DISTRICT COURT OF QUEENSLAND

CITATION:	*Clapham v Butler & Anor* [2016] QDC 268
PARTIES:	**DONAL IAN CLAPHAM** **(plaintiff)** **v** **JENIE JUDY JESSIE BUTLER** **(first defendant)** **and** **ALLIANZ AUSTRALIA INSURANCE LTD (ABN 15 000 122 850)** **(second defendant)**
FILE NO/S:	BD 3469/15
DIVISION:	
PROCEEDING:	Civil Trial
ORIGINATING COURT:	District Court of Queensland
DELIVERED ON:	2 November 2016
DELIVERED AT:	Brisbane
HEARING DATE:	27 and 28 October 2016
JUDGE:	Andrews SC DCJ
ORDER:	**Judgment for the plaintiff against the second defendant in the sum of $18,750.05**
CATCHWORDS:	DAMAGES – PERSONAL INJURIES – QUANTUM *Bell v Mastermyne Pty Ltd* [2008] QSC 331 at [19] cited
COUNSEL:	Moon for the plaintiff Morton for the first and second defendants
SOLICITORS:	Dwyer Law Group for the plaintiff Moray & Agnew for the first and second defendants

Background

[1] The plaintiff and the first defendant were each driving a different motor vehicle northbound on Sandgate Road toward that road's intersection with Centro Toombul Access Road. The first defendant negligently drove into the rear of the plaintiff's stationary vehicle. As a result, the plaintiff suffered an injury to his right wrist and an

injury to his thoracic/lower cervical spine. Within a week he also complained of knee pain. He continues to feel symptoms in the wrist and knee which interfere with his work.

Issues

[2] Did the plaintiff suffer an injury to his right knee in the collision or are his subsequent symptoms in the knee a coincidence caused by pre-existing pathology? Has the wrist injury sustained in the collision resolved so that continuing symptoms are due to pre-existing pathology? Has the injury to the thoracic/lower cervical spine resolved? Did the plaintiff sustain an injury to the chest and ribs? And, if so, has it resolved? Has the plaintiff lost income he would otherwise have earned? Will the injuries sustained in the collision produce any financial loss in the future?

Facts

[3] The plaintiff was born on **28 September 1947** and is aged 69 years and one month. He has qualifications and experience as a builder in Queensland and New South Wales.

[4] In the financial year to **30 June 2010** the plaintiff's individual income tax return recorded that he had no gross or net income. In the calendar year 2010 the plaintiff was building a project house in Brisbane which he had designed.

[5] In the financial year to **30 June 2011** the plaintiff's individual income tax return recorded that he earned no gross or net income.

[6] In the financial year to **30 June 2012** the plaintiff's individual income tax return recorded that he earned a net income of $62,772 and gross income of $82,584 as Managing Director of Spectrum Constructions. The plaintiff was the sole income producer for Spectrum Constructions which employed his de-facto partner to run the office. It follows that the plaintiff's earning capacity was something more than was suggested by his own net income paid by Spectrum Constructions.

[7] **Between August and November 2012** unrelated heart surgery and rehabilitation kept the plaintiff from working as a telecommunications site designer employed by his company Spectrum Constructions as contractor from Aurecon.

[8] After that convalescence the plaintiff's work with Aurecon recommenced from some date in about **November 2012** until some date in about **April 2013**.

[9] **Between May and 30 June 2013** the plaintiff was approaching 65, was unemployed and pursuing employment. In June 2013 the plaintiff was descending a ladder, made a misstep, and landed on his knee. It swelled. He saw his general practitioner Dr Murray and he took anti-inflammatory tablets.

[10] **From July to October 2013** the plaintiff was still unemployed and looking for work. The swelling in his knee abated, but there continued a background soreness which the plaintiff could put up with but which would not go away. On **28 September 2013** the plaintiff turned 66, was unemployed and pursuing employment.

[11] On **15 November 2013** the plaintiff went to see Dr Murray. He knew that he might secure employment with Kordia Solutions. I find that his right knee was then troubling the plaintiff. He explained:[1]

> if I can't do my job I wouldn't have lasted in the job. I knew it was a high profile job. So I had to be fit so I decided I'd go to the doctor and just say what is – is anything going on here that would stop me from doing my duties at work. And that's the reason I – I went to the doctor.

[12] The plaintiff then told Dr Murray that he had wrenched his right knee, that it was painful on the inside, that he had pain since June 2013 and that the pain was worse with walking and activity. The plaintiff had done research to determine that Dr Ganko was a specialist who dealt with such problems and knew that Dr Murray was not a specialist. On 15 November 2013, the plaintiff asked Dr Murray for a referral to Dr Ganko. In spite of the referral, the plaintiff did not make an appointment to see Dr Ganko.

[13] The plaintiff signed a contract on **25 November 2013** with Kordia Solutions for 12 months work for a gross $140,000 for 38 hours work each week as a project manager. The contract was for a fixed term to 27 November 2014. It was relatively light work compared with the more physical work the plaintiff had been accustomed to.

[14] It was submitted for the plaintiff that he earned about $100,000 pa net or about $1,923 net per week. That was roughly correct on the basis of an annual gross income of $140,000. But that was not the rate at which the plaintiff had earned by reference to the preceding years. Historically his earnings had been less. His capacity to earn at that rate after 27 November 2014 was not established.

[15] The collision occurred on **27 November 2013** as the plaintiff drove home after his first day's work. The plaintiff was driving a Ford Utility which was a 1995 or 1996 model. It was 18 or 19 years old but in good condition. The plaintiff and the defendant were each driving northbound on Sandgate Road toward that road's intersection with Centro Toombul Access Road. The plaintiff brought his manual vehicle to a stop for a red light and left it out of gear when it was struck. The first defendant was driving to the rear of the plaintiff's vehicle. She was aware that there could be vehicles ahead of her and out of sight which were stationary at the intersection so she prepared by keeping her foot between the brake and the accelerator. She became distracted, drove too close, braked hard but still her vehicle collided with the rear of the plaintiff's vehicle. The plaintiff's vehicle was pushed into the rear of the car in front. The plaintiff believed that it bounced back.

[16] The plaintiff described his vehicle as having been written off in the collision. The plaintiff's counsel urged that this was an indication of the degree of the severity of the impact. I reject the argument. The decision that the value of the vehicle made it uneconomic to repair is not reliable evidence of the force of the impact. The photographs in evidence suggested a minor impact.

[17] In evidence the plaintiff said that the effect he suffered at the time were "a horrendous thorax pain and – and neck problems straight off the bat. When I hopped out of the car, the – my knee was sore, and my wrist was extremely sore". Notwithstanding that evidence at trial, the plaintiff accepted that when he exited his car, he moved freely. The first defendant, a nurse, gave evidence that she looked for signs of injury and saw

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[1] T1-11 line 5

none. I find that the plaintiff did move freely. The first defendant had made a WorkCover claim herself three years before the accident. I accept her evidence that the plaintiff, at the scene, mentioned WorkCover. She gave evidence, which I accept, that she asked the plaintiff if he was "okay" and that he said words to the effect that he was okay and that if something came of the accident it would be covered by WorkCover. I accept that the plaintiff said words to this effect. Later in his evidence the plaintiff gave evidence to the effect that knee pain occurred about a week after the collision. For reasons explained below, I accept that the knee pain arose a week after the collision and that the knee was not sore when the plaintiff exited his car.

[18] There is no evidence that the plaintiff struck his knee in the impact and there is no allegation or submission that he did. **On 28 November 2013** the plaintiff attended work. He mentioned his injuries. He was directed to attend Medibank Health Solutions. The notes made by the medical practitioner as a result of that consultation included the following:

> Was clenching tight on steering wheel on impact so now also sore in right wrist. No other injuries reported … Past medical history – nil Current medications – nil Allergies – nil Examination NO bruising over back Slightly tender to palpate over upper-mid thoracic region of back and along the sides Normal neck and shoulder ROM Able to touch toes and extend normally Normally wrist movement and intact sensation … Provisional diagnosis – Whiplash injury – minor upper back muscular strain and wrist sprain Plan: Able to resume ND Offered to refer for physiotherapy but declined as he is currently very busy with moving house and starting in new job Advised to use heat and Nurofen as required to return within 4 weeks if not improved.

[19] Significantly, the notes contained no mention of the knee as a subject for complaint.

[20] On **5 December 2013** the plaintiff returned to Medibank Health Solutions. The notes made by Dr Lee as a result of this visit relevantly included:

> Returned today because right knee is now sore. Upper back pain has resolved but right wrist still slight sore. Informed that after he saw me here he started to experience a mild pain in his right knee mainly over the medial and inferior side of the patella. Has not had any clicking or popping from that knee, also no instability reported. … Likely mild knee capsular sprain, from having his right foot twisted to step on the brake at time of accident. He mentioned that he always plants his heel on the floor and twists the foot side to side …

[21] On **17 December 2013** the plaintiff returned again to Medibank Health Solutions. The examining doctor, probably Dr Muller, created the following relevant notes:

> Improving, but R knee still troublesome. Has been moving house, carting boxes, unpacking Examination: R wrist: no swelling, tender radial site. Snuffbox. Tender medial joint line Back and neck: NAD …

[22] On **17 January 2014** the plaintiff was seen by Dr Lee who created the following relevant notes:

> Right knee still not improving. Sharp pains mainly on walking up stairs. Denies any instability or locking. Still has full range but sore at extremes of range. Right wrist is not particularly bothering him but does get sore around the hand and over the radial side. Keen to see a specialist for his knee in particular … referral provided, he will ring a few specialists to check on appt times …

[23] Subsequent notes revealed that the plaintiff made an appointment with Dr Ganko, that his complaints at Medibank Health Solutions came to focus more on the knee though he continued to complain of problems with the knee and wrist.

[24] Significantly, there is no mention within the notes of Medibank Health Solutions of the fact that his knee was injured and symptomatic six months before the motor vehicle accident.

[25] The plaintiff saw Dr Ganko by **28 March 2014**. The plaintiff denied to Dr Ganko that he had any trouble with his knee before the motor vehicle accident although he mentioned arthroscopic surgery many years before. The plaintiff surmised to Dr Ganko that he hurt his right wrist and right knee bracing on the steering wheel and bracing against the brake pedal. The plaintiff explained in evidence that he does not tell doctors "too much because they go off on their wrong tangent".[2] The plaintiff did not tell Dr Ganko about his knee having been symptomatic and explained that he did this "because I thought he has the MRIs, he's got my [indistinct] he makes his own decision".[3]

[26] The plaintiff's instructions to Dr Ganko about his lack of symptoms were deliberate. They were not an oversight. They were deliberately misleading by omission.

[27] The plaintiff emailed WorkCover on **31 October 2014** with respect to his right knee, advising "the pain I am experiencing is not due to an underlying condition as the underlying part was causing no pain for the last 35 years until the accident occurred <u>now there is pain.</u> Work Cover should not use this as a way of wiping your hands of the situation by blaming this component of ??? existing condition ??? as it is not".[4]

[28] The motive for the plaintiff's deliberate and misleading omissions from his medical history is not necessary to determine. His motive may have been no more than to have the cost of knee treatment met by WorkCover. Even persons with private health insurance, such as the plaintiff, might be called upon to fund some of their costs of hospital, medical and physiotherapy treatment.

[29] The plaintiff ceased work with Kordia Solutions on **27 November 2014**. He gave evidence to the effect that he regarded the job with Kordia Solutions as so high profile that it put "horrendous" pressure on him. He explained that he was so "brain smacked" by the pressure of the job that he did not look for more work before **February 2014**.[5] I infer that the pressure was psychological and not due to physical complaints.

[30] The plaintiff saw Dr Wallace, another orthopaedic surgeon who examined him on **27 May 2015,** for the purpose of providing a medico-legal report. The plaintiff omitted to advise that his knee had been symptomatic before the accident and was injured in June 2013.[6] I infer that the omission was deliberate.

[31] The plaintiff also saw Dr Dickinson, another orthopaedic surgeon, on **11 June 2015**. This was for the purpose of obtaining a medico-legal assessment. The plaintiff told Dr Dickinson of his old football injury to the knee but there is no note of his having told Dr Dickinson of the injury sustained in June 2013 or of the symptoms which continued until the collision. I infer that he deliberately omitted to tell Dr Dickinson.

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2 T1-65, LL 5-25.
3 T1-73, L 1.
4 Exhibit 20.
5 T1-14 lines 35-40.
6 T1-72, L 26.

[32] The plaintiff's evidence at trial about the knee was more frank. It was given with the knowledge that the second defendant was aware that the right knee had been symptomatic prior to the collision. The plaintiff gave evidence that in the night after the accident the knee "swelled up a bit and then when I went to work after a week or so, it started hurting. It was going up and down the stairs".[7] I accept that the knee hurt going up and down stairs a week or so after the collision. There is no evidence of pain in the knee in the week following the collision. There was no note of a complaint of knee swelling made by Dr Lee on 28 November 2013. I make no finding about swelling in the evening following the collision.

[33] Because the plaintiff failed to disclose the knee symptoms he had experienced prior to the collision it has the result that a number of medical opinions about the genesis of his knee pain have been opinions based on a false premise. Later opinions were based on a corrected premise. Dr Dickinson opined in his report of 25 May 2016:

> The motor vehicle accident was a minor accident. Mr Clapham told me that he had not hit his knee at the time of the accident. The incident was of such low impact that there is no possibility that he would have had an injury of his knee at the time or aggravated any underlying condition of his knee. That is not to say that Mr Clapham would not have had knee pain at the time but his knee pain would only been as a result of his underlying osteoarthritis and not of any injury related effect. There was no effect on Mr Clapham's knee as a result of the motor vehicle accident.

[34] In one respect the premise upon which Dr Dickinson gave that opinion was incorrect. The doctor seemed to assume that Mr Clapham had knee pain immediately following the collision. That was incorrect. The plaintiff may have honestly believed that the knee symptoms he experienced some time after the accident were attributed to it. The plaintiff suggested a mechanism by which the injury may have occurred. He suggested that he may have twisted his foot while applying the brake. This mechanism was put by the plaintiff's counsel to Dr Dickinson. Dr Dickinson rejected it emphatically.[8]I am not satisfied that the knee was injured while applying the brake.

[35] Dr Wallace expressed a written opinion which was more favourable for the plaintiff's claim for damages with respect to the right knee. "He would in my opinion have begun to experience progressive deterioration of his knee symptoms were it not for the accident. These however have in my opinion been accelerated by the accident by a period of some five years".[9]

[36] Dr Wallace confirmed that opinion which he gave in March 2016 by another written opinion of 22 September 2016. The significance of the confirmation is that it was after apparently reading a report of Dr Dickinson of 25 May 2016. A reading of the report of Dr Dickinson of 25 May 2016[10] ought to have revealed to Dr Wallace that the plaintiff twisted his knee six months before the collision and that he had pain in the knee and medial tenderness 12 days before the collision. It was reasonable to infer from those 3 documents that Dr Wallace had given his opinion in September 2016 on the correct premise that the plaintiff had been symptomatic for six months before the collision. Dr Wallace denied in cross-examination that he had known these things when he expressed that written opinion on 22 September 2016.[11] Dr Wallace explained that his written opinion was based on the evidence he had at the time of the

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7 T1-72, L 15.
8 T2-19.
9 Report dated 22 March 2016 paragraph 2.
10 Exhibit 18.
11 T1-85, L 25.

interviews with the plaintiff.[12] It follows from Dr Wallace's oral evidence that he accepted that if he had taken account of the significant pre-existing history of six months symptomatology it would have affected the written opinions he expressed.[13] In re-examination, Dr Wallace reiterated that he became aware only on 27 October 2016, the day he gave evidence, that the plaintiff had seen his general practitioner two weeks before the collision with a history of six months symptomatology.[14]The plaintiff submitted that Dr Wallace's memory was wrong. I am satisfied by Dr Wallace's oral evidence that his opinion during his evidence was based on the correct history and was a revised opinion. It follows that Dr Wallace retracted his earlier written opinion as based upon a false premise.

The knee

[37] I accept the opinions of Dr Dickinson with respect to the effects of the collision upon plaintiff's right knee. There was no effect upon the knee as a result of the motor vehicle accident. The plaintiff has significant problems with his right knee. He asserts, and I proceed on the basis that he asserts correctly, that his knee problems affect his ability to work and his costs of doing business building granny flats. Dr Wallace assessed the knee as causing a 20% whole person impairment using Table 17.31 and that he will require a costly total knee replacement in four years. I am not satisfied that those losses are attributable to the collision because I am satisfied that they are caused by the degenerative condition of the knee.

The plaintiff's credibility

[38] Perhaps the plaintiff believed that his knee was aggravated in the collision. It is unnecessary for me to determine whether he believed that or not. I find that the plaintiff decided to deliberately keep from the medical practitioners he saw after the collision and to keep from WorkCover the history of injuring his knee in June 2013 and of the continuing symptoms which followed. That demonstrated a willingness to mislead with respect to his knee.

[39] It may be that it was only on this issue that the plaintiff sought to mislead. But there are a number of other aspects of his claim for damages where the assessment depends on the plaintiff's honest reporting of his symptoms and their impact. Where a plaintiff bears the onus of proof and has demonstrated a willingness to mislead his examining doctors it makes suspect the plaintiff's description of his subjective problems such as the level of his pain and the impact upon his activities.[15] The medical practitioners whose assessments the plaintiff relies upon were unable to objectively assess pain and relied upon the plaintiff's descriptions of the levels of his incapacity. Even so, Doctors Wallace and Dickinson reached substantially different conclusions.

The wrist

[40] The plaintiff has a minor osteoarthritic condition of his right wrist. It is described by Dr Wallace as STT osteoarthritis. Dr Wallace opined that the plaintiff had reached maximum medical improvement by the time of his examination on 27 May 2015. He opined that the collision caused a torsional injury to the right wrist which aggravated

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12 T1-86, L 37.
13 T1-86, L 46.
14 T1-95, L 17.
15 *Bell v Mastermyne Pty Ltd* [2008] QSC 331 at [19] per McMeekin J.

the pre-existing STT osteoarthritis and that no surgical treatment was required. With respect to his right wrist he assessed, using chapter 18, that the plaintiff had a 2 per cent whole person impairment but accepted that any such assessment was dependent upon the accuracy of the plaintiff's reporting. The plaintiff gave evidence of giving up golf for reasons to do with twisting and loading of his knees and his wrist. He mentioned difficulty gripping and using hammers. Fortunately, he is semi-ambidextrous and with carpentry has learned to use both hands. He gave evidence that he could use a hammer with his left and right hand. When pressed by his own counsel's cross-examination the plaintiff retreated to say that he could use a hammer in his right hand for light tapping but not heavy banging. Notwithstanding his pre-existing degeneration the plaintiff said that he had none of these problems with his right wrist prior to the accident. Dr Wallace's assessment of a 2 per cent impairment was based upon pain reported by the plaintiff. The plaintiff gave little evidence of pain and basically the scant evidence of disability related to the wrist outlined above. Dr Wallace saw no restriction of motion in the wrist. Dr Wallace was not able to prognosticate with respect to when symptoms in the wrist would have arisen were it not for the accident.

[41] Dr Dickinson recorded the plaintiff's complaints on 11 June 2015 that the plaintiff continued to have pain in his right wrist all over the circumference of the wrist from the medial to the lateral side and over the dorsum of the wrist and that he had trouble with such things as opening jars and turning knobs, that the plaintiff's golf swing had been affected and that he had difficulty with a handshake because of pain in the wrist. He noted a slight loss of radiolunate joint space and scaphotrapezial arthritis. It was his opinion that the plaintiff had significant pre-existing STT joint osteoarthritis at the base of the right thumb. Yet, he observed the right wrist to be normal clinically and radiologically. It was his opinion that the osteoarthritis identified because of the radiolunate joint space was not caused by the accident. His opinion in June 2015 was that there was no impairment of the wrist arising from the accident. And yet, it seems the plaintiff was asymptomatic before the accident and symptomatic after the accident.

[42] I accept the plaintiff's submission that the collision rendered the arthritic wrist symptomatic. I accept the opinions of Dr Dickinson relating to the wrist. Consistently with both those findings I allow the plaintiff for twelve months of the symptoms in the wrist following the collision. I am not satisfied that his wrist symptoms after 27 November 2014 are related to the collision. It follows that I am not satisfied that the wrist is a cause of economic loss, past or future.

The neck and back

[43] At trial the plaintiff complained that the neck pain continues. He said that he had just come off a month's period of intense pain in the neck area with numbness at the back of his skull. He explained that he managed to get rid of that after a long period of taking pills and a hot compress. He said with respect to the thoracic spine that it appears to be not too bad. The plaintiff gave evidence that the neck was a problem "straight off the bat" which I infer to mean that it was a problem at or shortly after the collision. When the plaintiff saw Dr Dickinson on 11 June 2015 he told him that he has minor pain in the upper thoracic/lower cervical region which had largely settled although he still had discomfort from time to time. Dr Dickinson reported that the plaintiff had no tenderness, muscle spasm or guarding of those two regions and that he moved his thoracic spine comfortably in flexion, extension and rotation and

that there was a full range of rotation. He saw no significant abnormalities. He assessed a 0 per cent impairment for each of those regions. Dr Wallace, examined the plaintiff a couple of weeks earlier. He reported that the plaintiff then spoke of continued posterior cervical spinal pain and mid-thoracic spinal pain worse with bending, lifting, twisting and that he had nocturnal pain. He noted some tenderness in the para-vertebral musculature at the base of the spine. He assessed a 3 per cent whole person impairment using chapter 18 with respect to the cervical spine despite conceding that radiology showed nothing and that he saw a full symmetrical range of movement. He assessed a 3 per cent whole person impairment of the thoracic spine using chapter 18 despite similar concessions about radiology and range of movement. He accepted that those assessments depended upon the reliability of the plaintiff's reporting of symptoms and restrictions.

Chest

[44] The plaintiff gave evidence that the chest and neck had given him horrendous pain, that he staggered around in shock after exiting his car, that the symptoms from these two areas were the reason for not reporting his knee initially and that he would have reported them. His movements and conversation at the scene are inconsistent with that version of horrendous pain and staggering. The notes of Dr Lee of the consultation on 28 November 2013 do not give objective support. The plaintiff accepts that the chest problems have improved. I am not satisfied of more than minor pain and tenderness for a short period.

Special damages

[45] On the hypothesis that the plaintiff would not establish an injury to the knee from the collision but that there would be found to have been injury to the wrist and spine there is agreement as to special damages. As I accept those hypotheses, special damages are assessed as agreed and as follows:

WorkCover expenses:	$12, 217.90
Medicare:	$593.50
Medication:	$300.15
Analgesic Rub:	$11
Dr Ryan:	$180
Parking:	$7.50
Total:	$13, 310.05

General damages

[46] The plaintiff's major disability seems to be his knee. The problems with the knee are not related to the accident. His second major disability seems to be with respect to his wrist. But in respect of that, it is only for 12 months that the plaintiff's symptoms can be attributed to the accident as opposed to his osteoarthritis. I accept the submissions for the defendant that it is appropriate to allow for some minor problem with the wrist arising from the motor vehicle collision. The defendant submits that an ISV of 2 should be assessed for the wrist with a mark-up to an ISV of 3 for a temporary effect upon the neck or back. The plaintiff's submissions did not deal with a specific ISV for the wrist, for the cervical or thoracic spine or for the chest. As the neck symptoms appear to be recurrent they are more persistent than the defendant's submission contemplated. It is appropriate to assess the ISV as increased to 4. The

multiplier prescribed by *Civil Liability Regulation 2014* schedule 7 section 5 for an injury scale value assessed as 5 or less is $1,360.

[47] I assess $5,440 for general damages.

Economic losses

[48] The plaintiff completed his 12 months with Kordia Solutions and no loss is claimed for that period. He did not seek work before February of 2015. The plaintiff did not point to any particular employment that he would have obtained. The difficulties he described himself as having because of the need to honestly disclose his disabilities to prospective employers are difficulties which would primarily relate to pre-existing conditions with his wrist and knee rather than to the injuries caused by this collision. The plaintiff has some difficulties currently with his occupation of building granny flats. He is obliged to engage others to assist with hanging doors and some carpentry. I am not satisfied that the disabilities which cause such problems are disabilities related to the collision as opposed to disabilities related to degenerative change.

[49] I am not satisfied that the plaintiff has or will suffer economic loss as a result of this collision.

Summary of damages

General damages:	$5,440
Past economic loss:	Nil
Future economic loss:	Nil
Special damages:	(Agreed) $13,310.05
Total:	$18,750.05