SUPREME COURT OF QUEENSLAND

CITATION:	*Smith v Topp & Anor* [2003] QCA 397
PARTIES:	**WENDY KAY SMITH** (plaintiff/appellant) **v** **JENNY TOPP** (first defendant/respondent) **SUNCORP METWAY INSURANCE LIMITED** ACN 075 695 966 (second defendant/respondent)
FILE NO S:	Appeal No 10527 of 2002 SC No 2622 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury - Quantum only
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	8 August 2003
JUDGES:	Williams JA and Muir and Holmes JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal** **2. Set aside the judgment of first instance** **3. Judgment for the appellant in the sum of $180,873.28**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – ONUS OF PROOF – where the appellant suffered injuries in a motor vehicle collision – where only the quantum of damages was in issue – where the appellant was found to have a residual income earning capacity – whether the respondents had the onus of proving the appellant's ability to obtain income producing work within the limits of her incapacity – acceleration of pre-existing degenerative condition – whether the evidence established that loss of income earning capacity arose in part from such condition – onus of proof – appropriate method of allowing for such condition in assessment of damages

Baird v Roberts [1977] 2 NSWLR 389, applied
Coleman v Anodising & Aluminium Finishers of Qld Pty Ltd [2002] 1 Qd R 141; Appeal No 9809 of 1998, 12 November 1999, referred to
Fink v Fink (1946) 74 CLR 127, cited
Graham v Baker (1961) 106 CLR 340, referred to
Husher v Husher (1999) 197 CLR 138, referred to
Malec v J C Hutton Pty Ltd (1990) 169 CLR 638, applied
Naylor v Yorkshire Electricity Board [1968] AC 529, cited
Purkess v Crittenden (1965) 114 CLR 164, applied
State of New South Wales v Moss (2000) 54 NSWLR 536, applied
Thomas v O'Shea (1989) Aust Torts Report 80-251, cited

COUNSEL: K N Wilson SC for the appellant
S C Williams QC, with P A Hastie, for the respondents

SOLICITORS: McInnes Wilson for the appellant
Walsh Halligan Douglas for the respondents

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Muir J and there is nothing I wish to add thereto. I agree with those reasons and with the orders he proposes.

[2] **MUIR J:** This is an appeal against a primary judge's determination of quantum in a case in which damages were claimed by the plaintiff/appellant for injuries sustained in a motor vehicle accident on 11 September 1998.

[3] At the time of the accident the appellant, who was born in 1965 and educated to year 10 level, was employed by a franchisee in the Red Rooster retail chain as a catering manager. It is not contested by the respondents that the appellant's injuries prevented her from continuing in that employment or that the appellant's income earning capacity was adversely affected by her injuries. The issue between the parties at trial and on appeal is the extent to which that income earning capacity has been and will continue to be reduced in consequence of the appellant's injuries. A related question is whether the appellant's pre-existing degenerative spinal condition, without the effects of the accident, over time would have caused the disability complained of by the appellant and, if so, when.

[4] It is desirable at the outset to say a little about the expert medical evidence.

The medical evidence

[5] Dr Weidmann, a neurosurgeon, who saw the appellant on a number of occasions, expressed the opinion in his report dated 3 December 2001 that it was likely that the appellant had suffered a soft tissue injury to her cervical spine as a result of the accident and that her "ongoing neck symptoms and headaches" were consistent with such an injury. On examination, he found that the appellant moved freely without apparent discomfort but that there was diffuse tenderness across her lower lumbar spine. He noted that her movements were "moderately limited in all directions". He considered it likely also that the appellant had suffered a soft tissue injury to her lumbar spine and that she has a minor lumbar disc herniation "which is probably the result of pre-existing degenerative changes, as well as the accident in question."

[6] In Dr Weidmann's opinion the soft tissue injury to the cervical spine constituted a 4% whole person permanent impairment and that, together with her lumbar spine condition, resulted in an 8% partial permanent whole person impairment. He considered that, although the appellant would have difficulty returning to her previous employment as a caterer, she was medically fit "for any light form of work that did not require bending or lifting, or prolonged sitting or standing." That opinion coincided with that expressed in his report of 1 August 2000. In a report of 25 March 1999, Dr Weidmann had formed the view that it was likely that the appellant would soon become fit to return to her work as a catering manager.

[7] Dr Boys, an orthopaedic surgeon, stated in a report dated 8 February 2002 that the appellant –

(a) experiences intermittent postural musculoligamentous neck strain and mechanical low-back pain as a consequence of pathology at the L5/S1 disc space;
(b) suffers minor disability referable to the neck but manifests no assessable impairment of bodily function referable to the cervical spine;
(c) has an 8% impairment of bodily function "relating to pathology of the lower lumbar region", half of which should be apportioned to the effects of her injury and the other half to constitutional degenerative change;
(d) has injuries which do not preclude sedentary employment;
(e) has symptoms of pain after sitting which are attributable to strain which can be alleviated or dissipated by a little amount of movement or stretching.

[8] Dr Pentis, orthopaedic surgeon, concluded in his report of 18 December 2001, that the appellant –

(a) had sustained soft tissue injuries to the chest, cervical region, lumbar region and had aggravated the L5/S1 disc in the lumbosacral region;
(b) should avoid heavy lifting, repetitive bending and twisting; and
(c) has been left with a residual incapacity of approximately 12.5% loss of the efficient function of her spine as a whole and needs to be careful at work in limiting the amount of lifting done by her.

[9] Dr Pentis, by implication, was of the opinion that the appellant could continue to work and the contrary was not suggested to him. In a report given on 28 October 1998, he concluded that it would take at least another couple of months for the appellant's condition to settle and that she would then slowly improve and "[a]s her condition improves she can increase her activities and her work activities".

[10] It is convenient to deal separately with the appellant's complaints directed to the assessment of past and future economic loss.

Past economic loss

[11] The appellant challenges the primary judge's finding that from March 2000 until the date of trial the appellant could have earned an income of about $300 per week net on the basis that it is not supported by the evidence.

[12] It is submitted on her behalf that the finding is contrary to evidence which establishes that the appellant is a highly motivated person with a strong work ethic who endeavoured unsuccessfully to obtain employment prior to the date of the trial.

[13] In the latter regard, reliance is placed on evidence to the effect that the appellant –

(1) considered a job in a video store and at Red Rooster but did not apply for either when she ascertained that the work involved prolonged standing;
(2) considered and rejected a position at Woolworths because it involved heavy lifting;
(3) applied unsuccessfully (and without obtaining interviews) for jobs at Coles and K-Mart;
(4) worked for an unspecified trial period as tuckshop convenor at the school attended by her children but found herself unable to cope with the work which involved the constant physical activity of food preparation, cooking and counter service.

[14] The evidence did not disclose when these events occurred, whether the appellant sought advice or assistance in seeking employment or whether she pursued any other lines of enquiry.

[15] Reliance was placed also on the evidence of Ms Stephenson, occupational therapist, to the effect that if the appellant was restricted to part-time work that would make it more difficult for her to obtain employment. In her report of 26 April 1999, Ms Stephenson advanced the opinion that –

> "Based on her current symptoms, Mrs Smith's working tolerance would be a maximum of 20 hours per week unless she has some improvement in her symptoms."

[16] The appellant submits that the respondents led no evidence countering the above evidence and that it demonstrated the inability of the appellant to obtain suitable employment. Furthermore, it is submitted that on the primary judge's findings the appellant required retraining in order to enable her to undertake suitable sedentary work, but had been unable to undertake it through lack of funds. In those circumstances, it was argued, the findings under challenge could not stand.

[17] The respondent's central contention was that the subject findings were consistent with the medical evidence to the effect that, although the appellant may not be able to do work such as catering which involved heavy lifting, she was capable of lighter work which did not necessitate repetitive bending and lifting. Reliance was placed also on the evidence of the appellant that she was capable of returning to secretarial work as long as she could move about from time to time as well as on the fact that the appellant, by seeking some employment, implicitly considered herself capable of working.

[18] That evidence of the medical specialists coincided with that of a physiotherapist, who in a report dated 15 February 1999, concluded that the appellant should be capable of returning to full time employment in the future "though may require some considerations with regard to heavy lifting …".

[19] There was thus a consistent body of expert evidence which supported a finding that the appellant was probably fit for light work which did not involve heavy lifting and bending by March 2000. The evidence on which the appellant relies was

insufficient to show that, despite the expert evidence, which was not sought to be put in issue, the appellant was in fact unfit for work until the date of the trial.

[20] The evidence led by the appellant also falls short of establishing that she was unable to obtain employment as a result of her physical limitations. The primary judge was entitled to conclude that the evidence of investigation of job prospects summarised above, was insufficient to establish that there was no employment reasonably available to the appellant. Alternatively, that evidence is insufficient to demonstrate that the primary judge erred in making the subject findings. The evidence for the most part is, or is based on, the appellant's subjective assessment and provides but faint evidence of employment opportunities or the lack thereof.

[21] It is argued also that the primary judge accepted that the appellant would require suitable retraining before being able to undertake work within the scope of her physical limitation. His Honour did accept that some retraining was appropriate, and perhaps even necessary, in order to enable the appellant to obtain particular types of employment such as secretarial and telephone counselling. There was, however, no finding to the effect that no employment at all could be obtained without retraining and the medical evidence was inconsistent with such a conclusion.

[22] The primary judge concluded that the income the appellant was earning from March 2000 was probably less than she could have earned as a catering manager and he assessed her income earning capacity at about $300 per week net. The reasons do not reveal how that figure was derived and that is a subject of complaint. There was however some evidence upon which the primary judge could draw, namely evidence of the award rate for secretaries, the appellant's remuneration at Red Rooster and rates of pay for clerical workers and telephone counsellors. I will return to a consideration of the adequacy of this evidence directly.

[23] It was submitted on the appellant's behalf that once the appellant had established a diminution in her post accident income earning capacity flowing from an incapacity to continue in the secure employment held by her prior to the accident, an evidentiary onus passed to the respondents to show that there was in fact work within her capacities available to the appellant and to prove the remuneration which could be expected to result from such work. Reliance was placed on *Baird v Roberts*[1] and on *Thomas v O'Shea.*[2] There is, however, no such inflexible principle or rule as *Coleman v Anodising and Aluminium Finishers of Qld Pty Ltd* [3] and the authorities discussed below make plain. The legal onus of proving that damage was suffered and the quantum of the damage always rests with the plaintiff.[4] Moreover, the appellant's pleaded case was that she "suffered a diminution in her capacity to earn income which has been productive of financial loss". It was surely incumbent on her to prove the extent of that loss.

[24] Looked at generally, if the plaintiff's evidence is inadequate on the question of loss resulting from a diminution in earning capacity and the defendant leads no or insufficient evidence on that issue, it does not follow that the residual income earning capacity or the resultant diminution in income earning capacity must be

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1 [1977] 2 NSWLR 389 at 397, 398.
2 (1989) Aust Torts Report 80-251.
3 [2002] 1 Qd R 141.
4 *Purkess v Crittenden* (1965) 114 CLR 164 at 167, 168.

disregarded in the assessment of damages or that only nominal damages may be awarded. Where the existence of damage is established, difficulty in quantification is not a ground for defeating the plaintiff's claim. The court is entitled, and perhaps obliged, to make the best estimate it can in the circumstances.[5]

[25] In *State of New South Wales v Moss*,[6] Heydon JA observed –

> "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. … 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."

[26] As *State of New South Wales v Moss* demonstrates, in determining loss resulting from diminution in earning capacity, courts have a broad discretion and may make awards on the basis of little evidence.[7] The approach taken by the primary judge was consistent with those principles. Moreover, he was entitled to conclude that there was work within the appellant's capacities available to her. After all, the evidence (consistent with her pleaded case) was that her capacity to work in some types of employment had been removed or diminished, not that she was generally unemployable.

[27] For these reasons, I would not disturb the primary judge's award in respect of past economic loss. There is, however, another matter which needs to be addressed. On the hearing of the appeal, Mr Wilson argued that an adjustment should be made to the primary judge's calculation of past economic loss to account for an alleged error in the primary judge's calculation of income tax payable. The matter was not raised in the notice of appeal and, if detected, could have been the subject of an application to the primary judge under the slip rule. It is difficult to detect how the primary judge's precise figure was arrived at and I am not satisfied that any error has been demonstrated.

Future economic loss

[28] The principal findings challenged by the appellant are –

> "With respect to her future loss of income I conclude on the medical evidence that in any event her degenerative spinal condition to which Dr Weidman and Dr Boys referred would have left her with her present incapacity within about eight years of her accident – which I will assume would be by about October 2006.

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5 *Fink v Fink* (1946) 74 CLR 127 at 143; *Naylor v Yorkshire Electricity Board* [1968] AC 529 at 548 and *Baird v Roberts (supra)*.

6 (2000) 54 NSWLR 536 at para 87.

7 *(supra)* at paras 72 to 87 inclusive.

> I propose therefore to calculate her future loss of earning capacity for a period of four years from date of trial."

[29] The appellant argues also that the evidence fails to establish that at any relevant time the appellant's incapacity would, in any event, have resulted from her pre-existing degenerative condition and that, in consequence, her damages cannot be reduced by reference to that condition. Alternatively, it is submitted that any reduction must be effected by reference to the principles relating to the assessment of loss of a chance stated in *Malec v J C Hutton Pty Ltd*.[8]

[30] In the following passage from their reasons in *Purkess v Crittenden*,[9] Barwick CJ, Kitto and Taylor JJ, referring to a discussion in *Phipson on Evidence*[10] concerning the "distinct and frequently confused meanings" of the onus of proof, namely "(1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of *establishing a case*, whether by preponderance of evidence, or beyond a reasonable doubt; and (2) the burden of proof in the sense of *introducing evidence*" said –

> "We understand that case to proceed upon the basis that where a plaintiff has, by direct or circumstantial evidence, made out a prima facie case that incapacity has resulted from the defendant's negligence, the onus of adducing evidence that his incapacity is wholly or partly the result of some pre-existing condition or that incapacity, either total or partial, would, in any event, have resulted from a pre-existing condition, rests upon the defendant. In other words, in the absence of such evidence the plaintiff, if his evidence be accepted, will be entitled to succeed on the issue of damages and no issue will arise as to the existence of any pre-existing abnormality or its prospective results, or as to the relationship of any such abnormality to the disabilities of which he complains at the trial. It was, we think, with the character and quality of the evidence required to displace a plaintiff's prima facie case that *Watts v. Rake* (1960) 108 CLR 158 was essentially concerned. It was, in effect, pointed out that it is not enough for the defendant merely to suggest the existence of a progressive pre-existing condition in the plaintiff or a relationship between any such condition and the plaintiff's present incapacity. On the contrary it was stressed that both the pre-existing condition and its future probable effects or its actual relationship to that incapacity must be the subject of evidence (i.e. either substantive evidence in the defendant's case or evidence extracted by cross-examination in the plaintiff's case) which, if accepted, would establish with some reasonable measure of precision, what the pre-existing condition was and what its future effects, both as to their nature and their future development and progress, were likely to be. That being done, it is for the plaintiff upon the whole of the evidence to satisfy the tribunal of fact of the extent of the injury caused by the defendant's negligence."

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8 (1990) 169 CLR 638.
9 (1965) 114 CLR 164.
10 10th ed (1963) par 92.

[31] Before addressing the appellant's criticisms and the above expressions of principle, it is desirable to consider the facts in a little more detail.

[32] Dr Weidmann gave evidence that it was more likely than not that the appellant "would have developed problems with her back at some time in the future." The time at which and the extent to which those problems would occur, plainly, were incapable of precise prediction. Although Dr Weidmann was prepared to give the opinion that it was "more likely than not that she wouldn't have worked until her normal retiring age" he declined the invitation proffered to him in cross-examination to assess, on the balance of probabilities, the time at which the appellant's condition at trial would have been arrived at as a result of degenerative changes wrought by her pre-existing condition. Asked in cross-examination about that, he said "… if you wish me to be more specific, I would say that maybe within a few years, five to ten years perhaps, but again, that is quite speculative and this is my best guess."

[33] He then said –

> "… in assessing five or ten years I was taking into consideration the sort of work she was doing. So that it's likely that some other event, as I said, lifting or bending or whatever at some time in the next few years, and again, I would say five years perhaps, but stressing that that's an estimate, she would have developed similar problems and in the long-term – the long-term outcome would have been much the same; so that in any event, it is unlikely she would have continued working until a normal retiring life or retiring age".

[34] The substance of Dr Weidmann's evidence is that there was a material possibility that within five to 10 years the appellant would have reached the condition she was in at the time of trial had she remained in her previous employment, and a probability that such point would have been reached before the appellant attained the age of sixty. No further refinement of the degree of probability was attempted.

[35] Asked by the primary judge whether he could say if the appellant's degenerative condition would have become symptomatic had it not been for the accident, Dr Pentis responded "No, you can't give a percentage because no-one knows. Anyone who says they know, well, is kidding themselves."

[36] Dr Boys' view on the point was broadly similar to that of Dr Pentis. The primary judge accepted the evidence of Dr Weidmann in preference to this evidence and it is not suggested that he erred in this regard.

[37] It was common ground that the medical evidence established the existence of a pre-existing degenerative condition. It also addressed the relationship of that condition to the appellant's incapacity.

[38] The evidence failed to show, on the balance of probabilities, that the appellant's degenerative changes, unaccelerated by the accident, would have reached their level at the time of trial by a particular date, other than by a date before the time at which the appellant turned 60. But, as the evidence accepted by the primary judge established that the chance of such an occurrence was not so low "as to be regarded as speculative" the appropriate course was to assess the chance of the event

occurring and to take that chance into account in assessing the damages.[11] *Purkess v Crittenden*, of course, was decided before *Malec v Hutton* and the Court, in the former case, did not give specific consideration to the principles governing damages where the "loss of a chance" is to be assessed. In any event, there is nothing in the above quoted passage from *Purkess v Crittenden* which is inconsistent with the conclusion just expressed.

[39] The appellant has suffered damage through the loss of reasonably secure employment in an area in which she was competent. As well, the range of occupations open to her has been reduced, making it more difficult for her to find employment. This, in turn, makes it likely that periods spent by the appellant in unemployment over her working life will increase.

[40] The primary judge was not prepared to find that the appellant's capacity to do light work was restricted to 20 hours per week. He considered it possible that the appellant would be able to set up her own "bulk distribution business" and that, with training, she could become a telephone counsellor, or have the capacity to pursue some other such occupation which might result in her losing little or no income. He noted that, in order to pursue some such activities, the appellant would need to undergo training which could take "a couple of years".

[41] Having considered these matters, he determined the appellant's loss of income on the basis of the difference between the remuneration she would have received had she stayed on as manager at Red Rooster ($457 per week) and a clerical employee's remuneration, based on a 40 hour week, of $341 net per week. The difference between the two sums is $116. This loss, he considered, should be allowed over four years. He then discounted the sum, using the 5% tables to arrive at $22,000 which in turn was discounted by 15% to allow for contingencies. The four year period resulted from the finding that the appellant's condition at trial would have been arrived at without the intervention of the accident, within about eight years. The trial was roughly four years after the date of the accident.

[42] Apart from failing to allow appropriately for the loss of the chance that the plaintiff would have continued on to age 60 without her degenerative condition restricting her income earning capacity (or the chance of her not being able to work beyond a much earlier date), his Honour's method of calculating future economic loss was in accordance with authority and conventional practice. He calculated the difference between the remuneration which would have resulted from the employment of the appellant with her unimpaired earning capacity and that obtainable by her with her reduced capacity.[12]

[43] The following assessment of loss was put forward by the appellant as a means of correcting the error in the primary judge's assessment –

$116 net per week for 23 years (to age 60)	
discounted by 35% for contingencies	- $54,386.00
Future superannuation loss at 9% of $54,386	- $4,894.74

[44] In my view, although the 35% discount may be a little low to allow for the contingency that the appellant's working life may have come to an end well inside

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11 *Malec v J C Hutton Pty Ltd (supra)* at 642-643.

12 See *Baird v Roberts (supra)* at 397, cf *Graham v Baker* (1961) 106 CLR 340 at 347 and *Husher v Husher* (1999) 197 CLR 138 at 143.

23 years, once regard is had to the other matters referred to in paragraph [39] above, the appellant's calculations support a global award of $60,000. That takes into account vicissitudes of life and it is thus unnecessary to allow any further discount in that regard.

Conclusion

[45] For the above reasons, I would allow the appeal, order that the judgment at first instance in the sum of $147,243.28 be set aside and give judgment for the appellant in the sum of $180,873.28. That figure is derived by substituting $60,000 for $18,734 in the primary judge's calculation of future economic loss and by deleting therefrom $5,950 on account of four years future benefits, as well as $1,686 on account of four years superannuation benefits.

[46] On the hearing of the appeal a timetable was set for the delivery of submissions on costs. Submissions should be delivered in accordance with it.

[47] **HOLMES J:** I agree with the reasons for judgment of Muir J and the orders he proposes.