SUPREME COURT OF QUEENSLAND

CITATION:	*Petchell v Du Pradal; Pia Du Pradal Pty Ltd v Petchell* [2015] QCA 132
PARTIES:	**In Appeal No 11051 of 2014:** **DAVID PETCHELL** (appellant) **v** **JACQUES DU PRADAL** (respondent) **In Appeal No 11118 of 2014:** **PIA DU PRADAL PTY LTD** ACN 067 906 450 (appellant) **v** **DAVID PETCHELL** (respondent)
FILE NOS:	Appeal No 11051 of 2014 Appeal No 11118 of 2014 SC No 5581 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane – [2014] QSC 261
DELIVERED ON:	17 July 2015
DELIVERED AT:	Brisbane
HEARING DATE:	27 May 2015
JUDGES:	Gotterson JA and Atkinson and Martin JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeals are dismissed.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – WHERE ECONOMIC OR FINANCIAL LOSS – CARELESS ACTS OR OMISSIONS – where the defendant was found to have negligently caused injury to the first plaintiff – where the trial judge made an assessment of damages based on expert and other evidence given at trial – whether the trial judge erred in the assessment of damages for past and future economic loss – whether the trial judge erred in the assessment of damages for past and future care and assistance

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – GENERALLY – where the second plaintiff pleaded a cause of action and specified a measure of damages under that cause of action – where the High Court of Australia ruled, between the close of pleadings and the trial of the matter, that the measure of damages specified was incorrect – where evidence was raised at trial conforming to the correct measure of damages – where the second plaintiff at trial sought to argue the correct measure of damages – whether failure to plead the correct measure of damages, either originally or by amendment, was fatal to the second plaintiff's claim for damages

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – OTHER PECUNIARY DAMAGE – where the first plaintiff was an employee of the second plaintiff – where the first plaintiff was injured outside his employment and was consequently unable to continue working in the second plaintiff's business – where costs were incurred by the second plaintiff in paying for other persons to do work that would otherwise have been done by the first plaintiff – where the second plaintiff did not pay the first plaintiff any wages after his injury – where the sum expended by the second plaintiff to replace the first plaintiff's services was less than the amount of the wages that would have been due to him – whether the second plaintiff was entitled to damages *per quod servitium amisit*

EMPLOYMENT LAW – RIGHTS AND LIABILITIES AS BETWEEN EMPLOYER AND THIRD PARTIES – RIGHTS OF EMPLOYER AGAINST THIRD PERSONS – INJURY TO EMPLOYEE – GENERALLY – where the first plaintiff was an employee of the second plaintiff – where the first plaintiff was injured outside his employment and was consequently unable to continue working in the second plaintiff's business – where costs were incurred by the second plaintiff in paying for other persons to do work that would otherwise have been done by the first plaintiff – where the second plaintiff did not pay the first plaintiff any wages after his injury – where the sum expended by the second plaintiff to replace the first plaintiff's services was less than the amount of the wages that would have been due to him – whether the second plaintiff was entitled to damages *per quod servitium amisit*

Civil Liability Act 2003 (Qld), s 59, s 60
Civil Liability and Other Legislation Amendment Act 2010 (Qld), s 11
Uniform Civil Procedure Rules 1999 (Qld), r 5(1), r 150(1)(b), r 155, r 375(1)

Anderson v Gregory [2008] QCA 419, cited
Barclay v Penberthy (2012) 246 CLR 258; [2012] HCA 40, cited
Cattanach v Melchior (2003) 215 CLR 1; [2003] HCA 38, referred to
Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, distinguished
Leotta v Public Transport Commission (NSW) (1976) 50 ALJR 666; (1976) 9 ALR 437, cited
Medlin v State Government Insurance Commission (1995) 182 CLR 1; [1995] HCA 5, referred to
Water Board v Moustakas (1988) 180 CLR 491; [1988] HCA 12, cited
Witherspoon v Hutson [2015] QCA 109, distinguished

COUNSEL:

In Appeal No 11051 of 2014:
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J Rolls for the respondent

In Appeal No 11118 of 2014:
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J P Kimmins for the respondent

SOLICITORS:

In Appeal No 11051 of 2014:
McCullough Robertson for the appellant
Bennett and Philp for the respondent

In Appeal No 11118 of 2014:
Bennett and Philp for the appellant
McCullough Robertson for the respondent

[1] **GOTTERSON JA:** I agree with the order proposed by Atkinson J and with the reasons given by her Honour.

[2] **ATKINSON J:** Jacques Du Pradal was snorkelling on a fine Sunday morning on 29 June 2008 in the sea near Honeymoon Bay off Cape Moreton. He was run over by a motor boat driven by David Petchell and suffered severe injuries. He and Pia Du Pradal Pty Ltd ("the Du Pradal company"), a company of which he was both a director and an employee, took action in the Supreme Court for damages for the loss each suffered.

[3] Mr Petchell was found liable in negligence for the injury suffered to Mr Du Pradal and ordered to pay $675,203 damages. Mr Petchell appealed against the award of damages in respect only of past and future economic loss, and past and future care and assistance. Mr Petchell submitted that the award for past economic loss should be reduced from $144,200 to $12,136. In his submissions on appeal, he argued that no amount should have been allowed for future economic loss.

[4] Damages of $138,321 (with interest at two per cent being $17,521) for past care and $146,618 for future care were awarded at trial. On appeal, Mr Petchell submitted that no allowance should be made for personal care from 18 October 2010 to 24 October 2014; that the allowance for domestic care between 17 October 2010 and 24 June 2014 (the date of judgment) should be reduced; and that there be no allowance for future care or, alternatively, the allowance for future care be varied so as to allow one hour per week for domestic assistance, one hour per week for yard assistance and no allowance for personal care.

[5] The learned trial judge dismissed the Du Pradal company's claim. The Du Pradal company appealed that order, seeking that it be set aside and in lieu, an order made that there be judgment for the Du Pradal company against Mr Petchell in the sum of $19,054, together with interest on that sum from 29 June 2008.

The Petchell appeal

[6] It should first be noted that there was no appeal against the trial judge's findings that Mr Petchell was liable for Mr Du Pradal's injuries and that there was no contributory negligence. There was no appeal from the findings made as to the extent and duration of the injuries suffered by Mr Du Pradal as a result of Mr Petchell's negligence. There was no appeal from the awards of $68,000 for general damages; $119,579 for special damages; $865 interest on particular special damages of $8,752 at 1.56 per cent; and future medical expenses of $5,492.

Submissions by David Petchell

[7] Mr Petchell submitted that Mr Du Pradal had not proved any past or future economic loss, except during the year ended 30 June 2009, when Mrs Pia Du Pradal received gross income of $25,000 and Mr Du Pradal did not receive any income.

[8] With regard to the award of damages for past care, Mr Petchell submitted that the hourly rate allowed for care was excessive and should have been reduced to $20 per hour from 17 October 2010; that the amount of two hours per week for personal care from October 2010 was excessive and nothing should have been allowed; and that no more than two hours per week, rather than seven hours per week, should have been awarded for domestic assistance from 17 October 2010. Mr Petchell also submitted that no interest should have been allowed on the damages assessed for care, as the relevant date for s 60 of the *Civil Liability Act* 2003 (Qld) is the date of judgment.

[9] In relation to future care, Mr Petchell submitted that there should be no allowance for personal care; that there should be no allowance, or alternatively only one hour per week, for domestic assistance; and that future care should only be allowed for five years, i.e. until Mr Du Pradal turns 76, not for 16 years. No challenge was made to the one hour per week allowed for yard assistance.

Consideration

[10] It was common ground before the learned trial judge that damages for past and future economic loss represent diminution in earning capacity that is productive of financial loss: *Medlin v State Government Insurance Commission*.[1]

[11] As the learned trial judge found, Mr Du Pradal performed an administrative role in the Du Pradal company's business for which he received the relatively modest salary or "management fee" of $30,000 gross a year in each of the three years before his injury. These management fees were in addition to dividends which were received both before and after his injury (except for the 2009 year). Since he was injured, Mr Du Pradal has received no salary or management fees from the Du Pradal company.

[12] The Du Pradal company runs a business which designs, manufactures and sells limited runs of high-quality clothing, both made-to-measure and ready-to-wear. Mrs Du Pradal designs the clothes, chooses the fabric and works in the boutiques where the clothes are sold.

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1 (1995) 182 CLR 1 at 3 and 16.

Mr Du Pradal's role in the company was to do all the book work, attend to all the accounts and pay the bills. At the time when he was injured, the Du Pradal company was in the process of buying a studio. Mr Du Pradal, a qualified and experienced architect, was to plan and organise the fit out. He had also done the negotiations with the banks. Mr Du Pradal was responsible for dealing with suppliers, running stock and other deliveries, that is, what was described as the "rational" rather than the creative side of the business, which was the domain of Mrs Du Pradal.

[13] Mr Du Pradal's injuries meant that he was unable to perform any of his administrative tasks until 31 December 2010 when his injuries "somewhat stabilised".[2] After that date, he was assessed as having lost about 80 per cent of his pre-accident capacity. It was therefore correct to assess his past economic loss at $500 net per week until 31 December 2010 and at $400 net per week from 1 January 2011 until the date of judgment. That amount is $144,200.

[14] Mr Petchell did not dispute that the correct interest rate to apply was 1.56 per cent. For the six years and four months from injury to judgment, this represents interest payable of $14,247.

[15] The appeal against the award for past economic loss and interest on it cannot be successful.

[16] So far as future economic loss is concerned, the learned trial judge found that Mr Du Pradal's expressed intention to have continued working for another 10 years, until June 2018, if he had not been injured, was "aspirational".[3]

[17] Instead, an allowance was made for only a further one year of loss of earning capacity into the future. This was an amount of $400 net per week, or $20,360 in total. No argument was advanced which would persuade me that the learned trial judge's assessment was erroneous. Accordingly the appeal against the award for future economic loss should be dismissed.

[18] The appeal with regard to the assessment of past and future care concerned only care and assistance for the period from 18 October 2010 onwards. The assessment of past and future gratuitous care is governed by s 59 of the *Civil Liability Act* which provides:

> "**59 Damages for gratuitous services**
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> (1) Damages for gratuitous services are not to be awarded unless–
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> (a) the services are necessary; and
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> (b) the need for the services arises solely out of the injury in relation to which damages are awarded; and
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> (c) the services are provided, or are to be provided–
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> (i) for at least 6 hours per week; and
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> (ii) for at least 6 months.
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> (2) Damages are not to be awarded for gratuitous services if gratuitous services of the same kind were being provided for the injured person before the breach of duty happened.

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2 *Du Pradal v Petchell* [2014] QSC 261 at [118].

3 At [119].

> (3) Damages are not to be awarded for gratuitous services replacing services provided by an injured person, or that would have been provided by the injured person if the injury had not been suffered, for others outside the injured person's household.
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> (4) In assessing damages for gratuitous services, a court must take into account–
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> (a) any offsetting benefit the service provider obtains through providing the services; and
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> (b) periods for which the injured person has not required or is not likely to require the services because the injured person has been or is likely to be cared for in a hospital or other institution."

[19] There is no appeal from the finding that the threshold under s 59(1)(c) was met.

[20] The evidence in support of the need for care came from the evidence which the trial judge accepted from Mr Du Pradal, Mrs Du Pradal and the occupational therapist, Helen Coles. The claim was, however, limited to the particulars given in the assessment of the need for care and assistance made by Ms Coles. In certain instances, the trial judge reduced the amount allowed by Ms Coles in light of other evidence adduced at the trial but specifically observed that that did "not suggest any general unreliability otherwise about Ms Coles' assessment".[4]

[21] The amount that was in dispute was the allowance of $26.80 per hour for seven hours of domestic assistance for the 192.29 weeks from 17 October 2010 to 24 June 2014, an amount of $36,074; and of two hours per week for personal care at $26.80 per hour for 209.71 weeks from 18 October 2010 to 24 October 2014, an amount of $11,240.

[22] With regard to the period from October 2010, the judge's findings as to the need for personal care were:

> "With respect to the ongoing personal care from October 2010, Mr Du Pradal only needed limited assistance in putting a sock on his left foot, tying his shoe lace and cutting his toe nails. I accept the defendant's submission that Ms Coles' allowance of three to four hours per week is excessive. It appears that Ms Coles allowed for Mrs Du Pradal's drying Mr Du Pradal's feet, but that does not accord with Mr Du Pradal's evidence. I will therefore allow two hours per week personal care for the period from October 2010 until the date of judgment."[5]

[23] This accorded with the evidence given by Mrs Du Pradal that the personal tasks she undertook for Mr Du Pradal took 15 minutes a day, with another 15 minutes once a week for a pedicure. The learned trial judge was entitled to accept that evidence and no error has been shown in her having done so.

[24] With regard to ongoing domestic assistance, the learned trial judge assessed the diminishing but continuing assistance provided by Mrs Du Pradal to Mr Du Pradal. Her Honour found that the ongoing amount was no less than one hour per day (or seven hours per week). She found that the assessment by Ms Coles was reasonable given

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4 At [131].
5 At [131].

that Mrs Du Pradal prepared the evening meals and did all of the laundry.[6] The learned trial judge allowed one hour per week for tasks in the garden after October 2010. This assessment was not questioned on appeal.

[25] In assessing the commercial cost of the care provided, the trial judge relied upon the evidence of Susan De Campo, an expert as to the relevant wage rates for various services provided. The learned trial judge recorded the defendant's submission that the hourly rates referred to in Ms De Campo's report with respect to personal care were excessive, as most persons paid under the award have a Certificate IV in disability and aged care, or many years' experience in personal care. The defendant submitted that there was no evidence in relation to a reasonable award for personal care relevant to Mr Du Pradal's needs. The learned trial judge accepted, as she was entitled to, that the rates in Ms De Campo's report were relevant for calculating the commercial cost of providing the care that Mr Du Pradal required and that it was appropriate to use those award rates.

[26] The trial judge assessed Mr Du Pradal's ongoing needs for future care on the same basis, allowing $26.80 per hour for two hours of personal care and seven hours of domestic assistance per week, and $40 per hour for one hour per week of garden maintenance. This made a total of $281.12 per week which, discounted by 10 per cent, produced damages for future care of $146,618.

[27] The trial judge allowed interest at common law at two per cent from the date of the accident to the date of judgment on the total amount allowed for damages for past care and assistance of $138,321. The amount of interest assessed was therefore $17,521.

[28] There was ample evidence to support the learned trial judge's assessment. That evidence was provided by Mr Du Pradal, Mrs Du Pradal, the occupational therapist and two orthopaedic surgeons. While the most detailed evidence was contained in the expert report of occupational therapist, Ms Coles, as discussed earlier in these reasons, the learned trial judge properly revised the conclusions there given as to the amount of care required on the basis of evidence given at trial by Mr and Mrs Du Pradal. The lesser care requirements evidenced at trial may be attributable to Mr Du Pradal's desire to regain some element of his previous ability and independence, as suggested by some of the expert evidence. The medical experts also considered that, given the length of time between Mr Pradal's incurring the injuries and the preparation of their reports, any further improvement in his situation was improbable. Any reduction in the amount of care he will require in future is correspondingly unlikely. In these circumstances, the criticisms made of the learned trial judge's assessment of the damages awarded for gratuitous care on appeal are without merit.

[29] So far as interest is concerned, s 60 of the *Civil Liability Act* provides that a court cannot order the payment of interest on an award of damages for gratuitous services provided to an injured person. However, the section in question was introduced by s 11 of the *Civil Liability and Other Legislation Amendment Act* 2010 (Qld), which commenced on 1 July 2010, well after Mr Du Pradal was injured. Since the award of interest is compensatory, this is a substantive rather than merely procedural provision and, without words clearly removing accrued rights, must be read only to apply to injuries that occurred after 1 July 2010.

[30] The appeal by Mr Petchell is without merit and should be dismissed.

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6 At [132].

The Du Pradal company appeal

[31] The Du Pradal company submitted that, as a consequence of the injuries suffered by Mr Du Pradal, it was deprived of his services and so suffered loss and damage. The learned trial judge made findings in favour of the loss suffered by the Du Pradal company. However, because the claim for damages in its pleading was for loss of profits, a measure of damages no longer considered appropriate for this cause of action after the decision of the High Court in *Barclay v Penberthy*,[7] the claim was dismissed.

Submissions by Pia Du Pradal Pty Ltd

[32] The Du Pradal company submitted that it was an error to dismiss the claim on the basis that only a loss of profits had been pleaded, so that a claim for the costs of replacement labour was precluded. It also submitted that the learned trial judge had failed to consider the uncontested evidence as to the losses sustained by the second plaintiff in paying wages to another employee to carry out some of the services which had previously been rendered by Mr Du Pradal to the Du Pradal company.

Submissions by David Petchell

[33] Mr Petchell submitted that the Du Pradal company failed to plead specifically the damages it sought to be awarded after trial in accordance with r 150(1)(b) and r 155 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"). He argued that the evidence led as to the loss was vague and was not subject to cross-examination as it did not form part of the pleaded case. No claim was advanced in the Du Pradal company's written submissions at trial for additional moneys paid to an existing employee, Mr Adler, for providing replacement labour and it could not be said that the trial judge erred in failing to make an allowance for additional moneys paid to Mr Adler.

Consideration

[34] The cause of action which was the basis of the Du Pradal company's claim is described as *per quod servitium amisit*. This has recently been recognised by the High Court as continuing to form part of the common law of Australia. The High Court in *Barclay v Penberthy* explained the nature of this cause of action by reference to Professor Fridman's *The Law of Torts in Canada*,[8] where the learned author emphasised that "the 'essential idea' behind this action is that to cause loss to the master of a servant by rendering his servant incapable of performing the services for which the servant was engaged or hired is an actionable wrong, as long as the defendant either intentionally or negligently acted in such a way as to bring about the deprivation of the services."[9]

[35] So far as the measure of damages is concerned the plurality in the High Court referred with approval to a passage in the last edition of *McGregor on Damages* to deal with the matter.[10] There it was said that the basic measure of damages "should be the market value of the services, which will generally *be calculated by the price of a substitute less the wages which the master is no longer required to pay to the injured servant*."[11] The measure of damages is generally said to be the extra cost of employing substitute employees but not loss of profit.

[36] Kiefel J, in a separate learned concurring judgment, concluded that:[12]

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7 (2012) 246 CLR 258.
8 2nd ed (2002), p 733.
9 *Barclay v Penberthy* at 279-280 [30].
10 13th ed (1972) at [1167].
11 *Barclay v Penberthy* at 286 [57] (emphasis added).
12 At 317 [164].

> "Consistency with the purpose and scope of the action *per quod servitium amisit* requires that damages be limited to the cost of substitute labour. In *Cattanach v Melchior*,[13] it was observed that the employer suffers damage only when it is forced to pay a salary or wages to its injured employee when it is, at the same time, deprived of the employee's services. To permit recovery on any wider basis, including for profits lost, would be to transform an exceptional remedy for a particular type of loss into a substantial exception to the general principles which have developed concerning recovery of economic loss in tort. In terms of the coherence of the law, that would be undesirable."

[37] The learned trial judge referred to the High Court decision as to the appropriate measure of damages for this cause of action. The pleading by the Du Pradal company, which preceded the High Court decision in *Barclay v Penberthy*, had claimed damages for loss of profits as a result of its loss of the services of Mr Du Pradal. However during the course of the trial and in submissions, the plaintiff changed the form of damages claimed from loss of profits to the notional cost of replacement labour, less the fees paid to Mr Du Pradal. This was opposed by the defendant on the basis that what was pleaded in the claim and statement of claim was loss of profits, not the cost of replacement labour.

[38] At the trial, evidence was led which demonstrated the loss that the Du Pradal company suffered in accordance with the loss held to be recoverable for this cause of action in *Barclay v Penberthy*. Was the failure to amend the pleading fatal to the recovery of such loss? An application to amend the pleadings so that the damages claimed were consistent with those allowed in *Barclay v Penberthy* would have been desirable and could not have been sensibly opposed. Nevertheless, in spite of there being no such amendment, evidence was led which provided a proper, contested basis for a decision being made by the trial judge for awarding damages for the replacement costs of labour. The cause of action in *per quod servitium amisit* was otherwise pleaded. In those circumstances, the failure to amend the pleadings should not of itself have been fatal.

[39] The High Court in *Leotta v Public Transport Commission of New South Wales*[14] held that a failure to amend was not fatal in a case where the cause of action remained the same, but the evidence led deviated from the facts alleged in the statement of claim, where the evidence led was capable of satisfying the elements of the cause of action. This is illustrated by the following passage from *Leotta*:[15]

> "[T]he duty of the trial judge was clear. If in the cause of action upon which the plaintiff sued there had emerged at the conclusion of the evidence facts which, if accepted, established that cause of action, then it was the duty of the trial judge to leave the issue of negligence to the jury. The pleadings should have been amended in order to make the facts alleged and the particulars of negligence precisely conform to the evidence which had emerged. Part 20, r. 1(2) of the New South Wales *Supreme Court Rules* provides that all necessary amendments shall be made for the purpose of determining the real questions raised by or otherwise depending on the proceedings. Now, and for many years past, a plaintiff does not fail by being refused leave to amend or through

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13 (2003) 215 CLR 1 at 32 [67].
14 (1976) 50 ALJR 666.
15 At 668.

> failure formally to apply for amendment, where the evidence has disclosed a case in the cause of action fit to be determined by the tribunal of fact. Particularly is this so when the action finally determines the rights of the parties in the cause of action."

[40] Rule 5(1) of the UCPR provides that the purpose of the UCPR is to facilitate the just and expeditious resolution of the **real issues** in civil proceedings. That purpose is facilitated by r 375(1), which provides that the court may allow or direct a party to amend its claim or pleading at "any stage of a proceeding".

[41] The approach favoured by the High Court has been followed in this Court in *Anderson v Gregory*:[16]

> "It is well established that a failure to amend pleadings to conform with the evidence is not fatal to the plaintiff's succeeding on that evidence; see *Leotta v Public Transport Commission (NSW)*;[17] *Water Board v Moustakas*.[18]"

[42] This is not a case where the issue was first raised on appeal.[19] The learned trial judge allowed questioning relevant to this issue, despite counsel for Mr Petchell objecting on the basis that the pleadings did not raise the cost of substitute labour as the measure of damages. Evidence was adduced through cross-examination of an expert accountant, Mr Rodger Flynn. Further evidence was led through cross-examination of Mr Du Pradal, evidence-in-chief of Mrs Du Pradal and the report of expert accountant Mr Bradley Conn as to substitute labour costs being incurred by the Du Pradal company in the fit-out of its new premises.

[43] With respect to day-to-day running of the Du Pradal company, although Mrs Du Pradal gave evidence in examination-in-chief that no additional staff were hired to undertake Mr Du Pradal's role in the business, she said in cross-examination that Mr Adler "took over a lot of the jobs that [Mr Du Pradal] had been doing [in the running of the business] and he did get a pay increase" as a result. Mr Flynn's expert report expressly addressed the issue of "Replacement of Mr Pradal" [*sic*]. The report noted that Mrs Du Pradal took on much of Mr Du Pradal's workload, as oral evidence corroborated, without increased remuneration. However, the report also recorded that Mr Adler took on additional duties and received additional income in the sum of $12,054 over the three years following Mr Du Pradal's injuries. While Mr Flynn drew no conclusion as to the reason for this increase, Mrs Du Pradal confirmed that it was brought about by Mr Du Pradal's absence from the company.

[44] The evidence led at the trial showed that the cost of additional labour incurred by the Du Pradal company as a result of the injury to Mr Du Pradal was $19,054. That amount was made up of $7,000 expended by the Du Pradal company for the design and fit out of the new studio, which would otherwise have been performed by Mr Du Pradal as part of his duties; and $12,054 in additional wages paid to Mr Adler, who took on tasks previously performed by Mr Du Pradal which he was unable to undertake because of his injuries.

[45] However, this amount of $19,054 is still less than the amount of money that would otherwise have been paid to Mr Du Pradal. When the amount of $30,000 per year

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16 [2008] QCA 419 at [30] (Holmes JA, with whom McMurdo P and McMeekin J agreed).
17 (1976) 50 ALJR 666 at 668.
18 (1988) 180 CLR 491 at 497.
19 Cf *Coulton v Holcombe* (1986) 162 CLR 1; *Witherspoon v Hutson* [2015] QCA 109 at [57].

that Mr Du Pradal would have been paid is offset against the moneys expended by the Du Pradal company because of his absence, the effect is that the cost of the additional labour is less than the amount that would have been paid to Mr Du Pradal. As a result, there is no compensable loss.

[46] It follows that the appeal by the Du Pradal company must be dismissed.

Costs

[47] The parties are invited to make submissions as to costs of each appeal.

Orders

[48] The appeals are dismissed.

[49] **MARTIN J:** I agree with Atkinson J.