# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Nichols v Curtis & Anor* [2010] QCA 303 |
| PARTIES: | **SHANNON MICHELLE NICHOLS**<br>(plaintiff/applicant)<br>**v**<br>**ROBERT GRAHAM CURTIS**<br>(first defendant/first respondent)<br>**QBE INSURANCE (AUSTRALIA) LIMITED**<br>ACN 003 191 035<br>(second defendant/second respondent) |
| FILE NO/S: | Appeal No 2866 of 2010<br>DC No 3070 of 2007 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for leave s 118 DCA (Civil) |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 29 October 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 13 August 2010 |
| JUDGES: | McMurdo P, Fraser and Chesterman JJA<br>Separate reasons for judgment of each member of the Court each concurring as to the orders made |
| ORDERS: | **1. Grant the application for leave to appeal, allow the appeal, and vary the judgment given in the District Court on 19 February 2010 by ordering that there be judgment for the plaintiff against the second defendant in the sum of $52,418.10;**<br>**2. Vary the order made on 23 March 2010 by omitting from the order the words "to a maximum of $2,500";**<br>**3. The second respondent pay the applicant's costs of the application for leave to appeal and the appeal, to be assessed on the standard basis.** |
| CATCHWORDS: | APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – EXCESSIVE OR INADEQUATE DAMAGES – GENERAL PRINCIPLES – PERSONAL INJURY OR DEATH CASES – where the plaintiff/applicant sought leave to appeal pursuant to s 118 of the *District Court of Queensland Act* 1967 (Qld) – where the primary judge assessed damages in the applicant's personal injuries claim and ordered judgment in the amount of $47,618.10 against the second respondent – where the applicant argued that the primary judge erred in rejecting the applicant's claim for past |

economic loss – where the primary judge found that the applicant did not give evidence that she lost employment or rejected specific work or general types of work due to her injuries – whether the primary judge erred in rejecting the claim for past economic loss – whether the primary judge erred in concluding that there was no evidence that the applicant's impaired capacity for employment resulted in financial loss between the accident and trial – whether the primary judge erred in holding that there was no evidence that the applicant excluded any category of work in seeking employment – whether the evidence justified an award of past economic loss

APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – whether the error is sufficient to warrant a grant of leave to appeal – whether the applicant would be substantially prejudiced by the error

APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – whether the costs of the trial should be awarded on the indemnity basis

*District Court of Queensland Act* 1967 (Qld), s 118
*Motor Accident Insurance Act* 1994 (Qld), s 55F(3)(a)

*Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Ltd* [2008] QCA 100, applied
*Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649; [1968] HCA 9, cited
*Calderbank v Calderbank* [1976] Fam 93; [1975] 3 WLR 586, cited
*Cassidy v McDonald* [2007] QCA 332, cited
*Elford v FAI General Insurance Company Ltd* [1994] 1 Qd R 258; [1992] QCA 41, cited
*Graham v Baker* (1961) 106 CLR 340; [1961] HCA 48, cited
*Humberdross v Rapp* [1991] 1 Qd R 353, cited
*Keefe v R T & D M Spring Pty Ltd* [1985] 2 Qd R 363, cited
*Lai Wee Lian v Singapore Bus Service (1978) Ltd* [1984] AC 729; [1984] 3 WLR 63, cited
*Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638; [1990] HCA 20, cited
*Manwelland Pty Ltd v Dames & Moore Pty Ltd* [2000] QSC 432 (20/12/2000), cited
*McDonald v FAI General Insurance Co Ltd* [1995] QCA 436, discussed
*Medlin v State Government Insurance Commission* (1995) 182 CLR 1; [1995] HCA 5, cited
*Nichols v Curtis and QBE Insurance (Australia) Limited (No 2)* [2010] QDC 99, related

*Nichols v Curtis and QBE Insurance (Australia) Limited* [2010] QDC 34, related

COUNSEL: R D Green for the applicant
S J Williams for the respondents

SOLICITORS: Queensland Law Group for the applicant
Quinlan Miller & Treston Lawyers for the respondents

[1] **McMURDO P:** I agree with Fraser JA's reasons for granting the application for leave to appeal and allowing the appeal. I agree with the orders proposed by Fraser JA.

[2] **FRASER JA:** The applicant, the plaintiff in a District Court claim for damages for personal injuries, sought leave to appeal pursuant to s 118 of the *District Court of Queensland Act* 1967 (Qld) from a judgment against the second respondent ("insurer") for $47,618.10. It had been agreed before the trial that the insurer was liable to the plaintiff and that the amount of her damages was to be reduced by 40 per cent to reflect her contributory negligence. The only issue in the proposed appeal is whether the primary judge erred in rejecting the applicant's claim for past economic loss.

[3] The primary judge assessed damages as follows:[1]

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| "(a) Pain and suffering and loss of amenities of life | $11,000.00 |
| (b) Past economic loss | $ 0.00 |
| (c) Future economic loss | $60,000.00 |
| (d) Loss of superannuation benefits at 9 % | $ 5,400.00 |
| (e) Special damages | $ 300.00 |
| (f) Future medical expenses | $ 2,663.50 |
| TOTAL | $79,363.50" |
| Judgment (60% of $79,363.50) | $47,618.10 |

[4] The applicant argued that the primary judge's rejection of any award for past economic loss was contrary to the evidence and difficult to reconcile with the award for future economic loss of $60,000 ($36,000 after the agreed reduction for contributory negligence); that the primary judge erred in failing to assess the probability that the applicant had suffered past economic loss in the manner prescribed by *Malec v J C Hutton Pty Ltd*[2]; and that the primary judge erred by failing to apply the principle expressed in *Arthur Robinson (Grafton) Pty Ltd v Carter*[3] that damages for economic loss are awarded for loss of earning capacity and not for loss of earnings.

[5] I will discuss the parties' arguments, and the further question whether the case is an appropriate one for the grant of leave to appeal, after I have first summarised the relevant findings by the primary judge.

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1 *Nichols v Curtis and QBE Insurance (Australia) Limited* [2010] QDC 34 at [49].
2 (1990) 169 CLR 638.
3 (1968) 122 CLR 649 per Barwick CJ at 658.

**Findings by the primary judge**

[6] The applicant was 18 years old at the time of her motor vehicle accident on 11 June 2004 and she was 24 years old at the time of the trial some five and a half years later in February 2010. From 1998, when the applicant completed Grade 8, there were difficulties in her family life. She finished school by age 14. When she was 15 she entered into a relationship with an older man who physically and emotionally abused her. She was drinking excessively, she suffered depression, and she engaged in self-harm. She was unemployed.

[7] In early 2004, whilst she was residing with her father, she obtained work but for only a few days. She did not obtain any more substantial employment in the 12 to 18 months when she resided with her father, despite his parental advice to her to get a job or do some study, before the accident on 11 June 2004. Partial explanations for that were her youth and naivety about the ways of the world, and that she was scared in new situations, insecure, and had an alcohol problem. The applicant was disadvantaged in the open labour market by a variety of psychosocial issues which were recorded in a report by a career counsellor who saw the applicant in June 2006.[4]

[8] The applicant suffered injury to her cervical spine in the car accident in June 2004. By June 2006 her condition was stable and stationary. Her ongoing care should have consisted of analgesia, stretching exercises and local heat as required. She had cervical spinal pain worse on the right side and worse with flexion. Her pain was aggravated by prolonged sitting, was associated with occipital headaches, and she suffered from some positional nocturnal pain. The interference with her sleep was particularly disturbing for her. She would endure those symptoms from her relatively young age. There was a DRE 2 category impairment of the cervical spine in the range of 5 to 8 per cent.[5]

[9] After the accident the applicant was employed at Kilcoy Meatworks. She found the job difficult because of her back but she lost her employment there after only three days because she lost her driver's licence for an offence related to drink driving. She obtained work in five cafes between July and December 2007 for a total of 142 hours. Because of her preference for jobs which did not involve customer service, for which she lacked confidence, she obtained work at a nursery in February 2008. That work was sometimes too heavy for her but she persevered with the help of other employees and regular use of analgesic. She lost that work after about four and a half months because she lost her driver's licence in May 2008 as a result of another alcohol related offence. She obtained a few days work at a hydroponics farm but lost that job as a result of catching the 'flu'. The applicant did not leave any employment because of neck or back related pain.[6]

[10] The applicant had made some improvements to her life that improved her employability. She undertook a numeracy and literacy course over a few months

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4 *Nichols v Curtis and QBE Insurance (Australia) Limited* [2010] QDC 34 at [18].

5 *Nichols v Curtis and QBE Insurance (Australia) Limited* [2010] QDC 34 at [19], [21], [34].

6 The primary judge accepted the applicant's complaints of pain in her back in regions lower than her cervical spine but found that she was not entitled to be compensated for that pain because she had not claimed for it or satisfied her onus of proof that it related to neck injury; conversely, the primary judge held that it was inappropriate to find that the applicant's diminished capacity to earn was attributable to her low and mid-back pain because that was not pleaded in the insurer's defence or explored with the witnesses: *Nichols v Curtis and QBE Insurance (Australia) Limited* [2010] QDC 34 at [24]-[26].

and a coffee shop and bar course. She attended Alcoholics Anonymous during 2008 as a consequence of a bad relationship and depression she was then suffering, but by the time of the trial she was six months pregnant, was in a new and satisfying relationship, had not consumed any alcohol during her pregnancy, and had gained in confidence.[7]

[11] In relation to future economic loss, the primary judge found that the applicant's lack of education, history of depression, lack of confidence in dealing with customers, history of alcohol abuse and history of under-employment suggested that her future employment would be less than full employment; but the plaintiff's confidence had improved, she had stopped abusing alcohol, she had maintained moderately heavy manual work in a nursery for four and a half months despite regular pain, she had created a resume and distributed it, and she was regularly on the telephone about employment. The primary judge held that her employability on the open labour market was adversely affected by her disadvantages in competing for work and by the difficulties she would have with heavy manual work, process work, and sedentary work.[8] The primary judge referred to the applicant's demonstrated desire for employment, discipline to put alcohol abuse behind her, maintenance of nursery work that caused her pain for four and a half months, her potential working life of about 40 years, and assessed future economic loss at $60,000.[9]

[12] The controversial findings relate to past economic loss. The directly relevant findings on that topic are contained in the following passages of the primary judge's reasons:[10]

> "[32] …The plaintiff did not give evidence of any potential employment that she declined to apply for because of a neck related injury. I accept that heavy work at the meatworks was difficult for the plaintiff and partly because of her neck injury and that she was pleased to leave when her driver's licence was suspended. She did not give evidence to suggest that her failure to return to the meatworks or to apply for any other employment was due to incapacity or pain related to her neck.
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> [39] Between the accident and trial the plaintiff had a disadvantage on the open labour market due to her incapacity to do heavy work. I accept that there were a number of jobs which the plaintiff physically would have been unable to perform. The plaintiff bears the onus of proof that that impairment has caused her economic loss between June 2004 and the trial. The onus is not satisfied merely by proof of the impaired capacity to compete in the labour market. There is no evidence that the injury to the cervical spine caused the plaintiff to leave any of the jobs she obtained or to be rejected for any of the jobs for which she applied or to decline to apply for any available job. The

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7 *Nichols v Curtis and QBE Insurance (Australia) Limited* [2010] QDC 34 at [28].
8 *Nichols v Curtis and QBE Insurance (Australia) Limited* [2010] QDC 34 at [42].
9 *Nichols v Curtis and QBE Insurance (Australia) Limited* [2010] QDC 34 at [43]-[45].
10 *Nichols v Curtis and QBE Insurance (Australia) Limited* [2010] QDC 34 at [32] and [39]-[40].

> plaintiff's counsel submitted that the plaintiff would have worked more than she did, but for the accident and would have had more opportunities open to her, but for the accident. There is no evidence that she would have worked more than she did but for the accident. I accept that the plaintiff would have had more opportunities open to her, but for the accident. However, the plaintiff gave no evidence of eliminating employment opportunities because of neck injuries.
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> [40] There was no submission made for the plaintiff that she should receive damages for past economic loss expressly on the basis of loss of a chance or by reference to principles in *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 considered in this context in *McDonald v FAI General Insurance Co Ltd* [1995] QCA 436. It may have been implied in the plaintiff's submissions and is worthy of consideration. It seems to me that without evidence that the plaintiff lost employment or in seeking employment rejected specific work or general types of work because of her injury the plaintiff fails to satisfy an onus that she suffered loss."

***Malec v JC Hutton Pty Ltd* and damages for loss of earning capacity**

[13] The effect of those findings was that the applicant did not merely fail to prove that it was more probable than not that she would have earned more money if she had not been injured; she failed to establish that there was any real prospect that that she would have earned more money. On that basis there was no room for the application of *Malec v JC Hutton Pty Ltd*.[11]

[14] Nor did the primary judge make the mistake of thinking that damages for economic loss were awarded for loss of earnings rather than for loss of earning capacity. Whilst damages are awarded for loss of earning capacity, they are awarded only to the extent that the loss produces or might produce financial loss.[12] In *Medlin v State Government Insurance Commission*,[13] Deane, Dawson, Toohey and Gaudron JJ held that a plaintiff in action for negligence is not entitled to recover damages for loss of earning capacity unless the plaintiff establishes both that the plaintiff's earning capacity had been diminished by reason of the negligence-caused injury and that the diminution of earning capacity was or might be productive of financial loss. There was no error in the primary judge's observation in paragraph 39 of the reasons that the applicant did not discharge her onus of proving that her incapacity to do heavy work caused her economic loss merely by proof of that impaired capacity itself.

**Evidence that the applicant sustained past economic loss**

[15] The real issue is whether the primary judge was correct in proceeding on the footing that there was no evidence to justify the inference that the applicant's impaired capacity for employment was productive of financial loss during the five and a half years between the accident and the trial.

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11 See *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 at 643, per Deane, Gaudron and McHugh JJ.

12 *Graham v Baker* (1961) 106 CLR 340 at 346 to 347; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 3, 18.

13 *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 3.

**Summary of the parties' arguments**

[16] The applicant accepted that there was no evidence that the injury caused her to leave any of the jobs she had obtained, to be rejected for any job for which she had applied, or to decline to apply for any job which was shown to be available. The applicant argued, however, that she did give evidence to the effect that her incapacity to do heavy work caused the applicant to refrain from applying for her preferred field of employment (manual, outdoor work) in favour of other employment (lighter, indoor work). The applicant argued that, contrary to the primary judge's conclusions, the applicant gave evidence that she would have worked more than she did but for the accident, she eliminated employment opportunities because of neck injuries, and she rejected general types of work because of her injury. The applicant argued that having regard to the five and a half year period between the accident and the trial an assessment of $20,000 ($12,000 after the agreed apportionment) would have been a conservative award for past economic loss on the evidence.

[17] The insurer argued that the primary judge's findings accurately reflected the evidence. In particular, the suggestion that the applicant was forced to depart from her pre-accident desire to undertake work involving "hands on outdoorie stuff" was without substance. Her pursuit of work at the nursery, which was her longest period of employment in her working life and which only ceased when she lost her licence, coupled with her work at a hydroponics farm which also ceased for reasons unrelated to the accident, undermined the premise of that claim. The insurer argued that there was no evidence to support an inference that the applicant would have earned anything more than she did prior to the date of trial, but for her cervical spine injury. Damages did not have to be assessed for loss of a chance because it was not proved that the applicant was unable to exercise her earning capacity by reason of the accident. At the trial the applicant's counsel was unable to point to evidence that supported this claim. Further, the evidence did not permit the quantification of any damage the applicant may have suffered; the claim was purely speculative, and could never succeed for want of proof of an essential element.

[18] The insurer also argued that even if the primary judge erred, the applicant must persuade the Court that correction of the suggested error would result in a substantial alteration to the total award. That required consideration of whether the component for past economic loss was "so far out of line with what the appellate court considers appropriate, as to indicate that the assessing judge has erred in principle, and if the substitution of an appropriate award for that item would make a substantial alteration in the total award, then the appellate court has the duty to make the substitution and to alter the total accordingly."[14] The award should not be adjusted if there is nothing more than a "wrong estimate of one component which has no substantial effect on the total" and a relatively small error of one component of what is in substance a "sum of estimates" does not necessarily falsify a judgment.[15]

**Consideration**

[19] Reference to the transcript confirms that the applicant did not clearly identify any specific employment opportunity which she passed up as a result of her injury. The

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[14] See *Lai Wee Lian v Singapore Bus Service (1978) Ltd* [1984] AC 729 at 735; *Humberdross v Rapp* [1991] 1 Qd R 353: *Keefe v R T & D M Spring Pty Ltd* [1985] 2 Qd R 363 at 366 to 367.

[15] *See Elford v FAI General Insurance Company Ltd* [1994] 1 Qd R 258 at 265 per Pincus and Davies JJA and Thomas J.

more substantial question is whether the primary judge erred in holding that there was no evidence that the applicant excluded any category of work when she was searching for employment and, if so, whether that evidence justified an award for past economic loss. As to that, it seems clear that one ground of the primary judge's rejection of the claim for past economic loss was the absence of evidence that the applicant excluded any category of work when she was searching for employment. So much is suggested by references in his Honour's reasons to the absence of evidence that the applicant refrained from applying for "potential employment" or "any other employment",[16] or eliminated any "employment opportunities",[17] particularly when those expressions are understood in light of his Honour's reference to the absence of evidence that the applicant in seeking employment rejected "specific work or general types of work" because of her injury.[18]

[20] It is correct, as the insurer argued, that in the course of final submissions at the trial the applicant's counsel was unable to point to specific evidence that the applicant had refrained from applying for potentially available work, but counsel did submit that the evidence demonstrated that the applicant had sustained past economic loss. In the applicant's evidence in chief she referred to her difficulties in coping with her job at the nursery between February and May 2008 and said that she had applied for jobs which were "totally different to what I would like to and what I was used to… because I know I'm gonna be in pain, so I have to sort of look for something alternative that I think maybe I could do a little bit easier". She said that she was hoping to do something like, "little food stalls, clothing stalls, chemist… a floristry course [where] you can stand up, you can sit down". She had not been successful in those applications, "because I think its because I have had to change what I was originally looking for and good at to something where I have no idea about what [I am] doing". After referring to her lack of confidence in indoor work with customers, the applicant gave evidence that she had, "tried to look for maybe part-time nursery work but that's not how they employ you. It has to be five days a week or whatever, but yeah."

[21] The applicant adhered to that evidence in cross examination. She said she had really liked the work at the nursery but found it difficult. She was lucky that she had people there to help her. It was the sort of work she would like to do but she knew that she could not do it after the accident. She was only able to do the work at the nursery because other employees there helped her. The applicant said that, "not every nursery is the same… not every nursery is as nice as that." She denied that her problems arising from the accident had not precluded her from obtaining work. It was put to the applicant that her applications for jobs at the meatworks and the nursery, where the work was heavy, reflected a belief that she was able to perform such work. The applicant responded that she would like such a job for a couple of years but knew that she couldn't; "that's the line of work that I would be happy in and I can't look for that sort of work anymore; so it is pretty disappointing that now I have to change my whole life path of what I would really like to do to something totally different."

[22] The use of the future tense in that last passage was not significant in the context of the preceding passages in her evidence and the finding that her injuries had been

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16 *Nichols v Curtis and QBE Insurance (Australia) Limited* [2010] QDC 34 at [32].
17 *Nichols v Curtis and QBE Insurance (Australia) Limited* [2010] QDC 34 at [39].
18 *Nichols v Curtis and QBE Insurance (Australia) Limited* [2010] QDC 34 at [40].

stable for more than three and a half years before the trial. The applicant's evidence was to the effect that her injury had caused her to refrain from seeking employment in the field of work which she preferred and for which she was suited, save for short-lived jobs which had confirmed for her that such work was generally too hard for her. That was most clearly articulated in her evidence that she had tried to look for part time nursery work but found that only full time work was generally available, work that was too hard for her in the typical case where she could not rely upon the assistance she had been given in one nursery in early 2008.

[23] The primary judge did not refuse this claim on the ground that the applicant's evidence should not be accepted for the reasons which the insurer advanced in this Court. His Honour did not advert to that evidence in this context. Whilst the primary judge earlier noted that the applicant could be an "unreliable historian", his Honour rejected the insurer's arguments at trial that the applicant was not credit worthy.[19] Importantly, the applicant's evidence on the present topic was entirely consistent with the primary judge's findings that the applicant had incurred a disadvantage in competing for work because of her difficulties with heavy manual work, and she had demonstrated a desire for employment and a discipline to put alcohol abuse behind her. It seems likely that if the primary judge had adverted to the relevant evidence his Honour would have accepted it. In my respectful opinion the primary judge's apparent omission to take this evidence into account justifies reconsideration of the rejection of the claim for past economic loss.

[24] The applicant's limited employment history before the accident is unsurprising, given that she was only then 18 years old and, despite her somewhat troubled teenage years, the findings suggest that it was always likely that she would work more regularly as she matured. Nevertheless a cautious approach to the applicant's past economic loss claim was certainly warranted.

[25] The basis for distinguishing between the applicant's claims for past and future economic loss lay in the applicant's success in improving her employability, including by undertaking courses, embarking upon a new relationship, and giving up alcohol, between the date of the accident and the date of the trial. Unsurprisingly, the evidence about the timing and extent of that improvement lacked clarity and precision. The psychosocial issues discussed in the primary judge's findings seem to have retained real significance for the applicant's employment prospects, most significantly in the period from the accident up to about two years or so before the trial. The applicant had obtained medical certificates as to her inability to work as a result of matters unrelated to the accident in mid 2006, early 2007, and in late 2007 through to early 2008, as a result of anxiety and depression. Her attendance at TAFE about two and a half years before the trial gave her more confidence to work. The applicant's evidence was that two years before the trial (that is, in early 2008) she realised she had an issue with her alcohol dependence and obtained help. (Consistently, the primary judge found that the applicant attended Alcoholics Anonymous on three occasions during 2008.[20]) The applicant's drinking problem was exacerbated following a suicide by a friend's mother in July 2008, when the applicant reported an inability to work due to insomnia, mood swings and alcoholism. She obtained a medical certificate as to her inability to work because of depression in the middle of 2008, but she had some

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19 *Nichols v Curtis and QBE Insurance (Australia) Limited* [2010] QDC 34 at [27].

20 *Nichols v Curtis and QBE Insurance (Australia) Limited* [2010] QDC 34 at [28].

work in coffee shops during periods whilst she was depressed. The applicant had not had a drink during her pregnancy in the six months period before the trial and she had little to drink for some period before then.

[26] Another reason for caution is found in the applicant's evidence that she worked at an abattoir between 15 and 20 November 2006 and a nursery in early 2008, albeit with difficulty. That suggests that she retained some capacity to work in such jobs for some of the lengthy period between the date of the accident and her trial. She lost that employment for reasons unconnected with her injury, she did not disclose her injury to any potential employer, she did not lose any employment because of her injury, and she was disadvantaged in looking for work of any kind by the fact that she lost her driver's licence for reasons unconnected with the accident in December 2003, November 2006 and April 2008.

[27] That evidence required that an award for past economic loss should be very moderate, especially for the period up to about two years before the trial, but it did not suggest that the applicant had not sustained any such loss.

[28] It is also relevant that the applicant was vague about specific employment opportunities. If the applicant's injury had caused her to rule out any specific employment it might be expected that she could have given evidence to that effect. Such evidence would have been very useful, at least in eliminating or reducing the uncertainty in one of the variables in the assessment of damages for past economic loss which ordinarily must remain uncertain in relation to future economic loss.[21] However the point loses some of its significance on the facts of this case, since it does not seem surprising that this applicant was vague about specific employment opportunities in a field of work which was substantially foreclosed to her by her injury.

[29] In *McDonald v FAI Insurance* Thomas J said that, "When a plaintiff is shown to have had at least some earning capacity, and to have suffered some physical disability from an accident which might be expected to make the maintenance of employment somewhat more difficult, it is usual to make some allowance for economic loss."[22] In this case the applicant had also given evidence that she had been required to preclude from her search for employment the category of work for which she seemed most suited.

[30] Thomas J went on to categorise many of the cases typically encountered:[23]

> "In a case where damage is capable of precise proof, and a plaintiff fails to produce such proof, no assessment (or a nil assessment) will be made (*Sunley and Co. v. Cunard* [1940] 1 K.B. 740, 747; *Woodham v. Rasmussen* (1953) St.R.Qd. 202, 215; *Holmes v. Jones* (1907) 4 C.L.R. 1692, 1703, 1717; *Ted Brown Quarries v. General Quarries* (1977) 16 A.L.R. 23 37). In cases where some loss has apparently been suffered but the plaintiff has failed to take the trouble to produce evidence that would reasonably be expected to be available, no more than a very conservative estimate of damages will

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21 *McDonald v FAI General Insurance Co Ltd* [1995] QCA 436 per Thomas J at p 4 referring to Harold Luntz, *Assessment of Damages for Personal Injury and Death* (3rd Ed, 1990) at para 5.1.13.

22 *McDonald v FAI General Insurance Co Ltd* [1995] QCA 436 at pp 5 to 6.

23 *McDonald v FAI General Insurance Co Ltd* [1995] QCA 436 at pp 6 to 7.

> be made (*Minchin v. Public Curator* (1965) A.L.R. 91, 93; *Ashcroft v. Curtin* [1971] 3 All E.R. 1208; *Aerial Advertising Co. v. Batchelors Peas* [1938] 2 All E.R. 788, 796). This may be contrasted with the familiar exercise of assessing damages upon issues which of their very nature are incapable of precise proof, such as future economic loss, and, quite frequently, past economic loss, where the Courts do the best they can on necessarily imprecise matter. (Malec (above); *Chaplin v. Hicks* [1911] 2 K.B. 786, 795; *Wheeler v. Riverside Coal Transport* [1964] Qd.R. 113, 124; *Biggen and Co. v. Permanite Ltd* [1951] 1 K.B. 422, 438; *Dessent v. The Commonwealth* (1977) 13 A.L.R. 437, 447). Even in cases of that kind a plaintiff is expected to place before the Court the essential facts upon which the necessary inferences and projections are to be made. There is no difference in the approach of the Courts according to whether the case is based on contract or tort. In all cases the extent of proof required depends upon the nature of the issue to be proved."

[31] The present case does not fall neatly into one of those categories, but in my view it certainly does not fall into the first category, both because the applicant's claim for past economic loss was inherently insusceptible of precise proof and because the applicant adduced the quite extensive evidence relevant to that claim which I have endeavoured to summarise. That evidence might well have been more precise in some respects but, as I have indicated, that imprecision was understandable. Despite the obvious reasons for substantially discounting the claim, I am unable to accept that the applicant did not establish that she suffered some economic loss during the period between the accident and the trial, a period in which the primary judge found that she had made significant and effective efforts to improve her employability. The primary judge referred to the applicant's earnings from her employment at the abattoir where she earned $307.20[24] and at the nursery where she earned $6,834.00,[25] despite her difficulties in performing the work. Bearing in mind also the quantum of the primary judge's award for future economic loss, and that it related to a far longer period which commenced when the applicant had substantially improved her employability, the evidence I have endeavoured to summarise justified an award for past economic loss of $8,000.

[32] In many cases such an assessment would be too insignificant to justify any alteration to the damages, especially because the main components of such an award are necessarily estimations. In this case, however, the primary judge assessed future economic loss quite separately and there is no suggestion that it was other than an appropriately conservative estimate. The only reason for the primary judge's rejection of any additional component for past economic loss was his Honour's finding that the applicant did not give any evidence that supported it. In light of my different conclusion it is appropriate here to treat the component for past economic loss as being separate from the component which the primary judge awarded for future economic loss.

[33] I would increase the primary judge's assessment of the applicant's loss by $8,000 from $79,363.50 to $87,363.50. Applying the agreed apportionment, the amount of the judgment should be increased by $4,800 from $47,618.10 to $52,418.10.

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24 *Nichols v Curtis and QBE Insurance (Australia) Limited* [2010] QDC 34 at [30].

25 *Nichols v Curtis and QBE Insurance (Australia) Limited* [2010] QDC 34 at [31].

**Leave to appeal**

[34] Although the amount of damages in issue is small in relation to many other cases, in this matter it is not insignificant in comparison with the applicant's overall award.

[35] There is a much greater significance of the proposed appeal in relation to costs. The primary judge ordered costs in favour of the applicant. We were told that the applicant's costs were estimated to be in the order of $40,000 to $50,000, but because the damages were less than $50,000 s 55F(3)(a) of the *Motor Accident Insurance Act* 1994 (Qld) imposed a limit of $2,500 upon the amount of costs recoverable by the plaintiff on the standard basis. Accordingly the primary judge imposed that limit in his Honour's subsequent judgment concerning costs.[26] If the damages are increased the applicant's costs will not be limited in that way. That is a consequence of what I have found to be an error in the judgment, an error which is not in itself insignificant for this applicant. I would not accept the insurer's characterisation of the proposed appeal in this case as one which involves civil litigation becoming "an end in itself".[27] Unless leave is granted the applicant will be very substantially prejudiced by the error. That is sufficient to enliven the discretion to grant leave,[28] and in my view this is an appropriate case for the grant of leave to appeal.

**Indemnity costs**

[36] The applicant argued that if this Court increased the damages above $50,000 then costs of the trial should be awarded on the indemnity basis. There were two grounds for that argument.

[37] Firstly, the insurer failed to accept an informal offer made by the applicant on 9 July 2009 to accept $50,001 in respect of her claim, with "standard fees, costs and interest on the appropriate District Court scale". Bearing in mind the informality of the offer and the applicant's failure to take advantage of the rules (and the curious reference to "interest", whether on the offered amount or on the costs was not clear) this did not justify an unusual indemnity costs order.[29]

[38] Secondly, the applicant made a formal offer of settlement described as a "Calderbank Offer to Settle"[30] that the applicant would accept $50,001 inclusive of claim and interest together with her standard fees and costs including reserved costs on the District Court scale. That offer was made only at 8.30 am on the first day of the trial yet it was expressed to remain open for acceptance only until the commencement of the trial at 10.00 am that day. Plainly it did not justify indemnity costs for the first day of the trial. I am not persuaded that it is appropriate to order indemnity costs for the second day.

**Proposed Orders**

[39] I would grant the application for leave to appeal, allow the appeal, and vary the judgment given in the District Court on 19 February 2010 by ordering that there be judgment for the plaintiff against the second defendant in the sum of $52,418.10.

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26 *Nichols v Curtis and QBE Insurance (Australia) Limited (No 2)* [2010] QDC 99 at [17].

27 C.f. *Cassidy v McDonald* [2007] QCA 332 per Keane JA at p 6.

28 *Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Ltd* [2008] QCA 100 at [5].

29 C.f. *Manwelland Pty Ltd v Dames & Moore Pty Ltd* [2000] QSC 432 (20/12/2000) per Dutney J at [16].

30 *Calderbank v Calderbank* [1976] Fam 93.

[40] I would also vary the order made on 23 March 2010 by omitting from the order the words "to a maximum of $2,500". Although the applicant did not file a separate application for leave to appeal from that order the insurer did not contend that this Court should not vary the order if that flowed from a decision to vary the judgment for damages.

[41] The second respondent should be ordered to pay the applicant's costs of the application for leave to appeal and the appeal, to be assessed on the standard basis.

[42] **CHESTERMAN JA:** I agree with the orders proposed by Fraser JA for the reasons expressed by his Honour.