SUPREME COURT OF QUEENSLAND

CITATION:	*Parkinson v Bullamon (St George) Pty Ltd & Ors* [2018] QCA 344
PARTIES:	**GLENYS FAYE PARKINSON** (applicant) **v** **BULLAMON (ST GEORGE) PTY LTD** **ACN 009 944 183** **WILLIAM KENNETH WILLIS** **SUSAN MARY LOGAN WILLIS** (respondents)
FILE NO/S:	Appeal No 8644 of 2017 DC No 3412 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – [2017] QDC 200 (Jones DCJ)
DELIVERED ON:	7 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	10 April 2018
JUDGES:	Fraser and Philippides JJA and Bond J
ORDERS:	**1. Grant leave to appeal and allow the appeal.** **2. The judgment below should be varied by substituting the figure of $204,908.26 for the figure of $142,686.04 assessed below (subject to further joint submissions).** **3. The cross appeal should be dismissed.** **4. The respondents should pay the costs of the appeal and cross appeal.** **5. The parties should have leave to make written submissions, limited to three pages, as to the costs order below within seven days.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – REMOTENESS AND CAUSATION – OTHER MATTERS – where the applicant was employed by the respondents and in the course of her employment she was driving a four wheeled all-terrain vehicle that rolled on top of her and caused her injuries – where the applicant claimed damages from the respondents and the key issue at trial was the quantum for the assessment of damages for past and future economic loss – where the

applicant appealed on the basis that the trial judge erred in assessing past economic loss and future economic loss and in finding a failure to mitigate by the applicant – where the respondents cross appealed on the basis that the trial judge erroneously proceeded on the basis that the parties agreed the applicable rate for the calculation of economic loss – whether the trial judge erred in applying a discount of 45 per cent to future economic loss

COUNSEL: R C Morton, with J M Sorbello, for the applicant
B F Charrington for the respondents

SOLICITORS: Morton and Morton Solicitors for the applicant
BT Lawyers for the respondents

[1] **FRASER JA:** I agree with the reasons for judgment of Philippides JA and the orders proposed by her Honour.

[2] **PHILIPPIDES JA:** In a District Court action, the applicant claimed damages against the respondents for a work related accident occurring in the course of her employment with the respondents. Liability was not in dispute at trial and the only issues relating to quantum left in contention concerned the assessment of damages for past and future economic loss. The trial judge, Jones DCJ, assessed those damages as totalling $142,686.04, inclusive of interest and the WorkCover refund.[1]

[3] The applicant sought leave to appeal against that decision and sought orders that the judgment below be set aside. In lieu thereof judgment was initially sought in the sum of $198,155.04 but ultimately in an amount of $204,908.26 or alternatively $193,961.47.[2]

[4] The respondents sought leave, pursuant to r 766 of the *Uniform Civil Procedure Rules* 1999 (Qld), to cross appeal against the assessment of the quantum on the ground that the trial judge erroneously proceeded on the basis that the parties had agreed that the applicable rate for the calculation of past and future economic loss was $790 net per week, whereas the appropriate rate was said to be $485 net per week. The respondents sought orders that past and future economic loss be calculated using a multiplier of $485 net per week.

[5] Leave was required to extend time in which to seek leave to appeal but was not opposed by the respondents, who did however oppose leave to appeal, pursuant to s 118(2)(a) and s 118(3) of the *District Court of Queensland Act* 1967 (Qld).

The circumstances of the accident

[6] The applicant obtained employment as a jillaroo with the respondents on 7 May 2012. On 3 August 2012, when the applicant was mustering sheep, a four wheeled all-terrain vehicle which the applicant was driving rolled on top of her causing her to lose consciousness for a period. The vehicle was too heavy for her to shift and

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1 *G F Parkinson v Bullamon (St George) Pty Ltd & Ors* [2017] QDC 200 (Reasons).

2 See the "Agreed summary award of damages – comparative assessment" document filed after the hearing of the application, the difference concerns whether the discount for future economic loss is assessed at 30 per cent or 45 per cent.

she had to wait for the assistance of others. The applicant was taken by ambulance to the Mungindi Hospital and ultimately to the Princess Alexandra Hospital in Brisbane from which she was discharged on 6 August 2012. The applicant's subsequent medical treatments are summarised in the chronology agreed by the parties.[3]

[7] The applicant was 63 years of age at the time of the accident. It was not in dispute at trial that the applicant sustained the following injuries: right brachial plexus injury with median nerve damage, thoracic spine injury and psychiatric injury.[4] What was disputed was the extent of the applicant's injuries and whether the injuries sustained resulted in the applicant suffering injuries to such an extent that resulted in an inability to work. On that issue, the applicant called Dr Walden, a pain physician and anaesthetist,[5] and Dr Campbell, a neurosurgeon.[6] The respondents called Dr Atkinson, also a neurosurgeon;[7] Dr Journeaux, a trauma and orthopaedic surgeon and consultant;[8] and Ms Welshe, an occupational therapist.[9] The respondents also commissioned a report by Professor Whiteford as to the psychiatric injuries suffered by the applicant.[10]

The applicant's employment history

[8] After leaving school at the age of 15, the applicant obtained employment as a nanny and then as a café assistant until she married at 17 years of age. The applicant had her first child at 19 years of age. She returned to work when she was about 25 and commenced work as an office typist, having studied at secretarial school. After divorcing from her husband, she continued to work in a secretarial/administrative capacity, including for eight years with Mount Isa Mines. The applicant ceased that employment as a result of remarrying and becoming pregnant with her third child.

[9] The applicant returned to temporary secretarial work, eight weeks after the birth of her third child. She continued with temporary secretarial work until she became pregnant with her fourth child. Soon after the birth of that child, the applicant obtained employment as a manager in a bakery at Strathpine. The applicant and her second husband moved to the Sunshine Coast and she obtained administration work and then worked in a family business for two years. The applicant left that role on separating from her second husband and found work as a cleaner while studying remedial massage.

[10] The applicant worked as a masseuse and eventually started her own massage business, where she worked six to eight hours per day, six days a week. In 2001, the applicant closed that business to travel overseas at which time she was about 50 years of age. She planned to be away for a year but returned after five months and started another remedial massage business. She worked eight hours a day for five and a half to six days per week.

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3 Referred to as Exhibit 3: see Reasons at [4] fn 2 (AB at 217-222).
4 Reasons at [23].
5 AB at 70.46.
6 AB at 79.12.
7 AB at 85.24.
8 AB at 94.9-94.11.
9 AB at 97.7.
10 AB at 120.9.

[11] In March 2012, the applicant decided on a material lifestyle change. The applicant had the desire to travel around Australia while also working. She was offered a position at Bullamon Plains where she commenced working as a jillaroo on 7 May 2012.

[12] After the accident, the applicant returned to work at Bullamon Plains on 12 November 2012. However, she was no longer able to carry out many of her previous duties and she ceased employment on 15 March 2013.

[13] She immediately obtained other employment at the Yuleba Roadhouse as a cook which she ceased after approximately five months because it aggravated her injuries. After which she obtained work as a cleaner but ceased after two days because the nature of the work was not within her physical capabilities. She was still receiving regular medical treatment at this time. The trial judge found that the applicant's resignation from the Yuleba Roadhouse on 15 September 2013 was reasonable.[11]

[14] The applicant then commenced work at a bakery in Chinchilla. On 28 February 2014, after working there for about four months she ceased her employment because the work aggravated her arm and back. She returned to Hervey Bay. After the period of rehabilitation, the applicant commenced work on 15 March 2014 at a café. That employment only required her to work two to two and a half hours a week, but came to an end on 3 December 2014.

[15] The applicant then began work as a disability support worker, one day per week for four hours for about 14 months. There were no physical aspects to this role which involved mentoring an intellectually handicapped man. This role ceased when her contract was not renewed. Thereafter, the applicant's attempts to obtain employment were unsuccessful.

[16] The applicant's ambition after travelling around Australia was to return to Hervey Bay and restart a massage business. Remedial massage work was not possible as it aggravated her back.

[17] At the time of the trial, the applicant was 68 years old and in receipt of the pension. She had commenced as a volunteer at St Stephen's Hospital at Hervey Bay.

[18] In addition, the mortgage on her current home will not be finalised until she is 85 years of age. On her current pension, she only has a few hundred dollars a week left after her mortgage payments are paid.

The trial judges' findings

[19] The trial judge found the applicant to be an "honest reporter" and not one prone to deliberately exaggerating the state of affairs. The trial judge concluded from the applicant's employment history that "she was a hard worker, willing to give virtually anything a go, and, but for the injury, would have continued to maintain consistent and relatively well-paid employment". His Honour stated there was one caveat, "that being the [applicant's] clear intention to travel around and see as much of Australia as she could". His Honour considered that there was little room for doubt that when the applicant began to put in place this goal at age 63, she intended

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11 Reasons at [74].

to pursue it as long as practicable, quite likely up until about 70 years of age. The applicant had no superannuation and was not financially in a position to retire.

[20] The trial judge drew the following conclusions from the evidence:[12]

> "1. As a consequence of the work-related accident, the [applicant] immediately suffered a right brachial plexus injury with median nerve damage and a thoracic spine injury. Over time, the [applicant] developed depression and the phobic condition kinesiophobia, which caused her to limit any movement of her right upper limb.
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> 2. The [applicant] has now recovered about 80 per cent of limb movement, but that level of improvement had plateaued.
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> 3. Notwithstanding that level of movement and, notwithstanding that there might be no underlying physical cause for it, the [applicant] suffers real pain of the type she described.
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> 4. The level of her depression makes it impossible to form a diagnosis of whether or not she suffers a post-traumatic stress disorder.
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> 5. Prior to the accident, the [applicant] was suffering from no meaningful physical and/or mental disorder.
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> 6. The [applicant's] current depressed state was probably the consequence of a number of factors and in particular, her inability to return to full-time work at Bullamon Plains (or other rural employment), persistent pain in her right arm and back and difficulties in sustaining meaningful employment after that accident because of those work-related injuries. Other factors would likely include the stress of the WorkCover claim and this litigation.
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> 7. Provided the [applicant] had kept up her medication and attended counselling for a period of six months, she probably would have been able to return to at least 20 hours of sedentary and between 15 to 20 hours of massage therapy work per week, within 9 to 12 months of her injury.
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> 8. Given the [applicant's] age and her mental health issues, there is a genuine prospect that, as Professor Atkinson opined, the [applicant] will continue to remain on the pension."

The trial judge's assessment of economic loss

[21] The trial judge observed that on the evidence before him, neither past nor future economic loss could be precisely calculated.[13]

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12 Reasons at [51].
13 Reasons at [65].

[22] His Honour found[14] that prior to the accident, the applicant was earning between $790 and $816 per week net plus board and keep.[15] His Honour noted, referring to Exhibit 1:[16]

> "[… that it was agreed] between the parties that for the purpose of calculating economic loss the court should proceed on the basis that the earning capacity of the [applicant] was at the time of the accident $790 per week net."

Past economic loss

[23] In relation to past economic loss, his Honour referred[17] to the applicant's submission that, but for the accident, the applicant would have worked on an all but full time basis at a rate of $790 per week. The applicant's general submission as to past economic loss was that her anticipated earnings based on pre-accident earning capacity ought to be calculated as $154,774 (being $790 per week x 253 weeks less actual earnings of $45,096). The respondents' contention was that given the applicant's intention to see Australia and move from one job to another past economic loss should be assessed at $150 per week over a 40 week period, resulting in an award between $4,000 and $6,000.

[24] His Honour was prepared to accept[18] that the rate of $790 per week might have been an indicative rate of pay overall, but found that the applicant's submissions failed adequately to have regard to the applicant's real intentions and motivation to see as much of Australia as she could. The trial judge approached the calculation of past economic loss as follows.

1. Period one: From 3 August 2012, the date of the accident, to 15 March 2013, when the applicant (acting reasonably) resigned from her job at Bullamon Plains, a period of 31.57 weeks, the applicant's economic loss, "based on the agreed rate of $790 per week", was $24,940.[19]

2. Period two: For the period from 16 March to 23 March 2013, while the applicant was in between jobs, her economic loss calculated at the agreed rate of $790 per week amounted to $903.[20]

3. Period three: For the period from 24 March to 15 September 2013, whilst the applicant was working at Yuleba Roadhouse, the applicant's economic loss was $2,800. This was calculated as 24 weeks at $118 per week ($790 - $672).[21]

4. Period four: For the period between 27 September 2013 and 28 February 2014 (20 weeks), when the applicant was working at the bakery, his Honour awarded $3,760, proceeding on the basis that the applicant received $602 per

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14 Reasons at [69].
15 As evidenced in ex 2.
16 Reasons at [69].
17 Reasons at [61].
18 Reasons at [61].
19 Reasons at [70].
20 Reasons at [71].
21 Reasons at [74].

week net at the bakery and suffered loss at a weekly net rate of $188 ($790 - $602).[22]

5. Period five: For the period from 28 February to 1 September 2014 (28 weeks), the applicant's loss was assessed as $20,417.[23] This was calculated using a weekly net figure of $816 deducting $2,431 earned at the takeaway.[24] The trial judge used the date of 1 September 2014 because his Honour found that, if appropriate steps had been taken by the applicant to treat her mental condition, she would have been capable of returning to the workforce in a meaningful way by that date.

6. Period six: For the period from 1 September 2014 until trial, his Honour[25] assessed the loss on the basis that, after 1 September 2014, had the applicant received psychiatric treatment, she should have been capable of earning $550 net per week. The trial judge assessed loss for this period at a net weekly rate of $240 ($790 less $550) yielding $55,440.[26] (It is accepted by all parties that the figure of $55,440 involved a mathematical error and that the figure ought to have been $34,560 ($240 per week for 144 weeks)).

7. Discount: The total of the calculations for past economic loss was discounted by 30 per cent. In doing so, his Honour reasoned[27] that that discount was appropriate, taking into account not only the applicant's age, "likely to be considered a negative in respect of a number of rural employment opportunities", the applicant's desire to travel and the seasonality of some rural employment.

Future economic loss

[25] The trial judge assessed future economic loss based on his conclusion "that following the [applicant's] 70th birthday it is unlikely that she would suffer any economic loss.[28] In so finding, his Honour held that the applicant would not have been likely after her 70th birthday "to remain in the workforce to the extent that she would exceed the maximum allowable rate before her pension would be impacted upon. That is, $414 per fortnight".[29] His Honour proceeded on the basis that there was some 76 weeks from the date of trial to the applicant's 70th birthday and that if she had worked at her original capacity up until that birthday, her net income would have been $60,040.[30]

[26] His Honour considered that it was appropriate "to apply a significant" discount of 45 per cent, which resulted in a final assessment for future economic loss of $33,022. His Honour took that approach, "having regard to the circumstances addressed above when dealing with past economic loss (i.e. the desire to travel etc.) and taking into account the [applicant's] advancing years, together with the other vicissitudes of life".[31] In that context his Honour stated[32] that it was relevant that

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22 Reasons at [78].
23 Reasons at [82].
24 Reasons at fn 83.
25 Reasons at [83].
26 Reasons at [83].
27 Reasons at [85].
28 Reasons at [88].
29 Reasons at [88].
30 Reasons at [89].
31 Reasons at [89].
32 Reasons at [89].

the medical evidence of Dr Walden and Professor Whiteford indicated that the applicant "would have had a capacity to earn a level of meaningful income for at least part of that period had she taken appropriate steps to address her medical issues".

Issues on the appeal and cross appeal

[27] Three questions arise for consideration:

1. Whether for the period from 1 September 2014 to the trial (and to the date of appeal hearing 10 April 2018) (period six) the trial judge erred in finding a failure to mitigate by the applicant?
2. Whether there was appellable error in the trial judge's approach to the assessment of past economic loss at $760 per week as the agreed rate (raised by the cross appeal)?
3. Whether the discount of 45 per cent applied to the assessment of future economic loss involved appellable error?

Did the trial judge err in finding a failure to mitigate?

[28] The applicant submitted that the trial judge erred in the finding, referred to already, that provided the applicant kept up her medication and attend counselling for a period of six months, she probably would have been able to return to at least 20 hours of sedentary and between 15 to 20 hours of massage therapy working per week, within nine to 12 months of her injury.[33]

[29] In relation to this ground of appeal, the respondents conceded that the trial judge erred in finding a failure to mitigate by the applicant. In particular, the respondents concede the trial judge erred in his methodology in calculating past economic loss in the application of evidence from Professor Whiteford that the applicant would have been fit to return to work if within six to nine months if she had taken steps to undergo psychiatric treatment. The respondent made the following concessions, in relation to the evidence of Professor Whiteford:[34]

1. They did not plead a failure to mitigate by her by way of unreasonably refusing or failing to undergo recommended psychiatric treatment from 2014;
2. They did not cross examine the applicant in such a way that put to her that she had unreasonably refused or failed to undergo recommended psychiatric treatment from 2014;
3. They did not submit that past economic loss should be reduced to take account of an unreasonable refusal or failure by the applicant to undergo recommended psychiatric treatment from 2014;
4. A reduction in the calculation of the applicant's economic loss for an unreasonable refusal or failure to undergo recommended psychiatric treatment was not traversed with parties in closing addresses; and
5. The evidence, contained in Exhibit 2, of Professor Whiteford of the applicant's prospective return to work after six to nine months of successful

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33 Reasons at [51].

34 Respondents' amended outline of argument at [20].

treatment, was incapable of retrospective interpretation such that it applied prior to the date of trial.

[30] While the respondents conceded that the trial judge relevantly erred, in effect finding that the applicant failed to mitigate her loss and would otherwise have been able to return to work within nine to 12 months, the respondents' answer was to contend (by the cross appeal) that the trial judge erred in adopting an incorrect multiplicand (namely $790 net per week) in assessing economic loss to the detriment of the respondents. It was submitted that when that error was corrected the difference in result was not sufficient to justify a grant of leave to appeal or vary the outcome of the judgment.

[31] The respondents argued that, notwithstanding their concession that there was no failure by the applicant to mitigate loss in this period, and that his Honour should not have approached the assessment of past economic loss on that basis, nor should he have approached the calculation using the figure of $790 per week.

Did the trial judge err in the use of the multiplicand of $790 for period 6?

Errors as to period 6

[32] Before addressing the respondents' submissions that his Honour fell into error in the assessment of economic loss, which is disputed by the applicant, it is to be noted that it was accepted by the parties that there was a mathematical error in the trial judge's assessment of past economic loss (from 1 September 2014 up to the date of trial) for period 6 in that $240 net per week (144 weeks) yielded $34,560, not $55,440. Furthermore, the period allowed should have been to the date of judgment (152 weeks) rather than that of 144 weeks which was to the date of the trial.[35]

[33] The respondents' main contention on the cross appeal was that for period six, the trial judge erred in applying the rate of $790 per week, and instead should have used the multiplicand of $485 net a week for discounted factors. It was contended that the trial judge erred in holding[36] (by reference to Exhibit 1) that it was agreed between the parties that for the purpose of calculating economic loss the court should proceed on the basis that the earning capacity of the applicant was at the time of the accident $790 per week net. The trial judge wrongly interpreted Exhibit 1 as constituting agreement between the parties as to the multiplicand for the purposes of calculating economic was $790 net per week. That is, the trial judge wrongly considered that was a rate that the parties had agreed was to apply to the assessment of past economic loss, whereas it was only agreed as the applicant's amount of *then* earnings, not her earning capacity. There was no such agreement, as the respondents' submissions at trial made clear. The applicant's then earnings of $790 per week could not be used as an appropriate figure of the applicant's earning capacity because it merely related to earning capacity of an entirely different nature of employment.

[34] The applicant argued that, contrary to the submission of the respondent, the trial judge did not proceed on the basis that the amount of $790 net per week was the agreed measure of the applicant's future earning capacity.

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35 Transcript 1-5.37.

36 Reasons at [69].

[35] The applicant submitted that the trial judge considered in detail the matters relevant to the determination of the applicant's earning capacity but for the accident.[37] In that regard, his Honour noted that a rate of $790 net per week was conservative as not including free accommodation and food.[38] The applicant's contention was that likely earning capacity of the applicant, if uninjured when pursuing her intention to travel and work was likely to be more than she earned from her massage business in Hervey Bay. That much was borne out by her earnings with the respondents which were agreed. It was agreed that his honour's observation of the submission made on behalf of the respondents that an allowance should be made in the amount of $4,000 to $6,000 over a 40 week period ($100 to $150 a week),[39] clearly indicated an appreciation that the respondents' submission was not that economic loss should be calculated at $790 a week. Further, indicative of the fact that the trial judge did not misapprehend the nature of the agreement between the parties, his Honour discounted his calculations for past economic loss specifically noting the seasonality of some rural employment.[40]

[36] The applicant argued that a finding that economic loss ought to be assessed on the basis of an earning capacity of $790 net per week was open to the trial judge and there was no error as to there being an agreement on that rate as representing future earning capacity. Read as a whole, the reasons demonstrate that his Honour considered relevant matters and found that $790 net per week represented the applicant's earning capacity. The trial judge correctly observed[41] that it was agreed between the parties that the earning capacity of the applicant "at the time of the accident" was $790 per week net. Exhibit 1 recorded the agreement between the parties were agreed as to the applicant's "gross weekly income received from the [respondents] was $957 which amounts to the sum of $790 net per week".

[37] I agree that there was evidence upon which the trial judge could make the finding he did that the figure of $790 per week being the amount the applicant was earning at the time of the accident in her new working environment appropriately represented her earning capacity subject to further discount for contingencies. That, as the reasons indicate, was his Honour's approach. Past economic loss for period 6 should not have been reduced by $550 net per week to $240. The resulting figure was discounted by 30 per cent by the trial judge and there is no basis for interfering in that approach.

[38] The respondents have failed to make out the ground raised in the cross appeal.

Other errors asserted by the respondent

[39] The respondent argued that, in respect of period 2, allowance should have been made for only one week at $790 per week being $790, not $903. As the applicant submitted, that period comprised eight days, so that the calculation of the trial judge of $903 was correct.[42]

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37 Reasons at [58]-[64].
38 Reasons at [61].
39 Reasons at [59].
40 Reasons at [85].
41 Reasons at [69].
42 Reasons at [71].

[40] The respondent made submission that, in respect of period 5, the trial judge used the wrong weekly multiplicand of $816 (as opposed to that of $790 used for period 6). The applicant argued there was no error. His Honour was entitled to find that the applicant's earnings if uninjured would have been $816 net per week. Exhibit 2 showed that the applicant's earnings were in that amount.[43] The reference in Exhibit 1 to $790 net per week concerned the applicant's earning capacity at the time of the accident only and not the period before it. No error is established.

Future economic loss (the appropriate discount)

[41] In relation to future economic loss, the applicant submitted that the trial judge erred in discounting future economic loss by 45 per cent. It was submitted that his Honour should have only discounted by 30 per cent, since no reason was given as to why 45 per cent was required for future economic loss, when past economic loss was only discounted by 30 per cent.

[42] The respondents submitted that the trial judge's discount of 45 per cent (using a rate of $790 per week in calculating future economic loss) should not be disturbed. The discount represented a discretionary aspect of the judgment that did not warrant disturbance. The discount took into account[44] contingencies including the applicant's advancing years. The applicant was about 68 and a half years of age at the time of judgment with a period of one and a half years remaining until reaching the age of 70. Yet the trial judge increased the discount for contingencies for that period by a further 15 per cent compared with the discount for period 6.

[43] Having regard to authorities such as *Phillips v MCG Group Pty Ltd*[45] and the discretionary aspects of the assessment of the discount, increasing age was a relevant factor which impacted on the appropriate discount. However, it is difficult to understand why such a significant further discount was warranted for such a relatively short period so close to the judgment date.

[44] In my view, an additional discount of 15 per cent resulting in a 45 per cent discount was beyond the sound exercise of the discretion so as to warrant interference. There was error in the trial judge in not applying a discount of 30 per cent which his Honour had applied in respect of the preceding period of past economic loss.

Conclusion

[45] In summary:

1. There was error in the finding that there was a failure to mitigate.
2. There was no error in the use of the multiplicand for period 6.
3. There was error in the discount for future economic loss.

[46] The agreed summary award of damages proceeding on the above basis as opposed to the basis found by the trial judge was:

Head of damage	Jones DCJ	Appellant Fel 30%

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43 AB at 216.
44 Reasons at [89].
45 [2013] QCA 83.

		Discount
General damages	$23,050	$23,050
Special damages	$16,418.12	$16,418.12
Interest on out-of-pocket expenses	$82.75	$101.67
Fox v Wood	$2,018	$2,018
Future special damages	$12,453.80	$12,453.80
Past economic loss	$75,782	$121,030
Interest on past economic loss	$1,282	$3,216.86
Future economic loss	$33,022	$42,973.63
Past loss of superannuation	$6,820	$10,892.70
Future loss of superannuation entitlements	$3,302	$4,297.36
Sub-total	$174,230.67	$236,452.14
Less WorkCover refund	$31,543.88	**$31,543.88**
TOTAL	**$142,686.79**	**$204,908.26**

[47] The difference in the figures resulting from the trial judge's erroneous finding that the applicant failed to mitigate her loss constitutes is not insubstantial as a percentage of the whole award and not so insignificant that the error the subject of ground 1 should not be corrected in the interest of justice.

[48] The total amount of $204,908.26 was put forward on an agreed basis and should represent the amount the applicant is entitled to by way of judgment, subject to any adjustment required due to the intervening period to delivery of the reasons of the Court, in which case, the parties are to provide a joint submission as to the quantum of the judgment.

Orders

[49] The orders made should be:

1. Grant leave to appeal and allow the appeal.
2. The judgment below should be varied by substituting the figure of $204,908.26 for the figure of $142,686.04 assessed below (subject to further joint submissions).
3. The cross appeal should be dismissed.
4. The respondents should pay the costs of the appeal and cross appeal.
5. The parties should have leave to make written submissions, limited to three pages, as to the costs order below within seven days.

[50] **BOND J:** I agree with the reasons for judgment of Philippides JA and with the orders proposed by her Honour.