SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Atherden v Caldipp**
Citation:	**[2019] ACTSC 29**
Hearing Dates:	30 January, 31 January and 1 February 2017
Decision Date:	15 February 2019
Before:	Penfold J
Decision:	Judgment is given for the plaintiff against the defendants (see [233] to [235] below).
Catchwords:	**TORTS – NEGLIGENCE** – Contributory Negligence – employee injured while participating in dangerous activity devised by supervisor – whether employee should have refused to participate – whether employee was "on a frolic of his own" or acting in employer's interests – no contributory negligence found. **DAMAGES** – Measure and Remoteness of Damages in Actions for Tort – calculation of loss of income – whether tax paid is to be deducted from taxable income or from gross income – not all tax deductions are necessarily incurred in earning income – only non-discretionary deductible expenses may be deducted from gross income. **EVIDENCE** - Admissibility and Relevancy – claimed admission against interest – claimed admission contained in document possibly involving second-hand hearsay – no attempt to establish source of claimed admission – evidence excluded.
Legislation Cited:	*Civil Law (Wrongs) Act 2002* (ACT) ss 47, 102 *Evidence Act 2011* (ACT) ss 60, 81, 82, 136 *Workers Compensation Act 1951* (ACT) ss 105, 185
Cases Cited:	*Baker v McKenzie & Anor* [2015] ACTSC 272 *Bourke v Butterfield and Lewis Ltd* (1927) 38 CLR 354 *Commissioner of Railways v Ruprecht* (1979) 141 CLR 563 *Dasreef Pty Ltd v Hawchar* [2011] HCA 21; 243 CLR 588 *Davies v Adelaide Chemical & Fertiliser Company Limited* (1946) 74 CLR 541 *Ghunaim* v Bart [2004] NSWCA 28 *Husher v Husher* [1999] HCA 47; 197 CLR 138 *Lardil, Kaiadilt, Yangkaal, Gangalidda Peoples v State of Queensland* [2000] FCA 1548 *McLean v Tedman* (1984) 155 CLR 306 *Meyer v Cool Chilli Pty Ltd* [2015] ACTSC 336 *Nance v British Columbia Electric Rail Co Ltd* [1951] AC 601 *Pangallo v Smith* [2015] ACTSC 313 *Papp v Finley & Insurance Australia Limited* [2015] ACTSC 74 *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529 *Robinson v Ng* [2014] ACTSC 227

	Smith v Pangallo [2017] ACTCA 61 *State of NSW v Moss* [2000] NSWCA 133; 54 NSWLR 536 *Sungravure Pty Ltd v Meani* (1964) 110 CLR 24
Parties:	Jason Charles Atherden (Plaintiff) Caldipp Pty Ltd (First Defendant) Insurance Australia Limited t/as NRMA Insurance (Second Defendant)
Representation:	**Counsel** Mr F Tuscano (Plaintiff) Mr W Reynolds (First Defendant) Second Defendant not represented **Solicitors** Ken Cush & Associates (Plaintiff) Moray & Agnew Lawyers (First Defendant) Spark Helmore (Second Defendant)
File Number:	SC 428 of 2014

Introduction

1. Jason Atherden seeks damages from his employer Caldipp Pty Ltd in respect of injuries suffered in February 2013 in a workplace accident involving a vehicle. Caldipp Pty Ltd admits liability, but says that Mr Atherden's damages should be reduced because of his contributory negligence. The extent of the loss suffered by Mr Atherden resulting from the accident is also in dispute.

2. The second defendant, NRMA, provided the compulsory third party insurance for the vehicle involved. There is no allegation made against NRMA or the driver of the vehicle, but NRMA has been named as a defendant at the request of the first defendant, and I understand that there is agreement between the defendants about how any damages award will be dealt with. In this judgment I shall generally refer simply to "the defendant".

The accident

3. Mr Atherden worked as a motor mechanic for the first defendant, trading as Rolfe Mazda. On the day of the accident he and his supervisor, Peter Fisher, were trying to determine the cause of knocking noise that could be heard in the area of the engine of a vehicle that was being worked on in the workshop at the Belconnen premises of Rolfe Mazda. After all usual diagnostic techniques had failed, Mr Fisher suggested that they should remove the car's bonnet, and that one of them should travel on the engine area of the car while the other one drove the car; it seems that this provided a better opportunity to identify the source of an engine noise when all else had failed, and it was a technique that had been used in the past, successfully, in the area of the workshop.

4. On this occasion, however, the car was driven to a park in Belconnen. Mr Fisher lay on the front of the car after its bonnet had been removed, while Mr Atherden drove the car in

the park. Mr Fisher heard the knocking noise, and believed he knew its cause. He suggested, however, that since Mr Atherden would be the person working to address the noise, it would be useful if he also had the opportunity to listen to the noise properly and identify its cause.

5. Mr Atherden agreed, and took up the position on the front of the car. Mr Fisher drove the car, and Mr Atherden listened to the noise. However, as Mr Fisher was bringing the car to a stop, Mr Atherden lost his grip and fell off in front of the car.

The injuries

6. Mr Atherden sustained a relatively serious injury to his wrist, involving a fracture, ligament damage and a torn cartilage. He was taken to hospital, and his wrist was operated on the next day. Later that year he had further exploratory surgery including arthroscopic debridement. He has also had significant ongoing treatment, including from physiotherapists.

7. Since the accident, Mr Atherden has not been able to perform a number of the tasks required of a motor mechanic. After two years during which he continued in that role, but avoided the heavier aspects of the job, he was redeployed to the spare parts area of the employer's business. However, Mr Atherden does not enjoy this work. The doctors involved in this case all agree, however, that continuing to do heavy work would cause his wrist to deteriorate even more quickly.

8. Counsel for Mr Atherden noted that under s 105 of the *Workers Compensation Act 1951* (ACT), an employer is obliged to provide suitable employment to an injured worker who is fit to return to work in some capacity, but said that this obligation ends once common law damages are received; counsel said he was not sure of the basis for this latter proposition, but since it was not challenged by counsel for the defendant, I have accepted the proposition as correct for present purposes.[1]

9. In short, it seems that Mr Atherden does not expect to remain working for his current employer after this matter is resolved.

10. There were two main issues in this case; on each issue, one party took an extreme position:

    (a) the plaintiff sought something over $1,000,000 in damages;

    (b) the defendant's counsel submitted, on instructions, that I should assess the plaintiff's contributory negligence at 100%, thus entirely defeating the plaintiff's claim (at [126] below).

11. As far as I could see, this had eliminated any possibility of compromise, despite the fact that most independent observers would have had no trouble concluding that even if the plaintiff had contributed to his injury to some extent or in some way, he was nevertheless entitled to a significant, although not enormous, award of damages.

Oral evidence

12. The plaintiff and one other witness gave evidence in the plaintiff's case.

13. The defendant called no oral evidence.

Jason Atherden

14. Mr Atherden impressed me as an entirely honest witness who had not been coached in any way. He answered questions in a straightforward way, with no apparent thought about the impact on his claim of any particular answer. He was not seriously challenged in cross-examination.

15. Mr Atherden's modest performance in the witness box may explain why his counsel chose at times to "over-egg the pudding" to a remarkable degree (at [159] below), and also perhaps why counsel for the defendants found himself propounding unconvincing interpretations of some aspects of Mr Atherden's evidence (at [160] below).

Background

16. Mr Atherden was born in 1977. He was 39 years old at the time of the trial, and 35 years old at the time of the accident. He lived with his parents, who are in their late sixties. He has two younger sisters.

17. Mr Atherden has a partner, who has two young children. She currently lives on her father's farm in Tidbinbilla, where Mr Atherden spends a lot of time; Mr Atherden and his partner had plans to move into a house in the suburbs of Canberra during 2017.

Education and employment history

18. Mr Atherden was educated in Canberra. He described himself as a "better than average" student, in relation to both academic achievement and conduct, explaining that he was good at "maths, sport, anything to do with metal work, woodwork, sort of more hands on classes", but was not interested in subjects such as English or science. He completed Year 12 in 1995, and began an automotive apprenticeship with National Capital Motors, which involved completing a four-year certificate course.

19. Mr Atherden said that as a child, he had enjoyed pulling things apart, seeing how they worked, and putting them back together, and that he had liked car-racing on TV; he said that, from his childhood, "I just wanted to work with cars".

20. After starting work as a mechanic, he had become involved in performing a mechanic's role in car rallying, through a supervisor who was already involved in rallying and who had his own rally car. Mr Atherden began by helping his supervisor put his car together, and attending events with him. Over time he began to install various features, mainly related to safety, that were required to turn an ordinary vehicle into a rally car. During rallies, he was a member of the service crew. At some point he began to do this kind of work for a New Zealand team. This was work he did in addition to his usual employment.

21. From August 2002 to March 2003 he had worked in New Zealand full-time for the Reece Jones Rallysport team, on an all-expenses-paid basis. Before that, he had accompanied the team to events in places including Japan, China and New Caledonia, roughly every three months, on trips lasting 7 to 10 days. He had taken annual leave from his full-time job to go on these trips, and had all his expenses paid. Mr Atherden had stopped working for the rallying team after he returned from New Zealand in March 2003, because the team's main sponsor had pulled out.

22. After returning from New Zealand Mr Atherden worked at the Mitchell Service Centre, and during his time there might have done one or two further rally events for the Reece

Jones Rallysport team. He also injured one of his knees in a gym, sustaining a meniscus tear which was repaired. Mr Atherden left the Mitchell Service Centre around 2008, feeling he needed a change, and joined a firm that did camper van conversions. He worked there as a compliance technician until December 2010, leaving when the business down-sized.

23. Mr Atherden then found a job at Rolfe Honda as a service technician and then foreman, and after about 12 months moved to Rolfe Mazda. Early in his time at Rolfe Mazda he injured his other knee during exercise, and had surgery.

24. At Rolfe Mazda Mr Atherden was able to buy spare parts at cost price (for himself or for friends, and in unlimited quantities as far as he knew, that he could use as a backyard repairer), a benefit he has not been aware of from other employers.

Work at Rolfe Mazda

25. At Rolfe Mazda Mr Atherden was employed as a service technician, and from time to time relieved as foreman. There were 10 to 12 mechanics in the service area, and one foreman/supervisor, Peter Fisher. Mr Atherden gave the following description of what was involved in a standard motor vehicle service:

> …You receive a job card or a job sheet form the workshop foreman outlining what needs to be done. You will bring the vehicle in, check all exterior lights to make sure they're working, check wiper blades, make sure they're clearing the screen properly, your windscreen. Open the bonnet, do a quick visual inspection of all your driver belts and cooling system hoses. Clean out your air filter, jack the vehicle up front and rear, put some jack stands under it or use a lifting aid called a hoist. Drain the engine oil and replace the engine filter. Do a check under the vehicle of brakes and suspension components and exhaust system. Remove all four wheels. Rotate front to back if required. Had another look at the brakes and suspension while you've got the wheels off, put the wheels back on, put the vehicle back on the ground, refill the engine with a correct amount of oil, replace the lube sticker and stamp the service book for the car and then road test the vehicle afterwards and park it and hand the job card in.

26. Mr Atherden said that aspects of that work were physically demanding; for instance, changing the oil involved draining the old oil into a container and carrying the container, which could weigh up to 10 kg when full, to the waste oil collection area; changing wheels could also involve heavy lifting. Other repairs that might be required as a result of the basic inspection could also require heavy lifting; for instance, a shock absorber assembly could weigh anything between 10 and 20 kg, and some exhaust pipe systems also weighed up to 10 kg. Mr Atherden also described difficulties in changing light globes in some models (eg the Mazda CX-7) and replacing drive belts, and agreed that for many repairs the mechanic needed "two good strong hands".

The accident

27. Mr Atherden described spending time on and off over two days trying to identify the source of "a strange knocking noise evident from the engine on acceleration from a standstill, or engine area".

28. He gave this evidence:

> I now want to ask you some questions about the accident. We'll start with the two days leading up to 21 February. You'd been working on a vehicle. Is that correct?---Yes, correct.

Were you having problems with the vehicle?---Yes.

What were the problems?---There was a strange knocking noise evident from the engine on acceleration from a standstill, or engine area.

Had you been working on that vehicle on and off for those two days?---Yes.

What were you trying to do?---Trying to locate where the noise was coming from and figure out a way to fix it.

Sorry, I missed the last bit?---Figure out a way to fix the problem.

Figure out a way to fix it. What methods did you use to try and work out what the problem was?---Initially we placed specific microphones which you can use to pick up noises around various places of the engine, varying from top to bottom, side to side, to try and locate where this noise was coming from.

Was that in the workshop?---We placed them in the workshop and then went for a road test out on the streets.

I think you used the word "we"?---Yes.

Was there someone else working with you?---Yes, the foreman, Peter Fisher.

Was he working with you on that vehicle for the whole two days?---On and off, when I couldn't get – or I tried something and couldn't work out - - -

So you'd try something?---Yes.

Couldn't work out the problem, you'd go back to him?---Yes.

What would he suggest?---He'd suggest something else to look at or a different area or try and place the microphone somewhere else and then we'd go for another drive.

When you went for a drive did he come with you?---Yes. You need an extra person just to sit in the passenger seat with the headset on to try and listen for the noise.

29. As Mr Atherden described, the foreman Mr Fisher was also involved in the attempts, suggesting other approaches and accompanying Mr Atherden on test drives.

30. Mr Atherden gave the following evidence about what happened on 21 February, the day of the accident:

Let's start with what happened on 21 February. At that point in time did you go to Mr Fisher and say something to him about this vehicle?---Yes. I said, you know, "I've completed all these other things you've told me to check and swapped from another vehicle to try and eliminate certain things to try and find the problem," and I said, "Well, what do you want to do now?"

What did he say?---He said, "The last resort, we'll pull the bonnet of the vehicle and we'll go for a drive with it off with someone sitting up in the engine bay."

Had you ever been asked to do that before in a vehicle?---Not to that extent.

What do you mean by not to that extent?---We'd done it a few times – I'd done it a few times in the driveway of the workshop.

Who instructed you to do it on those occasions?---Peter Fisher.

What do you mean by do the same thing? Just tell us what you did when you did it in the workshop and where?---In the driveway there's a little drain. So it's a little sort of culvert. If there was a suspension noise that we couldn't pick up out on the road test we'd often use that to try and find where the noise was coming from. So we'd just pop the bonnet up and have it still on the car and someone would climb up into the engine bay and try and locate where the noise was coming from.

That's while someone drove it and - - - ?---As someone was driving it just down along the driveway.

How long was the driveway?---It would probably be 30 metres. That wasn't the whole distance. It was probably only a distance of 10 metres that we'd actually use.

So you'd been asked to do it twice?---Yes.

Had you seen Mr Fisher do it?---Yes.

Where did you see him do it?---The same place, on the driveway.

That's within the workshop in the driveway?---Yes.

Had you seen anybody else other than Mr Fisher do it?---No.

Had you ever been asked to do something like that anywhere else?---No.

You've told us what he said that you were going to do?---Yes.

Where did you go?---After we removed the bonnet we drove to MacDermott Place.

Did you both remove the bonnet or just you?---Yes, both of us.

Both of you removed the bonnet, yes?---Then Peter drove and I was in the passenger seat, drove to MacDermott Place by Lake Ginninderra to a quiet carpark.

What happened then?---We pulled up at the end of a straight sort of little quiet section of road and Peter said, "You drive and I'll climb up first and have a listen."

Did you do that?---Yes.

How far did you drive?---Approximately 100 metres.

With Mr Fisher on top of the vehicle?---Yes.

While he was on top of the vehicle and you were driving did he indicate something to you?---He said he'd nod to me when he'd heard the noise.

And he did that?---So he did and I slowed down to a stop. He climbed off and we hopped back in the car.

What speed did you reach when you were driving?---Approximately 20 to 30 kilometres an hour.

He hopped off?---Yes.

What happened then?---He got back in the passenger seat and we drove back to our original starting point and he said, "You may as well jump up and have a listen, seeing as you're working on it." So I climbed up. He jumped in the driver's seat and - - -

Just describe how you climbed up?---I climbed up over the front of the vehicle, over the radiator and grabbed my right hand around the battery and the left hand around the brake master cylinder on either side of the engine bay.

What happened then?---I nodded to Peter that I was right to go so he accelerated. I heard the noise and I nodded to him and as I nodded to him I lost, starting loosing grip and started sliding off the front of the car.

What happened next?---I felt my left foot start to hit the ground and start to go under the car and I said to myself, you know, crap I'm going under. The next thing I remember I was sitting on the ground with the car to my right and my sunglasses down the road further on the left.

31. Mr Atherden said that his left leg hit the ground first, and afterwards he found a graze on the side of his left wrist and on his left elbow, but didn't remember his wrist hitting the ground. He said:

> You don't remember. All right, so you noticed something about your wrist?---I sat there and, sort of, once I realised I was on the ground I just, for some reason I lifted my arm up and just grabbed it, grabbed my wrist area and felt things move and that's when I had a look at it and realised it was deformed.

32. Asked to explain "deformed", Mr Atherden said: "It was a great bulge out the side of it where there shouldn't be".

33. He described Mr Fisher's reaction:

> … He jumped out of the car and came running around asking if I was all right and I sort of said, I don't know and I sort of lifted my arm up and he could see the, how deformed it was and realised that I wasn't so he helped me up into the passenger seat and helped me put my seatbelt on and jumped in the driver's seat and we drove back to work.

34. Back at work, Mr Fisher arranged for another staff member to take Mr Atherden to hospital. During the trip to hospital his arm became very painful, from his wrist to up past his elbow. He was admitted to hospital and operated on the next morning. That afternoon, he was discharged from hospital with pain-killers and some kind of antibiotic. His arm was in a cast, and remained in plaster for six weeks.

After the accident

35. Mr Atherden did not work during that six-week period, although he went to his workplace to sign a claim form relating to the injury. Two weeks after the accident he went on a pre-arranged holiday to Queensland with his sister, brother-in-law and nephew. His holiday was "bad", because having his wrist in a cast, and being in pain, meant that he had not been able to do any of the things he had hoped to do, such as go-karting, jet skiing, quad bike riding, shooting at a shooting range and swimming.

36. During the holiday, the family stayed in a self-contained apartment. On previous similar holidays, Mr Atherden had helped with the domestic duties, but on this occasion he was unable to do so, and his sister and her husband did all the cooking and cleaning, as well as helping him put a "shower bag" on his arm and sometimes helping him dress.

37. Mr Atherden needed similar domestic assistance during the rest of the six-week period while his cast was on, and this was provided by his parents, with whom he was living. At home, he would usually have done cooking, cleaning up the dishes, vacuuming, washing, and gardening, but he was unable to do any of this with the cast. He estimated that he received a couple of hours of domestic assistance each week during the six weeks he had the cast on.

38. Mr Atherden returned to work a week after his cast came off, but still needed domestic assistance during that further week. After that, the degree of assistance he needed diminished over time to about one hour a week with heavy tasks, and had stabilised at that level.

39. Mr Atherden had physiotherapy for about six weeks after the cast came off, and was referred to a rehabilitation organisation for development of a return to work program. This program had Mr Atherden returning to the workshop, and started with 4-hour days at work for two weeks, after which Mr Atherden resumed full-time work on restricted duties. The restriction was that he could not lift or move heavy objects, and at the time of the trial that restriction had not been removed by his general practitioner.

40. In September 2013, Mr Atherden had further surgery on his arm, because he still had restricted movement in his arm, and suffered pain "pretty much any time [he] used it". After the surgery, the surgeon, Dr Chris Roberts, told him what he had found:

> What's your recollection of what he told you?---He found a lot of bone fragments and cartilage fragments floating around and damage to numerous tendons and ligaments in the back of my hand.
>
> When you hard that how did that make you feel?---Gutted.
>
> Did he say anything about how it's going to affect your career?---Yes, he said that I wouldn't be able to use it like I used to. He said it was never going to get better, it was only going to get worse.
>
> Did he say anything about how it was going to affect your job as a mechanic?---He said I wouldn't be able lift things like I used to.
>
> How did that make you feel?---Upset.

41. He had seen Dr Roberts several times after that surgery, and told him that the surgery had not helped with his symptoms. They discussed future options, and Dr Roberts said that apart from removing the screws in his wrist (which Dr Roberts thought would have no effect), the only other option was a wrist fusion, which could be done immediately or postponed until the point when Mr Atherden's pain became unbearable and he could not use his arm. Dr Roberts told Mr Atherden that the wrist fusion would mean that he would lose movement in his wrist, which would further reduce what he could do at work. Mr Atherden was annoyed.

42. Around the middle of 2014, Mr Atherden saw Dr Roberts for the last time, and also stopped physiotherapy, because he was not getting any benefit from it.

43. At this time he was still working in the workshop at Rolfe Mazda, and was coping "fine", although he suffered pain from time to time, and remained unable to lift or move heavy objects. This meant that there were some tasks he could not do, including removing and refitting wheels and emptying the oil drain tins; such tasks might need to be done up to 10 times a day in general servicing. A number of other tasks were problematic because of the restricted movement and reduced strength of his left wrist, including working with suspensions; dealing with oil leaks, and other repairs, that required getting into tight access points; replacing light globes and drive belts; and removing engine components. All these tasks needed to be done for him by an apprentice or a fellow worker.

44. If Mr Atherden knocked his hand, he suffered a lot of pain, up to "seven or eight out of 10" in intensity, which he felt all through his wrist and shooting off to his elbow. The pain could last up to half an hour.

45. Since the accident Mr Atherden has had 12 weeks off work resulting from his injury (one of them apparently being a week off in 2016 suffering anxiety), and at other times has gone to work despite being in pain. He explained:

> Apart from that have you had any other time off work?---Not a great deal, no.
>
> Have there been times where you've been in pain but chose to go to work? ---Yes.
>
> Why is that?---I just deal with the pain. It's there constantly.
>
> Are you the sort of person who takes a lot of days off work normally?---No.

46. Mr Atherden was unsure about the exact date, but said that some time after the accident he was offered a place in the servicing team with Citroen Rally Team Australia; he was however unable to accept it because of his physical limitations, which prevented him crawling on his hands and knees as is necessary in repairing rally cars, and prevented him lifting rally car wheels, which are heavier that ordinary wheels. If he had been able to do the work, Mr Atherden said, he would have accepted the offer, and would have done the work part-time. When he had to refuse the offer, he felt "gutted", because he wanted to get back into rally work.

47. Mr Atherden agreed that when Mr Barkley spoke to him about the Citroen rally team offer, there had been no discussion about payment.

48. In May 2015 Mr Atherden injured his right middle finger at work. He had some time off from work, but recovered quickly, and at the time of the trial the finger did not give him any problems. However, shortly after he returned to work, he was advised, by a letter from the Service Manager David Perry dated 26 May 2015 (Exhibit A), that he was being moved from the workshop floor to the spare parts area. He was annoyed about this. The full text of the letter was as follows:

> Effective from tomorrow Thursday may 28 your position with Rolfe Mazda will be changed to Spare Department.
>
> Please note that due to your injured hand you are not to lift, push or pull any items heavier than 30kilo as per your suitable duties plan.
>
> If you are in any doubt about the weight of any item then you must obtain assistance from another staff member.

49. In the spare parts area, there were already two staff, and Mr Atherden said there was not enough work for three people to do. He estimated that he had been occupied doing something for about two and a half hours each day. He hated working in those conditions, and eventually his general practitioner referred him to a psychologist, Dr Myra Whitney. He told Dr Whitney that:

> …they stuck me in spare parts with no consultation to me and that I was sitting there doing absolutely nothing all day and it was driving me nuts.

50. Mr Atherden had tried to get back to the workshop but was told this was not possible because of his hand. He described how that made him feel:

> That made you feel?---I was ready to explode.
>
> What do you mean by you were ready to explode?---Break a computer or something.
>
> Have you ever been like that before?---No.
>
> Were you feeling anxious?---Yes.
>
> Were you feeling down?---Very.
>
> I've used the word down. Can you describe to her Honour exactly how you felt? I know it's difficult for you to - - -?---Yeah, that I sort of had nowhere to go for the rest of my job or career and just felt like really down and not interested in anything.
>
> Sorry go on?---I ended up really with a short fuse, so the smallest things would make me really angry and annoyed.
>
> Was that affecting your relationship with your partner?---Yes.
>
> What about at work? Were you looking forward to going to work or not?---No.

> Was it affecting your relationships with your co workers?---Yes.
>
> In what way?---One of the guys was reading through some technical information which, because I'm in spares I needed to know what parts were required for it and he turned around and told me I don't need to look at that because you're not a mechanic.
>
> He said you're not a mechanic?---Yes, and we were close friends before that.
>
> Have you been close friends since?---No, haven't spoken to him.

51. As a result of discussions with Dr Whitney, Mr Atherden asked Mr Perry if he could get back into the workshop, but he was unsuccessful. He gave this evidence:

> What did you ask them?---If I could get back on the floor in some capacity, whether it be doing more technical stuff or helping apprentices.
>
> What did they say?---Flat out said no.

52. After that, he started looking for other jobs, in the hope of finding "something that's going to challenge me again and let me get back to myself"; he has no hope that he will get back to working as a mechanic, but has never done anything except being a mechanic.

53. By the time of the trial, roughly 18 months after Mr Atherden had been moved in to the spare parts area, he had applied unsuccessfully for about 10 jobs, including as a sheet-metal apprentice, with a lift-repair company, and with several other car dealers or repairers. He had been told that the sheet-metal company did not take on mature-age apprentices; in several other cases, he had admitted to his injury during an interview and after that had heard nothing further from the firm concerned.

54. Mr Atherden had enrolled in a basic welding course at TAFE for 2017, but it was a short course involving only five sessions. He said he had always liked metal and welding.

55. Mr Atherden indicated that he remained keen to find new work, giving this evidence:

> You've told us that you hate working where you are?---Correct.
>
> In terms of employment what are your plans?---Once this is all finished, find something else.
>
> Are you hopeful?---Yes, of course. I want to do something. I need to do something.

56. Mr Atherden's ambition as a mechanic had been to become a foreman, ideally a workshop foreman, and he had had some experience relieving as a foreman. In evidence that was somewhat unclear because of the form in which counsel asked his questions, Mr Atherden might have intended to indicate that he could have obtained a position as a foreman earlier but had decided not to because he wanted to continue working on cars.

57. Mr Atherden's psychologist had moved away from Canberra, and at the time of the trial he had not decided whether to see another psychologist, saying "I'll see how I feel in the future."

58. Mr Atherden said that over the last few years his wrist has stayed the same, but if it gets worse he expected he would have surgery.

Cross-examination

59. Mr Atherden had completed a three-year certificate course at CIT as part of his apprenticeship, which included studying occupational health and safety. Since then he has held responsible jobs, including working with apprentices and guiding them in how to

do their work safely. Mr Atherden agreed that while working for Rolfe Mazda, if he had been asked to do something, he would assess what he was asked to do, and if he felt it was beyond his capabilities he would let them know. If he felt it was something that he shouldn't do, he would be capable of expressing himself.

60. Before the accident he had, more than once, been on the front of a moving car (bonnet open, lying on the engine) trying to determine where a noise was coming from. He gave evidence as follows:

> I see. So on the occasion that you did it on 21 February – as I understand what you say Mr Fisher had you drive the vehicle first?---Correct.
>
> And he was over the bonnet?---Well, over the engine.
>
> Over the engine?---Yes.
>
> He recognised where the noise was coming from?---Correct, an area where it was coming from.
>
> He was able to identify that area?---Yes.
>
> So it would be fair to say from the point of view of identifying the source of the fault that had been done by Mr Fisher?---No.
>
> I thought you said he - - - ?---He'd heard where the noise was coming from but he wasn't doing the work on the car.
>
> No, but he was able – he's the mechanical engineer, isn't he?---No, just a mechanic, he's the foreman.
>
> He's the foreman. He would be as trained as much as you would be trained?---Yes.
>
> So if he was able to identify the source of the noise he could have told you about that?---Well he didn't find the source, it was just the area of where it was coming from.
>
> He found the area where it was coming from?---Yes.
>
> He pointed that out to you?---He said I think it's that area there.
>
> So there'd be no need, would there, for him to do any more than to check that area to see what would be causing that noise?---Well, I was working on the car so I wanted to know where it was coming from.
>
> If Mr Fisher said to you it's coming from a particular part of the car that he identified as being the source of the noise, there'd be nothing more for you to do than simply work at that section to see if you could identify the cause of the noise?---He wanted me to experience the noise for myself.
>
> I'm not asking you about what he might have wanted you to do. I'm asking you about the methodology of determining the noise. Having been told that the noise was coming from a particular area of the car, the next step would be to go to that area of the car and see what the cause was, would it not?---Possibly.
>
> It wouldn't matter whether one or 21 people said that that was the area where the noise was coming from, would it?---Yes.
>
> It would only be relevant to know, to identify the area where it's coming from and then to work on that area to see if you could identify the cause of the noise?---It was a wide area to pinpoint the noise.
>
> But that would involve having to work on that area, whether it was a wide area or a small area?---Yes.
>
> It may only have been necessary to have a further test for the noise itself if having worked in the area where the noise was identified, you were not able to discover the particular cause for the noise. Wouldn't you agree?---Yes.

But you hadn't done that, had you, before you got onto the engine of the car?---No.

61. Pressed as to why he had got onto the engine himself, Mr Atherden gave this evidence:

> What I'm putting to you squarely, Mr Atherden, is there was no real need for you to get onto the front of the car to identify the source of the noise?---I was working on the job so I wanted to hear the noise.
>
> Yes, you wanted to?---I wanted to fix this car.
>
> Yes, but you wanted to hear the noise, did you?---Yes.
>
> Right. It wasn't good enough for you, was it, that Mr Fisher said to you I think the noise is coming from a particular part that he's identified. It wasn't good enough?---Well, he suggested I get up and I wanted to hear the noise myself so that I could distinguish an area as well.
>
> Apart from what Mr Fisher may or may not have said to you, you wanted to identify the noise yourself?---Yes.
>
> And you wanted to identify yourself whether it was coming from there?---Correct.
>
> Of course, when you were driving the car you said you drove about 100 metres?---Yes.
>
> That's about 10 times the distance you'd previously experienced back in the controlled environment, wasn't it?---Yes.
>
> Of course, it's going at a substantially greater speed?---Yes.
>
> Because if the vehicle was only being driven in a controlled environment of the workplace, some 10 metres, the speed would be almost at the minimum, wouldn't it?---Correct.
>
> But when you were travelling the hundred metres or so you were travelling in terms of 20 or 30 kilometres an hour, weren't you, when you were driving?---Yes.
>
> That's the sort of speed that Mr Fisher was driving at when you were at the front of the vehicle?---Yes.
>
> Of course, you being an intelligent person would realise that hanging yourself across the bonnet of a vehicle by holding onto two points whilst it was being driven at 20 to 30 kilometres an hour carried with it an extremely high risk of danger?---I didn't think of it at the time.
>
> But you do now, don't you?---Yes.

62. Mr Atherden described himself hanging onto the back of the battery, where there is a clamp that attaches the battery to the car, and to the bottom of the master brake cylinder. He had his torso to one side of the engine bay, and was trying to avoid the hot part of the engine. He described nodding to Mr Fisher to indicate that he was ready to go:

> Having taken a hold of the battery and the brake cylinder that you're holding onto, did you indicate to Mr Fisher that you had a hold and you were ready to go?---Yes. I nodded to him.
>
> Nodded to him. Despite the fact that you thought you were holding on, the reality was you didn't have a proper grip?---Obviously not.

63. Mr Atherden agreed that in the period of roughly 10 years between 2003 or 2004 when he finished working with the Reece Jones Rallysport team and 2015 when he spoke to a team member in the Citroen rally team about the possibility of working with that team, he had not worked for any other rally team or looked for any such work. When he was living and working in New Zealand he received income, but the work in Australia had involved only the payment of expenses, and did not generate any income.

64. After returning from NZ, he had been in full-time employment in Australia. While working for Rolfe Honda he had been paid at least award rates, and was also being paid at least award rates at Rolfe Mazda. At the time of the accident he was being paid $1,000 a week gross, $830 after tax.

65. Mr Atherden said that in the future he hoped to find a job that would interest him. He was not interested in studying to be an automotive electrical engineer. He was interested in becoming an elevator repairer, but this would require completing an apprenticeship. He was not able to work "to the full extent" as a motor mechanic, but believed he could work as a diagnostic technician, which would not require further study.

66. Mr Atherden said that he would resign from his current job with Rolfe Mazda when he had another job to go to, as follows:

> At the moment, though, you're still working for Rolfe Mazda?---Yes.
>
> You haven't resigned from that position?---No.
>
> Is it your intention to resign from that position?---Eventually, yes.
>
> But presumably you'll resign from that position when you have an alternative job to go to?---Yes.

67. He believed that in his current job he was still being paid the same income as he had received as a motor mechanic.

68. Mr Atherden said he divided his time between his parents' home and his partner's home. At his parents' place he cooked dinner maybe once or twice a week, and at his partner's place he cooked dinner most nights. He also did washing up at both places, and sometimes vacuumed. He made the bed from time to time, but this caused some difficulty and pain, and mostly he received help.

69. Mr Atherden has had no physiotherapy since 2014, and takes Panadol as necessary for pain, roughly once a fortnight.

70. Until he was moved to the spare parts area after the accident to his finger, Mr Atherden had been doing most of his work, apart from some of the heavier tasks, and was "coping".

71. Mr Atherden agreed that his capacity to buy spare parts at cost price from Rolfe Mazda had been limited only by the requirement that he be able to pay for them at the end of the month, but that the opportunity had not been generating any income for him, before or after the accident; although his parents, friends and partner had paid for the parts themselves, he had not charged any of them for the work he did on their cars.

72. Mr Atherden had last seen Dr Whitney several months before the trial; he had not yet sought to find another psychologist, and although he expected that he would need to do so soon, there was no great urgency. He had found his consultations beneficial, but only during the actual consultation rather than afterwards.

73. Mr Atherden recognised that he might need further surgery on his wrist, but said that he wanted to leave it as long as possible, and agreed that his wrist was currently sufficiently stable for him to postpone further treatment.

74. Mr Atherden agreed it was possible that with his experience he might be able to get a supervisory job as a motor mechanic. He conceded that he had told his psychologist that

Rolfe Mazda was in some financial trouble, and that he didn't like the way the industry was going more generally, but said that he still liked the industry, just not the direction it was going. He was currently working 8am until 4pm.

Re-examination

75. Mr Atherden was aware of the noise from the vehicle he was working on for two days before the accident. After the accident, Mazda Australia agreed that it was an internal noise in a new engine that had been fitted shortly before the noise started. That is, the source of the noise was only found after the accident, when Mazda came out and did their own tests.

76. Rolfe Mazda does not employ diagnostic technicians, but Mr Atherden was aware of at least one firm that does have a person employed as a diagnostic technician.

77. Mr Atherden's wage has not changed since the accident.

78. Mr Atherden said that usually, supervisors "get their hands dirty", and occasionally have to do heavy work, rather than just working in an office.

79. Mr Atherden's concern about the industry is that cars are changing every day and people "don't get enough training on all the new systems that are coming out". His attitude has not been affected by his accident or his injury.

Previous injuries

80. Mr Atherden gave evidence of having suffered various injuries before those the subject of this claim, none of which had left him with any ongoing problems; there was no claim that any of these injuries had contributed to his current condition, and it is unnecessary to say more about them.

81. He did, however, suffer a minor injury to a finger of his right hand in 2015 (at [48] above) and it was shortly after this later injury that he was faced with the significant and, to Mr Atherden, unwelcome change in his working arrangements (at [48] above).

Anthony Barkley

82. Mr Barkley gave evidence by telephone from New South Wales. He is the manager/foreman for a company located in West Gosford, and has a diploma in mechanical engineering and other qualifications including as a vehicle body builder.

83. Mr Barkley also presented as an honest and straightforward witness, and gave no indication that his evidence might be unreliable.

84. In 2013, Mr Barkley said, he had the same job, but also had part-time employment with a rallying team run by Citroen Australia. He first met Mr Atherden when they both worked at National Capital Motors in Canberra in around 1996, and then worked with him as part of a rally maintenance crew for a New Zealand team which competed in the Asia-Pacific region. When Mr Atherden worked in New Zealand he had "more of a full-time position" with the rally team, while Mr Barkley was part-time.

85. In 2013 Mr Barkley was part of the Citroen rally service team, specifically the manager of a team supporting one of the two cars in the team. One of his duties was to get "the right people" into his team, and he had authority to engage people for the team.

86. He had previously observed Mr Atherden working both in a normal workshop and as part of a rally service crew. In 2013, unaware of the accident, Mr Barkley approached Mr Atherden to see if he was available "for doing the Australian championship". He thought that he had previously approached Mr Atherden about opportunities with another rally team, but he hadn't been in a position to take up an offer. When Mr Atherden told him about the accident, Mr Barkley had said, "Well, if you're ever available again I'd be more than happy to get you back on board."

87. The Citroen rally team had competed in 2014 and 2015. He thought that the team had competed in six events in 2014, and each event would have involved work for about seven days, depending on travel time. The position offered to Mr Atherden would have been a paid position at the same level as other members of the team, which according to his best recollection would have been a cash payment of $250 a day plus expenses.

88. In 2015, Mr Barkley said, the team had competed in five events, with the crews working on the same basis as in 2014. The team did not compete in 2016. At the time of the trial the team was in negotiations with a driver from Dubai about the 2017 season. Members of the service team in 2017 would be paid at least $250 per day and possibly more. The team would be supported by Dubai Tourism and accordingly would have no budget problems.

Cross-examination

89. Mr Barkley said that the various Australian events were spread out over the several months of the season rather than back to back, and that he would have expected team members to be available for all events throughout the season. He explained that in his full-time job he was entitled to only four weeks annual leave, and that he would have taken unpaid leave for the other events of the season. If Mr Atherden had accepted his offer, Mr Barkley said, he would have expected Mr Atherden to ask his employer for some leave without pay so that he could do the whole of the six weeks, but agreed that that was something Mr Atherden would have needed to negotiate for himself. Pressed about whether Mr Atherden would only have been engaged if he was available for all the events, Mr Barkley said that he was reasonably flexible, that if a person was good enough he would try to work out a way to get them there, and that Mr Atherden's work, attention to detail and knowledge of motor sport were all excellent, so he "would have negotiated something there as well". Mr Barkley conceded, however, that this would have depended on how accommodating Mr Atherden's employer was, and whether Mr Atherden had wanted to use all his available time working with the team.

90. Mr Barkley said that since the early 2000s he had asked Mr Atherden "numerous times" to work with him on rally teams, but clarified his evidence as being that on a couple of occasions Mr Atherden had turned him down, but on a couple of occasions he had come along. Mr Barkley had only been in a position to offer work to others when he worked for the Subaru team and the Citroen team.

Re-examination

91. Mr Barkley could not recall whether any of the Australian rally events had coincided with long weekends.

Documentary evidence

92. Each party tendered a number of documents in its case. One document tendered on behalf of Mr Atherden was objected to by the defendant but pressed by counsel for Mr Atherden. At the time I indicated my view that the document should not be admitted, and subsequently refrained from admitting it, for reasons set out at [229] and [230] below.

Expert medical reports

Plaintiff's reports

93. Two expert medical reports were tendered in Mr Atherden's case (Exhibit C), from Dr Leon Le Leu, an occupational physician, and from Dr James Bodel, an orthopaedic surgeon.

94. Dr Le Leu summarised Mr Atherden's injuries as follows:

> He suffered a comminuted fracture of the distal left radius with subluxation of the carpus. The injury has been stabilised surgically but arthroscopy has revealed a range of wrist abnormalities including ligamentous tears and cartilage damage.

95. Dr Le Leu noted that since Mr Atherden remained employed at the same wage, his economic capacity was not impaired, but that if he lost his current job, Mr Atherden was unlikely to get other work at the same rate of pay, and that:

> …if exposed to the job market, his economic capacity will certainly have been impaired.

96. He advised that Mr Atherden should avoid:

- Repetitive, forceful use of the left hand and wrist
- Lifting, carrying, pushing or pulling with the left hand and wrist greater than 2 kg (or horizontal force equivalent)

97. Dr Le Leu noted Mr Atherden's reports of his inability to continue riding a bicycle, and his reduced capacity to perform work on his own cars or to provide servicing for car rallies.

98. Asked about any further treatment required, Dr Le Leu identified only that Mr Atherden might eventually need a wrist fusion, "if the pain becomes unbearable". He calculated that Mr Atherden had suffered an 11% impairment in the movement of his left wrist, and a 1% impairment in his elbow movement, amounting to a 12% impairment of his arm below the elbow. His prognosis was for:

> …a gradual deterioration of the wrist over the next two decades with increasing pain and decreased range of movement.

99. Asked for further information about Mr Atherden's capacity for continuing employment, Dr Leu advised that Mr Atherden's injuries and disabilities prevented him from performing the full duties of a mechanic, and expanded on that advice as follows:

> **2. What work activities do his injuries and disabilities prevent him from performing effectively?**
>
> An auto mechanic requires good upper body strength with fairly symmetrical arm strength. Many car parts are very heavy and may have to be manipulated into awkward places; the latter will be made more difficult by the reduction in the range of his left wrist in addition to the weakness. The auto mechanic has to operate heavy hand tools including hammers, pneumatic spanners, and other devices. Parts have to be appropriately fastened in place

so that they will not come loose during vehicle operation. He would be less able to hold greasy car parts.

Because of the marked discrepancy of strength between Mr Atherden's two hands, he could not adequately perform in such a setting.

3. Do the plaintiff's injuries and disabilities disadvantage him in the open labour market, and if so, in what way?

They disadvantage him from performing work of a moderately to highly physical nature in the open labour market, again because of the need to exert fairly symmetrical force with the arms and to handle heavy tools in a forceful manner.

Since he is right-hand dominant, he is capable of performing work of a light ambulatory, semi-sedentary or sedentary nature such as the work he is currently performing as a spare parts interpreter, avoiding heavy lifting with the left hand. He can operate a computer keyboard with both hands but, if he does too long without moving the left wrist, it stiffens so he would need to have breaks.

He would be able to perform a range of work typified by although not limited to:

Accountant/Auditor	Bank teller	Data entry officer
Business manager	Recruitment Officer	Draftsperson
Museum guide	Reservations clerk	Payroll Clerk
Research Officer	Social worker	Proofreader
Valuer	Switchboard operator	Receptionist

Note that the listed occupations are ones for which Mr Atherden has a physical capacity/functionality but not necessarily for which he has education, experience or training.

100. Dr Bodel agreed with the assessments of others, in particular Dr Paul (at [109] below), that Mr Atherden "was not fit to return to pre-injury duties as a motor mechanic", although he noted that Mr Atherden's return to work in the workshop had been "largely successful" until he was "put off work" after the injury to a finger on his right hand. He said that if Mr Atherden continued with "heavy unrestricted work", it would "accelerate the post-traumatic osteoarthritis which will inevitably occur in the left wrist and that would be inappropriate".

101. As to Mr Atherden's economic capacity, Dr Bodel concluded:

> This gentleman's economic capacity has been diminished by the effects of this injury. Although he did return to work as a motor mechanic he really was not capable of all of the normal activities in an unrestricted manner and it would be inappropriate for him to do that. Significant modifications are required to allow him to continue in work with ongoing disability.

102. Dr Bodel also considered that a wrist fusion would be necessary at some point.

103. Counsel for the defendant sought, and I made, an order under s 136 of the *Evidence Act 2011* (ACT) excluding the use of the histories given by the plaintiff to the doctors, being histories set out in the medical reports tendered on behalf of the plaintiff, as evidence of the facts reported by the plaintiff to the doctors.

Defendant's reports

104. The defendant also tendered two expert medical reports, from Dr Nicolas Burke and Dr Matthew Paul, both consultant occupational physicians.

105. Dr Burke's report was dated 23 April 2014. Mr Atherden had reported pain associated with any repetitive or forceful activity, including gripping, that involved his left wrist. He said that banging his wrist caused quite significant pain, for which he had to take Panadeine Forte (ordinary Panadeine not being effective); he took this pain-killer once or twice each fortnight.

106. Dr Burke reported that Mr Atherden had a decreased range of motion in his left wrist, that he would need a wrist fusion in due course, and that his generally poor prognosis included the likelihood that he would develop arthritis. Dr Burke said that Mr Atherden could not ever return to his pre-injury duties.

107. Dr Paul also noted that Mr Atherden used Panadeine Forte for pain relief, and that he suffered pain most days, which was made worse by some activities. In particular, Mr Atherden reported suffering severe pain if he knocked his wrist or made a sudden wrist movement. Mr Atherden had problems with lifting, gripping or carrying anything weighing over 5 kg.

108. Mr Atherden reported that at work he had been performing "alternative duties", and that apart from his work restrictions he had given up weight training and riding his bicycle, as well as servicing rally cars. He was able to do light work on his own car at home, "with care".

109. Dr Paul confirmed the reduction in Mr Atherden's range of motion in his left wrist, but noted that generally he was managing his condition quite well. He noted that Mr Atherden would never return to his usual duties, and would only be able to perform:

> …permanently modified duties including no lifting more than 5kg with the left wrist. No pushing, pulling or carrying heavy items, or overly repetitive manual activity with the left wrist.

110. Dr Paul did not mention any possible need for a wrist fusion in due course.

Clinical records

111. Clinical records were in evidence (Exhibit D) relating to Mr Atherden's treatment by the following providers:

(a) The Canberra Hospital;

(b) Holt Medical Centre (where Mr Atherden's general practitioner practised);

(c) Northside Psychology (where Dr Whitney practised);

(d) Orthopaedics ACT (where Dr Roberts practised);

(e) Performance Edge Physiotherapy.

112. Most of this evidence does not require further consideration, but I note that Dr Whitney recorded that Mr Atherden presented to her suffering symptoms of depression, that his requests to his employer for different arrangements made after discussions with her had been unsuccessful, and that in discussion of learning styles, it emerged that Mr Atherden learns "kinesthetically, not academically" ("kinesthetically" seems to refer to a style of learning that involves students carrying out physical activities rather than listening to or watching others giving instruction).

Medical certificate

113. Exhibit E was a medical certificate recording Mr Atherden's unfitness for work from 14 to 22 July 2016 due to anxiety.

Evidence about remuneration for "comparable" positions

114. Several advertisements from the online "positions vacant" website Seek.com were tendered in the plaintiff's case, although Mr Atherden himself did not give any evidence about them. The advertisements were said to indicate what automotive service centre managers and mechanics might get paid in NSW and the ACT. Counsel for the defendant initially objected to this tender, but abandoned the objection when I indicated that the advertisements seemed to me to be of relatively low relevance and little probative value, but not inadmissible as irrelevant, especially in the absence of any other evidence about what Mr Atherden might have expected to earn over his career if he had not been injured.

115. The advertisements (Exhibit F) identified the following vacancies as at September 2016:

Position	**Location**	**Salary**
Qualified Motor Mechanic (Land Rover)	Sydney CBD, Inner West and Eastern Suburbs	$60,000 - $70,000
Motor Mechanic European & Prestige Vehicles	Sydney CBD, Inner West and Eastern Suburbs	$55,000 - $85,000 negotiable on experience
Automotive Service Centre Manager	ACT	$70,000 - $80,000 + bonus, co. vehicle & petrol
Motor Mechanic	ACT	From $55,000 to $70,000 for the right applicant

116. In short, Mr Atherden's salary at Rolfe Mazda seemed to be within the range of salaries advertised on Seek.com for motor mechanic positions, and it seemed that managerial positions paid more (in the order of $10,000 to $20,000 more, and sometimes with more perks). None of this seemed to take the matter beyond what I could have inferred from the evidence that Mr Atherden was being paid at least award wages at Rolfe Mazda (at [64] above), and what could have been a matter of judicial notice to the effect that managers are often paid more, and have access to more perks, than the workers they manage.

117. In the end, I did not see any need to make a detailed assessment, year by year, of Mr Atherden's likely loss of income as a result of his injury (at [216] and [217] below).

Tax affairs

118. Mr Atherden's tax returns and notices of assessment for the years ending 30 June 2011-2016 were also put into evidence (Exhibit G). The 2012 return and assessment (that is, for the last tax year before Mr Atherden's accident) showed a gross income of $61,978 from his employer, a total income (including dividends, franking credits and

interest) of $62,711, and a taxable income of $58,365. The figures for subsequent years were similar although not identical, and generally showed slightly lower income amounts.

Report of accident investigation

119. Counsel for Mr Atherden tendered a report of an investigation into the accident conducted on behalf of NRMA which, counsel claimed, contained an admission against interest by the defendant and relating to Mr Atherden's capacity for advancement within Rolfe Mazda. My reasons for declining to admit that report are at [229] and [230] below.

Defendant's tender bundle

120. Apart from the expert medical reports discussed above, the defendants provided a considerable bundle of documentation from GIO relating to Mr Atherden's workers compensation claim. There was no dispute about any of that material, and the aspects of the damages claim to which it is relevant are agreed between the parties.

Submissions – contributory negligence

Defendant's submissions

121. Counsel for the defendant accepted that the onus was on his client to establish, on the balance of probabilities, that there had been contributory negligence on Mr Atherden's part.

Test for contributory negligence

122. A finding of contributory negligence by Mr Atherden required a conclusion that he had failed to take reasonable care for his own safety and that his failure had contributed to the injury he had sustained (*Nance v British Columbia Electric Rail Co Ltd* [1951] AC 601 at 611; *Commissioner of Railways v Ruprecht* (1979) 141 CLR 563 (***Ruprecht***) at 570). The standard of care expected is that of a reasonable man of ordinary prudence (*Sungravure Pty Ltd v Meani* (1964) 110 CLR 24 at 36-37, and *Ruprecht*, in which Mason J at 573 identified a relevant question as whether the action of the plaintiff was "incompatible with the conduct of a prudent and reasonable man").

123. Aspects of determining contributory negligence are dealt with in the *Civil Law (Wrongs) Act 2002* (ACT) (the ***Wrongs Act***). Section 102(1)(b) obliges a court that finds contributory negligence to reduce the damages recoverable for the wrong "to the extent the court … considers just and equitable having regard to the claimant's share in the responsibility for the damage".

124. In *Ghunaim* v *Bart* [2004] NSWCA 28 (***Ghunaim***), the New South Wales Court of Appeal (McColl JA with whom Giles and Ipp JJA agreed) said at [71] that the statutory requirement in assessing contributory negligence (which is expressed in the ACT in the same terms as were used in NSW):

> …requires the trial judge to "compare the culpability of the plaintiff and defendant in the sense of the `degree of departure from the standard of care of the reasonable man' ". The trial judge has to have "regard ...to the `relative importance of the acts of the parties in causing the damage' ". It is " 'the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination' ".
>
> (citations omitted)

Approach to apportionment

125. As to the apportionment of liability if contributory negligence was found, counsel noted the obligation imposed on the court by s 102 of the *Wrongs Act* (at [123] above) and referred to the joint judgment in *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529 (***Podrebersek***) at 532-533, where the Court said:

> A finding on a question of apportionment is a finding upon a "question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds".
>
> …
>
> The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, i.e. of the degree of departure from the standard of care of the reasonable man (*Pennington v. Norris* [1956] HCA 26; (1956) 96 CLR 10, at p 16) and of the relative importance of the acts of the parties in causing the damage.
>
> (citations omitted)

126. Counsel noted that s 47 of the *Wrongs Act* allows a court to "decide on a reduction of 100% if the court considers it is just and equitable to do so, with the result that the claim for damages is defeated", and, on specific instructions, sought a reduction of 100% for contributory negligence.

Application in current case

127. Counsel for the defendant noted that it would not be possible to find a case with the same factual matrix as the current one, that it was accordingly necessary for me to consider the relevant principles, and that the relevant principle in this case is that one must look at what an ordinary reasonable person would do in the plaintiff's position, whether the plaintiff's conduct amounted to a failure to take care of his own safety, and whether that conduct resulted in injury to the plaintiff.

128. The submissions made by counsel for the defendant about contributory negligence appeared somewhat confused. At one point he seemed to be suggesting that Mr Atherden's contributory negligence lay in his failure to get a proper grip on the parts of the vehicle he was holding on to. Counsel said that it was Mr Atherden's choice to get onto the vehicle, to choose what to hold onto, and to indicate to Mr Fisher that he was ready for Mr Fisher to start the vehicle moving.

129. When it was put to him that his submission implied that the basic process of riding on the engine for diagnostic purposes was in fact a sensible system of work, or at least that it would have been quite sensible if Mr Atherden had managed to find the right part of the vehicle to hold on to, counsel reverted to what seemed to be the real argument, being that the procedure undertaken by Mr Atherden and his supervisor was so inherently stupid and risky that Mr Atherden should never have agreed to take part.

130. When I indicated to counsel that I was not inclined to determine a contributory negligence reduction of 100% (at [126] above), counsel pressed for a 50% reduction, noting that even this would be well above the usual reduction of around 15-20% in employment cases.

131. The proposition ultimately relied on by counsel, that Mr Atherden negligently contributed (possibly to the extent of 100% and certainly to the extent of at least 50%) to his own injury by participating in the procedure at all, relied on an interpretation of the evidence as showing:

(a) that Mr Atherden's personal qualities, experience and position in the workplace would have enabled him to refuse to participate in his supervisor's procedure; and

(b) that what Mr Atherden did was unnecessary given that his supervisor had already identified the source of the noise, and that in getting onto the engine he was "on a frolic of his own".

132. Counsel said:

> Mr Atherden … conceded that he was not the shrinking violet employee who was subservient to whatever the boss told him to do. There are lots of cases where that happens and where the finding of contributory negligence is therefore reduced because the employee had to do the task or felt he had to do the task because he was subservient to the employer. That's not this case.
>
> The plaintiff gave very clear evidence that he was an intelligent and articulate, well-trained man who had a senior role to play. He had apprentices underneath him, occupational and health and safety training. And he said squarely - "If I thought there was something that I didn't want to do I was capable of telling the boss I didn't want to do it."
>
> So it takes it well beyond the sort of subservient employee who is literally forced to do the activity.

133. Counsel said that Mr Atherden in evidence had conceded that in general in his employment, if he had assessed a situation and been concerned about it, he could have raised his concerns and said that the proposed action was ridiculous and that he couldn't do it. In short, Mr Atherden was educated and articulate, able to argue about an instruction, and not subservient, and "the sheer obviousness of the danger to which Mr Atherden exposed himself" meant that he was clearly negligent in taking part.

134. As to whether Mr Atherden's ride on the engine was unnecessary and not part of his work, counsel for the defendant relied on Mr Atherden's evidence to assert that on the occasion in question:

(a) "they" (being Mr Atherden and his supervisor Mr Fisher) had decided to act as they did, and Mr Atherden was not directed by Mr Fisher to participate;

(b) Mr Atherden had wanted to make his own personal observation in order to be able to fix the vehicle ;

(c) Mr Fisher had already found the source of the noise, and all that Mr Atherden needed to do was to work on the area identified by Mr Fisher; and

(d) therefore, Mr Atherden's wish to repeat the exercise was completely unnecessary, "a frolic of his own", and a completely stupid thing to do.

135. Furthermore, counsel said, Mr Atherden's evidence about what Mr Fisher had said to him before he got onto the engine (in particular the suggestion that Mr Atherden should

also have a look) was irrelevant, having regard to Mr Atherden's evidence about his own wishes as quoted at [60] above, particularly in relation to the "methodology of determining the noise".

Plaintiff's submissions

Test for contributory negligence

136. Counsel for Mr Atherden began and ended his submissions by asserting that he had never come across a case in which contributory negligence has been found against a person "working under the direct supervision of a supervisor in accordance with the supervisor's directions and instructions and in accordance with the system of work that was designed by" the defendant employer. Counsel for the defendant did not meet this challenge by identifying any such case, although that failure is clearly not determinative.

137. Counsel for Mr Atherden also relied on *Ghunaim*, at [70], where McColl JA referred to the significance of compliance with the employer's system of work as follows:

> Dixon J's injunction in *Davies v Adelaide Chemical & Fertiliser Company Limited* that, in substance, the question is whether the employee was acting within or beyond the system of work the employer had established, is well illustrated by two decisions. In *Liftronic Pty Limited v Unver* a finding of contributory negligence by a jury of the order of 60% was upheld in circumstances where the plaintiff had used a system requiring him to bend his back even though he had been specifically warned against using that system to lift heavy objects. Conversely, in *McLean v Tedman* the majority (Mason, Wilson, Brennan and Dawson JJ) held that the appellant, a garbage man injured by a motorcar while crossing the road carrying a "humper" to be dumped into a garbage truck - a system of work of which his employer knew or ought to have been aware - was not guilty of contributory negligence.

138. In *Davies v Adelaide Chemical & Fertiliser Company Limited* (1946) 74 CLR 541, Mr Davies had for some years followed a practice of performing his work, of greasing conveyer belts used in his employer's premises, while the belts were operating. This practice was recognised as having some risk, but it also reduced the inconvenience to the business of having to stop the conveyer belts during routine maintenance. The practice was well-known to Mr Davies' supervisors and managers, and he had never been advised or instructed not to follow it. Mr Davies sustained an injury while greasing an operating conveyer belt. In finding in Mr Davies' favour and setting aside the original finding of contributory negligence, Dixon J said at 551-553:

> In fact, though the practice did involve some degree of risk, it was not highly dangerous and, as between stopping the belts or greasing them in motion, the inconvenience to the factory of stopping the belts might easily be regarded as outweighing the risk. At all events, I think that in following such a practice at the time of the accident the plaintiff was not guilty of such negligence as to disentitle him to recover, because he was not acting contrary to any rule, instruction, advice or practice made, given or established by the defendant as his employer or in his own interest or for his own convenience but on the contrary, was performing his duties according to his habitual and long-standing practice for which he had the apparent, and, as I think, actual approval of the factory management who treated it as part of his ordinary work.
>
> …
>
> The reason why the foregoing considerations do not seem to me to be enough to support a conclusion that the plaintiff was guilty of such negligence as to defeat the prima-facie liability of the defendant for its breach of statutory duty is that they amount only to circumstances showing that he was as much alive as anyone to the factors involved in the practice of greasing the conveyer belt rollers in motion—including the risk, such as it was—

> and that had he thought it necessary he might have departed from the practice by asking that the belt be stopped.
>
> But these are all matters affecting the employer's primary duty and in my opinion do not involve that degree of culpability on the plaintiff's part which disqualifies him from attributing his injury to the lack of the very safeguards which are required by statute for the direct object of preventing the precise thing. It was open to the employer, the defendant, to take such measures as would ensure that the machinery was stopped on all occasions before greasing. Then the material parts of the machinery would not have been dangerous and the duty to safeguard would not have been broken. But so far from taking such measures, the defendant approved of the contrary practice; the participation of the employee in the practice cannot amount to contributory negligence relieving the employer of liability for breach of its resultant duty to safeguard. That would mean the transfer to the employee of the employer's responsibility for ensuring that there was no greasing of the machinery in motion as an alternative to providing safeguards against the danger involved in so greasing it.

139. I note that this decision was made in a context in which a finding of contributory negligence would have provided a complete defence to Mr Davies' claim of breach of a statutory duty to safeguard dangerous machinery (Latham CJ at 545), rather than requiring an adjustment of the damages awarded.

140. Counsel for Mr Atherden also mentioned *McLean v Tedman* (1984) 155 CLR 306 (***McLean***), referred to by McColl JA in *Ghunaim* (at [136] above), in which the High Court by a majority:

(a) determined (at 313) that the employer had "either failed to establish a [safe] system of work or [had been] content to acquiesce in the [unsafe] system of work adopted by the employees";

(b) noted (at 315) that, having found that the employer had failed to provide a safe system of work, the court must take into account the circumstances and conditions in which the employer had to do his work; and

(c) concluded (at 315-316) that the employee's undoubted contribution to the accident was "excusable in the circumstances because not incompatible with the conduct of a reasonable and prudent man", and accordingly did not amount to contributory negligence.

141. Also relevant were McColl JA's comments at [57], [60] and [68] about "misconduct", as follows:

> 57. In *Bourke v Butterfield and Lewis Ltd*, a case concerning the issue of contributory negligence in the context of an employer's failure to fence a dangerous piece of machinery, Knox CJ, Gavan Duffy and Starke JJ said:
>
> > "It is clear that the statute was made for the protection of employees in a factory, whether careful or negligent. Indeed, if there were no negligence, there would be little necessity for the fencing off of dangerous machinery... it would be unreasonable to attribute to Parliament an intention to impose upon the employer responsibility for an injury which the employee deliberately invites, whether by adopting the means of inflicting it, or by rejecting the means of avoiding it, or for an injury which has happened because the employee deliberately took an unnecessary risk not in the interests of the employer, but for his own purposes. It is not easy to frame an exact formula; but it may be said that the employer is responsible for the negligence, but not for the misconduct, of his employee. Whether the conduct of an employee goes beyond mere thoughtlessness or want of care and amounts to misconduct is in every case a question of fact."

> 60. The notion of "misconduct" referred to in *Bourke v Butterfield* has been expressed as meaning that in considering an allegation that an employee was guilty of contributory negligence, it is relevant to take into account whether the employee was acting "contrary to any rule, instruction, a device or practice made, given or established by the defendant as his employer or in his own interest or for his own convenience ... [or] was performing his duties according to his habitual and long-standing practice for which he had the apparent and ... actual approval of the factory management.".
>
> …
>
> 68. In Murphy J's view (at 577 – 578 [of *Ruprecht*]) before an employee could be found guilty of contributory negligence, there must be "wilful misconduct", having regard to "the cases which show that carelessness by an employee due to confusion, fatigue or natural slackening of attention, or preoccupation in what he is doing, is not to be regarded as contributory negligence. It is not enough to show mere knowledge of the risk; the onus is on the employer to prove that the employee knew and fully appreciated the danger at the time and yet went on to incur it."
>
> (citations omitted)

Application in current case

142. Counsel for the plaintiff submitted that Mr Atherden's evidence (at [30] above) established that the system of work was clearly one which had been devised by the employer, and that Mr Atherden was working under the direct supervision of his supervisor/employer, taking instructions from his employer and working in accordance with that system. The incident had not been a one-off. Mr Fisher had previously engaged in the same conduct and Mr Atherden had observed him doing so.

Consideration – contributory negligence

143. I accept the submission of counsel for Mr Atherden that the system of work had been devised (or at least implemented) by or on behalf of the employer, and was not in any sense a frolic of Mr Atherden's own. Although taking the vehicle to a park where it could be driven at 20 or 30 kph might have been a new extension of the practice, there is no evidence that it was instigated by Mr Atherden, and his evidence at [29] above suggests that it was Mr Fisher who initiated the idea of taking the vehicle "for a drive". Mr Atherden was not cross-examined about his evidence of Mr Fisher initiating the particular activity or the particular extension involved in taking it off the premises and to a park.

144. I reject the defendant's submission that after Mr Fisher got off the vehicle, there had been no need for Mr Atherden to get onto it because the source of the noise had been located by Mr Fisher. I also reject the related submission that although Mr Fisher had invited Mr Atherden to take a turn on the engine, Mr Atherden should not have accepted that invitation. Counsel's approach turns partly on the interpretation of Mr Atherden's evidence quoted at [60] and [61] above. Counsel said that the evidence established that:

> He didn't have to do the task. It was something he personally wanted to do - why, it's not really clear considering the general area of the noise had been determined by Fisher. Why it was necessary for Mr Atherden to … want to go and do it is beyond belief because once you know where the noise is you then start your investigation in that area and I put that to him in cross-examination and he agreed that once you knew where the noise was coming from all you needed to do was then work on the car in that area to try and determine the cause of the noise.
>
> After all they were doing out there was trying to locate where the noise was coming from, they were not looking to solve the problem out there, they were just looking to locate the

> source of the noise. The source of the noise had been located by Fisher. So it was a frolic of his own …

145. However, Mr Atherden's evidence makes it clear that Mr Fisher "didn't find the source, it was just the area of where it was coming from", that it "was a wide area to pinpoint the noise", and that he "wanted to hear the noise" because he "wanted to fix this car". While Mr Atherden did, in so many words, concede that once an area was identified, he could have worked on that area to see if he could identify the cause of the noise, Mr Atherden's evidence taken as a whole cannot be read as a concession that his wish to narrow down the relevant area by listening to the noise himself was unnecessary or inappropriate. After all, it was already clear that the noise was coming from the vehicle and, apparently, that it was coming from somewhere under the bonnet, but this much "narrowing down" had proved inadequate to enable discovery of the real problem.

146. It is also clear from his evidence quoted at [30] above that Mr Fisher expected Mr Atherden to take a turn on the engine (saying that he, Mr Fisher, would "climb up **first** and have a listen") (emphasis added) and then invited Mr Atherden to do so after they had discussed Mr Fisher's experience, saying "You may as well jump up and have a listen, seeing as you're working on it."

147. Counsel may be correct that Mr Atherden was not explicitly directed to take his turn on the engine, but having regard to Mr Atherden's evidence, I am satisfied both that he acted in compliance with Mr Fisher's expectations and that he acted not on a frolic of his own but "in the interests of the employer" (*Bourke v Butterfield and Lewis Ltd* (1927) 38 CLR 354, at [141] above) in doing so.

148. As to counsel's submissions that Mr Atherden was not "the sort of subservient employee who is literally forced to do the activity", I accept that this accords with Mr Atherden's evidence. However, I also note Mr Atherden's evidence that after he injured his right hand he was moved to the spare parts department with no consultation (at [49] above), and that his subsequent request to return to the workshop was rejected "flat out" (at [51] above). I also note the peremptory tone of the letter advising Mr Atherden of the move to spare parts (at [48] above). Mr Atherden may well not have thought of himself as "subservient", but the evidence of Mr Atherden's treatment after his accident suggests that dissent in the workplace was not encouraged.

149. Counsel for Mr Atherden noted his concession that with hindsight he realised that the activity was dangerous. He submitted that the cases show that the fact that a worker is aware of a particular risk does not necessarily mean that an action of the worker that results in the risk materialising involves any contributory negligence; he mentioned specifically *McLean* and *Ghunaim.*

150. Both *McLean* and *Ghunaim* were cases in which no contributory negligence was found against a worker who had been aware of the relevant risk and (in *McLean*), who had continued to follow a work practice that clearly gave rise to the risk.

151. Counsel for the defendant noted that *Podrebersek* involved a workplace accident in which the plaintiff had been doing something he knew he shouldn't have done, and submitted that such a situation was "exactly … what we have in this case". However, in *Podrebersek,* the plaintiff had known not that he was acting in accordance with a risky workplace practice but that he was specifically not complying with his employer's requirement for performance of the work concerned. In the current case, Mr Atherden

was complying with a practice which, even if not formally recognised by the defendant (as to which no evidence was provided), had to Mr Atherden's knowledge been used from time to time before, albeit only in the workshop area of the defendant's premises, by Mr Atherden's supervisor, and had not been forbidden or even warned against.

152. I find that the activity which resulted in Mr Atherden's injury was initiated (both as a workplace practice, and on the occasion of the accident) by his supervisor, and that Mr Atherden's participation in that activity was done not in his own interest but in the interests of his employer, and against that background I find that there was no contributory negligence by Mr Atherden.

Damages claim – agreed and disputed aspects

153. Several aspects of the damages claim were agreed, being:

(a) past out of pocket expenses, agreed at $43,353.82;

(b) as future out of pocket expenses, an amount attributed to the direct cost of the expected wrist fusion, being $12,840; and

(c) past domestic assistance expenses of two hours per week for 11 weeks (being periods of seven and four weeks immediately following the accident and the second surgery respectively), at a cost of $35 per hour and totalling $770.

154. The substantive aspects of the damages claim still in dispute were:

(a) general damages;

(b) damages for past and future loss of earning capacity, including superannuation;

(c) future out of pocket expenses associated with the expected wrist fusion;

(d) past domestic assistance, apart from the assistance mentioned at [153(c)] above; and

(e) future domestic assistance.

General damages

155. Mr Atherden sought $200,000 in general damages, while the defendant suggested that $80,000 would be appropriate.

Plaintiff's submissions

156. In support of the claim for $200,000 in general damages, counsel for Mr Atherden noted:

(a) that Mr Atherden is only 40 years old, and will suffer the effects of his injuries for many years to come;

(b) that Mr Atherden is in constant pain except on a few occasions;

(c) that Mr Atherden has already had surgery twice, that his condition will deteriorate, and that in due course he will need wrist fusion;

(d) that he has lost the ability to work in the only job he's ever wanted, and a job that he loved;

(e) that his capacity for domestic duties, and for recreation activities like bike riding, is now restricted;

(f) that he is long-suffering, as indicated by his evidence that he "just deals with the [constant] pain" (at [45] above).

Defendant's submissions

157. In asserting that the $200,000 amount was excessive, counsel for the defendant said:

(a) that Mr Atherden's injury was to his non-dominant hand, and that he had over time resumed all "pre-accident" work;

(b) that Mr Atherden was "confident of being able to obtain alternate [sic] work than what he's doing at the moment in the spare parts department";

(c) that Mr Atherden still has the same capacity to work as a mechanic as he had before the second injury (that affecting his right hand) and there's no evidence that he doesn't, that there may be other reasons why he is not still in a mechanic's job, and that attributing it to the accident is mere speculation;

(d) that Mr Atherden intends to stay in his current job until he finds a new job;

(e) that Mr Atherden has had only limited time off work, and therefore has "been able to pursue a career";

(f) that Mr Atherden is able to do all domestic duties, with the possible exception of changing bed sheets;

(g) that Mr Atherden has received no treatment for physical injury since 2014, so there is no continuing obligation, such as might sound in general damages, to undergo medical treatment;

(h) that Mr Atherden suffers frequent rather than unremitting pain and only if he uses his left hand in particular ways, and he only uses pain medication (Panadol) about once a fortnight;

(i) that there is no evidence that Mr Atherden has ongoing problems with leisure activities; and

(j) that there is no evidence that Mr Atherden can't interact in "normal" ways with his partner's children, who are aged three and seven years.

Consideration

Comments on counsel's approaches

158. Each counsel adopted an approach to the evidence that I found unhelpful, although for different reasons.

159. Counsel for Mr Atherden generally exaggerated Mr Atherden's claims, and his problems, and often in ways not borne out by the specific evidence (leaving me generally suspicious of even counsel's more modest claims). For instance:

(a) contrary to the submission at [156(b)] above, Mr Atherden's evidence in 2017 was not that he was in constant pain, but that he was generally at risk of sudden and quite intense pain if he knocked his left wrist or used it for a sudden movement (at [44] above), and that he used pain relief (Panadol) roughly every two weeks (at [69] above); counsel's references to Mr Atherden suffering more frequent pain may have reflected the 2014 medical reports (at [105] and [107] above) rather than the evidence given in 2017; and

(b) counsel's submission that Mr Atherden had "lost the ability to work in the only job he's ever wanted, and a job that he loved" (at [156(d)] above) seemed to be inconsistent with Mr Atherden's evidence that he could work effectively as a mechanic as long as he had help with heavy tasks (at [43] above), and perhaps also with his evidence of a longer-term ambition to be a foreman or manager in a workshop (at [56] above).

160. The approach of counsel for the defendant in several respects relied on what I consider to be misinterpretations of Mr Atherden's evidence, including:

(a) at [157(b)] above, that Mr Atherden was "confident of being able to obtain" alternative work: this apparently relied on Mr Atherden's evidence quoted at [55] above, which in my view expressed not confidence in finding some kind of fulfilling work but a realisation of how important finding such work was to his long-term well-being; and

(b) at [157(d)] above, that Mr Atherden intended to stay in his current job until he finds a new job: this apparently relied on Mr Atherden's evidence quoted at [66], in which he certainly said he would resign from his current position when he had another job to go to, but did not say that he would not resign before then (which could not be ruled out given the evidence that he "hates" his current work (at [55] above)).

161. Other submissions made by counsel for the defendant seemed to be unsustainable on the evidence more generally:

(a) That Mr Atherden had over time "resumed all 'pre-accident work", and that his accident was not necessarily the reason he was moved from a mechanic position: although Mr Atherden might for some time have remained in the same mechanic's position, it is clear that he was never again able to perform all the tasks required of a person in such a position, and that he remained there only because other employees took over the tasks he could no longer do (at [43] above). I do not consider there is anything speculative about the proposition that Mr Atherden no longer has a position as a mechanic because he had been rendered permanently unable to perform all the tasks required in that position. It may be correct that Mr Atherden had the same capacity after he recovered from the injury to his right hand as he had immediately before that latter injury, and that the actual decision to move him out of the workshop and into the spare parts department was precipitated by something unrelated; however, in the absence of any evidence to that effect, I am satisfied that while the latter injury may have provided the opportunity to move Mr Atherden out of the workshop, it was irrelevant to the unchallenged fact that as a result

of the wrist injury Mr Atherden had lost the capacity to perform a mechanic's job fully.

(b) That because Mr Atherden had had only limited time off work since his accident, his ability to "pursue a career" had not been affected.

162. I do not consider that much weight can be placed on the fact that Mr Atherden's injury was to his non-dominant hand. No doubt an equivalent injury to the dominant hand would have been more serious, but many day to day activities, including activities required in employment, are most conveniently done using both hands, and those involving any kind of weight bearing may be impossible with only one fully-functioning hand, even if it is the dominant one. In other cases, some activities are more conveniently done using the non-dominant hand so as to leave the dominant hand free for other tasks. Mr Atherden's work provides a good example of activity that involves both hands operating in various different combinations.

163. Another issue raised by counsel's submissions is that, quite apart from Mr Atherden's intentions, his continuation in his current position might not be entirely up to him; if, as is Mr Atherden's unchallenged evidence, there is not enough work for all the employees in the spare parts department, then it is entirely possible that one or more of the jobs concerned may eventually disappear.

Leisure activities

164. Finally, I note that evidence of Mr Atherden's ongoing problems with leisure activities (mentioned by both counsel) is scant but not entirely non-existent.

165. Mr Atherden did not give direct evidence about his inability to continue cycling since the accident, but he did refer to quad-bike cycling as one of several activities he had hoped to engage in during the holiday that had been scheduled before the accident and was to take place a couple of weeks after the accident (at [35] above). Mr Atherden also gave evidence that he was unable to engage in those activities during the holiday, but explained this only by reference to the fact that his arm was still in a cast.

166. However, Mr Atherden did mention that he had been unable to continue his pre-accident cycling to all four of the doctors who gave expert reports.

167. Mr Atherden's reports to Dr Le Leu and Dr Bodel about his problems with cycling may be inadmissible because of the order mentioned at [103] above limiting the use to be made of Mr Atherden's reports to those doctors, but his reports to Dr Burke and Dr Paul, which were tendered in the defendant's case, were not the subject of any equivalent order, and contain similar reports about Mr Atherden's capacity for bike-riding since the accident. Dr Burke noted that riding a bike "can also cause some difficulties with his left wrist", and Dr Paul reported that Mr Atherden had ceased weight-training and riding a bicycle. It seems that, absent a s 136 direction, the doctors' reports are admissible despite there being no separate proof of the facts on which they rely (*Dasreef Pty Ltd v Hawchar* [2011] HCA 21; 243 CLR 588 at [41]), and that under s 60 of the *Evidence Act*, Mr Atherden's reports of those facts, although hearsay, are not excluded by the hearsay rule.

168. The weight of such evidence needs to be carefully assessed given its hearsay nature (see, for instance, *Lardil, Kaiadilt, Yangkaal, Gangalidda Peoples v State of Queensland*

[2000] FCA 1548 at [26]). In this case, that assessment includes consideration of the fact that there was no obvious reason why Mr Atherden could not have given evidence of the effect on his leisure activities if there was, by the time of the trial, useful evidence to be given.

169. For the purposes of assessing general damages, however, I am satisfied on the balance of probabilities that the state of Mr Atherden's left wrist by the time of the trial, the restrictions on using that wrist, and the constant risk of significant pain resulting from either a knock or a sudden movement of the wrist, imposed limitations on his activities outside the workplace as well as within. In reaching that conclusion I take account of:

(a) Mr Atherden's relative youth;

(b) his unchallenged evidence of the kinds of activities that he was hoping to do on his holiday (at [35] above); and

(c) his areas of achievement in school, including specifically sport and "more hands on classes" (at [18] above);

to conclude that his leisure activities are likely to have involved physical rather than purely intellectual activity.

170. Also in relation to leisure activities, I note also that, although Mr Atherden's inability to remain involved in rally work has been raised as an aspect of his economic loss, it seems also to have some significance in assessing general damages: Mr Atherden was clearly distressed ("gutted", as he described it) by the fact that an activity which he seems to have particularly enjoyed, and to have engaged in at times without any financial gain, is now permanently unavailable to him.

Possibly comparable decisions

171. Each counsel referred me to several other decisions said to justify an award at the level proposed by the party concerned.

172. Counsel for Mr Atherden mentioned *Pangallo v Smith* [2015] ACTSC 313, in which Mr Pangallo was awarded $150,000 as general damages. At the hearing I noted that that decision was under appeal, and in its subsequent decision, handed down in December 2017, the Court of Appeal reduced the general damages to $100,000 (*Smith v Pangallo* [2017] ACTCA 61). Neither party sought to make further submissions in the light of the Court of Appeal decision.

173. In that case, the plaintiff was a semi-retired man in his mid-60s who already had a number of medical problems when he was hit by a motor vehicle, and whose evidence of his prior intentions about future employment was problematic in several respects (he was awarded only $10,000 for future economic loss). Mossop AsJ at first instance concluded at [56] that as a result of the accident the plaintiff:

(a) suffered short-term injuries to his head, face and left ankle;

(b) continued to suffer some additional headaches which might be managed using pain relief medication and exercise;

(c) suffered an aggravation of pre-existing back pain; and

(d) suffered a significant injury to his left knee and a lesser injury to his right knee.

174. His Honour also found that Mr Pangallo would need a knee replacement within a few years.

175. In *Robinson v Ng* [2014] ACTSC 227, a mishap caused by the defendant's negligence during a dental procedure left the plaintiff with ongoing facial pain, headaches and consequent fatigue. Mossop M at [185] to [189] described the matters that he had considered in assessing general damages at $170,000 as follows:

> 185. The plaintiff and her husband have three adult children. She and her husband used to breed and sell horses to make money. In 1996 the plaintiff enrolled in a Bachelor of Applied Science Equine course at Charles Sturt University in Wagga Wagga. The plaintiff graduated with a High Distinction average. During the period when she studied she also worked at Goulburn TAFE as a teacher of Equine Studies. Between 2002 and 2005 the plaintiff completed a Bachelor of Veterinary Science at Sydney University. She was 44 years old in 2002. She had enrolled in 2001 but became ill at the beginning of the year and had to withdraw. She was ultimately diagnosed with hypothyroidism which was controlled with medication. She completed her degree in four years by doubling up on her first year's units. She continued to live in Bookham while doing the course and on occasion would travel from Bookham to university and back in a day leaving at 4:00 am and arriving home at about 10:00 pm. She graduated in December 2005. She then set about gaining experience as a vet before establishing her own private practice.
>
> 186. This history is important in assessing general damages, in that the plaintiff's long worked-for goal of practising as a vet has been substantially frustrated by reason of the defendant's negligence and its consequences.
>
> 187. In terms of the more specific effects of the defendant's negligence, the plaintiff had her tooth root unexpectedly pushed through the wall of her sinus. She was then faced with the necessity for unpleasant emergency surgery in order to recover the tooth root. She suffered osteomyelitis as a complication of that. That was associated not only with pain but the uncertainty of not knowing her condition or its prognosis. She suffered the unpleasant and uncertain effects of antibiotic treatment over months as well as six days hospitalisation in order to have antibiotics administered intravenously. Although the course of her condition was unpredictable and uncertain she was free of osteomyelitis by August 2011. Since then she has suffered facial pain, headaches and consequential fatigue which have substantially altered her work and home life. She is likely to do so for the indefinite future.
>
> 188. Her goal of practicing as a vet, which she pursued with determination in middle age, has been thwarted and she faces the prospect of only being able to realise her goal in a very limited way notwithstanding her stoicism and perseverance.
>
> 189. In my view an appropriate award of general damages is $170,000 with $110,000 being attributable to the past. This gives an interest award of $10,626 (.02 x 4.83 years x $110,000).

176. Counsel for the defendant mentioned *Papp v Finley & Insurance Australia Limited* [2015] ACTSC 74 (***Papp***); *Meyer v Cool Chilli Pty Ltd* [2015] ACTSC 336 (***Meyer***); and *Baker v McKenzie & Anor* [2015] ACTSC 272 (***Baker***).

177. In *Papp*, the plaintiff, who was 50 years old at the time of the accident, suffered two "disabling injuries" in a motor vehicle accident. Cowdroy AJ, in awarding $90,000 in general damages, at [132] said:

> The effects of [the plaintiff's] injuries are continuing, disabling and painful, which will almost certainly affect her in the fulfilment of both her work and domestic duties. Those injuries can lead to periods of incapacity, which affect her in her employment and her home duties.

178. The plaintiff in *Meyer*, a 20-year-old woman, had suffered spinal fractures which had subsequently healed. In explaining an award of $70,000 as general damages, Mossop AsJ summarised her position as follows at [83]:

> The plaintiff suffered a traumatic fall. She was very fortunate not to have suffered greater injuries than she did. She was significantly incapacitated for a two week period and then underwent a significant period of rehabilitation in order to control the back pain from which she suffered. She lost the opportunity to pursue a reasonably well paid full-time job in the IT industry which would have given her a solid grounding for a long term career in that area had she wished to pursue such a career. She has suffered a period of over three years where to a greater or lesser extent her life has been significantly affected by the need to manage her back condition so as to permit her back to recover sufficiently that she can get on with the rest of her life. While it is difficult to disentangle the effect of the accident from other events and changes in her life, the accident and its sequelae have been at least a contributing factor to the deterioration in her relationship with her husband. In my view an appropriate award of general damages is the sum of $70,000 with $55,000 of that amount attributed to the past. That gives an interest award of $3,666 (3.333 x $55,000 x 2%).

179. I note that the attribution of nearly 80% of the general damages to the past suggests that the loss that was recognised by general damages had significantly resolved by the time of the trial.

180. The plaintiff in *Baker* was described (by counsel for the defendant in this case) as a 20-year-old woman with "brain damage" and an "ongoing executive functioning impairment", but since the $200,000 award for general damages was agreed between the parties, the basis on which it was appropriate was not explained. However, I note that Mossop AsJ attributed 50% of that amount to the past, rather than the 40% agreed between the parties, and awarded $190,000 for future economic loss, which was explained as reflecting the difference between the plaintiff's intended career in childcare, including promotions, and the plaintiff's expected continuing employment (as a result of her injuries) in low-level childcare positions. The facts that the plaintiff was assessed as retaining the capacity to work at the base level in her chosen career (at [54]), and that Mossop AsJ at [61] noted that "there remains a chance" that she will "rise higher within the childcare sector pay scales", suggest that the result of her injuries, while clearly life-changing, was not of the most dramatic kind often found in cases of brain damage and resulting cognitive impairment.

Conclusion

181. I do not consider that Mr Atherden's injury and its general consequences justify an amount of general damages exceeding that awarded to Ms Robinson, or Ms Baker, but his position does seem to me to be more unfortunate than those facing Mr Pangallo and Ms Papp, in particular because Mr Atherden's relative youth, and his need to remain in the workforce for some decades yet, mean that he can expect to have to deal with both the physical and psychological consequences of his injuries for longer than Mr Pangallo or Ms Papp. On the other hand, while Ms Meyer's life, and her career plans generally, were initially more severely disrupted by her injuries, her long-term opportunities do not seem to have been circumscribed to the same extent that Mr Atherden's opportunities have been.

182. I assess general damages at $125,000, and mention that this has included recognition of the non-economic impact of Mr Atherden's inability to remain involved in rally work. Noting on the one hand that Mr Atherden was able to continue with his preferred work (albeit with help) for more than two years after the accident, and on the

other hand that he is a relatively young man and that his injury has left him at enduring and untreatable risk of pain for several decades to come, I attribute 40% of the award to the past.

Damages for economic loss

Plaintiff's submissions

Past economic loss – tax issues

183. Counsel for Mr Atherden claimed a past loss of earning capacity of $26,900, which was not agreed by the defendant. Counsel did not provide any explanation of the basic calculation of this amount, but said that the failure to agree the amount of these damages resulted only from a disagreement between counsel about the method for accounting for income tax in the calculation (income tax was to be disregarded in comparing income actually received with income that would have been received but for the injury). Counsel for Mr Atherden said that the relevant income figure should be calculated by deducting tax paid from the gross income rather than from the taxable income, and in support of this proposition relied on *Husher v Husher* [1999] HCA 47; 197 CLR 138 (***Husher***) in which Gleeson CJ and Gummow, Kirby and Hayne JJ said at [23]:

> Deciding what value is to be ascribed to the loss of future earning capacity of an injured plaintiff requires close attention to the facts of each case. The task is not one to be undertaken by seeking to classify cases as concerning "sole traders" or "partnerships" or "wage-earners" or "trading trusts", and then attempting to deduce some rule of general application to all cases falling within the classification thus devised. Rather the inquiry is about what *could* the plaintiff have done in the workforce but for the accident and what sum of money *would* the plaintiff have had at his or her disposal. Only when those inquiries are pursued can a judgment be made about what capital sum to allow as damages for the impairment of the plaintiff's earning capacity. In doing so, regard must be had, of course, to all those contingencies of life that might reasonably be expected to affect the course of events in the future.

184. In context, these propositions seem to have meant that the true measure of a loss of capacity is the amount that the plaintiff would have had available to spend at his discretion, whether or not that amount was in fact spent in such a way as to generate a tax deduction and therefore a reduced taxable income.

185. Counsel further submitted that it was up to the defendant to establish that any particular deductible expense was necessarily incurred in earning the income (and therefore not part of the income available for discretionary spending).

Past economic loss – rally work

186. Mr Atherden claimed for the loss of income that he would have received if he had been able to accept Mr Barkley's offer of work with the Citroen rally team in 2013 and 2014. The claim was for $21,250, which seemed to involve a claim averaging $10,625 for each of the two years, that claim being made up of $1,000 per year as a meal allowance, and $9,625 per year representing 38.5 days at $250 per day. The claim did not make any allowance for the cost of the unpaid leave which, Mr Atherden conceded, he would have had to take in order to attend all six events in the rallying season (or, conversely, for the tax that would not have been levied as a result of the reduction in primary income by taking unpaid leave), and did not allow for the tax that would have been payable on the income other than the meal allowance, which counsel for Mr Atherden said during submissions was likely to be levied at around 25% to 30%.

Future economic loss

187. Counsel for Mr Atherden relied generally on comments made in *State of NSW v Moss* [2000] NSWCA 133; 54 NSWLR 536 (***Moss***) by Heydon JA, including the following:

> 66 There are two uncontroversial themes running through the cases relating to the assessment of damages for injury to earning capacity. One is that in general it is desirable for precise evidence to be called as to what the plaintiff would have been likely to earn but for the injury and what the plaintiff is likely to earn after it. The second is that the failure to call such evidence does not necessarily result in selection of only a nil or nominal figure as damages for impaired earning capacity.
>
> 67 Thus, in relation to the first of these themes, in *Paff v Speed* at 559 Fullagar J said that the "usual method of proving damages under [this] head is by calling evidence to show what the plaintiff could probably have earned during the rest of his life if he had not been injured and what, if anything, he is now capable of earning". The same is true where the defendant is seeking to demonstrate that the diminution of earning capacity is only partial. Barwick CJ in *Arthur Robinson (Grafton) Pty Ltd v Carter* at 657 said of a plaintiff who had been rendered almost a quadriplegic:
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> …
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> 68 The first theme was stated with the qualification "in general", because there is authority that in some circumstances over-elaborate evidence is unhelpful. In *J K Kealley v Jones* at 734-5 Moffitt P said:
>
> …
>
> This approach may rest on a general recognition that "the task of assessing damages in personal injuries cases should be kept as simple as possible".
>
> 69 The second theme in the authorities was summed up by Reynolds JA in *Yammine v Kalwy* at 155 as follows:
>
> > "in seeking to quantify his damages, a plaintiff could be well advised to offer [evidence of wage levels] in many cases; and likewise a defendant, in seeking to cut down the damage, might similarly be well advised to tender such evidence; neither, in the absence of such evidence, could complain, to the same effect, at any quantification arrived at. This, however, is far from asserting that in the absence of such evidence only nominal damages is appropriate. ... [W]here a plaintiff has suffered a significantly disabling injury which obviously affects the range and nature of the work he can, therefore, perform, a tribunal of fact can, without specific evidence as to what other persons with that kind of disability can earn, make a judgment and assessment, on a percentage basis or otherwise, of the value of the lost capacity."
>
> Where the plaintiff calls incomplete evidence and there is only a low award for diminution of earning capacity, it is difficult for the plaintiff to complain: *Minchin v Public Curator of Queensland* at 93; *Giorginis v Kastrati* at 375. But it does not follow that a substantial award in a case where the evidence is incomplete cannot survive appellate attack by the defendant: *Luntz, Assessment of Damages for Personal Injury and Death,* 3rd ed, para [1.9.28]. This is so for several reasons.
>
> 70 First, damages to compensate for that part of reduced economic capacity which will be reflected in the future are sometimes analysed as being one type of "general damages". Like other types of "general damages", as Fullagar J said in *Paff v Speed* at 559, they are "of their very nature, incapable of mathematical calculation and (although the expression is apt to be misleading) commonly very much `at large'. They are also at large in the sense that a jury has, in serious cases, a wide discretion in assessing them." In *Russell v J Hargreaves & Sons Pty Ltd* at 534 Taylor J said:
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> …
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> 71 Secondly, strictly the issue does not turn on a comparison between what money the plaintiff would have earned apart from the injury and what money the plaintiff will earn after the injury. The compensable loss is not a loss of income but the loss of capacity to earn

income in a manner productive of financial loss: *Graham v Baker* at 347. The income earned before the injury is relevant, but only as an evidentiary aid in assessing damages for the loss of capacity to earn income: *Paff v Speed* at 566 per Windeyer J. Evaluation of the worth of a loss of capacity to earn - of a lost chance to earn - is of its nature a more imprecise inquiry than calculation of a lost income. It rests on the hypothesis - that the plaintiff will have undiminished capacity - which has been rendered false by events. It does not depend on calculating the income from a particular career which is no longer possible, but in calculating the damage to a capacity to carry on various careers. It is an exercise in estimation of possibilities, not proof of probabilities. *Luntz, Assessment of Damages for Personal Injury and Death*, 3rd ed, para [1.9.18], said:

> "it is not necessary for the plaintiff to establish the future loss with the same degree of precision as the present and past loss ... The court is really being asked to estimate as best it can the future effect of the injuries from which the plaintiff has been proved to be suffering as a result of the defendant's wrongful act."

…

The English position was summarised thus by Lloyd LJ in *Foster v Tyne and Wear County Council* at 570:

> "when it comes to estimating loss of earning capacity, there is no such thing as a conventional approach; there is no rule of thumb which can be applied. It would be so much easier if there were. But there is not. In each case the trial judge has to do his best to assess the plaintiff's handicap, as an existing disability, by reference to what may happen in the future. As has been said so often, that is necessarily a matter of speculation; it is necessarily a matter of weighing up risks and chances in all the circumstances of a particular case. The very fact that the approach must necessarily be so speculative means, of course, that the occasions on which this court will feel justified in interfering with a judge's assessment will be few and far between, for there is no established range or standard against which to measure the judge's award."

72 Thirdly, the mere fact that the quantum of damages is difficult to assess does not mean that the plaintiff is only entitled to a nominal sum. …

73 The application of these principles is illustrated in a category of cases where the injury to a plaintiff who had the chance of a relatively high income if an appropriate tertiary training had been undertaken has prevented that training. In this category in particular the courts have not declined to make substantial awards to compensate for impaired economic capacity measured by valuing the lost chance to earn high income even though there was no evidence of the possible ranges of income.

74 In *Ashford v Ashford* at 196, a case where there was no evidence of particular income levels which would have been attained but for the injury and which could be attained after it, but where it was clear that there had been a diminution in earning capacity, Barwick CJ said for reasons including "the difficulty in determining what was the actual diminution of the appellant's earning capacity, the margins within which a trial judge might properly exercise his discretion in arriving at a verdict in this case were necessarily fairly wide." The High Court restored a verdict of the trial judge of $90,000 general damages, which evidently included $25,000 for impaired earning capacity.

75 In *Graham v Fogarty* the plaintiff suffered serious brain damage at the age of 16. She was awarded $20,000 general damages. The report refers to no specific evidence of what her earnings would have been but for the injury and what they would have been after it. The Court of Appeal said at 453-4:

> "If by reason of her injuries the appellant does not marry, then the economic significance of her seriously diminished capacity to work in a gainful occupation, on which she would have to depend, will be considerable. If, by reason of an unsatisfactory marriage, she has to resort to employment to support herself, again it will be significant."

The Court of Appeal increased the general damages component to $30,000. It did so notwithstanding the want of specific evidence on earning prospects.

…

77 Thus the trier of fact is not constrained by narrow limitations even though it is not entitled, without evidence, to assume a specific figure for what could have been earned without the injury. Thus in *Hayman v Forbes* the trial judge assumed that the plaintiff would lose "the difference between the income of a professional man and a man in a modest employment - probably, on average, not less than $20,000 gross per annum over his working life of 40 years or so." Making various allowances for contingencies, he assessed $100,000 as damages in relation to future economic loss for a school boy who had wanted to become a veterinary scientist but after the injury could only work in a clerical capacity. The Full Court held that there was no evidence to support the $20,000 differential and it was not a matter of which judicial notice could be taken. They held that the course adopted by the trial judge was erroneous and substituted for the figure of $100,000 the figure of $75,000. For that figure they gave no reasons. Zelling J merely said at 236:

> "the Court should do the best it can with the materials before it to assess the damages. In my opinion $75,000 is the greatest sum which could properly be regarded as appropriate in this case for damages for economic loss."

The point is that despite the want of specific evidence, the Full Court awarded very substantial damages. The case is similar to *Kettley v Roulstone*, where the High Court ordered a new trial because of a very high award of general damages. The award could only have been supported if evidence that the plaintiff would have earned £2,000 per annum as a carpenter in partnership with his brother could have been regarded as sufficient to justify a calculation of that degree of precision. But the High Court did not dispute that some sum for loss of earning capacity was recoverable, despite the "sketchy" nature of the evidence.

…

79 There is a related category of case where a person with a particular skill is compensated for a loss of the opportunity to develop it in a way which would have brought improved financial outcomes notwithstanding the absence of evidence as to what persons successfully exploiting those skills earn.

…

85 Further, the willingness of the courts to compensate plaintiffs for reduced earning capacity in the absence of specific evidence is highlighted by their willingness to compensate even where there was an increase in the post-injury but pre-trial earnings of the plaintiff which was prima facie contra-indicative of loss. In *Russell v J Hargreaves & Sons Pty Ltd* at 534 Dixon CJ and McTiernan J increased the trial judge's award and said of the plaintiff in this position:

> "His efficiency as a driver and his capacity to drive for any lengthy period have obviously been greatly impaired and even if an exact sum of special damages has not been proved the existence of this head of damage has been shown as a substantial element and ought to have been taken into account in assessing general damages."

86 It is true that in some cases the courts have supplemented exiguous evidence by resort to judicial notice. The courts have inferred that rates in private employment are not lower than in public employment. Thus in *Dessent v Commonwealth of Australia* Mason and Aickin JJ were prepared to assume that the earnings of a carpenter in civilian life would be not less than those of the plaintiff carpenter while in the Royal Australian Air Force, ie $100 per week net, and said: "it would be reasonable to assess the appellant's loss of earning capacity at not less than 25 percent of his full capacity, that is $25 per week ...". In *Leis v Gardner* at 187 Stable J thought it "notorious that an unskilled man does not overall get the same economic rewards as a skilled man. Were it otherwise, then why bother acquiring a skill at all?" He upheld a verdict of which one ingredient was $500 for loss resulting from incapacity to work as a bricklayer despite the lack of evidence of the difference in earnings. But in many instances substantial damages have been assessed for impaired earning capacity despite an absence of evidence about earnings and an inability to take judicial notice of them.

> 87 In short, where earning capacity has unquestionably been reduced but its extent is difficult to assess, even though no precise evidence of relevant earning rates is tendered, it is not open to the court to abandon the task and the want of evidence does not necessarily result in non-recovery of damages. Statements to the contrary … are not correct. … The task of the trier of fact is to form a discretionary judgment by reference to not wholly determinate criteria within fairly wide parameters. Though the trier of fact in arriving at the discretionary judgment must achieve satisfaction that a fair award is being made, since what is involved is not the finding of historical facts on a balance of probabilities, but the assessment of the value of a chance, it is appropriate to take into account a range of possible outcomes even though the likelihood of any particular outcome being achieved may be no more than a real possibility.
>
> (citations omitted)

188. Counsel for Mr Atherden summarised Heydon JA's remarks (as relevant in this case) as being to the effect that for the purpose of determining damages for future economic loss, loss of earning capacity is not the same as financial loss, that the appropriate damages award is often more in the nature of an award of general damages, and there is no need for great precision in calculating the award. He submitted that there may be scope for a calculation involving a percentage loss of capacity as mentioned at [191] below (although such an approach is mentioned by Heydon JA only in passing, in a discussion of the use of judicial notice of comparative wage levels in different employment sectors: at [86] of the extract quoted at [187] above)), and also for awarding damages for the loss of a chance to develop existing skills to increase earning capacity.

189. Counsel for Mr Atherden identified the following matters as relevant to the assessment of economic loss arising from difficulties in maintaining his primary employment:

    (a) That Mr Atherden is unlikely to remain with his current employer in the long-term, having regard to the evidence that there is not enough work for him in his current role, that his employer may be having some financial difficulties, and that management may not wish to retain him anyway.

    (b) That the nature and effect of his disability is likely to make it harder for him to find other appropriate work: all four doctors agree that Mr Atherden has suffered a significant injury causing permanent impairment, that his condition is likely to deteriorate over time, that it prevents work requiring repetitive or "forceful" use of his left hand (although there is variation in the maximum weight limits specified, which range from 2-5kg – 10 kg), that his prognosis is guarded rather than good, and that (in the opinion of three of the doctors) Mr Atherden will eventually need a wrist fusion.

    (c) That given Mr Atherden's age (39 years at the time of the trial) he may have problems with learning new skills and therefore some difficulties with retraining, and that any change of career would mean that he has lost the benefit of 20 years of experience and seniority.

    (d) That Mr Atherden has lost the chance of advancing to a position as a foreman or supervisor of mechanics in a workshop.

190. Mr Atherden sought a total of $570,128 by way of damages for economic loss. This was made up of $360,128 for the reduction in his capacity to work as a mechanic, and buffers of $150,000 for loss of the chance of promotion to foreman and of $60,000 for loss of the chance to do rally work.

191. The amount of $360,128 was calculated by assuming a 40% loss of earning capacity from a starting capacity of $1,000 per week, with a multiplier of 1059.2 and a 15% reduction for vicissitudes.

192. The $150,000 buffer represented an assumed loss of $10,000 per year for 15 years, and the buffer for rally work was calculated at the rate of 40 days' work per year, at $250 per day, for six years.

193. These claims were supported by counsel using an unconvincing mixture of:

(a) broad-brush references to fairly inadequate evidence (such as the claim that people in this kind of work can earn $55,000 – $85,000, which appeared to be based on the Seek.com advertisements, particularly that for a Sydney-based position for a motor mechanic with experience in "European and Prestige Vehicles" and also, perhaps, the one for an ACT-based Automotive Service Centre Manager); and

(b) entirely unexplained claims such as that 40% was a suitable assessment of Mr Atherden's loss of capacity, and that Mr Atherden might have continued with the rally work for six or seven years.

194. Counsel submitted that if the defendant asserted that Mr Atherden remained capable of earning the same wages as he had earned before the accident, and that appropriate work was available, it was up to the defendant to call evidence to that effect, which it had not done.

Defendant's submissions

Past economic loss – tax issues

195. In relation to how income tax should be accounted for in determining past loss of income, counsel asserted that that the proper calculation was to deduct tax paid from taxable income, on the assumption that any expense deductible from gross income was necessarily a cost of earning the gross income.

Past economic loss – rally work

196. Counsel for the defendant rejected the claim for damages based on Mr Atherden's failure to take up Mr Barkley's offer of work with the Citroen team, arguing that there was no or insufficient evidence that, but for his injury, Mr Atherden would have joined the rally team for even one of the two years concerned, noting:

(a) that there was no evidence that but for his injury Mr Atherden would have been "ready, willing and able" to take up Mr Barkley's offer in either year;

(b) that there was no evidence that Mr Atherden was aware of the particular terms and conditions of the offer;

(c) that Mr Atherden had given evidence that before Mr Barkley called him, he (Mr Atherden) had not sought out any rally work for nine years;

(d) that Mr Atherden had a partner with two young children, and accepting this work would not have been good for the relationship;

(e) that Mr Barkley gave evidence that when he had previously asked Mr Atherden about rallying, “a couple of times he has turned me down and a couple of times he’s come along”; and

(f) that Mr Atherden had a full-time job paying “above award rates”, and would not have made much extra from the rally work if he had had to take unpaid leave to do so.

Future economic loss

197. Counsel for the defendant noted the two themes identified in *Moss* at [66], being:

(a) that precise evidence of what the plaintiff had earned before, and what the plaintiff is likely to earn after, the injury is desirable; but

(b) that failure to call precise evidence does not result in nil or nominal damages.

198. He went on to note that evidence of the actual effect of the injuries could have been called, for instance in the form of an occupational or vocational assessment from an appropriate expert, but had not been provided.

199. Counsel agreed with the proposition that damages for future loss of earning capacity (which loss had to be shown to be productive of financial loss) were often assessed in a similar fashion to general damages, but in such circumstances the proper approach involved identifying a buffer rather than trying to calculate an exact loss. Counsel said that Mr Atherden had suffered an undoubted but incalculable loss, but that he retained the ability to work, that he is currently earning average weekly earnings and that any job he gets in the future is likely to pay a wage around the level of average weekly earnings, and that he will stay in his current job until he gets another one. I note that counsel’s submissions about average weekly earnings were not based on any evidence, but were not challenged by counsel for Mr Atherden.

200. Counsel suggested a buffer of $50,000 for economic loss in general and a further $20,000 for Mr Atherden’s loss of a chance to advance to a foreman or supervisor position (while noting that there was no evidence that Mr Atherden would have earned more in such a position than as a mechanic).

201. Counsel made no specific submissions about the claim for future economic loss in relation to the rally work, but his submissions about the rally-based claim for past economic loss seemed generally equally applicable to the claim of future loss.

Consideration

Past economic loss – tax issues

202. Counsel for the defendant is clearly ill-informed in asserting that for the purposes of calculating a taxable income, the only tax-deductible expenditure is expenditure necessarily incurred in earning one’s income. I take judicial notice of the tax deductions available for charitable donations and for the costs of managing one’s tax affairs, and note that certain other expenses more closely related to earning one’s income, such as self-education expenses, may be income-related but not necessarily a compulsory condition of earning income.

203. For present purposes, and noting the *Husher* requirement to focus on the amount that the plaintiff would have had at his disposal, I consider that the amounts used in calculating Mr Atherden's pre- and post-accident income should reflect gross income from which has been deducted:

    (a) tax-deductible expenditure that was necessarily incurred in earning the income; and

    (b) either:

        (i) the amount of income tax actually paid; or

        (ii) presumably, if tax-deductible expenses not necessarily incurred in earning the income have also reduced taxable income and therefore tax paid – an amount representing the amount of tax which would have been paid on a taxable income calculated by reducing gross income only by the tax-deductible expenditure described in [203(a)] above.

204. That is, if the plaintiff's gross income and taxable income differ only by the amount of non-discretionary deductible expenditure, then the "taxable income minus tax paid" calculation would give the correct result. If the amount of the taxable income, and the tax actually paid, are affected by discretionary deductible expenditure, the calculations of both income and tax paid would need to be adjusted to exclude the effect of that expenditure.

205. As to the availability of evidence of the nature of Mr Atherden's deductions, I note Exhibit G, which contains his tax return and notice of assessment for the tax year ending on 30 June in each year from 2011 to 2016 inclusive. For the 2012, 2013, 2014 and 2015 tax years, there is a deduction claimed for work-related clothing expenses which is identified as for a "Compulsory work uniform". This would in my view be acceptable evidence that the relevant clothing expenses are not discretionary, but I can see no basis in the evidence for assuming that any of the other deductions reflect non-discretionary expenses.

206. Rather than explaining the details of the claim for past economic loss, counsel for Mr Atherden suggested that I should indicate my view on the tax deduction question and leave it to the solicitors to do the calculations. In the absence of any informative submissions, I have no alternative but to accept this suggestion.

Past economic loss – rally work

207. There is nothing in the evidence that would justify awarding Mr Atherden damages representing the maximum that he might have earned in 2014 and 2015 if he had taken up the invitation from Mr Barkley for the 2014 season.

208. First, there is no specific evidence that Mr Atherden would also have been offered the rally work in 2015, or that if the offer was made, Mr Atherden would have accepted it.

209. Mr Barkley gave evidence of making the offer for 2014, and Mr Atherden gave evidence, which I accept, that but for his injury he would have pursued Mr Barkley's offer, and would have done the work "part time". I reject the submission of counsel for the defendant that there was no evidence that, but for his injury, Mr Atherden would have been "ready, willing and able" to take up Mr Barkley's offer, although I am not sure what if

any distinction counsel sought to draw between evidence that Mr Atherden would have taken up the offer and evidence that he would have been "ready, willing and able" to do the work.

210. I am also not sure of the significance of Mr Atherden's reference to working "part time" in the particular context. All the evidence seems to be that the rally work was full-time, but only for each of several short periods (each roughly a week) over a season that ran for several months of a year. Counsel's question to Mr Atherden about whether he would have done the job full time or part time is accordingly curious. The only sense I can make of it is that it was intended to raise the question whether Mr Atherden would have accepted the rally work for the whole season or only for some of the events in a season; this would have been a sensible question given the suggestion from Mr Barkley that in order to get a mechanic with Mr Atherden's skills he might have taken on Mr Atherden for some of the six events in 2014 even if he was not available for all of them. Whatever was intended by the question, Mr Atherden's answer clearly excluded any suggestion that he would have resigned from Rolfe Mazda to work in the rally team full time, but it might also have been intended to indicate that he would not have joined the rally team for all the 2014 events.

211. Nor does it seem to matter that Mr Atherden did not pursue the conversation with Mr Barkley to the point of asking about the terms and conditions. He had done the rally work before, including on the basis of having only his expenses covered, and there is nothing in Mr Barkley's evidence to suggest that the terms in fact on offer would have been inadequate in Mr Atherden's eyes.

212. Mr Atherden's evidence that he had not sought out rally work in the previous nine years does not seem significant to me, especially given Mr Barkley's evidence that he had offered Mr Atherden rally work on a number of occasions and sometimes the offers were accepted and sometimes they weren't. That is, the evidence is consistent that Mr Atherden did not go in search of rally work but that when offers were made, he sometimes accepted them.

213. Nor am I persuaded by counsel's submission that because Mr Atherden had a full-time job paying above award rates (although the evidence was in fact that he was being paid "at least award rates": see [64] above), he would therefore not have made much money from the rally work if he had had to take unpaid leave for any of the events. However, the terms identified by Mr Barkley would have adequately compensated Mr Atherden for the impact of the unpaid leave (his basic weekly salary of $1,000 would have been more than matched by seven days' work at $250 per day), and it was clear from Mr Atherden's evidence that he had done the rally work because he enjoyed it rather than for profit.

214. Finally, I reject counsel's invitation to find that Mr Atherden would not have accepted the rally work because he had a partner with two young children and such a decision would not have been good for his relationship with his partner. Counsel's proposition by no means reflects "a truth universally acknowledged" – rather, relationships, and even marriage-like relationships specifically, take a wide variety of forms, some of which involve the parties spending significant periods of time apart. There is no evidence at all that Mr Atherden's partner would have objected to him taking up the rallying work. Indeed, the only evidence before me about this relationship (apart from the fact that it began after the accident) is that it did not at the time of the trial involve Mr Atherden and

his partner living together full-time, and that it involved two children not fathered by Mr Atherden – either of these latter facts may have differentiated the expectations placed on Mr Atherden by the relationship from those apparently assumed in counsel's submission.

215. I am satisfied on the balance of probabilities that, but for the injury, Mr Atherden would have accepted Mr Barkley's offer for 2014, but would not have been available for all events. I allow an amount of $7,150, calculated on the basis of Mr Atherden attending four rally events in 2014 for a total of 26 days for each of which he would have been paid $250 and a food allowance of $25.

Future economic loss

216. Assessment of Mr Atherden's economic loss is complicated by the fact that (as a result of the effect in this case of s 105 of the *Workers Compensation Act* – at [8] above) he has continued to receive roughly the same wage from his employer since the accident as he was receiving before it. That is (apart from the rally work), any past economic loss that is demonstrated to have arisen from his injury will not, and certainly does not for my purposes (see [206] above) provide any useful kind of guide to the future loss. Nor is there more than vague and to some extent speculative evidence of how Mr Atherden's pre-accident earning capacity might have developed in the future. However, it is clear that the limited nature of the evidence before me is not a basis for awarding only nominal damages.

217. I accept most of the submissions of counsel for Mr Atherden set out at [189] above.

218. I accept that it is possible that when this matter is resolved, the defendant may not wish to retain Mr Atherden, whether because he is not able to perform a full mechanic's job and because he is not really needed in the spare parts department, or for other reasons that are unclear but whose existence may be hinted at by the employer's peremptory rejection of Mr Atherden's request to return to the workshop floor in some capacity (at [51] above).

219. Apart from the uncertainty of Mr Atherden's current position, I am in general satisfied that there will be work available to Mr Atherden that makes use of his long experience and recognised expertise as a motor mechanic, but I am also satisfied that such work may be less readily available to him in the form of a full-time position. This may be:

    (a) because his ongoing work restrictions make it difficult for him to perform all the duties of a particular position and there turns out to be no significant demand in mechanical workshops for employees who can provide expertise but cannot do enough of the physical work to justify their presence; or

    (b) simply because employers may be less inclined to take the risks perceived in employing a person with his disability.

220. However, I do not adopt the calculations offered by counsel for Mr Atherden (at [191] above), having regard in particular to the entirely unexplained and unsupported estimate that Mr Atherden's earning capacity has been reduced by 40% across the board, and the barely supported claim that as a foreman or supervisor, Mr Atherden would have earned $10,000 more per year.

221. As to Mr Atherden's claim in relation to rally work, I consider that the evidence of the 2014 offer, while adequate to support an award reflecting Mr Atherden's inability to

accept that offer for part (but not all) of the 2014 season, is not an adequate basis on which to award a buffer reflecting lost income equivalent to $10,000 per year for six years.

222. I accept the submissions of counsel for the defendant that, in this case, a buffer is the most suitable way of dealing with all future economic loss claimed. The issue then becomes the size of the buffer.

223. In *Papp*, an decision drawn to my attention by counsel for the defendant in the context of general damages (at [177] above), the plaintiff found herself in a situation not dissimilar to Mr Atherden's, in that her injuries had reduced her capacity to perform her pre-accident employment duties and she had been assigned a position with her pre-accident employer requiring "light duties". As in the current case, however, there were grounds for suspecting that the "light duties" position might not remain available indefinitely. Ms Papp, who was 50 years old at the time of the accident and 53 at the time of the decision, was awarded a buffer of $50,000 for future economic loss. Although at the time of the accident she had occupied a relatively unskilled position in a supermarket, she had hoped to obtain a salaried position with her employer given the systems skills and knowledge she had acquired during her employment. However, it seemed that this possibility had become remote as a result of her injury and in particular her inability to lift heavy items.

224. Having regard to:

(a) the challenges that will attend Mr Atherden's employment in the future, both in terms of the limited kinds of work that will be available and the possible reluctance of some employers to take a chance on him because of his disability;

(b) the fact that at his age he may need to stay in the workforce for another 25 years or more, but that new career or re-training opportunities may be scarce and not necessarily attractive;

(c) the fact that he is now unlikely to achieve any significant career advancement, at least based on his current skills and experience; and

(d) the loss of opportunity to use his skills and expertise as a mechanic to supplement his usual income on an irregular and occasional basis (whether by rally work or otherwise);

I consider that a suitable buffer for future economic loss would be $130,000. On this basis there is no separate calculation of lost superannuation. No more than $5,000 of that buffer could be attributed to rally work.

Other damages

Future out of pocket expenses associated with wrist fusion

225. The defendant accepted the plaintiff's claim of $12,840 for the expected wrist fusion, but disputed the associated claim for a buffer totalling nearly $10,000 for rehabilitation and medical expenses following surgery, and general practitioner visits, mental health treatment and medication. I consider it is highly unlikely that the wrist fusion would occur without involving any prior or subsequent contact with medical professionals, but equally

consider that the plaintiff's claim is excessive. I award a total of $15,000 for the expected wrist fusion, which provides a small buffer for associated medical expenses.

Domestic assistance

226. The cost of domestic assistance was agreed at $35 per hour. The plaintiff claimed assistance for 2 hours per week for the first year after the accident ($3,640), and one hour a week for the rest of Mr Atherden's life (totalling $49,287), as well as a buffer of $20,000 (equivalent to over 570 hours of care, or 10 hours a week for more than a year) for additional care when the expected wrist fusion is done.

227. In reliance on Mr Atherden's evidence about the help he needed after the first and the second surgeries, the defendant conceded liability for two hours domestic assistance per week for 11 weeks, amounting to $770.

228. Mr Atherden gave confusing evidence about his need for help apart from while he was recovering from surgery. Initially, he reported that the necessary assistance had dropped from two hours a week down to 20 minutes a day; when I pointed out that this in fact asserted an increased need for help, he suggested he still needed about one hour's help a week. Further cross-examination elicited the information that by the time of the trial, the only domestic task he still had difficulty with was changing his sheets, which counsel for the defendant suggested was de minimus and should not be accounted for. However, having regard to Mr Atherden's evidence that after the period when he needed help for two hours each week, his need for assistance "slowly tapered down or diminished", I allow a further 10 hours for past domestic assistance beyond that conceded by the defendant, giving a total award for past domestic assistance of $1,120, and nothing for future domestic assistance.

Admissibility of evidence – insurance investigation report

229. Counsel for Mr Atherden tendered a report prepared by an insurance investigator, Mr Giri, who worked for a firm of private enquiry agents engaged by the second defendant (NRMA). Mr Giri described a conversation with a senior employee of the first defendant, Mr Gordon Dunster, in which Mr Dunster had agreed that Mr Atherden was seen as "foreman material". Counsel tendered this report on the basis that, although hearsay, it was an admission against interest made on behalf of the first defendant and therefore admissible (*Evidence Act* s 81).

230. However, it was not clear that Mr Giri had personally spoken to Mr Dunster; his report said that "we" had spoken to him, and did not make it clear whether "we" referred to Mr Giri and one or more companions, to Mr Giri using the "royal plural", or to the firm for which Mr Giri worked (in which case there was no basis for assuming that Mr Giri rather than a colleague had spoken to Mr Dunster at all). Thus, it was possible that Mr Dunster's comment was at least second-hand hearsay, and as such not admissible, even under s 81, because of s 82 of the *Evidence Act*.

231. Counsel for Mr Atherden said that he did not know whether Mr Giri was available to give evidence, which would have opened up the possibility of establishing Mr Dunster's comment as first-hand hearsay, and showed no inclination to find out. Accordingly, I did not need to determine whether Mr Dunster's comment amounted to an admission against interest at all.

232. I note that this particular dispute would have been resolved more quickly than it was if counsel for Mr Atherden had been more willing to engage with the provisions of the ACT *Evidence Act* (which have been in force in NSW and the ACT in other enactments of the uniform evidence law since around 1995), and had not repeatedly sought to rely instead on the (largely overtaken and in some respects different) common law rules of evidence.

Orders

233. For reasons set out above, judgment will be given in favour of the plaintiff against the defendants. For the purpose of finalising the form of that judgment, I make the following determinations:

(a) That there was no contributory negligence by Mr Atherden in the accident that caused his injuries.

(b) That Mr Atherden's net income after tax for the purposes of calculating damages for past economic loss is to be determined in accordance with my conclusions set out at [203] above.

(c) That Mr Atherden is entitled to damages as follows:

(iii) General damages: $125,000, 40% of which is attributable to the past.

(iv) For past economic loss: as agreed between the parties having regard to (b) above.

(v) For future economic loss: $130,000 by way of a buffer (including loss in respect of rally work).

(vi) For past out of pocket expenses: $43,353.82.

(vii) For future out of pocket expenses: $15,000.

(viii) For domestic assistance: $1,120.

234. The parties are to prepare draft orders to give effect to those determinations (including by calculating an amount for past economic loss and any necessary interest or other additional amounts) and file them within 21 days after this decision is handed down.

235. Unless, within 21 days after this decision is handed down, a party files and serves submissions in favour of a different costs order, the defendant is to pay the plaintiff's costs.

I certify that the preceding two-hundred and thirty-five [235] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Justice Penfold.

Associate:

Date:

[1] Section 184 of the *Workers Compensation Act 1951* (ACT) precludes an injured worker receiving both common law damages and workers compensation payments, and provides for recovery of workers compensation payments from a worker who later receives common law damages, but does not obviously address the ongoing obligation under s 105 of that Act to provide work for the injured worker.