

AUSTRALIA / JUDGMENT

Kallouf v Middis [2008] NSWCA 61

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New South Wales

Court of Appeal

CITATION: Kallouf v Middis [2008] NSWCA 61

This decision has been amended. Please see the end of the judgment for a list of the amendments.

HEARING DATE(S): 11 March 2008

JUDGMENT DATE: 11 April 2008

JUDGMENT OF: McColl JA; Hall J

DECISION: 1. Appeal allowed. 2. Judgment of District Court Judge Nield of 29 May 2007 set aside and in lieu judgment for the respondent for \$635,535. 3. Respondent to pay the costs of the appeal and to have a certificate under the Sutor's Fund Act 1951 if qualified.

CATCHWORDS: DAMAGES – appeal - ECONOMIC LOSS – future economic loss – whether finding that respondent lost all wage-earning capacity open on evidence – principles – onus on plaintiff to prove loss of earning capacity – no evidence of work available to injured worker with residual earning capacity – scope of appellate review – finding open to review, but limited by exiguous evidence - DAMAGES – Motor Accidents Compensation Act 1999, s 126 – whether assumptions to found award for future economic loss sufficiently stated.

Civil Liability Act 2002

LEGISLATION CITED: Motor Accidents Compensation Act 1999

Sutor's Fund Act 1951

CATEGORY: Principal judgment

Adams v Ascot Iron Foundry Pty Ltd (1968) 72 SR (NSW) 120

Ahmedi v Ahmedi (1991) 23 NSWLR 288

Arthur Robinson (Grafton) Pty Limited v Carter [1968] HCA 9; (1968) 122 CLR 649

Brear v James Hardie & Co Pty Ltd [2000] NSWCA 352; (2000) 50 NSWLR 388

Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336

Graham v Baker [1961] HCA 48; (1961) 106 CLR 340

Husher v Husher [1999] HCA 47; (1999) 197 CLR 138

Kealley v Jones [1979] 1 NSWLR 723

Linsell v Robson [1976] 1 NSWLR 249

Macarthur Districts Motor Cycle Sportsmen Inc v Ardizzone [2004] NSWCA 145

Magnou v Australian Wool Testing Authority Limited [2007] NSWCA 357

CASES CITED: McCracken v Melbourne Storm Rugby League Football Club Limited [2007] NSWCA 353

Medlin v The State Government Insurance Commission [1995] HCA 5; (1995) 182 CLR 1

Morgan v Costello [2004] WASCA 260

Penrith City Council v Parkes [2004] NSWCA 201

Rabay v Bristow [2005] NSWCA 199

State of New South Wales v Moss [2000] NSWCA 133; (2000) 54 NSWLR 536

The Nominal Defendant v Lane [2004] NSWCA 405

Tran v Younis [2006] NSWCA 188

Wade v Allsopp (1976) 10 ALR 353

Wilson v Peisley (1975) 50 ALJR 207

Yammine v Kalwy [1979] 2 NSWLR 151

Zorom Enterprises Pty Ltd (in liq) v Zabow [2007] NSWCA 106

TEXTS CITED: P A Leslie and M M G Britts, Motor Vehicle Law in New South Wales, 4th ed (1993)

PARTIES: Nicole Kallouf - Appellant

Haydyn Paul Middis - Respondent

FILE NUMBER(S): CA 40398 of 2007

COUNSEL: Mr K P Rewell SC - Appellant

Mr M Aldridge SC with Ms E E Welsh - Respondent

SOLICITORS: Ferguson Bolton Lawyers - Appellant

Bryden's Law Office - Respondent

LOWER COURT JURISDICTION: District Court

LOWER COURT FILE NUMBER(S): DC 3278 of 2004

LOWER COURT JUDICIAL OFFICER: Nield DCJ

LOWER COURT DATE OF DECISION: 29 May 2007

IN THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL

CA 40398 of 2007

DC 3279/04

McCOLL JA

HALL J

Friday 11 April 2008

Nicole Kallouf v Haydyn Paul Middis

JUDGMENT

1 THE COURT: Nicole Kallouf, the appellant, appeals against a judgment for \$740,247 entered in favour of Haydyn Paul Middis, the respondent, by Judge Nield in the District Court.

2 The respondent was injured on 5 February 2000 when, while he was seated in a stationary motor vehicle, it was struck from the rear by a motor vehicle driven by the appellant.

3 Liability was admitted at an early stage and, accordingly, the hearing concerned only the issue of damages. The respondent was assessed by the Motor Accidents Authority but failed to satisfy the threshold of 10% for whole person impairment which opens the door to damages for non-economic loss: s 131 Motor Accidents Compensation Act 1999 (the "Act"). Accordingly the only substantial issue the primary judge had to determine concerned economic loss. Two other issues related to the necessity for future medical treatment and a claim for loss of superannuation benefits.

4 The appellant challenges the amounts awarded in respect of future physiotherapy expenses, past and future economic loss, and past and future superannuation loss.

Legislative framework

5 It was common ground on appeal that the respondent's economic loss claim had to be determined in accordance with s 126 of the Act which states:

"(1) A court cannot make an award of damages for future economic loss unless the claimant first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury.

- (2) When a court determines the amount of any such award of damages it is required to adjust the amount of damages for future economic loss that would have been sustained on those assumptions by reference to the percentage possibility that the events concerned might have occurred but for the injury.
- (3) If the court makes an award for future economic loss, it is required to state the assumptions on which the award was based and the relevant percentage by which damages were adjusted."

6 It is not clear if the primary judge's attention was drawn to s 126. He did not refer to it. Mr A J Lidden of Senior Counsel, who appeared for the respondent at trial, informed his Honour that it was "basically a common law assessment", to which there was no demur from the appellant's counsel, Mr D Cutler.

7 Section 126 is in the same terms as s 13 of the Civil Liability Act 2002. The provisions of the two sections have been considered by this Court on a number of occasions: *Macarthur Districts Motor Cycle Sportsmen Inc v Ardizzone* [2004] NSWCA 145; (2004) 41 MVR 235; *Penrith City Council v Parkes* [2004] NSWCA 201; *Nominal Defendant v Lane* [2004] NSWCA 405. The principles established by those cases as to the application of s 126 have been summarised by P A Leslie and M M G Britts, *Motor Vehicle Law in New South Wales*, 4th ed (1993) (at [13.7792]) as follows:

- (a) assess the "most likely" of the possible future economic circumstances facing the claimant but for the accident (including type of employment, duration of employment and remuneration);
- (b) assess the claimant's economic prospects as a consequence of the accident;
- (c) compensate the claimant for the difference between (a) and (b), including, where appropriate, through the use of a buffer;
- (d) adjust (c) by an appropriate percentage (including, where appropriate, by 0%) for vicissitudes, to reflect the possibility that the claimant may not have achieved (a) even had the accident not occurred; and
- (e) include a statement of the assumptions made as to the claimant's most likely future circumstances and the appropriate percentage adjustment.

Statement of the case

8 The plaintiff was born on 18 December 1967. Accordingly, as at the date of accident, 15 February 2007, he was 30 years and one month of age and at the date of the hearing, he was aged 39 years and four months. He is presently 40 years of age.

9 For almost the whole of the period from accident to trial, the respondent was unemployed. He claimed past economic loss on the basis of total incapacity caused by the injuries he suffered in the accident for the seven-year period to the date of hearing. He claimed future economic loss on the basis that, but for the accident, he would have worked until the age of 65 years. Accordingly, the future economic loss claim related to a period of 25 years. As discussed below, he effectively claimed that he was totally incapacitated.

10 The following statement of the case is extracted from the primary judgment. The primary facts were essentially undisputed. Rather, the appellant challenges the inferences the primary judge drew from those facts.

11 The respondent attended primary and secondary schools in New South Wales. He commenced, but did not complete, Year 12 at high school. After leaving school, he initially joined the Australian Army but was discharged after two years' service. He thereafter obtained a series of jobs which involved physically strenuous work, including working in a car yard, cleaning, washing and polishing cars (12 months), employment as a machine operator, furniture deliveryman, pastry cook, factory hand, floor sander, finisher and cork tiler and layer.

12 In April 1999, the respondent commenced employment with Peter Hardie who carried on the business of Hardie Floors in Chatswood. He worked in that business as a floor sander and finisher and cork tiler until 3 March 2000. This was heavy work involving the use of heavy machinery and other physically demanding activities.

13 The motor vehicle accident in question occurred when the respondent was travelling to work. Although he was wearing a seatbelt, the evidence was that he was thrown about in the car as a result of the impact. He developed pain in the neck, back and right knee. He did not continue to work but returned to his home.

14 He subsequently attended for medical treatment on 6 February 2000 (Dr Saunders in the Medical Clinic in Brookvale) and was absent from work for approximately one week. On return, he found it was difficult to perform his ordinary tasks. After consulting Dr Saunders again on 1 March 2000, his employment was terminated on 3 March 2000.

15 Thereafter the respondent continued in a business as a self-employed floor sander and finisher and cork tile layer. His evidence was that he paid friends to help him with the heavier tasks. He found that he was unable to perform the lighter tasks, and accordingly, the business came to an end in late June 2000.

16 The respondent's income tax return for the year ended 30 June 2000 established that he received a gross weekly income of \$753.

17 The respondent subsequently again attended on Dr Saunders and was referred to a Dr Kandiah, a rheumatologist, who he saw on a number of occasions.

18 On 12 September 2000, a CT scan of the respondent's lumbar spine revealed a bulge of the L4/5 disc with possible compression of the left L4 nerve route.

19 Dr Kandiah subsequently reviewed the CT scan and said that it revealed "a disc prolapse of the L4/5 with nerve route compression on the right side and a lateral prolapse to the left". He concluded that "the right-sided nerve route compression is obviously the main culprit for Haydyn's symptoms".

20 By reason of his straightened financial circumstances, in late September 2000, the respondent and his wife moved to Hervey Bay in Queensland to live with the respondent's parents. The respondent was in receipt of sickness benefits at that time. In March 2001, he commenced to receive a disability support pension. He was still living in Hervey Bay at the time of trial.

21 The respondent thereafter consulted his general practitioner in Queensland, Dr Rudd, for management of his low back and right leg pain. Dr Rudd, in due course, referred him to a Dr Agar-Wilson at the Pain Clinic at Rockhampton Hospital. Dr Agar-Wilson expressed the opinion that the respondent's back pain could have been caused by degenerative sclerosis and facet tropism at the L5/S1 level and that, as his leg pain was in the L5 distribution, the pain could have been caused by the lateral disc prolapse at the L4/5 level.

22 The respondent was reviewed initially on 16 July 2002 by Dr Ellis, orthopaedic surgeon, who saw the respondent at the request of his solicitor. Dr Ellis saw him on a number of occasions thereafter and issued reports that were all tendered in evidence.

23 On 2 October 2002, Dr Agar-Wilson injected a local anaesthetic into the respondent's lumbar facet joint. This was said to have given the plaintiff relief for only a few hours.

The primary judgment

24 The primary judge made the following findings about the respondent's disabilities (at [45]ff):

"[45] I find that the plaintiff suffered a musculo-ligamentous contusion, which I understand to be an injury to the tissues without the breaking of the skin, or strain to the back affecting the neck, low back and right hip, and a bulging of the L4/5 disc, with aggravation of underlying, but otherwise asymptomatic, degenerative changes in the neck and back, the neck less than the back, as diagnosed by Dr Saunders (exhibit A), Dr Rudd (exhibit E), and Dr Ellis (exhibit F) and, to a lesser extent, by Dr Jackson (exhibit 4) and Dr Rowe (exhibit 6) and by Dr Kandiah as to the cause of the plaintiff's right leg pain (exhibit C).

- [46] I find that the plaintiff continues to suffer from pain in his neck, low back and right hip; that the pain in his neck is intermittent; that the pain in his low back and right hip is ever-present, albeit that it waxes and wanes, and that the condition is permanent, as concluded by Dr Rudd (Exhibit E3) and Dr Ellis (Exhibit F7), and as to the neck and low back by Dr Jackson (Exhibit 4) and Dr Rowe (Exhibit 6).
- [47] I am satisfied that the plaintiff's condition in his low back and right hip interferes with his standing, sitting, walking, bending and sleeping; that it causes him to limp, favouring his right leg when he walks, and, because of this, he uses a walking stick for balance when walking; that it has resulted in his loss of wage earning capacity; and that it has greatly reduced, if not destroyed, his leisure activities.
- [48] Although I am satisfied that the plaintiff's lifestyle has been considerably affected by his continuing disabilities, I realise that the plaintiff is not a wheelchair-bound cripple. He can stand, sit, walk and bend. He can lift and carry objects. He can drive his car. He can mow the lawn around his rented home. I accept, however, that he does these things, and whatever else he does, with pain." (Red 20-21)

25 As to the respondent's residual capacity for work, the primary judge found (at [50]):

"I am satisfied that the plaintiff has lost his wage earning capacity...All of his employments have been physical in nature and required him to be physically fit and healthy. I do not doubt that he could not return to any of his pre-injury employments or to any employment which required him to be physically fit and healthy. The plain and simple fact is that he is not employable in the open labour market in any occupation that requires him to be fit and healthy.

- [51] However, the plaintiff has sought retraining and suitable alternative employment. He has been assisted by CRS. He has learnt the fundamentals of how to use a computer. He has attended at his local Centrelink office seeking suitable employment, but he has not been referred by Centrelink for an interview by a prospective employer.
- [52] I accept that the plaintiff is not beyond being retrained to be able to perform some employment task in some sedentary employment, but I doubt that, even with retraining, the plaintiff would be able to compete on the open labour market with a fit and healthy person for an employment position, and accordingly I am satisfied, as I have said, that, for all practical purposes, the plaintiff has lost his wage-earning capacity."

26 Regarding physiotherapy treatment, the primary judge found (at [56]):

"The plaintiff had regular physiotherapy treatment until the defendant's third party insurer refused to pay the cost of that treatment. As he was unemployed, and as he and his family were living on sickness benefits or disability support benefits, the plaintiff could not afford to pay for ongoing physiotherapy treatment. Notwithstanding he has not had any physiotherapy treatment for some years, and notwithstanding that none of the doctors have advised physiotherapy treatment, I accept that the plaintiff's condition, which waxes and wanes, will be at times sufficiently severe for him to need physiotherapy treatment."

27 As to the respondent's income for the 2000 financial year (at [18]) the primary judge recorded that the respondent's income tax return for the income year ended 30 June 2000 showed that he earned \$42,363 gross, of which \$25,200 gross were wages received from Mr Hardie, from which he deducted expenses of \$3,206, leaving him \$39,156 gross, equal to \$753 per week.

28 The primary judge concluded that the base rate for calculating the respondent's past and future economic loss should be \$850 gross (\$661 net). He found (at [59]):

"As to the past wage loss, I have referred already to what the plaintiff's income tax return for the income year ended 30 June 2000 shows. Because he was injured on 5 February 2000, because he was unable to work for about a week, and because he was unable to perform the heavy task of his work, the plaintiff's gross taxable income for that year was less than it would have been had he not been injured. I intend to allow the plaintiff a gross taxable income of \$850 per week for the period from 1 July 2000 to date."

29 As to future loss, his Honour was satisfied (at [60]) that for all practical purposes the respondent had lost his wage-earning capacity, and allowed him the present value of a gross taxable income of \$850 (to be calculated on the net weekly figure, \$661) per week from judgment until he turned 65.

30 As to past and future loss of superannuation, the primary judge found that (at [61]):

"... I am unable to say that his self-employed status would have continued after 1 July 2000. However, having said that, I consider, taking into account his past employments, that there was a fifty-fifty chance that he would not have continued his self-employed status. I intend, therefore, to allow the plaintiff half of the superannuation that he would have received from 1 July 2000 to date had he been an employee, and half of the superannuation that he would receive from now to when he is aged sixty-five years."

31 The primary judge invited the parties to prepare calculations of the damages which reflected his findings. The future economic loss figure was to be discounted by 15% for vicissitudes. His final judgment set out the agreement of the parties as to the calculation of damages based on his preliminary findings:

- (1) Future medical expenses \$3,824.00
- (2) Future physiotherapy expenses \$9,198.00
- (3) Future medication expenses \$19,122.00
- (4) Past wage loss \$231,120.00
- (5) Future wage loss \$434,150.00
- (6) Past superannuation loss \$13,770.00
- (7) Future superannuation loss \$24,748.00

TOTAL: \$735,932.00

Out-of-pocket expenses of \$7,843 were added to this amount.

32 A verdict was entered in favour of the respondent in the sum of \$743,775 for which the appellant was allowed a credit of \$3,528 presumably in relation to disbursements it had paid on the respondent's behalf. Accordingly, judgment was entered in favour of the respondent for \$740,247.

33 The appellant was ordered to pay the respondent's costs on a party/party basis to 15 April 2005 and, after taking into account an offer of compromise of \$350,000 served on that date, on an indemnity basis from 16 April 2005. The appellant submitted that the indemnity costs order should be set aside if her challenge to the judgment reduces the amount awarded below the offer of compromise figure.

Issues on appeal

34 As we have said, the appellant challenged the amounts awarded in respect of future physiotherapy expenses, past and future economic loss, and past and future superannuation loss. It contended that the evidence supported the following award of damages:

Out of pocket expenses \$7,843.00

Future medical expenses \$3,824.00

Future physiotherapy expenses Nil

Future medication expenses \$19,122.00

Past economic loss \$114,000.00

Future economic loss \$194,055.00

Past superannuation loss Nil

Future superannuation loss Nil

TOTAL: \$338,844.00

35 The suggested calculation of past and future economic loss was based on net comparable earnings of \$600 per week (based on a gross of \$750 per week) and a 50% partial loss of earning capacity (that is, \$300 net per week x 380 weeks to judgment, \$114,000) and \$300 net per week x 25.5 years from date of judgment to age 65 (\$761 less 15% for vicissitudes, \$194,055).

36 The respondent sought and was granted leave to file out of time a Notice of Contention. That document argued that the base rate the primary judge used to calculate his economic loss (\$661 net per week) in effect left him with a significant earning capacity as it reflected the respondent's income at the date of injury rather than trial. Although the Notice contended the primary judge ought to have commenced his calculations at a pre-accident earning rate of \$1,263 gross per

week, the respondent did not seek to disturb the primary judge's award. Rather we understand that the point of the Notice of Contention was to underline what the respondent contended was the "equity" of the award. However, in our view, it is not open to the respondent to rely upon a Notice of Contention as a plea ad misericordiam. The base figure for calculating his economic loss differed from that used by the primary judge. He should have filed a cross-appeal.

Incapacity: medical evidence

37 In assessing past and future economic loss, the primary judge relied largely upon the medical evidence as well as the respondent's own evidence. His Honour had regard to the history of injury and the radiological investigations including the CT scan and the MRI scan which provided a basis for the factual finding that the respondent had suffered permanent injury related to a disc prolapse at the L4/5 level which had produced some nerve root compression on the right side.

38 The primary judge was entitled to conclude, in our view, that the injury the respondent sustained produced disability in the nature of chronic low back pain with intermittent leg pain. His Honour was also entitled to accept Dr Rudd's report of 18 August 2006 which stated the respondent had a long-term chronic back problem which was extremely unlikely to improve and "may well become worse over time".

39 Dr Ellis's reports recorded his opinion that the respondent was permanently unfit for physically demanding work, in particular, work requiring repeated bending or heavy lifting as he had done in the past. Dr Ellis's assessment of incapacity was expressed in essentially similar terms in his reports of 1 February 2005, 19 December 2005 and 15 December 2006. In his report dated 15 December 2006, Dr Ellis stated (at p 3):

"It is unlikely he will achieve re-employment in the future, he is permanently unfit for physically demanding work requiring repeated bending and heavy lifting.

He is accustomed to working in physically demanding work. Rehabilitation assessment and assistance should be provided in an attempt to re-train him and to find alternate light work."

He added that if the respondent returned to physically demanding work, re-occurrence and exacerbation of the back condition could be expected and, with it, increased likelihood of the need for surgical intervention.

40 In reaching his conclusions the primary judge rejected the opinions of the appellant's medical experts Dr Blue and Dr Martin which were to the effect that the respondent was fully fit for work in his pre-injury occupation as a sander. The appellant does not seek to dispute his Honour's conclusion in this respect.

Appellant's submissions: past and future economic loss

41 Mr K P Rewell of Senior Counsel, who appeared for the appellant, submitted that the primary judge erred in awarding damages for past and future economic loss on the basis that the respondent was effectively totally and permanently incapacitated for all forms of remunerative employment from 1 July 2000 until his expected retirement at the age of 65 years.

42 The appellant contended that the lay and medical evidence could not support a finding that the respondent was totally incapacitated for all forms of remunerative employment from 1 July 2000 to the date of trial nor could it support a finding of that kind in respect of the future economic loss claimed on the basis of retirement at the age of 65 years. It accepted that the respondent's pre-injury occupation of floor sander involved heavy manual work. It also appeared to accept Dr Ellis's opinion of 15 December 2006 to which we have referred. The respondent also referred to a report of Mr Gerard Glancey, psychologist, tendered by the respondent which it argued did not suggest any psychological symptoms that inhibited the respondent's work capacity.

43 The appellant conceded that it was open to his Honour to find that the damage to the L4/5 intravertebral disc was sufficient to incapacitate the respondent for his pre-injury work but argued he erred in making the finding he did as to incapacity and, in particular, as to the future, that the respondent was effectively not employable in the open labour market.

44 The appellant also contended that the primary judge failed to calculate damages for future economic loss, in accordance with s 126 of the Act. It argued that the primary judge erred in failing to set out the assumptions about future earning capacity on which the award of damages for future economic loss was based. Alternatively it submitted that if the assumptions as to future earning capacity based on s 126 of the Act were to be inferred, the evidence did not support those assumptions.

45 The appellant further contended that past and future economic loss ought to have been calculated on the amount of \$750 gross per week and not \$850 gross per week. It argued that there was no evidence to support the primary judge's "adjustment" of the latter figure to \$850 gross per week.

Damages for economic loss: principles

46 Damages for both past loss and future loss are allowed to an injured plaintiff "because the diminution of his earning capacity is or may be productive of financial loss": *Graham v Baker* [1961] HCA 48; (1961) 106 CLR 340 (at 347) per Dixon CJ, Kitto and Taylor JJ. As McHugh J said in *Medlin v The State Government Insurance Commission* [1995] HCA 5; (1995) 182 CLR 1 (at 16) "the loss of earning capacity principle more accurately compensates a plaintiff for the effect of an accident on the plaintiff's ability to earn income."

47 Although it is loss of earning capacity and not loss of earnings that is the subject of compensation, the rate of wages being earned and the rate of wage likely to be earned in the future afford a basis for assessing compensation for the loss of earning capacity. Expectation of working life is also an element in that assessment: *Arthur Robinson (Grafton) Pty Limited v Carter* [1968] HCA 9; (1968) 122 CLR 649 (at 658) per Barwick CJ; see also *State of New South Wales v Moss* [2000] NSWCA 133; (2000) 54 NSWLR 536 (at [66] – [67]) per Heydon JA.

48 It is necessary to identify both what capacity has been lost and what economic consequences will probably flow from that loss. Only then will it be possible to assess what sum will put the plaintiff in the same position he or she would have been in if injury had not been sustained. What a worker earned in the past may provide very useful guidance about what would have been earned if that worker had not been injured. But the inquiry is one about the likely course of future events and evidence of past events does not always provide certain guidance about the future: *Husher v Husher* [1999] HCA 47; (1999) 197 CLR 138 at [7] – [8] per Gleeson CJ, Gummow, Kirby and Hayne JJ.

49 Any assessment in respect of the impairment of future earning capacity necessarily involves a consideration of possibilities. In some cases, it would be an error in treating as certain the fact that a plaintiff would lose wages for a period of years from the date of trial. Where incapacity is established as at the date of trial, what is to be evaluated will be the extent of the possibility that the plaintiff may not work in the future or may lose time from work and determine the allowance of proper compensation in respect of that possibility. That evaluation will depend upon the evidence. Where there is no evidence to support a conclusion that, as a matter of certainty, an injured plaintiff would not earn monies from employment for a number of years post trial, then such a finding would involve an error of principle: *Ahmedi v Ahmedi* (1991) 23 NSWLR 288 (at 302) per Clarke JA, Handley JA agreeing.

50 In *Magnou v Australian Wool Testing Authority Limited* [2007] NSWCA 357 the Court (Tobias and McColl JJA and Handley AJA) at [20] accepted that the general principles that apply to the assessment of past and future economic loss were as set out by McColl JA (Handley and Bryson JJA agreeing) in *Rabay v Bristow* [2005] NSWCA 199:

"[73] Compensation for loss of earning capacity is awarded because the diminution in an injured plaintiff's earning capacity 'is or may be productive of financial loss': *Graham v Baker* [1961] HCA 48; (1961) 106 CLR 340 at 347. It is incumbent upon the plaintiff to prove the loss for which compensation is claimed (*Todorovic v Waller* [1981] HCA 72; (1981) 150 CLR 402 at 412) but, conversely, it is not incumbent upon the injured plaintiff to prove what employment he or she 'is not incapacitated from performing'. It is for a defendant which contends that the plaintiff has a residual earning capacity to adduce evidence of what the plaintiff is capable of doing and what jobs are open to such a person : *H Luntz , Assessment of Damages for Personal Injury and Death* (4th ed) at 118 [1.9.20].

[74] The primary judge was entitled to take into consideration the fact that the respondent had an employment history which demonstrated a consistent pattern of full time employment in work which might fairly be described as having been of a heavy manual nature: *Husher v Husher* [1999] HCA 47; (1999) 197 CLR 138 at 143 per Gleeson CJ, Gummow, Kirby and Hayne JJ.

....

[79] The assessment of damages for future economic loss involves reference to future or hypothetical events. It was described as 'the process of estimation of possibility' in *Malec v J C Hutton Pty Limited* [199] HCA 20; (1990) 169 CLR 638 at 643 per Deane Gaudron and Gummow JJ. This is, as Santow JA has pointed out, 'necessarily an imprecise matter of estimation, carried out within broad parameters ...': *Donald v McKeown* [2004] NSWCA 285 at [38]." (emphasis added)

51 For the purposes of this case it is necessary to expand the proposition in *Rabay* [73] concerning proof of loss of earning capacity.

52 In *Arthur Robinson* (at 657) Barwick CJ observed that lost earning capacity "ought to be the subject of evidence and not of mere suggestion on the part of the judge or advocate", a remark interpreted by Malcolm CJ (Murray and Wheeler JJ agreeing) in *Morgan v Costello* [2004] WASCA 260 (at [99]) as supporting the proposition that "the defendant who contends the plaintiff has a residual earning capacity has the evidentiary burden of adducing evidence of what work the plaintiff is capable of performing and what jobs are open to a person with such capacity."

53 The relative responsibility of the parties for adducing evidence going to the issue of residual earning capacity was discussed in *Linsell v Robson* [1976] 1 NSWLR 249 (at 254 – 255) by Glass JA who stated:

"I should like to recapitulate what I said in *Davies v Lumsden* ... concerning the evidentiary responsibility in cases of this kind of the real defendant, viz the insurer, and the risks it runs in pursuing its policy of testimonial inactivity. The plaintiff, of course, has the ultimate burden of proving the extent of his loss. The plaintiff tendered evidence of the disabilities which severely restricted his earning capacity, the failures which he encountered in his attempts to get work. The evidence of attempts was slight, but whether the proved record of failure is extensive or not, the plaintiff is trying to prove a negative. The real defendant, who is known to have a virtual monopoly of the third party insurance business in this State, must have resources from which evidence can be produced to show what sort of employment is within the residual capacity of an injured litigant, and what sum it is likely to produce. It has, in my view, an evidentiary burden requiring it to adduce material of this kind. If it elects to call no evidence and prefers to rely on argument, it runs the risk that the plaintiff's meagre materials will be held sufficient to support a conclusion, which in this case the trial judge clearly reached, viz that the plaintiff retained only a severely restricted earning capacity, the exercise of which was unlikely to produce a large income."

54 Reynolds JA (with whom Hope JA agreed) made observations to like effect in *Yamine v Kalwy* [1979] 2 NSWLR 151 (at 155) (approved by Heydon JA in *Moss* (at [69])) that:

"[I]n seeking to quantify his damages [for lost earning capacity] a plaintiff could be well advised to offer such evidence [as to the level of wages he might earn, notwithstanding his handicap]; 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. "

55 In the final analysis, however, at common law the onus rests on the plaintiff to prove he is incapable of undertaking employment which medical evidence demonstrated he was capable of undertaking: *Adams v Ascot Iron Foundry Pty Ltd* (1968) 72 SR (NSW) 120 (at 132-133) per Sugarman JA: see also *McCracken v Melbourne Storm Rugby League Football Club Limited* [2007] NSWCA 353 (at [64 ff] per Ipp JA (Beazley and Basten JJA agreeing)).

56 This position is not, in our view, displaced by s 126 of the Act, albeit that s 126(1) imposes a requirement on the plaintiff to satisfy the Court "that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury". It is, of course, incumbent on the plaintiff in the first place to demonstrate lost earning capacity.

57 In *Moss* (at [66] ff) Heydon JA (at [87]) summarised the authorities concerning the extent to which evidence is required to support a significant award to a plaintiff for lost earning capacity as demonstrating that "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." His Honour went on to explain that because the tribunal of fact is making a discretionary judgment involving assessing 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." In arriving at the discretionary judgment, Heydon JA said, the "trier of fact ... must achieve satisfaction that a fair award is being made", echoing Barwick CJ's statement in *Arthur Robinson* (at 656) that in considering whether a verdict is excessive, the Court must bear in mind that the amount awarded "ought to be a fair and reasonable compensation for the injuries received."

58 Consistently with this view, in *Wilson v Peisley* (1975) 50 ALJR 207 (at 209) Barwick CJ held:

"The setting aside of an award of damages in a trial ... where there is neither challenge to the findings of fact made by the trial judge nor any demonstrated misconception of the evidence, should ... be a most unusual event, to occur only in circumstances where the disproportion between injury and award of damages is so great as to make the award quite unreasonable ... in the circumstances, whether by being too great or too small; and therefore of itself a demonstration of error present though otherwise undisclosed."

59 Yammine and Moss were referred to with apparent approval by Mason P (Spigelman CJ and Priestley AJ agreeing) in *Brear v James Hardie & Co Pty Ltd* [2000] NSWCA 352; (2000) 50 NSWLR 388 (at [48]). However, in an appeal confined to error of law, Mason P discerned no error in the primary judge concluding that where the plaintiff had moved to Queensland, a labour market of which he did not know, and as to which no evidence was called, the plaintiff had not demonstrated loss of earning capacity.

60 In *Kealley v Jones* [1979] 1 NSWLR 723 (at 732-733) Moffitt P referred to judicial criticism, addressed to both plaintiffs and defendants who fail to lead at trial available evidence in relation to wages in aid of the quantification of compensation for diminution of earning capacity. In his Honour's view such criticisms were "justifiably ... made ... because a court, left to do the best it can, may arrive at a sum not reviewable on appeal which may be less true and just than an award made in the light of the best evidence." Having said that, however, his Honour added (at 733) that each case depended on its own facts including the range of permissible inference.

61 In *Brear*, Mason P accepted however (at [49]) that a court must do its best "with the available evidence in the necessarily impressionistic task of assessing damages for lost earning capacity" and that "absence of evidence about wage rates or working conditions in a particular vocation does not necessarily or usually deprive a tribunal of fact of the capacity to make a proper assessment". However his Honour added (at [50]) that it was not the law that "a tribunal of fact must find a positive value in such an assessment exercise" citing *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 (at 361). Accordingly he concluded that no error of law emerged if the tribunal of fact was not persuaded "of financial loss, in the absence of evidence about the availability of relevant remunerative work in the area where the plaintiff lives or is likely to live."

Economic loss – conclusions

62 It is convenient to deal first with the appellant's contention that the primary judge erred in assessing both past and future economic loss on the basis of an estimate of the respondent's pre-injury earnings at \$850 gross per week. Mr Rewell argued that there was "uncontradicted evidence" that the respondent's pre-injury earnings were approximately \$750 gross per week and that there was no evidence to support his Honour's "adjustment" of that figure to \$850 gross per week.

63 Mr Rewell submitted that the evidence indicated that the respondent only had one week off work, then returned to work, albeit that he accepted the respondent was thereafter unable to perform heavy work. Nevertheless he argued the respondent should be regarded as having earned \$753 gross per week, a figure calculated by dividing the respondent's 2000 income of \$39,156 by 52 weeks.

64 Mr Aldridge contended that the amount of \$850 gross per week was conservative, having regard to two factors:

- (a) It was based upon net income received seven years prior to trial. He argued that his Honour had utilised the figure of \$850 gross per week for the purposes of calculating both past and future economic loss. Accordingly, it being based on income received seven years earlier, it was a conservative figure so far as the future assessment was concerned. This was his Notice of Contention point, which as we have already said, should not be entertained.
- (b) It was not correct to say that the respondent's net annual income for the year 2000 was diminished by only the week he took off work immediately following the accident. He referred to the respondent's evidence in chief that following the accident he was unable to work as he had before, that he was taking longer to complete work, that he had breaks between jobs and, that within a few months after the accident, he was probably earning 50% or 40% less than he had been prior to the accident. He stated that his earnings in the post-accident period were not adequate to pay his bills and he closed his business. Accordingly Mr Aldridge submitted that a division of the respondent's 2000 income by fewer than 52 weeks better reflected the respondent's lost earnings for that financial year.

65 In our view the evidence supports the proposition that although the respondent continued to work for all but one week after the accident he was increasingly hampered in so doing – a point the appellant effectively conceded. His earnings of \$39,156 should be regarded as reflecting his inability to earn at the rate he had prior to the accident and, concomitantly, as not truly reflecting what his average income was over the 1999 - 2000 financial year. This was the approach the primary judge took (at [59]) and, in our view, that was well open to his Honour.

66 The primary judge did not set out the way he assessed the figure of \$850 gross per week. That figure accords with a division of the respondent's income by 45, rather than 52 weeks, a rough, but in our view fair, way of attempting to calculate the increasing restriction on the respondent's physical capacity as the year progressed. A division by 45 produces a gross weekly income of \$870, close to the figure of \$850 gross the primary judge used. On the unchallenged evidence, 45 weeks is a conservative figure.

67 Accordingly, Ground 4 of the Notice of Appeal is without substance.

68 We turn then to consider the questions of past and future economic loss. It is convenient to deal first with the future.

69 As to future loss of earning capacity the critical question was whether the respondent would return to remunerative employment during his working life. The appellant did not challenge the proposition that the respondent would have remained in remunerative employment had he not been injured and, accordingly that the respondent discharged his burden under s 126 of the Act.

70 Mr M Aldridge of Senior Counsel, who appeared with Ms E E Welsh for the respondent, submitted that the primary judge's finding that the respondent was unemployable accorded with the evidence. He also sought support for the primary judge's conclusion in the appellant's failure to cross-examine the respondent to suggest he was capable of undertaking particular work, and that that work was available.

71 For the reasons we have explained, Mr Aldridge's submissions proceeded on an erroneous premise as to who bore the burden of proving the respondent's lost earning capacity. However, it has some force, as we have also sought to explain, when considering whether even "meagre materials" (per Glass JA, Linsell (at 254–255)) might justify a particular finding absent evidentiary challenge from a defendant.

72 Accordingly, the appellant's challenge to the respondent's claim for past and future economic loss is to be evaluated by an assessment of the following matters:

- (a) The nature and extent of the medical and other evidence that supported the respondent's claim that he was very significantly incapacitated for work;
- (b) the extent to which, having regard to the respondent's lack of vocational training and the fact that he had only previously undertaken heavy grades of manual work, the prospect that he had a residual capacity for work was realistic;
- (c) the absence of any post injury rehabilitation or vocational training to equip him for lighter classes of work;
- (d) the availability of suitable employment in the Hervey Bay area; and
- (e) the possible level of earnings from performing (on either a full time or part time basis) lighter grades of work.

73 The appellant did not seek to pursue an evidentiary case which addressed any of the matters referred to in pars (b) to (e). Mr Rewell argued that calling such evidence would, in effect, have posed a dilemma for the appellant having regard to its case that the respondent had suffered no diminution in earning capacity. That was a tactical decision for the appellant. However as the authorities to which we refer make clear, the appellant's failure to lead such evidence makes its task of challenging the primary judge's determination more difficult. Without evidence from the appellant on those matters, the primary judge was left in the position of making the best assessment that the exiguous evidence permitted.

74 In our view, the evidence disclosed that the respondent was hard-working. It is likely he would have remained in employment for the duration of his working life. As a result of the accident he is, as the appellant now concedes, unable to exploit his earning capacity to the full.

75 However we disagree, with respect, with the primary judge's conclusion that the respondent is effectively unemployable.

76 The only evidence bearing on matters of rehabilitation and vocational training was adduced by the respondent. That evidence established that he had had very limited training on computer fundamentals, had received very limited pain management treatment and had received no specific vocational retraining with a view to realising or maximising any prospect he may have had of undertaking lighter grades of work. In those circumstances, in our opinion, it was open to the primary judge to conclude, that the respondent's significant back condition placed him at a distinct disadvantage in the open labour market and that his prospects of obtaining work were

limited indeed.

77 The respondent's evidence in chief was that after moving to Queensland, he spent some six months with an organisation, CRS, where he was assisted in undertaking a course in which he "did a little bit on the computer". He said that although he could use a computer in a limited fashion, "I wouldn't get a job". He stated that he had kept an eye out for work, and went to Centrelink every now and again seeking work but that he thought that the maximum amount of work he could do would be two to three hours a day and even then he would need a couple of days a week to be able to cope and manage with such part time work. He stated that "I wouldn't be reliable at all".

78 As we have said, the cross-examination of the respondent did not expressly address the question of his residual capacity. There was no cross-examination directed to his attempts to locate work or his physical abilities to undertake light work. Aside from some questions on matters such as his ability to carry his four year old daughter and undertaking (from about 2005) some lawn mowing activity (which the respondent said resulted in an exacerbation of his back), there was no other attempt to establish that he was fit and able to undertake work of any particular kind.

79 Mr Aldridge appeared to argue that the fact the respondent had not obtained work, was evidence of his lost capacity. But a focus on lost earning as opposed to lost earning capacity distracts attention from the true issue of lost earning capacity: *Medlin* (at 4) per Deane, Dawson, Toohey and Gaudron JJ; (at 16) per McHugh J.

80 In our view, in determining the respondent's lost earning capacity it is necessary to take into account his lack of qualifications, the nature of his pre-injury employment, the opinions of Dr Ellis, the fact that at the date of trial he had been out of work for approximately seven years and that his condition had become chronic and static. It is also necessary, too, to take into account the apparently limited employment prospects available to a person with diminished capacity: *Wade v Allsopp* (1976) 10 ALR 353 (at 361) per Stephen J (Gibbs, Jacobs and Murphy JJ agreeing). This can be seen as reflected in his lack of success in securing employment to date.

81 Whilst we consider that the appellant failed to discharge her evidentiary onus to produce evidence of the residual capacity the respondent possessed, we are also of the opinion that the respondent did not establish that he had no residual capacity whatsoever. Dr Ellis accepted that the respondent could do light work. The respondent himself sought to retrain and to obtain work, which also gives some insight into his capacity for light work. In our view the respondent will be able to undertake such work in the future, although we accept that any residual capacity the respondent does have is limited. It would, at best, involve part-time employment in the field of clerical/stores work or similar work with special provision made for standing and sitting and periodic resting.

82 Having regard to all of these factors, and seeking to determine what is a fair award, we consider that an allowance for the respondent's limited earning capacity should be made in respect of future economic loss by reducing the amount awarded by 15% or \$65,122. On that basis, the allowance for future wage loss would be reduced from \$434,150 to \$369,028.

83 As to past economic loss for the seven year period between the date of accident and the date of hearing, the assessment and allowance was essentially based upon the primary judge's acceptance of Dr Ellis's assessments made during that period and his positive assessment of the respondent's credibility.

84 The Court is in a better position to determine the extent to which a loss of earning capacity "is or may be productive of financial loss" when considering the closed period between accident and trial: *Tran v Younis* [2006] NSWCA 188 per Handley JA (at [12]) (Hislop J agreeing). Given that the respondent had made some attempts to find employment but had failed, and having regard to the nature of the disabilities established on the medical evidence and the absence of any substantial attack upon the respondent's efforts to locate employment in the Hervey Bay area, there is, in our view, no basis for this Court to interfere with the assessment of past economic loss.

85 Whilst the closed period of seven years in the present case is a lengthy one the primary judge was entitled to bring into account the respondent's consistent pattern of pre-injury full-time employment in work, the nature and content of his post-accident disabilities and his genuineness in seeking light work. This is especially so when there was effectively no change by the appellant to the respondent's attempts of rehabilitation and efforts to secure light work and no affirmative evidentiary case was raised by the appellant to establish that some lesser amount for past economic loss was appropriate.

86 Finally, in respect of the primary judge's assessment of the respondent's past economic loss in light of the events of the preceding seven years, there being no challenge to any particular finding of fact relevant to past economic incapacity and no demonstrated misconception of evidence, there is no basis for this Court to interfere on either bases. The appellant has not, in our opinion, established a gross disproportionality in the award made for past loss: *Wilson v Peisley*.

87 Accordingly Ground 2 should be allowed as to the award for future economic loss, but rejected as to the past.

88 The appellant's third ground of appeal criticises the primary judge for failing to state the assumptions about future earning capacity on which the award of future economic loss was based: s 126 of the Act. We have already set out the essence of the task required by s 126. We would merely make some short further observations.

89 Section 126, as Giles JA observed in *The Nominal Defendant v Lane* [2004] NSWCA 405 (at [61]) "enshrines in legislation the method for asserting an uncertain career path that was adopted in *Norris v Blake (No 2)* [as] has been noted by Professor Luntz in *Assessment of Damages for Personal Injury and Death*, 4th ed (2002) para 1.28 [sic, 11.2.8]".

90 The combined effect of s 126(1) and s 126(3) is to require the Court to identify and state the "assumptions about future earning capacity or other events on which the award [of damages for future economic loss] is to be based", while s 126(1) requires satisfaction that these assumptions "accord with the claimant's most likely future circumstances but for the injury". Section 126(2) requires an adjustment of the "amount of damages for future economic loss that would have been sustained on those assumptions" by reference to the "percentage possibility that the events might have occurred but for the injury"; and s 126(3) requires the Court to state "the relevant percentage by which damages were adjusted": *Macarthur Districts Motor Cycle Sportsmen Inc v Ardizzone* [2004] NSWCA 145 (at [3]) per Hodgson JA (Stein AJA agreeing); see also Bryson JA (at [52]) (speaking of s 13 of the Civil Liability Act which is in identical terms to s 126).

91 These requirements were, no doubt, inserted in the legislation to which we have referred to require courts to make clear the basis on which awards for future economic loss are founded.

92 We do not understand it to have been in dispute at trial that the respondent would have continued to work in either a self-employed capacity or in employment, in either case involving work of a physical nature, had he not been injured. That is the assumption on which the primary judge proceeded (at [50]). As to the future loss, the primary judge assumed that there had been a permanent loss of the respondent's capacity for pre-injury work and for other physical work requiring physical fitness (at [50]), an assumption that while the respondent was capable of retraining, even with that benefit, he would be unable to compete with an able bodied rival for any particular position.

93 These matters were briefly stated. As we have pointed out neither party appears to have directed the primary judge's attention to s 126. However, in our view his Honour's observations and his approach to the assessment of the respondent's future economic loss, subject to the matters we have stated, sufficiently exposed the basis of his award under this head. Ground 3 should be rejected.

Ground 5: Damages for past and future superannuation

94 Damages for loss of an employer's contribution to future superannuation are an aspect of damage for loss of earning capacity: *Zorom Enterprises Pty Ltd (in liq) v Zabow* [2007] NSWCA 106 (at [83]) per Basten JA.

95 The appellant submitted, in substance, that the respondent's claim for loss of superannuation was misconceived, having regard to his successful claim for economic loss calculated on the basis that he was, and would have remained, self-employed. Mr Aldridge effectively conceded this point, but argued that the superannuation award was supported by the evidence and sustainable in the event the appellant's challenge to the future economic loss figure was sustained.

96 While we have upheld the challenge to the future economic loss claim we have calculated the award for that head of damage on the basis of the respondent's earnings in a self-employed capacity. The past economic loss figures are based on that premise too.

97 In those circumstances it is not appropriate to compensate the respondent for loss of superannuation. As a self-employed person he would have had to cover himself for superannuation out of his income.

Ground 1: Future physiotherapy expenses

98 The appellant contended there was no medical evidence to support the award of damages or to justify the need or benefit of physiotherapy treatment. The primary judge awarded the amount of \$9,198 for future physiotherapy expenses on the basis of 10 sessions of physiotherapy sessions per year for the remainder of the respondent's life expectancy.

99 The medical evidence first referred to the respondent receiving physiotherapy treatment in 2003 (see Dr Ellis's report of 22 August 2003). At that time, Dr Ellis considered that he would require pain management treatment over a two or three-year period in which he was to receive different kinds of treatment including physiotherapy and medication for pain relief. I do not understand Dr Ellis to be making a forecast that two or three years only would be required as much would depend upon the respondent's response to treatment.

100 Dr Ellis repeated his recommendation for treatment including physiotherapy for a two or three year period from the date of his report, 1 February 2005.

101 The respondent did not adduce medical evidence that he would be required to receive physiotherapy treatment for the rest of his life. There is, as stated above, however, recommendations in the past by Dr Ellis for the respondent to have physiotherapy as well as other forms of treatment. The respondent gave evidence that physiotherapy had produced some limited short-term improvement in his symptoms.

102 In light of Dr Ellis's opinion, it was reasonable for Nield DCJ to make an allowance for future physiotherapy treatment, but a more conservative assessment ought to have been made and 50% of the amount allowed was reasonable. Accordingly, the allowance of \$9,198 should be reduced to the amount of \$4,599.

Conclusion

103 The consequence is that the appellant has succeeded in her challenges to the awards of future economic loss and physiotherapy, but failed on the other grounds of appeal. The revised assessment of damages is:

Out of pocket expenses \$7,843.00

Future medical expenses \$3,824.00

Future physiotherapy expenses \$4,599.00

Future medication expenses \$19,122.00

Past wage loss \$231,120.00

Future wage loss \$369,028.00

TOTAL : \$635,536.00

104 As we earlier noted, the respondent obtained an indemnity costs order at trial from 16 April 2005 by virtue of an offer of compromise he had served offering to settle his claim for \$350,000. The appellant submitted that that order should be set aside if the judgment was reduced in accordance with its contentions. Although the judgment will be reduced, it will not fall below the offer of compromise. Accordingly the primary judge's costs order should not be disturbed.

Orders

105 We make the following orders:

- (1) Appeal allowed.
- (2) Judgment of District Court Judge Nield of 29 May 2007 set aside and in lieu judgment for the respondent for \$635,535.
- (3) Respondent to pay the costs of the appeal and to have a certificate under the Suitor's Fund Act 1951 if qualified.

11/04/2008 - change name - Paragraph(s) front cover

16/04/2008 - Front cover sheet - Paragraph(s) Category: Principal judgment

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