SUPREME COURT OF QUEENSLAND

CITATION:	*McKenna v Fraser & Anor* [2014] QSC 14
PARTIES:	**DARREN McKENNA** **(Plaintiff)** **v** **BRETT FRASER** **(First Defendant)** **And** **ALLIANZ AUSTRALIA INSURANCE LIMITED** **ABN 15000 122 850** **(Second Defendant)**
FILE NO:	S 381 of 2012
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	12 February 2014 (revised ex tempore reasons)
DELIVERED AT:	Townsville
JUDGE:	North J
CATCHWORDS:	Evidence – Admissibility – Hypothetical considerations – Assessment of damages for loss of earning capacity consequent upon personal injury.
LEGISLATION:	*Civil Liability Act 2003; Section 11(3)*
CASES:	*Attard v James Legal Pty Ltd* (2010) NSWCA 311 *Belnaves v Smith* (2012) QSC 192 *Husher v Husher & Anor* (1999) 197 CLR 138 *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638
COUNSEL:	G Mullins for the plaintiff G Crow QC with W Elliott for the defendants
SOLICITORS:	Banks Lawyers for the plaintiff McInnes Wilson Lawyers for the defendants

[1] I will give some reasons now because of the novelty of one of the issues raised in the argument and because of its importance in the context of the trial[1]. Objection has been taken to parts of paragraphs 146 and 147 of the quantum statement of the plaintiff which is part of exhibit 3. The sentences objected to in paragraph 146 were the plaintiff's statement that his goal is to float the company in three years time, and a reference to the turnover necessary to achieve a successful float. The sentences in paragraph 147 objected to was the long first sentence that started, "Had I not been injured."

[2] Mr Mullins, who appears for the plaintiff, does not oppose the objection to the impugned sentence in paragraph 146. He acknowledges that the plaintiff has neither pleaded in the statement of claim nor advanced in the statement of loss and damage[2] or in the quantum statement, a claim that his future lost income or his loss of future earning capacity as a result of his injuries should be calculated or assessed by reference, either wholly or in part, to any effect that his injuries might have upon the proposed or hoped for float. It is sufficient, therefore, strictly speaking, to uphold the objection and to rule out that sentence in paragraph 146 noting that it is unforeshadowed and irrelevant to the assessment of damages in this case.

[3] As part of the objection made by Mr Crow, however, he referred to section 11(3)(b) of the *Civil Liability Act* 2003 ("the Act"), and to a footnote observation by his Honour Byrne SJA in *Belnaves v Smith*[3] in which his Honour noted the reasoning of the New South Wales Court of Appeal in *Attard v James Legal Pty Ltd* [4]. In argument it was submitted that section 11(3)(b) of the Act might render "inadmissible"[5] evidence of the plaintiff concerning the hypothetical of his business and work endeavours in the period between accident and trial and into the future which commenced with the words "had I not been injured".[6] I do not accept the submission that section 11(3)(b) concerns the evidence the subject of the objection.

[4] It is plain from the commentary upon the Act[7] that section 11(3) of the Act had its genesis in one of the recommendations of the Ipp Report which recommended counteracting "hindsight bias"[8] and it was noted that in a number of judgments justices of the High Court had expressed concern about a too ready reception of subjective hindsight evidence.[9]

[5] When the report and the cases referred to are considered it is plain that the section is directed to matters to do with "causation" in the context of the trial upon this issue of breach, not to the assessment of damage for loss of earning capacity. I think that

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[1] This is a revised and amended version of ex tempore reasons given upon an objection to admissibility on day 3 of the trial

[2] Exhibit 5

[3] (2012) QSC 192 at [97]

[4] (2010) NSWCA 311 at [118] to [126]

[5] Whatever the statutory term "inadmissible" means in this context, see for example *Attard v James Legal Pty Ltd at [121] ff.*

[6] In fairness to Mr Crow QC who led for the defendants the submission was made while recognising some of the matters I will canvass hereafter.

[7] Annotated Civil Liability Legislation – Queensland 3rd edition, editors Douglas Mullins & Grant, Lexis Nexis Butterworths 2012 at para 11.10 & 11.18.

[8] See Annotated Civil Liability Legislation – Queensland at para 11.18.

[9] Consider some of the cases referred to in Annotated Civil Liability Legislation – Queensland at paras 11.10 & 11.18 cf *Attard v James Legal Pty Ltd [2010] NSWCA 311 at [120].*

this is apparent also from a reading of the section[10], and in particular, the context in which that section is found in the Act noting the provisions in later parts of the Act that deal with the assessment of damages. There is another reason why, in principle, that section should not apply to the consideration of the assessment of damages which flows from the very nature of the task to be performed by a court in assessing damages following personal injury.

[6] In rulings upon other objections to evidence on a number of occasions I have already referred to the decision of the High Court in *Husher v Husher*.[11] Because of the complex arrangements of companies and trusts under which the plaintiff's business was and is conducted that case is of particular relevance in this case. It is convenient for the purposes of understanding this ruling that I expressly refer to some of the observations by the High Court in *Husher v Husher* which concerned the assessment of damages for an injured plaintiff who had worked as a partner in a family partnership. When considering the principles to be applied or considered the court said[12]:

> "6. As has long been established, the damages to be awarded to the victim are "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation". If the victim's pursuit of gainful employment is interrupted or affected because of the negligent infliction of physical injury, the victim is to be compensated by an amount that reflects the financial consequences that follow from the impairment.
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> 7. Since at least *Graham v Baker* it has been recognised that it is convenient to assess an injured plaintiff's economic loss "by reference to the actual loss of wages which occurs up to the time of trial and which can be more or less precisely ascertained and then, having regard to the plaintiff's proved condition at the time of trial, to attempt some assessment of his future loss". But damages for both past loss and future loss are allowed to an injured plaintiff "because the diminution of his earning capacity is or may be productive of financial loss". Both elements are important. It is necessary to identify both what capacity has been lost and what economic consequences will probably flow from that loss. Only then will it be possible to assess what sum will put the plaintiff in the same position as he or she would have been in if injury had not been sustained.
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> 8. No doubt the past may provide important evidence about the plaintiff's earning capacity and what economic consequences will probably flow from what has happened. What a worker earned in the past may provide very useful guidance about what would have been earned if that worker had not been injured. But the inquiry is an inquiry about the likely course of future events and evidence of past events does not always provide certain guidance about the

[10] Consider section 11(3) in context.
[11] (1999) 197 CLR 138.
[12] *Husher v Husher & Anor* (1999) 197 CLR 138 at 142–143, [6] – [8].

future. There may be many reasons why an injured plaintiff's past work history provides no assistance in deciding what that plaintiff has lost through diminution of future earning capacity. ”

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“23. Deciding what value is to be ascribed to the loss of future earning capacity of an injured plaintiff requires close attention to the facts of each case. The task is not one to be undertaken by seeking to classify cases as concerning "sole traders" or "partnerships" or "wage-earners" or "trading trusts", and then attempting to deduce some rule of general application to all cases falling within the classification thus devised. Rather the inquiry is about what *could* the plaintiff have done in the workforce but for the accident and what sum of money *would* the plaintiff have had at his or her disposal. Only when those inquiries are pursued can a judgment be made about what capital sum to allow as damages for the impairment of the plaintiff's earning capacity. In doing so, regard must be had, of course, to all those contingencies of life that might reasonably be expected to affect the course of events in the future".[13]

(Footnotes omitted)

[7] In many cases, the High Court has emphasised that the assessment of loss of earning capacity, both between injury and trial but particularly future, is not merely an arithmetical exercise. It involves a consideration and an assessment of the sum of money that a notional plaintiff would have had at his or her disposal but for the accident. The inquiry into that issue necessarily involves the consideration of the hypothetical[14] circumstances that might have confronted a plaintiff before and subsequent to trial, or might be in prospect at the time of trial. In other words, necessarily, plaintiffs give evidence of what their plans were, what their aspirations were and what they thought their capabilities in the future might, if uninjured, might have been as well as what they might be in the circumstances of the injury.

[8] Indeed, a part of the inquiry by the defendant at trial often is directed to those issues so as to flesh out a better picture of what might have been the circumstances applicable absent injury and into the future when the hypothetical of the past and future loss is considered. For these reasons, statements of the nature that “absent injury, my plans in the future were to be” are receivable. The ultimate forensic question at the trial, is whether the evidence is persuasive and what weight is given to it and what role it plays, if any, ultimately in the assessment of the damages.

[9] It is with those observations in mind I turn to the impugned sentences of the quantum statement.[15]

[13] *Husher v Husher* at 148-149

[14] The enquiry into the “hypothetical” in the assessment of damages is considered in the important decision of *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638. See also Luntz, “Assessment of Damages for Personal Injury and Death: General Principles”, Lexis Nexis Butterworths, 2006 at paras 9.7-9.11.

[15] On day 4 of the trial the parties announced that they had agreed terms of settlement.