SUPREME COURT OF QUEENSLAND

CITATION:	*Adrian & Anor v Ronim P/L* [2007] QCA 397
PARTIES:	**ALAN ADRIAN** (first plaintiff/first appellant) **AERON PTY LTD** ACN 079 948 431 (second plaintiff/second appellant) **v** **RONIM PTY LTD** ACN 001 387 051 (defendant/respondent)
FILE NO/S:	Appeal No 6185 of 2007 Appeal No 3578 of 2007 SC No 6008 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 November 2007
DELIVERED AT:	Brisbane
HEARING DATE:	1 November 2007
JUDGES:	Williams, Keane and Holmes JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeals dismissed** **2. Plaintiffs to pay the defendant's costs of each appeal assessed on the standard basis**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – where first plaintiff suffered personal injury in building owned by defendant – where first plaintiff employed by second plaintiff – where damages awarded to first plaintiff – where second plaintiff's claim dismissed – where learned trial judge found first plaintiff suffered no past economic loss or impairment of earning capacity – whether finding reconcilable with inclusion in first plaintiff's damages of *Fox v Wood* component – whether finding reconcilable with evidence of reduced working capacity PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – POWERS OF COURT – where defendant offered to settle both plaintiffs' claims for a single sum –

whether defendant should have been precluded from relying on offer by s 40 of the *Personal Injuries Proceedings Act 2002* (Qld) or r 361 of the *Uniform Civil Procedure Rules 1999* (Qld) – whether offer embarrassing in form

Personal Injuries Proceedings Act 2002 (Qld), s 40
Uniform Civil Procedure Rules 1999 (Qld), r 361, r 689

Abalos v Australian Postal Commission (1990) 171 CLR 167, applied
Fox v Wood (1981) 148 CLR 438, considered

COUNSEL: M Grant-Taylor SC for the appellants
R A I Myers RFD for the respondent

SOLICITORS: Schultz Toomey O'Brien Lawyers for the appellants
Carter Newell for the respondent

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Keane JA; there is nothing I wish to add to what is said therein. I agree with the orders proposed.

[2] **KEANE JA:** On 29 July 2002, the first plaintiff suffered personal injuries when he slipped and fell while alighting from a lift in a building owned by the defendant. On 25 July 2005 he commenced an action for damages against the defendant. The second plaintiff in the action was a company which carried on business as a legal costs assessor in which it employed the first plaintiff. The second plaintiff claimed damages as a result of the injury to the first plaintiff *per quod servitium amisit*. The hearing of the plaintiffs' claims was split, with judgment being delivered in favour of the first plaintiff for $70,594.43 on 30 March 2007. On 22 June 2007, after hearing an application by the defendant for summary judgment based on the findings against the first plaintiff, the learned trial judge dismissed the second plaintiff's claim against the defendant.

[3] Each of the plaintiffs appeal against these decisions on the basis that the learned trial judge erred in his assessment of the damages recoverable by the plaintiffs. The principal issue in both appeals is concerned with the learned trial judge's conclusion that the first plaintiff had suffered no past economic loss or impairment of earning capacity for the future. The plaintiffs also seek to challenge the orders for costs made in respect of the proceedings at first instance. In this regard, it should be noted that the learned trial judge refused to grant the plaintiffs leave to appeal against the costs orders pursuant to s 253 of the *Supreme Court Act 1995* (Qld).

[4] I shall summarise the learned trial judge's findings in relation to the first plaintiff's injuries and his reasons for dismissing the second plaintiff's claim before discussing the arguments agitated by the plaintiffs on the appeal.

The first plaintiff's injuries

[5] The learned trial judge found that the first plaintiff suffered an aggravation of pre-existing degenerative change to the lumbar/lumbo-sacral spine, and a tear of the triangular fibro-cartilage ("TFC") complex of the left wrist.[1]

---

1 *Adrian & Anor v Ronim Pty Ltd* [2007] QSC 073 at [49] and [63].

[6] The first plaintiff gave evidence that, after the accident, he was absent from work because of his injuries for about two weeks. He said that, when he returned to work, his left wrist and lower back were still causing problems which limited his capacity to carry out work as a legal costs assessor. The first plaintiff is right-handed, but said that it was necessary for him to use his left hand constantly to turn pages in the course of assessing legal files.

[7] The first plaintiff said that his left wrist remained symptomatic, and, on 3 December 2002, he underwent surgery by way of an arthroscopy to his left wrist. Following his return to work, he experienced pain from his swollen left wrist. Eventually, this pain receded to the level he experienced prior to the surgery.

[8] The first plaintiff suffered from a pre-existing bilateral carpal tunnel syndrome. During the surgery of December 2002, the tendon in the left wrist was depressed so as to give the first plaintiff some relief from his carpal tunnel syndrome. This procedure was successful, and, in January 2003, the first plaintiff underwent a further operation to decompress the tendon in the right wrist. The first plaintiff's evidence was that, following this latter procedure, he experienced numbness in his right hand until about two years prior to trial, when it became asymptomatic and did not interfere with his ability to work. The learned trial judge held that any difficulty in the first plaintiff's right wrist was irrelevant to his claim because it was unrelated to his fall in July 2002.[2]

[9] The first plaintiff's evidence was that, by the time of trial, he worked from 7.00 am to 6.00 pm five days per week and five to eight hours on the weekend, ie between 60 and 63 hours per week. He said that, before the accident of July 2002, he was working an additional 15 to 20 hours per week. It may be noted here that this assertion was contrary to the first plaintiff's earlier assertion in an application for workers' compensation that he worked a 60 hour week. The first plaintiff also said that he was losing 45 to 60 productive minutes of work each day by reason of his need to walk around the office to "loosen [himself] up" to ease the pain in his back and his left wrist.

[10] The first plaintiff's case was supported by the evidence of a forensic accountant, Mr Thompson, who prepared a report dated 3 November 2005. That report recorded the first plaintiff's instructions that, after his return to work in September 2002, he had been unable to work to his pre-accident capacity so that the second plaintiff (of which his wife was the sole director and shareholder) had been "forced to pay other costs assessors to undertake work that would have, but for the accident, been undertaken by the [first plaintiff]". The first plaintiff, in his evidence, confirmed the accuracy of his instructions to Mr Thompson. It may be noted here that Mr Thompson's report did not identify any diminution in the salary paid to the first plaintiff and his wife by the second plaintiff after the first plaintiff's injury. The first plaintiff himself did not give evidence that he lost wages as a result of time off work because of his injury, and there was no documentary evidence that he had suffered any such loss.

[11] The first plaintiff was 42 years old when he was injured. He was nearly 47 years old at the date of trial. He was described by the learned trial judge as "an experienced and knowledgeable costs assessor". He has been a costs assessor since

---

2 [2007] QSC 073 at [60].

1980. His evidence was that it had been his intention, had it not been for the accident, to work as long as he could which may have been to around 70 years of age.

[12] The learned trial judge did not accept the evidence of the first plaintiff as to the impact of his injuries upon his earning capacity. Indeed, his Honour found the first plaintiff to be distinctly unreliable in this regard. The plaintiffs' cause was not aided in this regard by the circumstance that, on the morning of the fourth day of trial, it emerged that the plaintiffs had not made proper disclosure of documents relevant to the assessment of the second plaintiff's claim for damages. It was the disadvantage to the defendant arising from the plaintiffs' default in relation to disclosure that led to the adjournment of the determination of the second plaintiff's claim.

[13] The first plaintiff's claim to have been adversely affected in terms of his capacity to earn income was also not aided by the expert medical evidence adduced at trial. The learned trial judge discussed the evidence of Dr Scott-Young, Dr Parkington and Dr Pentis in the following passage:

> "Dr Scott-Young reported, on 17 December 2003, that he had treated the first plaintiff between 11 December 2002 and 26 June 2003. His report continued:
>
> > 'Mr Adrian presented at my practice on 11 December 2002 with chronic persistent low back pain. He did have some left leg pain that ran into the buttock, down the posterior thigh, into the calf and … the sole of the foot. … Most of his lower back pain was … on the left side. … He had limited success in sitting, standing was a little difficult. Recumbency did give him some relief, but his sleep could be affected. … Mr Adrian stood with symmetrical development of his quads and calves. His range of motion was reasonable in all directions. His straight leg raise showed mild hamstring tightness and reproduced back pain. … He had tenderness over the lower lumbar sacral spine. His tone was normal, his power was normal, and his reflexes and sensation appeared to be intact. I reviewed the MRI scan … . It showed loss of signal from the L5-S1 disc. There was also an annular tear to the left of the midline … adjacent to the left S1 nerve root, which correlates with his symptoms.
> >
> > I advised Mr Adrian … that he probably had some minor degenerative disease present at the time of his fall and, as a result of the force has sustained in the fall and … has sustained … an axial compression injury that has resulted in the annular tear. …
> >
> > I advised Mr Adrian that the bulk of the treatment was conservative and revolved around avoidance activities, regular stretching, exercising, anti-inflammatories, analgesics and physiotherapy … . I recommended that Mr Adrian return to the workplace [as] soon as possible … . On 26 April 2003 … he reported that he was not much improved … . I advised … that his symptoms were

> no longer related to the annular tear but were related to his underlying degenerative condition.'

The first plaintiff was examined by Dr Parkington, orthopaedic surgeon, at the request of WorkCover Queensland on 6 August 2003. Dr Parkington reported:

> 'Mr Adrian was hurt … when he fell backwards. He appears to have jarred his back and hurt his left wrist.
>
> There is evidence of pre-existing degenerative disease in the lumbar spine and it is possible that he may have aggravated this. That aggravation has now ceased. There was no disc prolapse and no nerve root entrapment in the lumbar spine. … His lumbar spine … has now fully recovered and any symptoms he may have are due to pre-existing age-related degenerative disease at the lumbo-sacral level.
>
> Although Mr Adrian is suffering from degenerative disease in the cervical spine, which is quite widespread, there is no evidence at all that this was injured or aggravated in any way in this accident. He had no complaints in relation to his cervical spine until after he had undergone surgery to the right hand … six or seven months after his accident. … I accept that Mr Adrian may have suffered a fibro cartilaginous injury to the left wrist. He has undergone entirely appropriate treatment for that. He has regained full movement in the left wrist with only some minor discomfort on certain movements.'

Dr Parkington concluded that the first plaintiff was fit for work as a legal costs assessor but that there were 'significant psycho-social factors' affecting the first plaintiff's recovery.

Dr Scott-Young noted in his report of 17 December 2003:

> 'In relation to Mr Adrian's consistency of presentation, I am of the opinion that there are significant psycho-social factors at play here. … The symptoms in relation to his cervical spine are primarily constitutional and … he is trying to attribute these symptoms to the fall. I am of the opinion that he has convinced himself that this is the case. I have no doubt that some of the symptoms he reports are present, but they are significantly out of proportion to the clinical signs. There are considerable inconsistencies in his proposed disability versus his functional capability.'

The same point was made by Dr Parkington in evidence (T280.50-281.2):

> 'His range of movement of the cervical spine was better during the conversation than when he's being formally observed … when I put him on the scales to weigh him he looked down … to the scales, flexing his neck some 45 degrees yet there was only about 20 degrees of flexion when he was being formally examined. So there was conflicting physical signs. … I put it down to voluntary restriction of movement.'

> The last report which it is necessary to mention is that of Dr Pentis of 18 January 2007. Mr Adrian complained to him of constant low back pain which radiated into his buttock and down to his left knee and foot. He complained also of neck pain which caused difficulty with activities involving lifting, bending and twisting. He repeated his complaints of discomfort while driving for any distance and some difficulty in sleeping. He complained as well of difficulties in his left wrist which is painful all the time and weak. He said that he could cope with his work but had been unable to return to any of his sporting activities. Dr Pentis expressed the opinion that the first plaintiff had suffered a soft tissue injury to his spine, 'an aggravation of degenerative problems in the cervical and lumbar regions' which were causing 'some symptoms' which were best treated conservatively."[3]

[14] Reference may also be made to the evidence of Dr Purssey who, in his report of 11 February 2005 to the plaintiffs' then solicitors, accepted that the first plaintiff's injuries were stable with "no more treatment indicated", although Dr Purssey accepted that the first plaintiff was still experiencing back pain which was apparently related to his fall.

[15] Reference should also be made here to the report of Dr Pentis to the plaintiffs' solicitors of 18 January 2007. Dr Pentis described the "aggravation of degenerative problems in the cervical and lumbar regions" as "causing some symptoms". Dr Pentis went on to say: "If his condition deteriorates and he shows more specific signs of nerve root entrapment, pressure on the nerve root, then operative treatment would be the alternative", to the conservative treatment which had thus far been applied. Dr Pentis had observed that "[c]linically at present, there are no signs of major nerve root entrapment …".

[16] The learned trial judge found that the first plaintiff's claim for lost earnings was "contrived". His Honour said:

> "It is apparent that the plaintiff seeks to attribute a greater disability to his mishap of 29 July 2002 than the evidence will support. Mr Adrian displayed an eagerness to convert his sufferings into moneysworth and was not, therefore, a careful historian of his symptoms and his disability. His claim for lost earnings and his employer's (his wife's company's) claim for loss of services need not be addressed in these reasons but both were, in my opinion, contrived. The first plaintiff's claim was essentially for the loss of bonuses which the second plaintiff was accustomed to pay him before his injury but did not pay afterwards because of his lack of capacity to fulfil his employment. What happened in fact was that Mrs Adrian, after discussions with Mr Adrian, did not pay the former amounts by way of bonus to her husband but allocated the amount saved to herself, by way of dividends or director's fees. The second plaintiff's income which derived from the efforts of the first plaintiff and other employed costs assessors did not decrease despite Mr Adrian's injury."[4]

---

3 [2007] QSC 073 at [55] – [59].

4 [2007] QSC 073 at [48].

[17] I pause here to note that the argument advanced in this Court on behalf of the plaintiffs does not seek to challenge the findings expressed in the passage cited in the preceding paragraph.

[18] The learned trial judge concluded:

> "I am satisfied that the plaintiff has exaggerated the extent to which he is inconvenienced by the injuries sustained in the fall. It was not a serious accident and I accept the medical evidence that the first plaintiff suffered soft tissue injury to his lower back which stirred up some previous degenerative chain which had been largely asymptomatic. The extent to which the plaintiff continues of ongoing pain and disability is exaggerated. I attribute the exaggeration to a conscious desire to maximise his return from the litigation and as well Mr Adrian's own personality which makes him overly concerned about his health and well-being and sensitive to every ailment. He admitted that he had 'health issues' before his fall. It is apparent from the medications he had been prescribed that he was tense and nervous and preoccupied with his bodily conditions. There is, I think, no doubt that the first plaintiff worked extremely hard. He put in long hours, felt tense and had trouble sleeping. He was prescribed medication to assist him to relax and to sleep. These circumstances combined to cause the first plaintiff to attribute more symptomology to the injuries sustained in the fall than the evidence justifies and led him to seek greater recompense than the case warrants.
>
> I am not satisfied that the first plaintiff has suffered any diminution to his earning capacity. On his own evidence he returned to work after an absence of about two weeks and has performed as before though with discomfort and pain. On occasions he needed assistance to lift boxes of files, and to turn pages. He feels a need to stand and move around after he has been sitting for a prolonged period. None of this affects his capacity to work very long hours as a costs assessor. It is noteworthy that he mentioned to the doctors that he copes with work."[5]

[19] His Honour then explained the basis on which he proceeded to assess the damages payable to the first plaintiff:

> "The first plaintiff is to be compensated for some continuing lower back pain which does cause him discomfort and has probably led to his giving up his pastimes. I am not satisfied that he engaged in them as often as he claimed: the hours he worked and the demands of a young family would have left him with little time for his own amusement. It is probably right that he now needs some assistance with the garden but I do not accept that he needs assistance with ordinary household chores or that he has ever needed such assistance except initially after his fall and following his surgery to the left wrist."[6]

---

5 [2007] QSC 073 at [63] – [64].

6 [2007] QSC 073 at [65].

[20] I pause here to note that one of the arguments advanced on appeal focuses upon this paragraph of his Honour's reasons as an indication that the learned trial judge has accepted Dr Pentis' evidence in preference to the evidence of Drs Scott-Young and Parkington.

[21] The learned trial judge allowed $35,000 for pain, suffering and loss of amenity. He also included in the award of damages to the first plaintiff the sum of $7,109 as an agreed amount for "the so-called *Fox v Wood* component".[7]

[22] The learned trial judge adverted to this "*Fox v Wood* component" again in his reasons for granting the defendant's application for summary judgment dismissing the second plaintiff's claim. His Honour said:

> "The second plaintiff advances two arguments to resist the application. The first is that in my assessment of damages I allowed the first plaintiff the sum of $7,109 by way of the '*Fox v Wood* component.' The second plaintiff submits:
>
> > 'The principle explained in *Fox v Wood* is that an injured plaintiff may recover ... the amount of income tax deducted from [his] receipts of periodic compensation ... intended to replace lost income … . …. By rewarding the appellant in damages the total amount - $7,109 - of the income tax deducted from the periodic compensation, it can only be inferred that his Honour was ... satisfied that the necessary causal link had been established between ... the first plaintiff's injuries and ... the totality of the period of [his] absence from work .... Logic and common sense ... compel the conclusion that ... the [second plaintiff] has established an entitlement to be compensated for its loss in respect of the three periods (for which the first plaintiff was off work and received compensation).'
>
> This is a point which the first plaintiff takes in his appeal. It is that the award of the component is inconsistent with the finding of undiminished working capacity. The point being committed to the Court of Appeal I should say little about it. It is perhaps enough to remark, as the submissions themselves do, that the amount was conceded during a debate about special damages which the first plaintiff had difficulty establishing and the point which now excites the first plaintiff received no attention or analysis."[8]

[23] It is apparent from the appeal record that the learned trial judge was told that the *Fox v Wood* component was part of a sum agreed between the parties as recoverable by the first plaintiff in the event that his claim was successful.

The second plaintiff's claim

[24] The learned trial judge's reasons for dismissing the second plaintiff's claim are stated in the following passage:

> "The finding that the first plaintiff did not suffer any loss of earning capacity carries with it the implication that the second plaintiff was not deprived of any of the first plaintiff's services, at least not by any

---

7 [2007] QSC 073 at [66].

8 *Adrian & Anor v Romin Pty Ltd* [2007] QSC 150 at [15] – [16].

> negligence of the defendants. There was some evidence that the first plaintiff and his wife had reorganised cash flows to give the impression that the second plaintiff had been put to additional expense by reason of the first plaintiff's inability to perform his work to the same extent as he did before his fall. It was that part of the debate which had to be adjourned because of the late disclosure of relevant material to the forensic accountants. No finding can be made about whether the second plaintiff did or did not incur additional expenditure after the first plaintiff's injury. The finding I made establishes that the second plaintiff cannot prove that it was the first plaintiff's fall and injury which led to the changed pattern of expenditure, or loss of income.
>
> The finding of fact is binding on the second plaintiff. It was made in the second plaintiff's action as well as the first plaintiff's. The two were heard together and all the evidence was led in support of both claims. The only part of the second plaintiff's claim which was adjourned was the assessment of what, if any, loss the second plaintiff had sustained. That was the distinct question which was ordered to be tried separately from all the other issues in the actions. The other elements of the second plaintiff's cause of action were heard and determined at the trial. Those elements were: (1) Whether the second plaintiff's servant had been injured by reason of the defendant's negligence and (2) Whether the second plaintiff had thereby been deprived of his services. No specific finding was made as to the ultimate fact described in (2) but it follows ineluctably from the finding of fact made that the first plaintiff suffered no diminution in earning capacity. There is, in the second plaintiff's claim, a finding of fact which gives rise to an issue estoppel. The point has been precluded against it, unless and until set aside on appeal.
>
> It is right, as the defendant submits, that the second plaintiff has failed to prove that the defendant's negligence caused any incapacity in the first plaintiff to perform the services due under his contract of employment with the second plaintiff.
>
> There may have been an exception with respect to the two weeks for which the first plaintiff was off work receiving treatment and recovering from his injuries. However it was candidly accepted that there was no evidence of loss established by the second plaintiff with respect to that particular period.
>
> Accordingly the defendant has, in my opinion, made out its claim for judgment without further evidence."[9]

[25] On the appeal, it is accepted that the reasoning set out in the preceding paragraph can be challenged only if the first plaintiff's appeal is successful.

[26] Following the dismissal of the second plaintiff's claim, the learned trial judge made orders for costs. Those orders were that:

(a) the second plaintiff pay the defendant's costs of the action to be assessed on the standard basis;

---

9 [2007] QSC 150 at [8] – [12].

(b) the defendant pay the first plaintiff's costs of the action, those costs to be assessed on the standard basis by reference to the appropriate District Court scale up to and including 15 May 2006; and

(c) the first plaintiff pay the defendant's costs of the actions subsequent to 15 May 2006, those costs to be assessed on the standard basis appropriate to an action in the Supreme Court.

[27] The reference to 15 May 2006 in the orders for costs is explicable by reason of the circumstance that, on that date, the defendant made an offer to settle both plaintiffs' claims for damages by a payment of $120,000. In this regard, the learned trial judge said:

> "There remains only the question of costs. A number of offers were made by both plaintiffs and defendant. Relevantly, on 15 May 2006, the defendant offered 'to settle the claimants' claim for damages ... in relation to personal injuries and loss of services ... by payment of the sum of $120,000.'
>
> The defendant submits that the plaintiffs have recovered a judgment less favourable than the terms of its offer and that the appropriate order for costs is that the first plaintiff recover costs, assessed on the District Court scale to 15 May 2006 and that thereafter the first plaintiff pay the defendant's costs of the action to be assessed on the standard basis appropriate for an action in the Supreme Court. It is also submitted that the second plaintiff should pay the defendant's costs of its action, to be assessed on the standard basis.
>
> The plaintiffs' submission is that the offer of 15 May 2006 was not a mandatory offer for the purposes of s 40(6) of the *Personal Injuries Proceedings Act* nor is it an offer contemplated by *UCPR* 361 because a composite offer was made to settle the claims of both plaintiffs. The point is that the first plaintiff could not have accepted the offer because it was not addressed to him, but to him and the second plaintiff, and no discrete sum was offered to compromise his claim. It was pointed out that the first plaintiff had never been a director or shareholder of the second plaintiff and had no control over its response to the offer. It was also pointed out that the claims were separate and distinct in respect of separate and distinct losses.
>
> This is all true and may have given rise to difficulties if the question of costs had been decided before judgment was given dismissing the second plaintiff's claim. It is now clear that the amount offered by the defendant was more than sufficient to satisfy both plaintiffs' claims. It may be right that one plaintiff could not settle without the other but it is equally right that the plaintiffs could jointly have accepted the offer and worked out between themselves their proportion. The offer could have been accepted by the plaintiffs acting jointly. As between them and the defendant that fact is enough to make the order for costs sought by the defendant appropriate. Whether or not the offer was one within the meaning of *UCPR* 361 the terms of the offer, and its rejection are a sufficient reason for making 'another order' pursuant to *UCPR* 689."[10]

---

10 [2007] QSC 150 at [25] – [27].

The plaintiffs' arguments on appeal

[28] The plaintiffs filed notices of appeal containing extensive grounds of challenge to the decisions of the learned trial judge. The plaintiffs sought to maintain only three of those grounds by argument. I will address those arguments in turn.

The "so-called *Fox v Wood* component"

[29] It is submitted that the learned trial judge's refusal to recognise any past economic loss by the first plaintiff was logically irreconcilable with the learned trial judge's inclusion in the first plaintiff's damages of "the so-called *Fox v Wood* component". That component reflected the amount of tax deducted from the first plaintiff's periodic receipts of workers' compensation payments in respect of the injury of July 2002. It is said that the award of the *Fox v Wood* component necessarily recognised that the first plaintiff had suffered a loss of income from personal exertion. On the first plaintiff's behalf, it was emphasised that the rationale for the *Fox v Wood* component is that, unless such an allowance is made in favour of an employee under a statutory obligation to repay to the workers' compensation authority the gross amounts of compensation, the employee would be provided with inadequate compensation for his or her injuries.[11]

[30] The first plaintiff received gross workers' compensation payments totalling $13,821.93 from which $7,109 was deducted on account of income tax during the periods 3 August to 8 September 2002, 3 December 2002 to 12 January 2003, and 3 March 2003 to 16 March 2003.

[31] The plaintiffs contend that "logic and common sense … compel the conclusion that at a bare minimum, the [first plaintiff] has established an entitlement to be compensated for his past economic loss in respect of the three periods identified …".

[32] In my respectful opinion, the plaintiffs' submission ignores the circumstance that the *Fox v Wood* amount was agreed between the parties as a component of the first plaintiff's damages which would be recoverable should his claim succeed. There may have been no good reason for the defendant to agree to pay this component, especially bearing in mind the absence of evidence of any actual economic loss by the first plaintiff while he was off work. It may well be that the workers' compensation authority made these and the other workers' compensation payments in error. But whether or not the workers' compensation payments were made in error, the fact that the payments were made cannot be taken as giving rise to some form of issue estoppel as between the plaintiffs and the defendant.

[33] There was no reason why the learned trial judge should have regarded the defendant's agreement that this figure might be recovered as necessarily implying that it was common ground that the absence of evidence of actual loss of income by the first plaintiff should be disregarded. It was the stated position of counsel for the defendant that the first plaintiff should recover nothing by way of damages for economic loss; and senior counsel for the plaintiffs did not suggest to the learned trial judge that the defendant's agreement in relation to the *Fox v Wood* component had the consequence that an award of damages for past economic loss was inevitable. In the light of the way the trial was conducted, the plaintiffs cannot

---

11 *Fox v Wood* (1981) 148 CLR 438 at 442.

complain that the learned trial judge erred in failing to accept an argument that was never addressed to him.

[34] The plaintiffs' first submission should be rejected.

The evidence of reduced working capacity

[35] The plaintiffs argued in their written submissions that the learned trial judge's reasons are flawed by reason of his Honour's failure to reconcile his finding that the first plaintiff "feels a need to stand and move around after he has been sitting for a prolonged period"[12] with the conclusion that the first plaintiff's capacity to work very long hours as a costs assessor was not adversely affected by the first plaintiff's residual discomfort. The plaintiffs contend that his Honour's conclusion that the first plaintiff exaggerated his injuries cannot be regarded as involving a complete discounting of everything that the first plaintiff had to say on his own behalf on this issue.

[36] For my part, I consider that this is precisely what the learned trial judge meant to convey. A more explicit statement of his Honour's rejection of the plaintiffs' attempt to "contrive" a case of economic loss was hardly necessary. His Honour made it clear that the first plaintiff's evidence should be rejected insofar as it suggests that his earning capacity was adversely affected by the fall of July 2002. In *Abalos v Australian Postal Commission*,[13] McHugh J, with whom Mason CJ, Deane, Dawson and Gaudron JJ agreed, said:

> "… where a trial judge has made a finding of fact contrary to the evidence of a witness but has made no reference to that evidence, an appellate court cannot act on that evidence to reverse the finding unless it is satisfied 'that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion': *Watt or Thomas v Thomas* ([1947] AC 484 at 488)."

[37] I consider that the learned trial judge's adverse view of the first plaintiff's reliability means that this Court cannot proceed on the footing that there is, in truth, some sound basis in the first plaintiff's evidence for the proposition that his earning capacity was adversely affected by his injuries.

[38] On the hearing of the appeal, senior counsel for the plaintiffs focused his argument upon the learned trial judge's conclusion that the first plaintiff was "to be compensated for some continuing lower back pain which does cause him discomfort". It is said that this conclusion was consistent only with an acceptance of the evidence of Dr Pentis in preference to that of Dr Scott-Young and Dr Parkington. It is said for the plaintiffs that the learned trial judge did not expressly reject the evidence of Dr Pentis in relation to the possibility of further surgery to his lower back and so must be taken to have accepted Dr Pentis' evidence in this regard as well. On this basis, the plaintiffs contend that the prospect of further surgery demanded "the application of *Malec v JC Hutton Pty Ltd*[14] principles" to recognise the chance of an adverse effect upon the first plaintiff's earning capacity in the event that such surgery became necessary.

---

12 [2007] QSC 073 at [64].

13 (1990) 171 CLR 167 at 178 (citation footnoted in original).

14 (1990) 169 CLR 638.

[39] While his Honour may have been satisfied that there were some ongoing symptoms from the injury actually suffered in the fall, that did not mean that he was obliged to accept, as well, that further surgery was on the cards. None of the other medical experts, including Dr Purssey, suggested any such possibility.

[40] And, in any event, Dr Pentis did not actually suggest that further surgery would be necessary. The evidence of Dr Pentis summarised at paragraph [15] above did no more than advert to the possibility of operative treatment if the first plaintiff's condition were to deteriorate further: Dr Pentis did not suggest that the possibility was at all probable. Indeed, Dr Pentis noted that "clinically, at present, there were no signs of major nerve root entrapment", that being the kind of deterioration which might give rise to a need for operative treatment.

[41] For these reasons, I would reject the plaintiffs' second submission.

The costs orders

[42] The plaintiffs seek to appeal against the orders for the costs of the proceedings below made by the learned trial judge. The first basis on which they seek to challenge the costs orders depends on the success of their challenge to his Honour's conclusion that the first plaintiff suffered no economic loss as a result of the fall of July 2002. As the plaintiffs' challenge to that conclusion fails, so must the first basis for challenging the costs orders.

[43] The plaintiffs also seek to argue that, even if their substantive appeals fail, the learned trial judge erred in refusing the plaintiffs leave to appeal against his decision in relation to costs. They contend that the exercise of his Honour's discretion in relation to the orders for costs miscarried because the defendant was not entitled to rely upon the offer of 15 May 2006. The basis for this argument is that this offer proposed the settlement of both plaintiffs' claims for a single sum. It is said that the offer, in the form in which it was made, was not in conformity with s 40 of the *Personal Injuries Proceedings Act 2002* (Qld) or r 361 of the *Uniform Civil Procedure Rules 1999* ("the UCPR") because it was not capable of acceptance by one of the plaintiffs alone.

[44] It is also said on the plaintiffs' behalf that the offer in this form was embarrassing. The plaintiffs say that the first plaintiff had "no capacity to compel the incorporated entity [the second plaintiff] of which he is a mere employee to do anything. Likewise, nor could the company compel the first appellant to be party to accepting the offer."

[45] As to the first of the plaintiffs' arguments, the learned trial judge did not rely upon the provisions of s 40 of the *Personal Injuries Proceedings Act* or r 361 of the UCPR to make the orders for costs which he made. His Honour acted under the general power to make orders for costs reflected in r 689 of the UCPR. It was clearly open to his Honour to proceed in this way. The provisions of the *Personal Injuries Proceedings Act* and r 361 of the UCPR do not exclude the possibility of such an exercise of discretion.[15]

[46] The argument that the plaintiffs were embarrassed by the form of the offer focuses upon the formal legal structure by which the plaintiffs carry on business. It was

---

[15] Cf *Calderbank v Calderbank* [1976] Fam 93; *Cutts v Head* [1984] Ch 290; *Messiter v Hutchinson* (1987) 10 NSWLR 525 at 527 – 529.

open to the learned trial judge in the exercise of his discretion in relation to the award of costs to take the view that there was no real possibility that either plaintiff might have wished to accept the defendant's offer but was prevented from doing so by reason of the recalcitrance of the other plaintiff. There was no evidence to support the view that the plaintiffs suffered any actual difficulty in coming to a decision not to accept the offer by reason of the fact that it required acceptance by both of them. Further, his Honour had earlier found that the first plaintiff's wife, as the directing mind and will of the second plaintiff, "after discussions with [the first plaintiff], did not pay the former amounts [of bonuses] to her husband but allocated the amount saved to herself, by way of dividends or director's fees". In the light of this finding, it would have been distinctly unrealistic to accept that the plaintiffs were unable to agree upon a response to the defendant's offer of 15 May 2006 by reason of the form of that offer. Finally, it would, in my respectful opinion, be distinctly unjust if the legal structure employed to "contrive" the plaintiffs' claims were allowed to obscure the simple truth that the pursuit by each plaintiff of its claim after 15 May 2006 was, at best, so unreasonable and imprudent as to warrant the orders as to costs made by the learned trial judge.[16]

[47] The nature of the difficulty which confronts this aspect of the plaintiffs' appeal should not be minimised, even if one puts to one side the learned trial judge's refusal of leave to appeal. Orders in relation to costs are discretionary orders. I am unable to discern any arguable ground for a suggestion that the orders in question have departed from principle so as to give rise to an injustice such as might warrant the overturning of his Honour's costs orders.

Conclusion and orders

[48] The appeals should be dismissed.

[49] The plaintiffs should pay the defendant's costs of each appeal assessed on the standard basis.

[50] **HOLMES JA:** I have read and agree with the reasons of Keane JA, and with the orders he proposes.

---

16 Cf *Lawes v Nominal Defendant* [2007] QSC 013.