SUPREME COURT OF QUEENSLAND

CITATION:	*Doughty v Cassidy* [2004] QSC 366
PARTIES:	**GARY KENNETH DOUGHTY** (plaintiff) v **LARRY CASSIDY** (defendant)
FILE NO/S:	SC 5095 of 2003
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	27 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	11, 12, 13 October 2004
JUDGE:	McMurdo J
ORDER:	**There will be judgment for the plaintiff against the defendant for $630,673.26**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – PARTICULAR CIRCUMSTANCES – where plaintiff jockey suffered injury at a race – where plaintiff's career as jockey ended by injury and earning capacity also reduced – where liability admitted – where assessment of damages – where plaintiff had planned to ride in Macau – where adjustments for contingencies DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – LEGAL PRINCIPLES – where assessment of economic consequences from loss of earning capacity – where interpretation of s 51 *PIPA*-court must disregard earnings above 3 times average weekly earnings per week – whether s 51 requires court to assume that there was no possibility of earnings above that limit *Civil Liability Act* 2003 (Qld), s 101 *Motor Accidents Compensation Act* 1999 (NSW), s 125 *Personal Injuries Proceedings Act* 2002 (Qld), s 51 *Graham v Baker* (1961) 106 CLR 340, applied

Husher v Husher (1999) 197 CLR 138, applied
Kaplantzi v Pascoe [2003] NSWCA 386, applied
Cullen v Trappell (1980) 146 CLR 1, cited
Malec v J C Hutton Pty Ltd (1990) 169 CLR 638, cited
Medlin v State Government Insurance Commission (1995) 182 CLR 1, applied
Norris v Blake (No 2) (1997) 41 NSWLR 49, cited
Wynn v New South Wales Insurance Ministerial Corporation (1995) 184 CLR 485, cited

COUNSEL: S J Keim for the plaintiff
P V Ambrose SC with A S Kitchin for the defendant

SOLICITORS: Alex Mackay & Co for the plaintiff
Phillips Fox for the defendant

[1] **McMURDO J:** On 1 July 2000, the plaintiff, Mr Doughty, was a professional jockey. He was then aged 41 and he had been riding successfully for about 25 years. On that day his career ended when he was injured in a fall in a race at Bundamba.

[2] Another jockey in that race was the defendant, from whom Mr Doughty claims damages for negligence. The defendant's liability to the plaintiff is now admitted and the remaining issues concern the assessment of damages. There is no controversy as to the injuries suffered and the defendant accepts that they ended Mr Doughty's career as a jockey. The principal contest is as to the value of Mr Doughty's lost earning capacity.

Mr Doughty's injuries

[3] Mr Doughty suffered multiple fractures to the skull resulting in some brain damage, a total loss of sight in the right eye and a loss of hearing, tinnitus and hyperacusis particularly in the right ear. He suffered numerous soft tissue injuries especially to the right hip and cervical areas. There was damage to his teeth and jaw area. He has also suffered from depression.

[4] Prior to this accident, Mr Doughty had been involved in other racing accidents, but none of which had given him any significant head injury. He had been free of any neurological disorder or psychiatric illness. His loss of sight in the right eye was of itself sufficient to end his career as a jockey. But there are other permanent effects of his injuries which affect his earning capacity. He is left with some impairment of memory, concentration and capacity for problem solving and for what the medical evidence refers to as multi-tasking. He suffers light-headedness when he is feeling excessively tired, and excessive tiredness is another effect of his injuries. He is less able to control his emotions and is a more volatile personality than he was before the accident. He suffers headaches when exposed to loud noise or if excessively tired, as well as neck muscle spasms which can last for weeks at a time. Psychiatrically the accident has caused an Adjustment Disorder with Mixed Anxiety

and Depressed Mood of a mild to moderate degree and which is chronic. He has lost the ability to sleep well.

[5] Beyond that summary, it is unnecessary to discuss the medical evidence because none of it is controversial. He has made a relatively good recovery from a very serious accident, but undoubtedly he is unable to work as a jockey or to safely ride horses. It is also clear that his frequent tiredness, light-headedness, difficulty in concentration, headaches and poor hearing, together with his other difficulties, combine to effectively prevent him from working full time in any occupation. He works about 10 to 15 hours per week for his wife who is a race horse trainer. For most of that time he provides some professional training for apprentice jockeys. He also provides some assistance in taking phone calls in relation to another business conducted by Mrs Doughty, which involves the sale of security doors. There is some debate as to how much work he is now able to perform. The defendant argues that he is still able to earn about $200 net per week, whereas on Mr Doughty's submission, he is able to earn about half of that.

[6] It is plain that Mr Doughty has experienced very substantial pain and suffering and that although his recovery has been relatively good, he is left with several matters which affect his enjoyment of life. The loss of his career has caused a level of frustration and resentment and some loss of self esteem. He is unable to pursue some of the sports he previously enjoyed, such as water skiing and deep sea fishing. The respective submissions agreed that the appropriate range for the component of pain and suffering and loss of amenities is $80,000 to $100,000, and I will assess that component at $90,000.

[7] Ultimately the parties agreed on the other components of the award apart from past and future economic loss, as well as the appropriate amounts for interest on those various components. The figures are set out at the conclusion of this judgment. That leaves for determination the issues concerning economic loss.

Mr Doughty's Career

[8] Mr Doughty was born and educated in the United Kingdom before coming to Australia when he was 14. Within months of settling in Melbourne, he left school and commenced his apprenticeship as a jockey, riding for the trainer Tommy Harrison at Cranbourne in Victoria. In 1976 and again in 1977, he was the Dux of the Victorian Apprenticeship School. He won the Victorian Apprentices Provincial Premiership in 1978, and he was runner-up in the Metropolitan Apprentices Premiership for two years. He rode 168 winners as an apprentice.

[9] After completing his apprenticeship, he rode as the "number one" jockey for the trainers Tommy Harrison and Colin Alderson at Cranbourne, winning many races on metropolitan and provincial tracks, including the 1983 Toorak Handicap at Caulfield, the 1985 Sandown Cup, the 1986 Caulfield Guineas and the 1987 Geelong Cup. He rode in the 1987 Melbourne Cup. Whilst based in Victoria he won a number of races outside that State, including the Canberra Cup. He was offered and accepted a season riding in Hong Kong in 1984-1985, after which he

returned to Victoria and continued as the number one rider for the Harrison and Alderson stables.

[10] Whilst riding in the Queensland Winter Carnival of 1993, he decided to move permanently to Queensland. He says there were two reasons for this: one was the weather and the other was that Mr Harrison had relocated his stables out of Cranbourne and had been achieving less success in races. He said that out of loyalty to Mr Harrison he did not wish to take up riding for another stable in opposition to him and that Mr Harrison's declining success had an impact on his own level of income. I accept the substance of that evidence. Against it, there is nothing to suggest that his form was declining before he moved to Queensland, and there is evidence that he was competitive and well regarded in Victoria when he moved to Queensland in 1993.

[11] He moved to the Gold Coast where after five months he was leading the Gold Coast Jockeys Premiership and was racing frequently in metropolitan meetings in Brisbane. Throughout the 1990s he had what can only be described as a successful career, riding numerous winners in Brisbane, the Gold Coast, Ipswich and other places. The evidence includes a complete listing of all his rides from August 1993 until his accident, extracted from the records of the relevant racing authority. In addition, there is a summary of his career by reference to numbers of rides, wins and places for each year since 1978. The evidence demonstrates that he was in continuous demand as a jockey both before and after his move to Queensland at least until about 1997 or 1998. That is consistent with his records of his income as a jockey as disclosed in his tax returns.

[12] But in the last few years before his accident, Mr Doughty was less in demand. For some years before the 1998-1999 year his income from riding fees and bonuses, according to his tax returns, had exceeded $50,000. But for 1998-1999, it was $40,708 and for 1999-2000, it was $30,920. In the year to June 1996 he had 549 rides for 30 wins, in the following year 383 rides for 20 wins and in the year to June 1998, 410 rides for 34 wins. But in the year to June 1999 he had 262 rides for 14 wins and in the following year 180 rides for 8 wins, although for about six weeks of that year he rode in Macau.

[13] Mr Doughty says that this decline was due to but one matter, which was his wife's corresponding rise as a trainer. That is not simply his supposition. There is support for it in, for example, the evidence of Mr Doyle, another local trainer, who said that he and some other trainers became wary of using Mr Doughty because they believed that if owners had confidence in Mr Doughty, they could be inclined to engage Mrs Doughty as the trainer. Mr Doughty had heard similar comments from other trainers, one of whom had told him that he would not give him another ride now that his wife was a trainer. Against this matter, there seems to be no other explanation for his declining popularity. No witness said that Mr Doughty's fitness or form was declining. No doubt as he started to get fewer rides with consequently fewer successes, there was something of a compounding effect. But as to his fitness and competence up to the accident, the evidence is all one way. It is to the effect that he remained a competent and fit rider, well respected by his peers, trainers and officials.

[14] One of those peers was Mr Michael Cahill who had years of experience riding against Mr Doughty, and who was another rider in the race in which this accident occurred. Mr Cahill said that when he moved to Queensland in 1995, Mr Doughty had already become one of the "top riders in Brisbane" and that "he continued to be so right through until his accident". He described him as one of the better jockeys against whom he had ridden. The trainer, Mr Doyle, said that in the year 2000, Mr Doughty was "probably one of the top bracket riders here in Queensland". Another trainer, Mr Baldwin, said that Mr Doughty was a "good judge of a horse" and an able rider. Another witness, Mr Harrison, is a trainer in Victoria and the son of the trainer to whom Mr Doughty had been apprenticed. Mr Doughty did some riding for him in Victoria in 2000 and Mr Harrison expressed a high opinion of Mr Doughty, favourably comparing him with Mr John Didham, who is a jockey who has ridden with considerable success for some years now in Macau. Mr Clifford was a stipendiary steward for approximately 18 years and regularly chaired metropolitan, provincial and country meetings during that period. He was a senior steward in the last five to six years of his employment. Frequently he witnessed Mr Doughty's performances right up to the time of this accident. He described Mr Doughty as a very good and competitive rider who was highly respected by stewards and jockeys. Mr Fanning is the race course manager for the Gold Coast Turf Club and the race day starter, and he has been at that Club for 31 years. He described Mr Doughty in the first half of 2000 as still being a very professional and fit jockey. None of this evidence was substantially challenged and no contrary evidence was adduced.

[15] Most probably there were several circumstances which in combination had led to a decline in Mr Doughty's work in the last couple of years of his career. Undoubtedly he had become somewhat less popular, but on the evidence that could not have been due to any difference in his performance. I find that he remained a highly competent and fit jockey up to this accident. I also accept that at least one contributing factor to the decline in his work was the apprehension by some trainers that they would lose business to Mrs Doughty. It is unnecessary to discuss further the particular impact of that matter. What is more important is that, as his own case concedes, the demand for his services in Queensland had declined, and the decline was probably permanent.

[16] As a result, Mr Doughty sought work in Macau. That required him to obtain a licence from the Macau Jockey Club. He applied in late August 1998 for a licence but he was then unsuccessful. At that time, the Macau Jockey Club granted two types of licences to foreign jockeys. There was a "freelance" licence which was granted for the season, which ran for almost a year from the beginning of September. And there was a "visiting jockey's" licence which was for a term of three months. Mr Doughty was told by the Jockey Club in August 1998 that all available places had then been filled, which is likely to have been true because he applied very close to the beginning of the season in September.

[17] He applied again, this time successfully, in 1999. He rode under a visiting jockey's licence for about six weeks in July and August of that year. He had a total of 60 rides for 3 wins earning a total of HK$106,213 from which HK$5,414 tax was

deducted. The exchange rate was then about 5.5 Hong Kong dollars to an Australian dollar.

[18] In June 2000 he reapplied to the Macau Jockey Club but he was injured in this accident before the Club had considered his application. Had his application been accepted, he might have obtained a licence for the full season commencing in September 2000. Alternatively, he might have obtained the licence for an initial term of three months and then sought to renew it. He and Mrs Doughty gave evidence, which I accept, that they had decided to move to Macau so that he could ride there if he obtained the necessary licence. There was some suggestion that if licensed, he was unlikely to have remained in Macau for very long because of personal ties to Australia. Whilst those matters were and are obviously important to him, I accept that for as long as he was licensed in Macau he would have stayed there because of the much greater income on offer.

[19] The assessment of his economic loss, both past and future, requires then an assessment of his prospects of obtaining and retaining a Macau licence. It also requires consideration of his likely income if riding in Macau, although that consideration must accord with the limitation on claims for economic loss by the operation of what had been s 51 of the *Personal Injuries Proceedings Act* 2002 (Qld).

Macau prospects

[20] He is not the only Australian jockey to have ridden in Macau in recent years. The extent to which other Australians have succeeded in Macau provides an indication of the prospects which Mr Doughty had of being allowed to ride there and of making various amounts of income. A foreign jockey's income in Macau comes from three sources. There is a riding fee, which as at 1999 was HK$990 per race. There is a percentage of prize money, which was 10 per cent of a winning prize and 5 per cent of a place prize. Thirdly, it was a common practice for an owner to pay the jockey for a winning ride a bonus or what is known to in Macau as "lucky money". In addition, once the jockey is no longer an Australian resident, his Macau income is taxed at a lower rate. It also seems that in some cases, a jockey is able to receive free accommodation provided by one or more owners.

[21] A witness already mentioned, Mr Michael Cahill, has now ridden in Macau for a little over 12 months. According to the evidence of Mr Ian Paterson, who is the Director of Racing and Chief Stipendiary Steward of the Macau Jockey Club, the Club's records show that Mr Cahill has ridden 731 races for 112 winners. Mr Paterson estimates that Mr Cahill would have received in riding fees and percentages of prize money an income of the order of HK$300,000 a month. Another successful Australian rider in Macau has been Mr John Didham, who rode there for more than six years from 1996, and who has again ridden in Macau since early this year. In a six month period this year, Mr Paterson said Mr Didham had 338 rides for 46 winners, earning about HK$200,000 per month. Mr Dean McClelland was licensed for six months, in which he rode for four months in 276 races for 38 wins. Mr Noel Callow was there for six months, having 254 rides for

32 wins. Mr Paterson estimates Mr Callow's income from riding fees and prize money would have been about HK$750,000 over six months. Another jockey was Mr Mark Newnham, who rode in Macau for three months, having 104 rides for 4 wins and earning about HK$170,000 in the three months. A Mr M Wheeler earned about HK$110,000 in three months, having 62 rides for 3 wins. Mr V Coughlan, a New Zealand jockey, had 67 rides for 4 winners in his three months in Macau, earning about HK$150,000.

[22] The licensing regime in Macau and the considerations likely to affect a jockey's prospects of becoming and remaining licensed were explained in the evidence of Mr Paterson. There is no challenge to his evidence and, indeed, much of it provided support for some of the defendant's arguments. He has worked for the Macau Jockey Club since July 1998. Initially he was racing manager and chairman of the stewards before becoming the Director of Racing. An application for a jockey's licence is decided by the Licensing Committee of the Club. Although Mr Paterson is not a member of that committee which is made up of the Directors of the Club and its Chief Executive, he makes recommendations to the Committee. There are no published criteria by which the Committee makes its decisions but Mr Paterson's evidence, which I accept, summarises the relevant considerations. At any relevant time, only a minority of the jockeys riding in Macau are foreigners. In 2000, jockeys were licensed as freelance jockeys or as visiting jockeys. In the former class, there were some foreigners but most were local jockeys and the term of the licence was 12 months. A visiting jockey's licence was for three months only, although it could be renewed. Since 2000, all licences have become for a term of three months only. The Club is privately owned and there appears to be no means of having a refusal of a licence application reviewed. Ordinarily the prospects of renewal of a licence almost entirely depend upon a jockey's relative success in the previous three months, although Mr Paterson did add that there were some licences sometimes granted which were not so plainly consistent with performance or merit. A jockey's history outside Macau is relevant upon his initial application, but his prospects of renewal are governed by his success or otherwise in Macau.

[23] The best prospect of obtaining a three month licence is for the three months coinciding with the European summer, when there is less competition. It is also relatively easier to obtain a licence during September, October and November, because many Australian jockeys would prefer to race in Australia during that period. It is fair to conclude that Mr Doughty succeeded in obtaining a licence for July and August 1999 because that was a relatively less popular period. It is the policy of the Macau Jockey Club to keep the number of visiting riders to about ten to fourteen at any one time, and to endeavour to have a number of countries represented. For example, as at 1 March 2004, there were three Australians, one New Zealander, a Panamanian, two Brazilians, four Frenchman and one South African who were licensed in Macau. Mr Paterson added that in the last few years there has been increased competition for visitors' licences and that the standard of foreign jockeys now riding in Macau is somewhat higher.

[24] Mr Doughty's record in 1999, of three wins from 60 rides, would not have been regarded by the Licensing Committee as very successful. Mr Paterson said that with that record, there was no realistic possibility of Mr Doughty obtaining a twelve

month licence by his application in June 2000. As to his prospects of then obtaining a three month licence, Mr Paterson said that it would be "very difficult to say because it depends upon who was applying at the time and what is the make-up of the riders which are applying", by which he meant the need to have several countries represented. Mr Doughty's application was supported by two trainers then working in Macau, one of whom was Mr Baldwin. Mr Paterson said that that would have assisted his application although it would not assure it of success because of the potential for an association with a trainer to change. Had Mr Doughty then obtained a licence for three months, his prospects of any renewal were described by Mr Paterson as follows. To have a realistic chance of a renewal, a jockey would have to ride at least ten winners in three months. If he rode something like 20 winners he would be almost certain of a renewal. But if he rode about three, four or five winners in that three months, he would be "on the borderline". Returning to the experiences of some Australian jockeys already mentioned, Mr Didham has had the longest time in Macau. But despite his obvious success, his licence was not renewed at one point in 2002 and he did not return to Macau until earlier this year. Mr Cahill, who has been particularly successful there, is now in his fourth three month period. Some of those mentioned who were in Macau for three months were unsuccessful in obtaining an extension.

[25] Mr Doughty's record of three wins in a six week period in 1999 did not make him a particularly strong applicant in 2000. However, Mr Paterson did not appear to think Mr Doughty was without prospects, and that was a record over only a six week period. As I understood Mr Paterson's evidence, Mr Doughty's application in 2000 would not have been judged only on his six weeks in Macau in 1999, as if this had been an application for a renewal. In addition, it seems to me that Mr Baldwin's support was likely to have been important. Mr Baldwin had been a very successful trainer in Brisbane before being invited to go to Macau as he did in March 2000. It is likely that his endorsement of Mr Doughty, coming from a trainer who had been actively sought by the Club, would have provided considerable assistance. That application would have been considered in August 2000 and the three months would have commenced in September which would have avoided some competition from Australian riders. It is also argued that Mr Doughty had the support of other persons in Macau, some of whom had associations with Australian owners for whom Mr Doughty had ridden, but those other contacts do not seem to me to be particularly significant in assessing the prospects of a successful application.

[26] Having regard to these matters but particularly Mr Baldwin's support, I infer that it was more likely than not that Mr Doughty would have obtained a three month licence on his 2000 application. Had he obtained that three month licence, his prospects of any renewal for the next three months or then beyond would have been entirely dependent upon his success in Macau. Clearly a number of circumstances could have affected his success, at least one of which was luck. As Mr Baldwin said, it would have been very important for Mr Doughty to have success as early as possible. Mr Baldwin said he had advised other visiting jockeys not to begin riding until offered relatively good rides, and that success breeds success. Another of those factors, of course, was Mr Doughty's ability. As to that, a number of witnesses said that Mr Doughty was well able to succeed in Macau. Mr Kent, who has been a trainer for the last three years in Macau said that Mr Doughty would have been one of the leading riders and he rated Mr Doughty as a better rider than

Mr Didham. Mr Cahill said that he had no doubt that Mr Doughty would have been successful in Macau. In so far as ability would have affected his success, I find Mr Doughty was well placed to succeed, at least in the circumstances as they were in 2000.

[27] However, his prospects of remaining in regular work in Macau for several years were somewhat less. One reason for that is the policy of the Macau Jockey Club, as Mr Paterson explained, of encouraging some turnover in the ranks of foreign jockeys. Another is the growing competition since 2000 for these licences.

[28] Ultimately, the defendant conceded that I might assess Mr Doughty's past loss on the basis of two three month terms in Macau, whilst heavily discounting that component. In my view that submission understates the prospects which Mr Doughty lost. Allowing for the various possibilities ranging from failing to obtain the licence at all to a stay as lengthy as that of Mr Didham, I conclude that it is reasonable to assess his loss on the basis of a total period in Macau of two years from 1 September 2000.

[29] His possible earnings in Macau could have been of the order of those of Mr Didham. To have successfully reapplied for a licence he would have had to have achieved a level of success which would have given him an income of at least approximately AUS $300,000 per year. From that, some expenses in earning that income would have to be considered, and in my view an appropriate allowance would be about AUS $30,000 per year. Mr Day's evidence suggests that expenses would have been of the order of 40 per cent of gross income but that seems unpersuasive when put against such a large income. A better guide would be his expenses in Queensland with some adjustments. This would then result in Macau earnings of the order of $5,400 per week, which would require discounting by 10 per cent for the substantial chance of a further injury. It is at that point that the impact of s 51 must be considered.

Section 51

[30] Section 51 of the *Personal Injuries Proceedings Act* 2002 was in these terms:

> "**Damages for loss of earnings or earning capacity**
>
> (1) In assessing damages for loss of earnings, including in a dependency claim, the court must disregard earnings above the limit fixed by subsection (2).
> (2) The limit is 3 times average weekly earnings per week.
> (3) In this section –
>
> **"dependency claim"** means a claim in relation to a fatal injury brought on behalf of a deceased's dependants or estate.
>
> **"loss of earnings"** means –

(a) past economic loss due to loss of earnings or the deprivation or impairment of earning capacity; and
(b) future economic loss due to loss of prospective earnings or the deprivation or impairment of prospective earning capacity."

[31] This was one of a series of provisions[1] within Chapter 2 Part 3 of the Act which were omitted by s 101 of the *Civil Liability Act* 2003, but whose continued application to cases as this one was at the same time preserved by the insertion of s 81 of the *Personal Injuries Proceedings Act*.[2]

[32] This case raises questions of the proper interpretation of s 51. To discuss those questions, it is appropriate to refer to some relevant principles for the assessment of damages for impairment of earning capacity.

[33] The measure of such damages is that sum of money which will put the injured person in the same position as that person would have been in had he or she not been injured.[3] Damages must be assessed as one sum which compensates the injured person "once and for all". Absent some statutory modification of the common law, the court cannot order compensation by the payment of periodic payments. The assessment of damages for an impairment of earning capacity involves the evaluation of the capital asset of the injured person, which is his or her capacity to earn money.[4] A person whose ability to work is affected by the injury is compensated for the loss of earning capacity, and not for the loss of earnings.[5] Although it is convenient to assess the plaintiff's loss to the date of trial distinctly from the loss to be suffered in the future, in each case the court is assessing the financial consequences of an impairment of earning capacity.[6]

[34] An assessment of damages for lost earning capacity involves a factual inquiry of two elements of the case. The court considers what capacity has been lost, and the economic consequences likely to flow from that loss.[7] That first element is an historical fact, which the plaintiff must prove on the balance of probabilities. The second element requires the court to proceed hypothetically. Upon the hypothesis that the plaintiff had not been injured, the court investigates what the plaintiff would have been able to earn. Proceeding upon that false hypothesis requires some speculation and, in this context, "damages founded on hypothetical evaluations defy precise calculation".[8] Most cases will present alternative possibilities as to what would have occurred had the plaintiff not been injured. There could be several possibilities as to the type of work which the plaintiff could and would have pursued, the plaintiff's prospects of promotion, or the period of time over which the plaintiff could and would have worked. It is a legitimate process of reasoning for a

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1 Section 51 to s 55
2 Section 54 of the *Civil Liability Act* 2003 is the successor to s 51
3 *Husher v Husher* (1999) 197 CLR 138 at 142-143
4 *Cullen v Trappell* (1980) 146 CLR 1 at 7
5 *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 4, 16; *Husher v Husher* at 143
6 *Husher v Husher* at 143
7 *Graham v Baker* (1961) 106 CLR 340 at 347; *Husher v Husher* at 143
8 *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 at 640; *Wynn v New South Wales Insurance Ministerial Corporation* (1995) 184 CLR 485 at 499

court to assess damages on the basis of what was the most likely possibility and to adjust for contingencies, both adverse and favourable.[9]

[35] An evaluation of the plaintiff's loss will often, but not always, involve the use of an assumed sum of recurrent earnings which the plaintiff would have derived. That recurrent sum will be expressed often as a weekly sum. But that need not be so in every case. Not every assessment of past loss will be simply a weekly sum multiplied by a certain number of weeks; nor in every assessment of future loss will the assessment be simply the present value of a certain number of weekly payments. Especially in relation to future loss, it will also be the result of the court's judgment as to the appropriate effect to be given to relevant contingencies. In some cases, it can be appropriate to assess the future loss not simply by calculating the present value of certain earnings, adjusted for contingencies. For example, it can be appropriate in a particular case to include within an assessment a lump sum component representing an allowance for a particular favourable contingency.[10] In some cases, the assessment is made having regard to the possibility of different earnings at different times over an assumed working life. For many reasons then, not every assessment for impairment of earning capacity corresponds simply and precisely with the loss of a certain weekly sum.

[36] Section 51 is engaged where a court is assessing damages for "loss of earnings". That term is defined by s 51(3) for past loss by reference to a "loss of earnings or the deprivation or impairment of earning capacity". In relation to future loss, it is defined as "loss of earnings or the deprivation of prospective earning capacity". Read alone, s 51 might give the impression that courts assess damages in some cases for a deprivation or impairment of earning capacity, and in other cases for loss of earnings, whereas the common law compensates the plaintiff for loss of earning capacity, not loss of earnings. Section 51 should not be understood as creating a new and alternative right of action which is for loss of earnings.[11] Apart from the cases involving a dependency claim, s 51 is engaged where the court is assessing damages at common law for the loss or impairment of earning capacity.

[37] In assessing such damages, the court is required by the section to disregard certain "earnings" which are those "above the limit fixed by sub section (2)". As discussed, when assessing damages for impaired earning capacity, the earnings to which the court has regard are not actual earnings, but are hypothetical earnings. The section appears to affect the extent to which the court may consider otherwise relevant possibilities on the hypothesis that the plaintiff had not been injured. In particular, it appears to require the court to exclude any possibility which involves the making of earnings above the limit.

[38] The operation of the section in this way is exemplified by a decision of the New South Wales Court of Appeal which applied a similar provision, s 125 of the *Motor*

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9 *Norris v Blake (No 2)* (1997) 41 NSWLR 49 at 75

10 Such as in *Norris v Blake (No 2)*, where the New South Wales Court of Appeal added an additional $2,500,000 for vicissitudes (which were mostly favourable) to a sum calculated as a present value of certain recurring annual losses.

11 See the objects of the Act as expressed in s 4

Accidents Compensation Act 1999 (NSW). The case is *Kaplantzi v Pascoe* [2003] NSWCA 386, which was a dependency claim. Section 125 provides as follows:

> "**125 Damages for past or future economic loss—maximum for loss of earnings etc**
>
> (1) This section applies to an award of damages:
>
> (a) for past or future economic loss due to loss of earnings or the deprivation or impairment of earning capacity, or
> (b) for the loss of expectation of financial support.
>
> (2) In the case of any such award, the court is to disregard the amount (if any) by which the injured or deceased person's net weekly earnings would (but for the injury or death) have exceeded $2,500."

Section 146 of that Act provides for the indexation of that limit.

[39] In *Kaplantzi* the deceased had been killed in a motor accident in July 2000, caused by the negligence of the appellants. His widow brought proceedings seeking damages for herself and her children. The deceased and his wife had conducted a number of businesses through two companies. There was expert evidence to the effect that the deceased's earnings, expressed as a net weekly amount, were $4,310. The statutory limit of $2,500 had been indexed to $2,834 by the time of the judgment of the trial judge in November 2002. He calculated past economic loss on the basis that the deceased's earnings would have been (the maximum of) $2,834 per week, and that 74 per cent thereof would have been applied for the support of the deceased's family, and he deducted 2.5 per cent for the possibility of the respondent's remarriage. The future economic loss was calculated on the basis that the deceased's earnings would have been (again) $2,834 per week, that 74 per cent of this would have been applied for the support of the family, that the deceased would have worked until he turned 65 and that there should be a deduction of 15 per cent for vicissitudes. He then again deducted 2.5 per cent for the possibility of remarriage. The trial judge thereby reasoned from a premise that the deceased's earnings could not have exceeded the amount prescribed by s 125(2) (as varied pursuant to s 146). Because the assessment was affected by some discounting for vicissitudes relevant to whether the deceased would have earned the equivalent of $2,834 per week, the plaintiff's past loss was less than (74 per cent of) the statutory limit of $2,834 per week, and the future loss was less than (74 per cent of) the present value of $2,834 per week. The trial judge also held that the family had suffered a further loss, through the loss of the prospect of an increase in value of the assets of the family businesses. For that loss, he awarded a further $500,000.

[40] There were two relevant grounds of the defendant's appeal. The first was that the trial judge should not have applied the limit of $2,834 to all of the past losses, but should have applied the lesser maximum amounts which had been prescribed at various times from the date of death to the date of trial. That argument was unsuccessful. The second ground, which was upheld, was that the awarding of that distinct component of $500,000 for a loss of an increase in the capital value of the

businesses was contrary to s 125. That was upheld because such a capital gain should be regarded as part of the deceased's "net weekly earnings" under s 125(2). Because other components of the award had been assessed on the premise that the deceased's net weekly earnings would have been to the prescribed limit of $2,834, s 125 required the court to disregard the amount of the likely capital gain.

[41] According to the submissions of each party in the present case, the effect of s 51 is different from that which was given to an apparently identical section in *Kaplantzi*. The submissions here seem to agree upon an effect of s 51 which is more favourable to a plaintiff. The effect of the submissions can be described by reference to the facts in *Kaplantzi*, for which it will be assumed that the trial judge would have accepted the expert evidence of a loss of earnings of $4,310 per week. Consistently with these submissions, the sum of $4,310 per week would be reduced for the contingencies for which the court in *Kaplantzi* reduced the sum of $2,834. The result would be that even allowing for those reductions (2.5 per cent for the past and 17.5 per cent for the future) the weekly loss would still well exceed the limit of $2,834. Past loss would then be assessed at $2,834 multiplied by the number of weeks to the judgment, and future loss at the present value of $2,834 per week (until aged 65). Under this approach, the court would "disregard" earnings above the limit not by entirely disregarding them, but by disregarding them at a particular step in the process of its reasoning.

[42] It is further submitted that s 51 prescribes a maximum amount which can be awarded for impairment of earning capacity. This involves the proposition that any assessment can be seen to be the equivalent of the loss of a certain weekly sum over a certain period. It is submitted that s 51 effectively provides that the amount of an assessment, converted to a weekly sum, must not exceed the prescribed limit.

[43] On its face, s 51 does not affect the assessment of damages by imposing a limit on the award itself. It is not expressed in terms of what amount may be awarded; rather, it is in terms of what can be regarded or considered, in reasoning to a conclusion. And it requires the court to disregard earnings above the limit, not simply at a certain point of its reasoning, but throughout the process of its assessing the damages.

[44] According to the Explanatory Memorandum to the *Personal Injuries Proceedings Bill* 2002, cl 51 is a provision which "requires the assessment of damages for loss of earnings or loss of earning capacity to be limited to a weekly amount not exceeding three times average weekly earnings (as defined)". This could be thought to refer to a limitation on the amount which may be awarded or instead to a limit on the amount of earnings to which regard may be had in the process of assessing the amount to be awarded. In the Minister's Second Reading Speech[12] it was said that the Bill "provides that the maximum rate at which a court may assess loss of future income or earning capacity is three times average weekly earnings" and that "the bill imposes some significant restrictions on amounts recoverable … it provides that the maximum rate at which the court may assess loss of future income or earning

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capacity is three times average weekly earnings". Again, that statement is not inconsistent with an interpretation of s 51 corresponding with *Kaplantzi*.

[45] Which of these respective interpretations is accepted could have a large impact in some cases. They will be cases where there is a real possibility that the plaintiff would have derived an income well in excess of the s 51 limit, but where it is appropriate to heavily discount for contingencies. It is submitted here that if the possibility of earnings above the limit cannot be considered at any stage, then a plaintiff could be left with an award which is unfairly low. Clearly, there will be cases where that operation of s 51 will result in a large reduction of the common law entitlement. That in itself does not indicate that this interpretation of s 51, illustrated by *Kaplantzi*, must be wrong. Once the legislature has seen fit to modify the common law, by changing the assessment so that it does not put the plaintiff in the position he or she would be in if uninjured, then it is likely that the impact of s 51 will be greater in some cases than in others. But that is also the consequence of s 51 upon the alternative interpretation which is argued here.

[46] In my view, there is no presently material difference between the terms of s 51 of this Act and s 125 of the *Motor Accidents Compensation Act* 1999 (NSW),[13] and s 51 should operate in a way exemplified by *Kaplantzi*. The section is in terms which affect what a court may consider. It is not in terms of what a court may award. To read s 51 as limiting the amount which, within an award of damages, can be allowed for an impairment of earning capacity, would require the court to equate the sum allowed with a recurrent weekly payment. In some cases, the sum allowed will apparently correspond with the value of a certain sum paid weekly; in other cases it will not. To relate the sum to a weekly payment would require a premise of a certain number of weeks for which the plaintiff would have earned money, but for the impairment of his or her earning capacity. In some cases, particularly in relation to past loss, that premise will be apparent. In other cases, particularly in relation to future loss, it will not be. In not every case will it be necessary or considered appropriate to assess damages upon the premise of a certain period of lost or diminished earnings. Ultimately, this is because the assessment is of lost earning capacity, not lost earnings. The submissions here would treat the former as capable of conversion to the latter in every case, so as to be capable of expression as a weekly loss of earnings which can be compared with the limit defined by s 51(2). In my opinion that interpretation is inconsistent with the words of s 51. The evident purpose of s 51 is to reduce in some cases what would otherwise be the award of damages, but to do so by affecting what may be considered and not by the expression of a maximum amount in which damages may be assessed.

[47] The parties suggested that there is a particular problem with that conclusion, where the injured person's income would have been irregular, such that in some but not all weeks, he or she would have earned more than three times average weekly earnings. According to each of the submissions, it could not have been the intention that the prospect of exceeding that threshold within some weeks should be ignored, whilst the prospect of there being relatively little income in other weeks should be

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[13] There are analogues in *Civil Liability Act* 2002 (NSW) s 12; *Civil Liability Act* 2002 (WA) s 11; *Civil Law (Wrongs) Act* 2002 (ACT) s 98; *Personal Injuries (Liability and Damages) Act* 2003 (NT) s 20; *Motor Accidents (Liabilities and Compensation) Act* 1973 (TAS) s 22

considered. It is said that an interpretation of s 51 which requires the court to disregard, in all respects, earnings above the limit would have unfair consequences in such cases, in that it would unfairly discriminate between a person who received an income paid weekly in equal amounts, and someone who received an equivalent yearly income but at irregular intervals.

[48] Section 51 applies to all cases where damages are to be assessed for impaired earning capacity or within a dependency claim. It does not distinguish between full time and part time employees, and nor does it distinguish between the employed and the self employed. Clearly it could not have been the legislative intention to discriminate between plaintiffs, who had the same earning capacity and who suffer a loss of the same extent from its impairment, according to whether their earnings would have been by equal weekly payments or less regular receipts or accruals.

[49] However, that would not be the result of the interpretation of s 51 which I conclude to be correct. The section requires the court to disregard earnings above the limit. That limit is expressed as a recurrent weekly sum. But the prescribed limit is three times average weekly earnings *per week* rather than three times average weekly earnings *in any week*. What the section precludes is the assessing of damages by reference to assumed earnings which exceed an amount equivalent to a recurrent receipt of three times average weekly earnings.

[50] Again, what is involved is an assessment of impaired capacity. To assess the earning capacity of, for example, a salesman earning large commissions but at irregular intervals, requires a consideration of what would have been earned over a period which is long enough to provide a reliable indication of that capacity. In such a case, whilst the plaintiff's earnings might have varied greatly from week to week, the earning capacity would not. Often then, the assumed earnings used in assessing damages can be quantified only by reference to an extensive period. Section 51 is then applied by comparing those earnings, or their equivalent as a weekly sum over that period, with the prescribed limit. In some cases earning capacity is able to be valued from the loss of a certain assumed weekly amount through to the plaintiff's likely retirement. In others, of which the present case is an example, the plaintiff's likely earnings would have been higher in a certain period than in other periods of his working life. The fair assessment of Mr Doughty's damages therefore requires calculations which adopt different amounts of earnings for those different periods, being respectively his likely time in Macau and his subsequent working life. If, apart from s 51, damages would be assessed by reference to a certain period for which earnings would have exceeded an amount, the weekly equivalent of which exceeds three times average weekly earnings, then s 51 requires the court to instead work from the premise that the earnings for that period would have been no more than the prescribed limit.

[51] In the present case, therefore, it must be assumed that Mr Doughty, whilst riding in Macau, would have earned no more than the equivalent of three times average weekly earnings, which the parties agree amounts to $2,659.95 gross per week. To assess that part of his lost earning capacity which was his capacity to make money riding in Macau, the likely earnings over the assumed period in Macau must be assessed. Had Mr Doughty ridden at Macau, it is likely that his earnings in some

weeks would have been less than the s 51 limit whilst in most weeks they would have exceeded it. But apart from s 51, his earning capacity in Macau would not be valued by attempting some estimate of how his earnings might have varied week by week. Instead they would be quantified by reference to a period for which the earnings of other jockeys provide a reliable basis for comparison. That is the quantification at paragraph [29] above. Clearly, those earnings exceed the s 51 limit, and it must be assumed that he would have earned no more than the limit. Mr Doughty's likely earnings after Macau were markedly less, which is why his overall loss must be quantified by reference to this as a distinct period, for which the amount of his likely earnings would not have approached the s 51 limit.

Past Economic Loss

[52] His net income from Macau was dependent upon whether he was liable to pay Australian tax on his earnings. There is evidence to the effect that other Australian jockeys have not paid Australian tax after being in Macau for six months, and for present purposes the parties appear to agree that Mr Doughty's residency for tax purposes would have been treated in the same way. On that basis, his earnings for the six months from 1 September 2000 would have been subject to Australian tax (with a credit for Macau tax) and thereafter subject only to Macau tax. For that first six months then, I must disregard any earnings above the equivalent of $2,659.95 gross per week or $69,158.50 for the six months. He was not assured of that net income whilst riding in Macau, but the prospects of making at least that income (after expenses but before tax) were so relatively high that it is not appropriate to discount separately for the prospect that he would have been riding but making less than this amount. As I have said, it is appropriate to discount by 10 per cent for various contingencies, the most important of which is that of an injury. Allowing for the Australian tax on that income of $22,698, but with a credit for a Macau tax of $7,607, his earnings after tax would have been $54,067.50, which discounted by 10 per cent results in $48,660.75.

[53] In the 18 months from 1 March 2001 there should be allowed the prescribed limit ($138,317 multiplied by 1.5), which after allowing for Macau tax, results in $184,653. After a discount of 10 per cent this results in $166,185.

[54] The further component of past loss relates to a period from 1 September 2002 until the date of this judgment, for which Mr Doughty will be assumed to have returned to Australia. His average net earnings for the four complete financial years prior to this accident were $21,043. It is appropriate to allow him about another $5,000 per year, having regard to the nature of some of the expenses used to calculate his taxable income and also to the prospect that he might have been a little more successful if his wife was not training. Allowing a net loss of $26,000 per year over 25 months gives $54,166, which reduced by 10 per cent for contingencies results in $48,750. From these amounts of $48,660.75, $166,185 and $48,750 there should be deducted the sum of $5,081, his net earnings since the accident. The result is an amount for past economic loss of $258,514.75.

[55] Interest on that sum must be calculated according to s 55 of the *Personal Injuries Proceedings Act*. The parties agree that this will involve an interest rate of 2.9 per cent per annum against the amount which is the past loss less the workers' compensation payments of $58,474.19. This results in interest on past economic loss of $24,655.

Future Loss

[56] As for his future loss, it is possible that he would still be riding today but for this accident. But having regard to his earnings prior to the accident, I accept the approach submitted by the defendant, which is to calculate future loss by reference to Queensland Average Weekly Earnings of $880 gross per week, which is $670 net per week. His earnings prior to the accident were less than that, but as the defendant rightly concedes, it is likely that he would have moved to another occupation in the racing industry. I also accept the defendant's approach of assuming that loss of $670 net per week, less an amount for his residual earning capacity of $200 net per week, until an assumed retiring age of 60. Mr Doughty's written evidence suggests a residual earning capacity of $186.50 net per week, but in my view it is appropriate to allow $200, resulting in a net loss of $470 per week for 13 years. On a discount rate of 5 per cent, that equals $235,490 which I would reduce by 15 per cent for vicissitudes. Accordingly I allow $200,166.50 for future economic loss.

Assessment

[57] The damages and interest are therefore as follows:

1.	General damages for pain and suffering	$ 90,000.00
2.	Interest on a third thereof at 2 per cent for 4.25 years	$ 2,550.00
3.	Special damages	$ 25,024.01
4.	Interest on actual out of pocket expenses	$ 156.00
5.	Past *Griffith v Kerkemeyer* damages	$ 14,160.00
6.	Interest thereon	$ 4,440.00
7.	*Wilson v McCleay* damages	$ 1,050.00
8.	Interest thereon	$ 357.00
9.	Past economic loss	$258,514.75
10.	Interest thereon	$ 24,655.00
11.	Future loss	$200,166.50
12.	Future medical and Pharmaceutical expenses	$ 4,600.00
13.	Future *Griffith v Kerkemeyer* damages	$ 5,000.00
	Total	**$630,673.26**

[58] There will be judgment for the plaintiff against the defendant for $630,673.26. I shall hear the parties as to costs.