Limitation which was designated "8105" (which was in both of the earlier Visa Grant Notices). It relevantly states that the holder must not engage in work in Australia "for more than 40 hours a fortnight during any fortnight when the holder's course of study or training is in session". That accorded substantially with the plaintiff's own understanding of the limitation as generally revealed in his oral evidence.

[17] Although it is clear from the documentation to which I have just referred that the latest Visa has an expiry date of 3 November 2017 and that other documentation (not referred to in submissions) showed that a confirmation of a further enrolment at the Australian College of Technology and Business for an Advanced Diploma of Marketing for a period from 13 February 2017 to 3 September 2017 existed, the plaintiff expressed in his evidence that his first priority is to complete the courses of study, while looking for a sponsor to sponsor him for permanent residence; but, if that were not to happen, then he might have to go back to South Korea and work with his older brother "where he works".

[18] This should be seen in light of his Statutory Declaration admitted by consent (as redacted) which stated that he arrived in Australia "with the intention to immigrate permanently" and to "continue to remain in Australia with the intention to become a permanent resident". Additionally, in a further Statutory Declaration (as redacted) by Sung Min Oh, a director of Alpha Tiling Service Pty Ltd, who had engaged the plaintiff as a subcontractor and known him for two years prior to 20 November 2014, it was stated that, prior to the accident, he confirmed that he had considered offering the plaintiff "permanent employment" (which both sides agreed could be interpreted as "sponsorship" for permanent residence). For reasons which will be canvassed in much more detail later, Mr Oh went on to state that, as a result of the plaintiff's reduced working capacity following the accident, he (at that time) no longer contracted with the plaintiff and did "not consider him a viable candidate" (for sponsorship).

Working capacity

[19] In his evidence given to the Court, the plaintiff stated that his back problems affected his silicon sealing work "a lot", particularly when he bent down quite a bit and also when he lifted something. He changed the way that he conducted his silicon sealing business, according to his evidence, by assigning the work which he obtained under his subcontract to "other subcontractors or other workers", adding that this was "only after the accident". With respect to paying people to work in his business, the plaintiff stated that he either "had to employ people or… had to give the work to them". With respect to what he would have done if he had not had the accident, he stated that he "would have done the work as much as (he) could do it by (him)self".

[20] Turning, then to the medico-legal experts to which I have already favourably referred, Dr Campbell stated that the plaintiff's condition had stabilised, but that further recovery in the future was unlikely and his prospects of returning to work as a silicon sealer or timber floorer were "poor", since any exposure to heavy lifting and bending would place him at risk of further injury and "would be best avoided". He further stated that, although ideally he would be best suited performing desktop work, computer work or sales work, he may also need to limit his work hours to 20 to 30 hours per week "due to difficulties with sitting, standing, driving, lifting and bending".

[21] Dr Wallace stated that the plaintiff's capacity to continue working as a silicon sealer "would be limited" and that he should consider pursuing employment "in a sedentary or supervisory capacity".

[22] Dr Halliday expressed the opinion that the plaintiff would be "better suited to a more sedentary occupation" because a "return to physical labouring activity is likely to aggravate his back pain".

[23] Dr Campbell and Dr Wallace, when cross-examined, acknowledged that there was unlikely to be any improvement in the plaintiff's symptoms in the future.

[24] It was not in any way suggested to the plaintiff in cross-examination that his studies would lead him to obtain some specific kind of desk job or some other sedentary occupation which would permit him to work, perhaps in a supervisory capacity, in other than his own business of silicon sealing. Furthermore, he gave the whole of his evidence through an interpreter on the undisputed basis that he had "limited English".

[25] As to the plaintiff's present capacity as judged by himself, he stated that in "not a good week" (where he could not move his body "too well"), it would be about five hours a week, although in a "better week" (where he could move and have help from his friends) he could work up to 15 hours a week. To my mind, this is consistent with the fact that his object in obtaining business qualifications was initially because he had a business in his name and he realised that he did not know much about Australian business at all, so he thought he needed some more knowledge as he had desire to obtain a qualification related to his work. He had earlier stated that, whilst living in Australia, he learnt that it was important to have qualifications and also he wanted to learn English which he could do while studying in English and that if the opportunity arose where he could use his qualification, "that's even better". Hence, I infer, on balance, from the totality of the evidence led before me that, even though the plaintiff has been successful at his business studies, they have been of utility to him really only as an adjunct to running his own business, even though he acknowledged that if an opportunity arose, he would take it. The consequences of these conclusions will be addressed later in examining the extent to which this loss of earning capacity has been productive of financial loss.

General damages

[26] There is no contest that the plaintiff is entitled to general damages calculated by reference to an Injury Scale Value ("ISV") of 9 pursuant to Item 93 ("Moderate thoracic or lumbar spine injury – soft tissue injury") as set forth in Schedule 4 of the *Civil Liability Regulation* 2003 ("*CLA*") (current as at 1 July 2013) and after noting its purpose [as Schedule 3, s 2 (2) provides].

[27] Given the "comments" in that Item, it is appropriate, as agreed between the parties, that general damages be assessed at $13,240.00.

[28] No interest is awardable on general damages.[4]

Past special damages

[29] There is no dispute between the parties that, of the total amount claimed of $5,441.29, all but $2,805.00 (referable to chiropractic expenses) should be allowed.

[30] As to those chiropractic expenses, the fourth defendant admits that expenses of this nature up till the end of January 2015 were reasonably incurred in the sum of $385.00. That date is chosen because at that time Dr Campbell stated in his report of 2 February 2015 that his "opinion" as to what future treatment should be undertaken would mean he "would advise rest, painkillers and modification of activities". It should be noted that he also stated that, "unfortunately", chronic lower back pain is difficult to manage and that the treatment provided to date had been "appropriate" and had included, amongst other things, "chiropracty".

[31] There is nothing in the evidence given by the plaintiff, even in cross-examination, that reveals that he was informed that he should cease chiropractic treatment, even if that could be the only interpretation reasonably open on Dr Campbell's report. It should also be noted that it was only at trial that Dr Campbell stated that it was not likely that the plaintiff would have benefited from any formal therapy from about January 2015 to the present time.

[32] This should also be resolved in the context where the undisputed evidence in the statutory declaration (as redacted) of the plaintiff stated that the plaintiff's GP, Dr James Kang, had referred him to chiropractic treatment on and from 2 December 2014. There is no evidence from which it can be inferred that Dr Kang changed that advice at any time up to trial.

[33] Given all those particular matters, it has not been an unreasonable course for the plaintiff to follow to continue to have chiropractic treatment. Accordingly, I allow the full amount for chiropractic expenses of $2,805.00, meaning that the total of past special damages are assessed at $5,441.29.

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[4] *CLA* 2003 (Qld) s 60 (1) (a).

Interest on past special damages

[34] Since the plaintiff does not dispute an interest rate of 1.165% per annum on $3,844.74 over 847 days, the calculation yields an assessment of $103.94.

Future expenses

[35] The fourth defendant admits that the claimed future medical expenses should be assessed at $4,000.00.

Future commercially sourced services

[36] The plaintiff gave evidence that he now lived in shared accommodation with "lots of people living together" in a house. He stated that he does basic housework such as "dishing up and washing". With respect to "scrubbing baths, scrubbing toilets, heavy lifting in the house", he responded that he could not do those things and "had occasions where (he) asked (his) friend to help (him) with things". When further asked how often that happened (i.e. asking people whom he lived with to help around the house), he stated that it was "not a regular occurrence" and that "maybe" it was "once a month or twice a month".

[37] There was no evidence given by the plaintiff that he would, any time in the future, pay for such domestic assistance. There is no suggestion in the evidence given by the plaintiff that, for the future, he would not continue to ask people with whom he lived to help around the house. Furthermore, there is absolutely no evidence of the cost of such assistance.

[38] Insofar as any medico-legal expert commented on the requirement for domestic assistance, Dr Wallace, in cross-examination, after quickly reviewing his notes, stated that it was not his understanding that the plaintiff would require any paid domestic assistance in the future. For his part Dr Halliday, in answer to a specific question addressed to him, stated in his report that it was not necessary to receive paid assistance with domestic chores in the future as a result of injuries sustained in the accident. As earlier addressed, he was not cross-examined.

[39] In *ALDI Foods Pty Ltd v Young*[5] the Court considered this issue of the assessment of damages for future domestic assistance. In an analysis, with which Meagher and Simpson JJA agreed, Adamson J stated that, where there is an established need for domestic assistance, which has been provided gratuitously as at the date of hearing, the judge is entitled to assess damages for the future on the footing that there is a real (not fanciful) prospect that the assistance will have to be "provided commercially" at some stage in the future.[6] He, then, quoting an extract from *Miller v Galderisi* (citation omitted), referred to it not being appropriate to "simply pluck a figure out of the air because there is a remote, although not entirely fanciful, chance of the need for commercial domestic assistance in the future". He concluded that, in the case

[5] [2016] NSWCA 109.
[6] *ALDI Foods Pty Ltd v Young* [2016] NSWCA 109 at [193].

before him, the plaintiff failed to establish a need for domestic assistance resulting from the accident because there was "insufficient evidence" for the primary judge to determine what, if any, domestic assistance had been provided either before the accident, or in the period from the accident to the hearing, or what might be provided in the future and that, in the circumstances, the primary judge was "not entitled" having regard to the primary judge's reasons, to make any award for future commercial domestic assistance.[7] See, also, *Allard v Jones Lang Lasalle (Vic) Pty Ltd*,[8] especially Tobias AJA, where, in circumstances which involved actual specific assistance evidence being led of gratuitous services, stated that to pick a future point in time when such assistance might cease and commercial assistance may be required "would be nothing short of speculation".[9]

[40] It is not irrelevant to note that s 59 of the *CLA* imposes a statutory threshold for claiming damages for gratuitous assistance. But, as the above cases show, there can be circumstances where s 59 is inapplicable but commercially sourced services can be the subject of an award. Here, there is just not a sufficient factual foundation for me to make any assessment of any kind as to future paid assistance, especially in circumstances where no evidence was led from any commercial supplier of such services as to the way in which such a generalised claim as is made by the plaintiff could be appropriately met.

[41] Hence, no amount is allowed.

Past economic loss

[42] In making an assessment for this head of damage, the conclusions that I earlier reached regarding the plaintiff's financial records apply. In addition, for this past period, the fourth defendant has not contended that the plaintiff should have sought alternative sedentary work away from his silicon sealing business.

[43] It is, thus, from an analysis of the plaintiff's financial records and the evidence given by the plaintiff himself that calculations for this matter are to be determined.

[44] Since both parties have undertaken an analysis based upon the relevant facts of each of the periods comprising the financial year 2013-2014, the financial year 2014-2015 and the financial year 2015-2016 (to date), I will also analyse the evidence in that format.

2013-2014

[45] It is not disputed that, as at 22 January 2014, the plaintiff was self-employed as a silicon sealing contractor working under his own ABN (99 858 575 414). It is also not disputed that he had commenced that employment around 2 August 2013.

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[7] *ALDI Foods Pty Ltd v Young* [2016] NSWCA 109 at [194].
[8] [2014] NSWCA 325 at [57] - [74].
[9] [2014] NSWCA 325 at [73].

[46] The plaintiff's attitude to and aptitude for such labour intensive work is amply demonstrated by the Statutory Declarations (as redacted) of Mr Oh and Mr Kwon. The former states that such work requires long standing and strenuous activity and that, prior to the accident, he considered offering the plaintiff "permanent employment". The latter stated that he had been working with the plaintiff for the six months prior to his statement of mid-January 2016. After explaining what the role involves in a general way, he then stated that there is a necessity to work in confined spaces which require bending and crouching.

[47] I accept that an analysis of the invoices issued from 2 August 2013 to 26 February 2014 (with the latter referable to the fact that 90% of the work had been completed prior to the date of the accident) shows an income (before deductible expenses) of $35,354.00. The fourth defendant has admitted this figure in its Outline.

[48] I also accept that an averaging over the 24.7 weeks involved reveals a weekly income figure of $1,430.76. This is applicable for the 160 days from 22 January 2014 to 30 June 2014, yielding an additional, though notional, income of $32,707.00.

[49] The deductable expenses for the 2013-2014 financial year are admitted to be in the sum of $10,657.00.

[50] In addition, it is not in contention that subcontractors' fees were paid to Shin Sangjun in the sum of $12,742.00. Although the plaintiff's income tax return for the relevant year shows a figure of $15,860.00 for "sub-contract, contract labour", the difference between the two figures is reflected in that sum of $10,657.00 for actual expenses. I accept that the expenses should be limited to $10,657.00 because it is clear that Mr Sangjun was only contracted because the plaintiff was unable to do that work himself (as set forth in the plaintiff's own oral evidence). This is with respect to a notional gross income for the year of $68,061.00.

[51] Before considering any deductions for contingencies, both positive and negative, those calculations then show a notional taxable income of $57,404.00 for a full year. After deducting income tax payable for that financial year (including the Medicare levy – which, for future reference will be incorporated into the concept of "tax"), the notional nett income can be calculated at $46,479.00. Deducting, then, the nett income (after tax) actually received of $24,676.00, a loss of $21,803.00 is assessed.

[52] Before I consider any deduction for contingencies, it is also necessary to consider the fourth defendant's contention that it is possible to infer that the expenditure for materials and supplies, particularly insofar as it concerns the purchase of silicon material, would have been much more than the claimed amount of $2,971.00. Besides concluding (above) that the application of the rule in *Browne v Dunn*[10] precludes the use by the fourth defendant of factual matters not put to the plaintiff in cross-examination, it is not possible, even independently, to infer that because, for example, $21,859.55 was spent on silicon material for the period from 1 July 2015 to 29 April

[10] (1893) 6 R 67 (HL).

2016 the proportion of such expenditure to the income (before any deduction for any other expenditure) must be universally applied over all of the three particular periods in question; or even that the expenditure for such materials over the mid period could be applied to the first. The argument has even less traction insofar as it is sought to extend to motor vehicle expenses. There may have been reasons why the expenditure on silicon which occurred after the accident had a causal relationship with the accident itself. Even though that was not explored, it is the more probable inference, given the substantial disruption to the plaintiff's business. But while it is possible that the subcontractors whom the plaintiff engaged were either less skilled than he was and, or alternatively, less mindful of waste than he was, thereby generating a requirement to purchase significant additional silicon material, I cannot properly infer that since these are actual past events, they must be determined on the balance of probabilities. So, I am left with basal facts and inferences so determined which have to be applied according to their ordinary context, meaning that the only solid basis for determining the post-accident financial circumstances relating to expenses incurred in deriving income likely to have been earned are those which occurred before the accident.

[53] Also, it defies logic and common sense that the plaintiff, conducting his own business in the financial years 2013-2014 and 2014-2015, would not have claimed all relevant expenses. But whatever is the unexamined reason for the increases, there is no basis from which it can be properly inferred, given the conclusions that I have reached, that there should be a retrospective readjustment of expenditure to reflect the notional expenses in the post-accident environment based, simply, on either or both of the last period or the mid period of the three periods in question.

[54] Turning then to the matter of deduction for contingencies, there is really no basis for making any deduction. The evidence is that the plaintiff, for the balance of this first financial year, continued to attempt to earn income. There is just nothing from which to infer on a principled basis that there should be any deduction for a balance of adverse contingencies over positive contingencies where the facts are as I have indicated.

2014-2015

[55] Adopting the same approach as for the 2013-2014, taking note that the earlier period consisted of 334 - rather than 365 – days (i.e. from 2 August 2013 to 30 June 2014), the notional expenses for this period would be $11,646.00.

[56] With respect to the notional income before deduction of expenses, that would be $75,600.00 (being 52.14 weeks x $1,430.76 per week). This base figure was accepted by the fourth defendant.

[57] After deducting the notional expenses indicated, the taxable income would be $62,954.00. It is not contested that income tax on that taxable income would be $13,210.00, leaving a nett notional income of $49,744.00.

[58] After deducting the actual income of $18,096.00 (which was below the taxable threshold), the loss for the year is $31,648.00.

[59] Again, it is difficult to see why there should be any deduction for the balancing of adverse over positive contingencies. The plaintiff continued to seek work; and, although more restricted by the temporary loss of a contract with Mr Oh of Alpha Tiling Service Pty Ltd in about August 2014, the plaintiff still managed to generate an income (before expenses and income tax) of $39,154.00.

2015-2016

[60] Necessarily, this third period can only go from 1 July 2015 to 17 May 2016. Calculated proportionately on those 322 of the 366 relevant days, the notional income (before expenses and income tax) generates $65,632.00.

[61] Similarly, with respect to notional deductable expenses, the calculated sum is $10,246.00.

[62] Thus, the notional taxable income, calculated similarly, is $55,386.00.

[63] The notional income tax on that is $11,622.00.

[64] Thus, the notional income (after tax) is $43,764.00.

[65] The actual nett income for this period was $15,001.00. The difference between notional and actual yields an actual loss for this period of $28,763.00.

[66] That figure of $15,001.00 is calculated from a combination of the income recorded in Document 5.2.15 (Exhibit 4) plus the pre-GST income from the period 30 April 2016 to 17 May 2016 recorded in Invoice No 29 dated 25 April 2016, less the expenses which are partially recorded in Document 5.2.15 (being of $26,279.00) and partially calculated on the proportion that the number of days from 30 April 2016 to 17 May 2016 bears to the number of days from 1 July 2015 to 29 April 2016 with respect to those actual expenses recorded in Document 5.2.15 (of $26,279.00).

[67] Again, given the actual fact of income continuing to be earned from the plaintiff's continuing business in this period and given the continuing "fact" that the plaintiff kept up his studies, in the further circumstances where there was no evidence of a downturn in that kind of work being available, I see no justification for why there should be any deduction for adverse over positive contingencies for this period.

Interest on past economic loss

[68] Since the plaintiff and the fourth defendant do not dispute the claimed interest rate is 1.165%, on the sum of $82,214.00 over the period in question of 847 days, there is an interest yield of $2,222.60.

Future economic loss

[69] The impairment of earning capacity which is productive of a financial loss (especially for the future) is subjected to, principally, an assessment based upon *Malec v J C Hutton Pty Ltd*.[11] Provided double discounting is not engaged in, the approach dictated by *Malec* does not necessarily put to one side the common application of a reasoned deduction for contingencies (based upon applying both positive and negative aspects of such). As Ipp JA noted about *Malec* in *Seltsam Pty Ltd v Ghaleb*,[12] the court must form an estimate of both the likelihood that the alleged hypothetical past situation would have occurred and the likelihood of the possibility of alleged future events occurring.[13] The former has been canvassed earlier – the latter now.

[70] It is, additionally, subjected to the application of the principles derived from *Thomas v O'Shea*.[14] As extracted from that and applying qualifying local appellate decisions, McMeekin J, in *Martin v Andrews & Anor*,[15] discussed that, while an evidentiary burden can be cast on a defendant to show what alternative opportunities are open, including the state of the labour market and the likely earnings in circumstances where a plaintiff has proved that he has lost his pre-accident earning capacity and has not found suggested alternative positions, that does not mean that there is some "mechanistic approach", such that a failure to lead evidence of the kind discussed in *O'Shea* has the effect that a defendant is precluded from arguing some residual capacity – rather, the residual capacity must be assessed on the evidence, taken as a whole.[16]

[71] The overall evidence in this case does not show that the plaintiff has open to him realistic prospects of obtaining a sedentary position (either as a supervisor or otherwise – apart from being involved in his own business). I do not accept the submission that the plaintiff's present difficulty in obtaining sponsorship relates to his limited hours imposed by his current Visa, as opposed to issues associated with the accident. Even a brief consideration of the plaintiff's evidence in light of the Statutory Declaration (as redacted) of Mr Oh effectively negates that argument. This is correspondingly made more difficult for the fourth defendant to sustain because Mr Oh was not required for cross-examination and in a fair reading of Mr Oh's Statutory Declaration he attributes his decision about the "lack of viability" to the plaintiff's "reduced working capacity following the accident".

[72] The Amended Statement of Claim (which I gave leave to file on the first day of the trial) does not seek an amount calculated other than on the basis of a "current and continuing rate of loss of $954.05". In the plaintiff's Outline of Submissions, it is contended that the assessment of loss for this head of damage should *not* be less than that contended for in the Amended Statement of Claim. The reasoning which explains

[11] (1990) 169 CLR 638.
[12] [2005] NSWCA 208.
[13] [2005] NSWCA 208 at [103].
[14] (1989) Aust Torts Reports 80-251.
[15] [2016] QSC 20.
[16] [2016] QSC 20 at [96] – [97].

that contention is that that nett amount per week reflects merely what the plaintiff was earning before the accident when working, at most, for those 40 hours per fortnight only whilst the courses of study undertaken were in session and that, upon obtaining permanent residency, he would be free of this limitation. During oral submissions, counsel for the fourth defendant did not seek to add anything to the submissions that he had first made by way of both his written Outline of Submissions and the oral submissions made supplementing them, concerning the ceiling for such damages.

[73] In any event, the trial was run on the basis that while the plaintiff had the relevant Student Visas he had a restricted capacity to earn income and that, if he would have been able to obtain a sponsor and then obtained the consequential grant of permanent residence, he would no longer be subject to such limited working hours. Hence, I intend to give effect to the contentions raised by the plaintiff but restrict any future economic loss to a ceiling of the "claimed" amount because the requirements of the *Uniform Civil Procedure Rules* 1999 must be respected.

[74] It cannot be a contention which is sustainable that, if the plaintiff were not to obtain a sponsorship, even though he would have to return to South Korea, he would not be limited in his capacity to undertake whatever work his brother performs in that country. As already noted, whatever limitation *O'Shea* has, since residual earning capacity must be assessed on the evidence and there is no evidence about the nature of the work that the plaintiff's brother performs or the remuneration he could receive if he did it, there is absolutely no basis upon which to assess any calculable sum which would differ from that which the plaintiff would be able to earn by his own personal exertions should he still be able to stay in Australia in his present injured condition.

[75] The base figure relied upon by the plaintiff of $954.05 is that rate which is derived from the calculation of the notional income that the plaintiff would have earned during the full financial year of 2014-2015. There is no reason why this period which is fully reviewable should not be used. It is clear from the Amended Statement of Claim that the appropriate corresponding figure taken from the same financial year for deducting the notional expenses from this notional income, as reduced to a weekly basis, is $347.07 (i.e. $18,096.00 ÷ 52.14 weeks). It is noted that the deduction is more than contended for by the plaintiff in his written Outline – but the figure relied on there was amended in the governing pleading.

[76] Accepting that which is submitted by the plaintiff about the hours the plaintiff would have worked but for the accident in the future if he were to have been accepted as a permanent resident (i.e. in the order of 50 to 60 hours per week as a "fully-fledged, self-employed tradesman"), it is reasonably likely that his retirement would be in the age bracket of 60 to 65 years (given that no evidence was led before me about whether persons doing this kind of work as a silicon sealer in the role that he would have undertaken as a subcontractor – even in an increasingly supervisory role – would have gone either materially over, or materially under, that age bracket).

[77] No party has suggested that this approach would run counter to either s 54 or s 55 of the *CLA*.

[78] Proper discounting, either pursuant to *Malec* and the usual "deduction for contingencies", or principles reflecting an indistinguishable combination of the two, means that I accept that, in the circumstances to be next discussed, a 50% discounting is appropriate. Neither side contested such a discount.

[79] In calculating that discount, I have already indicated the inherent limitations about how, if at all possible, one could take into account some different figures for the potential income that might be earned in South Korea if that contingency were to eventuate. As for the likelihood that the plaintiff would have continued a successful self-employed business if he were not to have been injured and the further likelihood that he would have gained permanent residency, they are, to my mind, considerably better than even given his apparently assiduous devotion to his studies (which have been successful in every respect so far) and the relationship that he had formed with Mr Oh, taken against the background of the evidence that I have accepted that can be derived from Mr Oh's Statutory Declaration (as redacted). On the other side of the ledger, there is a lengthy period to be brought into account. As for the prospects of obtaining some other sedentary occupation outside the business he continued to conduct as a silicon sealer, I would calculate the prospects now as considerably low, given the conclusions I have reached about his limited capacity to speak fluent English and the complete absence of any evidence about what these sedentary jobs would involve, much less what qualifications would be necessary to obtain them. Because, below, I reject any assessment for future superannuation loss (from statutory employer contributions), this discounting exercise must, consistently, assess the estimate of the likelihood of not continuing to be self-employed (if uninjured) as being significantly low. While, for this exercise, it would otherwise have the potential to decrease the estimate of loss (because of the likelihood for a lower nett weekly income if working as an employee only in the absence of evidence to the contrary where the plaintiff had had considerable success as a sub-contractor), the choice of the actual discount gives some recognition also to whatever could have been the corresponding "benefits" (such as employer paid allowances, superannuation and leave) of such a future possibility. Thus, whatever small effect either way it would otherwise have on the assessment, the agreed discounting comfortably envelops it.

[80] Bearing all those factors in mind, I accept that the common approach by both parties to discounting by 50% is the one that should be adopted.

[81] Thus, on the relevant 5% tables [applying a multiplier of 822, over 30 years to age 62.5, at a weekly rate of $606.98 ($954.05 - $347.07), and after a discount of 50%] the calculation yields $249,468.78.

Future loss of employers' contribution to superannuation

[82] There is, I find, only a significantly low prospect that the plaintiff would have been entitled in the future to be paid compulsory contributions to his superannuation by prospective employers in accordance with the *Superannuation Guarantee (Administration) Act* 1992. This is because I accept that, given his vocational qualifications and his demonstrated capacity to undertake the business as a self-employed subcontractor (even though as injured for work as he has been), in the absence of any evidence by anyone qualified to speak to of the likelihood of employment by others in the industry (rather than self-employment as a contractor) should sponsorship have eventuated, it is highly unlikely in the *Malec* sense that he would ever have been remunerated as a PAYG employee. Even so, as I have just discussed, any such faint prospect is captured by the award for future economic loss.

[83] Thus, no amount will be allowed for this head of damage.

Summary

[84] The following table sets out the various sums under the different heads of damage that I have assessed in this case.

	Head of damage	Amount
1	General damages for pain, suffering and loss of amenity	$13,240.00
2	Past special damages	$5,441.29
3	Interest on past special damages	$103.94
4	Past economic loss	$82,214.00
5	Interest on past economic loss	$2,222.60
6	Future economic loss	$249,468.78
7	Future medical expenses	$4,000.00
	Sub total	$356,690.61
	Less rehabilitation expenses met by fourth defendant	$1,596.55
	TOTAL	$355,094.06

[85] Thus, I will give judgment for the plaintiff against the fourth defendant in the amount of $355,094.06 (inclusive of interest).

[86] Because this is a case in which mandatory final offers were given, I will give each of the plaintiff and fourth defendant a week in which to file, and serve, submissions on costs.