SUPREME COURT OF QUEENSLAND

CITATION:	*Bailey v Nominal Defendant* [2004] QCA 344
PARTIES:	**PETER JOHN BAILEY** (plaintiff/respondent) v **NOMINAL DEFENDANT** (defendant/appellant)
FILE NO/S:	Appeal No 12006 of 2003 SC No 969 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	24 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	3 June 2004
JUDGE:	Jerrard JA and Chesterman and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed. Order below is varied by substituting the amount of $370,000.00 as the judgment sum in lieu of the amount of $523,481.65;** **2. Appellant pay one half of the respondent's cost of the appeal**
CATCHWORDS:	TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – APPORTIONMENT OF DAMAGES – where respondent suffered injuries when his vehicle was involved in a single car accident – where respondent was the only witness to the accident – where trial judge's decision based on findings of credibility – whether trial judge misused his advantage in accepting respondent's account TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – APPORTIONMENT OF DAMAGES – where respondent suffered physical injuries in accident and subsequently suffered psychiatric injuries – where trial judge awarded damages for economic loss on basis that respondent had been discharged from the army because of his injuries – whether trial judge erred in so concluding – whether discharge resulted from misconduct of the respondent

Uniform Civil Procedure Rules 1999 (Qld), r 770(3)

Beard v Richmond & Ors (1987) Aust Torts Reports 80-129, distinguished
Devries v Australia National Railways Commission (1993) 177 CLR 472
Fox v Percy (2003) 77 ALJR 989, distinguished
State Rail Authority of NSW v Weigold (1991) 25 NSWLR 500, applied

COUNSEL: P A Keane QC, with K N Wilson SC, for the appellant
J A Griffin QC, with P C Lafferty, for the respondent

SOLICITORS: Walsh Halligan Douglas for the appellant
Roati and Firth for the respondent

[1] **JERRARD JA:** In this appeal I have read and respectfully agree with the reasons for judgment of Philippides J, which held that the appellant fails to overturn the decision on liability. I add the following comments.

[2] As Philippides J recounts, a decision to discharge the respondent on disciplinary grounds was made on 20 October 1999 and his discharge was delayed until the receipt of the FMB (Final Medical Board) assessment. That was received on 26 October 1999, assessing the plaintiff as grade 4, which would also result in an inevitable and immediate discharge. But since a decision had been made to discharge him on disciplinary grounds, then unless the conduct constituting those grounds was related to his psychiatric condition and therefore to the accident, it is simply unfortunate for the respondent that his physical injuries and the resultant grade 4 assessment would have resulted in his discharge on medical grounds in any event.

[3] It is undeniable that the respondent would have suffered the loss of his army career as a direct result of the accident, had he not engaged in conduct regarded as disciplinary breaches justifying discharge. He engaged in some of that conduct when it was probably clear to him that he would be discharged medically unfit. The trial judge found that Dr James and Mr Zemaitis had said the disciplinary breaches (leading to his discharge) were directly related to the psychiatric condition from which the respondent suffered, and which itself resulted from the accident. In fact Dr James did not say quite that and nor did Mr Zemaitis. What Dr James said was that the respondent's psychiatric condition could have made him feel that he was too tired to go on parade – (that being one of the disciplinary matters) – and Mr Zemaitis said that the respondent's knowledge of his approaching discharge could have caused the view that he need not bother to obey orders. On that evidence actually given, while there was a connection between the un-disciplined conduct and the respondent's knowledge that his discharge on medical grounds would ultimately occur, the nexus existing between the accident and the discharge is different from the nexus described by the learned trial judge.

[4] The actual nexus disclosed by the evidence means that the respondent's discharge from the Army was a consequence of his own conduct voluntarily engaged in, and for which he was criminally and otherwise responsible. He pleaded guilty to an offence of drink driving and to two offences of driving while

disqualified, that conduct being part of the disciplinary charges. It was not conduct which was a consequence of the accident and for which the appellant should be held liable. The analysis in the majority decision *SRA of NSW v Weigold* (1991) 25 NSWLR 500 at 501-517 is against the respondent. That analysis holds, and I respectfully agree, that in circumstances such as these a defendant should not be held responsible for loss a plaintiff suffers post accident, which loss results from a rational and voluntary decision to engage in unlawful activity, or, in this case, inactivity.

[5] The respondent's senior counsel submitted that the appellant should be held liable in damages to the respondent, it being sufficient that he would have suffered the loss of the opportunity of a career in the Army as a result of the accident in any event, had he not provoked his discharge on disciplinary grounds. The respondent's senior counsel submitted that a soldier who knew he would be discharged medically unfit on 2 March by reason of compensable injuries suffered in a motor vehicle accident, and who for that reason felt free to assault the commanding officer on 1 March – resulting in immediate discharge for that reason – would not be thereby disentitled to damages for the loss of a possible Army career caused by the injuries. I respectfully disagree with that argument. The discharge occurring in that hypothetical circumstance would then result solely from that soldier's own choice of behaviour. That choice would have consequences, as the respondent's choices of behaviour has had consequences. Those include that his conduct over time caused his discharge, and a Court can no more disregard that than the Army could disregard that conduct. The respondent's conduct was affected by the psychiatric consequences of his physical injuries, but was still conduct for which he was legally responsible, resulting from choices which were not inevitable or even predictable from his physical or psychiatric injury. A Court is obliged to consider the respondent's conduct based discharge as one of the vicissitudes of life which had actually occurred by the date of trial, and to conclude that the respondent had deprived himself of the basis for a claim that the appellant was liable to him in damages for lost opportunity of an Army career. That career was lost to him, but its loss was not caused by the appellant's negligence or the respondent's injuries resulting from that negligence.

[6] The respondent's damages were assessed on the basis that the appellant's conduct had caused that lost opportunity to remain in the Army; and were accordingly assessed on a wrong basis. I note that in *SRA v Weigold* the New South Wales Court of Appeal sent that matter back to the Common Law Division for a re-trial on the issue of damages. It is an order provided for by *UCPR* r 770(3), and the decision in *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23 makes clear such an order is a matter of discretion, where a plaintiff is found on appeal to have established liability but not the quantum of the plaintiff's loss. In *Weigold* Samuels JA described (at 518) some matters on which further evidence was necessary before a Court could assess properly the damages that plaintiff should receive, he having likewise been awarded a sum calculated on the incorrect assumption that had it not been for an accident caused by the negligence of the SRA that appellant would still have been employed by it; whereas the evidence in that case was that the appellant, following the accident, had been convicted and imprisoned for growing cannabis, and dismissed from employment with the SRA because he

was in jail and unable to attend work. The New South Wales Court held by majority that the trial judge had fallen into error in refusing to take into account the fact of that conviction and imprisonment as a vicissitude of life which had crystallised before the date of the hearing, and which reduced the notional economic loss which could be attributed to the negligence of the SRA.

[7] The further evidence Samuels JA suggested as necessary and relevant was as to the ability of the State enterprise to re-employ that respondent despite his conviction, and as to the general disadvantage that respondent would face in the employment market as a convicted criminal. Samuels JA considered that an assessment of that respondent's employability would depend to some extent upon the impression formed of him in the witness box, and was accordingly a matter for re-trial. It was not suggested that that plaintiff's claim for damages should be dismissed entirely because, although liability was established, part of the damages had been assessed at trial on a basis which involved an error of law.

[8] In this matter all possible relevant evidence appears to have been led, other than that of which judicial notice can be taken, such as the award rate for different types of employment, published in the Industrial Gazette.[1] The appellant's senior counsel submitted this Court should assess the damages, that the evidence had been led, and was "as good as it's going to get". I respectfully agree. The respondent's senior counsel invited the Court to assess the damages itself or send the case back to the trial judge, should the respondent uphold the finding on liability but be found to have failed to establish a lost opportunity to continue to serve in the Army. Neither counsel suggested any further submissions would be necessary.

[9] Awards have the force of law throughout the State and are enforceable 21 days after publication in the Industrial Gazette.[2] In these proceedings the evidence was that the respondent was 18 years old when injured in September 1997, would have been 20 when dismissed from the Army in October 1999, and will now be 25. Little employment history was revealed prior to his joining the Army, and although the evidence at trial showed he had struggled to complete the physical requirements of the rifleman's course and membership of 1RAR, he had persevered and succeeded. His post accident history is that he had not had any non-Army employment at all, in part because of his period of addictive use of unlawful and dangerous drugs, and in part because of physical and psychological conditions attributable to the accident.

[10] The evidence shows he had been involved in a second car accident, in late 2000, when a passenger in a stolen vehicle, and fractured his left ankle. The learned trial judge found that that fracture had left him with some disability, although not significant.

[11] The evidence at the trial showed that the plaintiff, when young, was a risk taker with poor judgment and capable of engaging in self destructive or self endangering behaviour. That obviously carried the risk of possibility of injury from other sources, such as in fact happened in late 2000, but the evidence did

---

[1] As a statutory instrument (*Statutory Instruments Act* 1992, s 7) of which judicial notice must be taken – *Evidence Act* 1977 s 43(b).

[2] *Industrial Relations Act* 1999 s 123(1)(b) and s 133. Publication is provided for in s 287(6).

not show any reason to assume that the plaintiff if uninjured in the 1997 accident would not have matured over time.

[12] The learned trial judge found that the plaintiff while very young had lost his Army career and, as a consequence of the injury for which the appellant was responsible, had an earning capacity limited to part-time work with an understanding employer. No reason has been shown for disturbing those findings. Assessing the plaintiff's loss of opportunity to earn an income from employment other than in the Army, if uninjured in September 1997, requires that the court substantially discount the value of that notional loss by reason of the respondent's demonstrated immaturity and risk taking, and the obvious possibility that he would have endangered himself by abusing non-prescribed drugs even if uninjured; in addition to discounting the notional value of other lost employment opportunities because of the ordinary contingencies and risks of life.

[13] The evidence showed that the plaintiff had a driver's license, and if uninjured no other obvious employment inducing attributes except youth and then good health. I think it appropriate to assess the lost opportunity of employment from other sources by reference to the Industrial Commission award for store workers and packers (for the Northern and Mackay division), and to the award for the transport distribution and courier industry, also for the Northern and Mackay division. That seems the work to which the respondent would most obviously have qualified. The awards are (for 2004) $512.70 per week for a grade 4 driver of a two axle rigid vehicle greater than 13.9 tonnes GVM, and $521.80 per week for the driver of a rigid vehicle and heavy trailer combination with 3 axles of GVM of 22.4 tonnes or less. A driver of a two axle rigid vehicle not exceeding 4.5 tonnes GVM is entitled to an award rate of $503.80 per week. A store worker grade 2 has an award rate of $508.50 per week (as at 2003), and a grade 4 store worker $542.20 per week.

[14] Using those figures produces, for a grade 4 driver, a net income after tax of $22,490.00, applying the current tax rates; for a grade 4 driver $22,821.00, after tax. A grade 4 store worker receives $23,564.20 after tax at the award rate. If one takes an average of $23,000.00 net per annum after tax, then after allowing for a 9% loss of superannuation contributions, the resulting figure is $25,000.00 lost net per annum or $480.00 per week.

[15] Assuming the uninjured respondent would have remained in the work force until age 65, he has lost the value of the opportunity of 45 years of employment outside the Army, to be discounted as described and also because of the possibility that he will get some part time work with an understanding employer. Five years have been lost up till now and 40 remain. The maximum value of the lost opportunity to date is (five years x $25,000.00 pa) $125,000.00. I consider the discount factor should be 60%, because the risks of his non-utilisation of that opportunity would be highest while the respondent was immature. That results in an award for past economic loss of $50,000.00, together with interest thereon at 9% for five years ($22,500.00), making a total figure of $72,500.00 under that head. The trial judge had allowed $125,000.00.

[16] Regarding future economic loss, the maximum value of the lost opportunity would have been ($480.00 per week x 917.6) $440,448.00, using the 5% rate and 40 years. I consider the overall discount for the described contingencies should

reduce because of assumed increased maturity, but in this case should still remain high. I would discount by 50%, resulting in a figure for future economic loss of $220,224.00; the trial judge allowed $300,000.00.

[17] That means I would reduce the past economic loss by $52,500.00, and the future economic loss by $79,776.00, totalling $152,276.00. The total sum for which the learned trial judge gave judgment was $523,481.65; rounding off the figures I would by order substitute judgment for the respondent in the sum of $370,000.00.

[18] I would order the appellant pay one half of the respondent's cost of the appeal.

[19] **CHESTERMAN J:** The facts relevant to this appeal are set out and analysed in the reasons for judgment of Philippides J. I agree with her Honour that it is not open to this Court to overturn the conclusion of the trial judge that the respondent was forced off the road by an unidentified truck.

[20] The trial judge accepted the evidence of the respondent. The judgments of the High Court which are reviewed by Philippides J make it impossible for an appellate court in that circumstance to reverse the finding of fact unless it is obvious that the finding is wrong such as where the accepted evidence is 'inconsistent with facts incontrovertibly established … or was "glaringly improbable"'. There must be something in the evidence that shows decisively that the trial judge erred in acting on his impressions of the respondent.

[21] The evidence proved that the respondent had not been honest in material parts of his testimony, as Philippides J has demonstrated. There was therefore a grave suspicion that his account of the accident was unreliable. A trial judge might be reluctant to accept it. The trial judge did, however, accept it and this court can interfere only if that finding is inconsistent with facts proved beyond controversy, or was glaringly improbable, or if the trial judge palpably failed to use his position of advantage as the tribunal of fact.

[22] It cannot be said that the finding made by the trial judge was glaringly improbable. There is nothing improbable in an account that an oncoming vehicle moved on to the wrong side of a carriageway and that in taking evasive action a motorist might lose control of his vehicle and slide off the road.

[23] The appellant did submit that the respondent's account was inconsistent with an incontrovertible fact established by the evidence. The respondent testified that he drove to his left to avoid the oncoming truck and his left hand wheels went from the sealed carriageway onto the gravel shoulder. It was this that caused him to lose control of the vehicle which then swerved to its right across the highway. A search undertaken by the investigating constable failed to find any tyre marks on the gravel. The absence of marks where one would have expected them cannot, I think, be regarded as an incontrovertible fact. The respondent's car may have left the sealed surface and may not have left marks on the gravel, or the marks may not have been where the constable looked. The absence of marks adds to the suspicion about the respondent's evidence, but it does not, I think, conclusively prove that the evidence was unacceptable. The evidence is different in kind and character to the tyre marks which, in *Fox v Percy* (2003) 77 ALJR 989 led to a finding that the collision could not have occurred where the trial judge thought it did. The wheel marks were certainly evidence and were

certainly incontrovertible. The absence of marks does not have the same attribute.

[24] I agree with Philippides J that the account given by the respondent to the ambulance officers who treated him at the scene of the accident is corroborative of his evidence. The trial judge was entitled to regard the statement as an indication that the other vehicle described by the respondent was on its incorrect side of the carriageway. The respondent told the ambulance officers that an oncoming vehicle was the reason for his losing control of the car. The trial judge was entitled to give particular weight to this corroborative statement made very shortly after the accident. Coupled with his Honour's assessment of the respondent and the fact that the respondent's version of events is not demonstrably wrong it is, as Philippides J says, impossible for this Court to conclude that that account was incapable of belief.

[25] The trial judge did not deal comprehensively with the established defects in the respondent's evidence and he did not properly explain why, despite those defects, he accepted the essentials of the respondent's testimony. It cannot, for the reasons just discussed, be concluded that the trial judge palpably misused his advantage of observing the witnesses.

[26] I agree also with the analysis made by Philippides J of the respondent's claim for damages and, in particular, her Honour's conclusion that the respondent failed to prove he suffered any compensable loss by reason of his discharge from the Army. This gives rise to a difficulty because the only basis on which the respondent put forward his claim for damages was that his injuries deprived him of a lifelong career in the Army. No other basis was advanced in the evidence or was made the subject of submissions, to the trial judge or this Court.

[27] Logically there are three possibilities: (i) a new trial could be ordered on the question of damages; (ii) judgment could be given for the appellant on the basis that the respondent had not proved any loss consequent upon the appellant's negligence; (iii) the court could assess damages utilising such evidence as was led and such materials that are, as a matter of law, available.

[28] In my opinion it is not appropriate to order a new trial. The need for it arises only because counsel for the respondent at the trial neglected to address what should have been an obvious possibility: that the respondent would not prove he had lost his Army career as a result of the injuries suffered in the accident. He should have led evidence of occupations that were or would have been available to the respondent but which he could not pursue because of his injuries. That course would have presented difficulties because the respondent had not engaged in any full time employment between leaving school and enlisting in the Army. He had had part time menial work the loss of which might not have resulted in any substantial award. Nevertheless something could have been done to show the kind of work available to a man of the respondent's capacities had he not been injured and the difficulty he would encounter in finding work because of those injuries. Nothing of this sort was done.

[29] The failure of counsel to raise a point, or adduce evidence on a point, at trial has always been regarded as a cogent factor in refusing a new trial. Examples are *Bursten v Melbourne & Metropolitan Tramways Board* (1948) 78 CLR 143 at 167; *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 at 39;

Coulton v Holcombe (1986) 162 CLR 1 at 8; *Water Board v Moustakis* (1988) 62 ALJR 209. To this list may be added the authority mentioned by Jerrard JA, *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23.

[30] The second course is unattractive. It would deprive the respondent of any recompense for his hurt and expose him to an order for the costs of the trial and of the appeal in circumstances where he has demonstrated to the satisfaction of the trial judge, affirmed by this court, that he was injured as a result of the appellant's negligence. The Court should not endorse this result if it can be avoided.

[31] The third course is to make an assessment of damages from the meagre resources available. Jerrard JA has undertaken this difficult task and has been able, from those trifling materials, to make an assessment of the respondent's loss.

[32] His Honour has noted that senior counsel for the appellant urged this course upon the Court, without offering submissions to assist the task. The same attitude was evinced by counsel for the respondent. Accordingly, I acquiesce in the course followed by Jerrard JA and respectfully agree with his Honour's assessment of damages.

[33] I agree with the orders proposed by his Honour.

PHILIPPIDES J:

Background

[34] The appellant appeals from a judgment given in favour of the respondent in the sum of $523,481.65 in respect of injuries he sustained in a motor vehicle accident.

[35] The accident occurred at about 1.00 am on 26 September 1997, when the vehicle driven by the respondent left the roadway and overturned. The respondent's case was that he had been driving in an easterly direction along the Sunshine Motorway near Buderim at about 100 kilometres per hour and that as he came to a gentle left hand curve in the roadway, he was faced with a semi-trailer on, or substantially on, his side of the roadway, causing him to swerve to avoid it and to lose control of his vehicle.

[36] The respondent was the sole occupant of his vehicle. The ambulance attended at the scene of the accident and the respondent was taken to the Nambour Hospital at 2.50 am where a blood sample was taken which indicated that the respondent had a blood alcohol reading of .045.

[37] The respondent was 18 years of age at the time. He was a serving member of the Australian Army and was returning to his barracks after a period of leave.

[38] The learned trial judge found that the accident was caused by the driver of an unidentified vehicle as claimed by the respondent, that there was no contributory negligence by the respondent and awarded damages of $523,481.65. The appellant appeals both the finding as to liability and the quantum of the damages awarded.

Appeal on liability

Grounds of appeal

[39] As to the finding on liability, the grounds of appeal pressed before this Court are that the learned trial judge:

(a) acted contrary to the evidence, and to the weight of the evidence;
(b) failed to give any or any sufficient weight to the differing accounts of the respondent;
(c) failed to give any or any sufficient weight to the respondent's consumption of alcohol;
(d) failed to properly scrutinise the respondent's evidence; and
(e) gave undue weight to Exhibit 1, being the respondent's version to the attending ambulance officers.

The appellant did not pursue the ground raised in the Notice of Appeal concerning the trial judge's refusal to permit the appellant to call evidence from Dr Fisher as to the effect of the respondent's alcohol consumption prior to the accident.

The decision below

[40] The only direct evidence given at trial as to how the accident occurred came from the respondent. The respondent's evidence was therefore of crucial importance. Before his Honour, as before this Court, the appellant placed emphasis on what was said to be discrepancies between various aspects of the account given by the respondent in his evidence in court and the account given to others. However, his Honour accepted the respondent's evidence as to how the accident occurred, finding that he was left with the "clear impression, having seen and heard the respondent that he was giving a truthful account when he described what occurred".

[41] At trial the appellant pointed to discrepancies in the respondent's evidence as to the position of his vehicle vis-a-vis the bend in the roadway immediately before the accident, in particular whether the respondent's vehicle left the road before the bend or at it. The respondent's evidence in chief was as follows (R 16):

> "I seen the lights of a vehicle in the distance. As I approached a corner, I seen some – like, several very bright lights. And then at about 50 metres away from those bright lights I could see that it was most indeed a semitrailer – a truck, sir. And I had no other option but to veer left because the semitrailer was in my lane. I veered left. I pulled to the left. I hit the gravel. I lost control. And then I ended up on the right side of the Sunshine Motorway, sir."

[42] This evidence was said to be inconsistent with the following version given by the respondent to the investigating police officer Constable Church (R 1173):

> "I was just about to go around a corner and I didn't see the truck at, when I got around the bend I saw the truck over the white line and I saw him swerve back into his lane as I swerved out to

> my left. I got into the gravel and the car has gone across the road and I don't know what had happened as I must went into shock as it was going off the edge of the road, it must have flipped as I remember crawling out of it and remember seeing it on its side when I got out of it."

[43] His Honour was not persuaded that the above quoted passage of the record of interview with Constable Church should alter his view that the respondent's account was truthful stating at [29]:

> "… it appears to me that it may, when the whole of the record of interview is looked at, be equivocal but in any case I do not consider that his reference to having come round the bend warrants the rejection of his evidence to the court. It is a somewhat vague term which may mean that he had fully traversed the curve or it may mean something less than that".

[44] The appellant also relied on the discrepancies in the evidence of the description of the other vehicle given by the respondent to medical experts. For example, according to Dr Giles the respondent described the other vehicle as "a wide trailer being towed behind a truck" and according to Dr Graham the respondent told him he swerved to avoid "a prominent trailer being towed behind a truck". His Honour dealt with these matters at [30] as follows:

> "Similarly the various references to the other vehicle involved do not lead me to doubt the [respondent's] account. I have reservations as to whether what he is recorded as having said to Dr Clark and Dr Giles should be taken as a precise description of what he said. No doubt when examining a plaintiff an account of what occurred forms part of the background material of relevance to the examination, but it is not of primary importance, at least so far as the detail of it is concerned. In each case the doctors have copies of other reports in which some reference is made to what occurred. None of the references to the other vehicle contained in the medical reports lead me to doubt his veracity on the subject of what occurred."

[45] His Honour had earlier referred to this aspect of the case when he observed that, having heard the respondent give his evidence, he had considerable reservations as to whether he was likely to have used the term "prominent trailer being towed behind a truck".

[46] On the issue of discrepancies, the appellant placed particular emphasis before the trial judge on discrepancies between the account given by the respondent at the trial as to the two days leading up to the accident and that given by his counsel before the Magistrates Court on an earlier occasion in March 1998, when the respondent was being dealt with in respect of an offence arising out of the accident concerning his blood alcohol level.

[47] The transcript of the March 1998 proceeding, which was before the Court, disclosed that the respondent's counsel had made submissions to the Court as follows (R 504):

> "[the respondent] was at Bribie Island on the night before the incident [i.e. the Wednesday], he had a big night, he was on leave from his employment – … He said he drank until about 10 or 11 o'clock in the morning [on the Thursday] and then he said he had a number of hours sleep, about six or seven hours' sleep. He then had a meal, said goodbye to his friends because he was going to – to see his parents for leave at Maroochydore and it was on the trip that he rolled the car. He says that the incident occurred not as a result of his own driving, but as a result of a truck which was coming in the opposite direction which forced him to take evasive action and it was a wet road and he ended up off the road and his car rolled over."

[48] At the trial, the respondent gave evidence that he had consumed a lot of alcohol on the Wednesday night, but had stopped drinking at about 10 or 11 pm that night. He said that the following Thursday he had consumed two beers at midday with lunch at a local hotel. He said that he then went for a swim, had a sleep on the beach for a couple of hours and then went shopping. He said that he left Bribie Island at about 8 pm and travelled to Caboolture where he met some people at a pizza place at about 9 pm and then went with them to a tavern for a couple of hours. His evidence was that he consumed no alcohol at the tavern and left at about midnight to travel to Mooloolaba along the Sunshine Motorway. The respondent accepted that the roadway was dry at the time of the accident.

[49] His Honour dealt with the discrepancies in these versions at [31] to [34]:

> "There is some discrepancy between the account which the plaintiff gave of his movements in the twenty-four hours or so prior to the accident and what was put to the court on his behalf when he pleaded guilty to drink driving. The defendant placed some reliance upon this. The plaintiff says that he does not remember hearing this account.
>
> It is not clear how such an account came to be given but I accept the plaintiff's account of his activities during this time, although I do not accept his statement that he had nothing to drink at the tavern in Caboolture. He had earlier said that he was "not a hundred percent sure" whether he had had anything to drink.
>
> There is no evidence that he was substantially affected by alcohol at the time he was driving the vehicle towards the scene of the accident.
>
> Of particular significance, it seems to me, in the resolution of the issue of liability is the account which the plaintiff gave in the immediate aftermath of the accident when treated by the ambulance officers. This is in my view consistent with his account in court. The marks on the roadway are also, it would seem to me, consistent with that account and contrary to the suggestion that the vehicle simply failed to take the curve and ran off the road. The marks show the vehicle out of control and moving at an angle across the roadway".

Relevant principles

[50] The principles that govern the scope of appellate review of a decision of a trial judge who accepts the evidence of a witness and whose decision is thus based on a finding of credibility were recently considered by the High Court in the decision of *Fox v Percy.*[3] In that case, Gleeson CJ, Gummow and Kirby JJ[4] reiterated the need for appellate respect for the advantages of trial judges, "especially where their decisions might be affected by their impression about the credibility of witnesses whom the trial judge sees but the appellate court does not", although reaffirming that this approach did not derogate from the obligation of appellate courts of weighing conflicting evidence and drawing their own inferences and conclusions. Their Honours referred to a series of High Court decisions[5] setting out this principle, including *Devries v Australia National Railways Commission,*[6] where the principle was encapsulated in the following statement:

> "More than once in recent years this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding of fact. If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge has failed to use or has palpably misused his advantage or has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or which was 'glaringly improbable'."

[51] In a separate judgment McHugh J[7] also affirmed the approach in cases such as *Devries* and noted the distinction between cases which concerned the approach of an appellate court in drawing inferences from facts admitted or found by the trial judge and cases such as *Devries* concerning the approach of an appellate court where the trial judge had made a finding as the result of accepting the oral evidence of a witness that other evidence contradicted. His Honour stated that:[8]

> "The distinction between the two classes of case is fundamental and almost always decisive. It was recognised by this Court in *Brunskill* where the Court said:
>
> > "The authorities have made clear the distinction which exists between an appeal on a question of fact which depends upon a view taken of conflicting testimony, and an appeal which depends on inferences from uncontroverted facts."

---

[3] *Fox v Percy* (2003) 77 ALJR 989.

[4] *Fox v Percy* (2003) 77 ALJR 989 at [26], Callinan J disagreeing on this issue.

[5] See particularly *Jones v Hyde* (1989) 63 ALJR 349 at 351-352 and *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 179.

[6] *Devries v Australia National Railways Commission* (1993) 177 CLR 472 at 479. See also *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd* (1999) 73 ALJR 306 at 307 where the above passage was quoted with approval by Gaudron, Gummow and Hayne JJ.

[7] *Fox v Percy* (2003) 77 ALJR 989 at [88].

[8] *Fox v Percy* (2003) 77 ALJR 989 at [88].

[52] However, McHugh J also observed that:[9]

> "It is a serious mistake to think that anything said in *Abalos* or *Devries* necessarily prevents an appellate court from reversing a trial judge's finding when it is based, expressly or inferentially, on demeanour. Those cases recognise – in accordance with a long line of authority – that it may be done. But there must be something that points decisively and not merely persuasively to error on the part of the trial judge in acting on his or her impressions of the witness or witnesses. Recently in *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)*, for example, this court held that undisputed and documentary evidence was so convincing that no reliance on the demeanour of witnesses could rebut it."

[53] This is not a case where the appellant alleged that the respondent's evidence was inconsistent with incontrovertibly established facts. Rather, the appellant contended that the learned trial judge failed to use or palpably misused his advantage. It was submitted that the learned trial judge did not properly consider all the evidence and did not properly deal with several inconsistencies in the respondent's evidence which it was said undermined its reliability. In this respect it was argued that, having seen the respondent give his evidence and having heard evidence which contradicted the respondent's evidence, his Honour failed to adopt a cautious approach to the assessment of the respondent's evidence and failed to give an explanation as to how he nevertheless found the respondent's evidence reliable in the circumstances. It was contended by the appellant that when all of the inconsistencies were taken into account, the trial judge could not rationally have accepted the respondent's account as to how the accident occurred. In those circumstances, it was submitted that his Honour misused or failed to use his advantage and reached a decision which was glaringly improbable and therefore susceptible to appellate correction on the basis of the principles mentioned above.

Is the trial judge's decision on liability sustainable?

[54] Before this court the appellant repeated its emphasis on the inconsistencies in the evidence concerning the position of the respondent's vehicle immediately before the accident. The respondent had drawn a sketch of the scene of the accident, which was tendered, positioning the course taken by the two vehicles. In cross-examination, the respondent had agreed to the proposition put to him that the sketch depicted the respondent's vehicle leaving the roadway before entering the bend and to the proposition that that was contrary to his evidence in chief that his vehicle had left the roadway at about the point where the road commenced to curve. The matter of where in relation to the bend the accident occurred was also dealt with in the following passage of cross-examination of the respondent (R 24):

> "What I'm asking you is at the time you moved your vehicle to the left and you say that the passenger wheels then moved into

---

9 *Fox v Percy* (2003) 77 ALJR 989 at [90].

the gravel had you commenced to negotiate that left-hand bend?
- - I'm – I'm pretty sure it was most indeed before the bend."

[55] It may be that the respondent was too ready to make concessions as to inconsistencies arising from the sketch. It is not entirely apparent that the respondent's sketch necessarily supports the propositions put to him concerning it. Furthermore, the discrepancies as to whether the respondent went off the road before the bend or in it were relatively minor ones, which could have occurred with a plaintiff being truthful or untruthful as to the actual accident. The scenario that the respondent went off the road at the bend is of neutral value, as it is equally consistent with the respondent's version that he swerved to avoid another vehicle on the incorrect side of the road, as it is with the possibility raised by the appellant that the respondent lost control through inadvertence or his own lack of attentiveness. Reference was also made by the appellant to the lack of gravel marks on the left hand side of the roadway to support the respondent's version. However, I do not consider that great significance can be placed on that as it was not inconsistent with the respondent's account.

[56] The appellant also contended that, contrary to the view taken by the learned trial judge, the evidence as to the marks on the road did not assist the respondent and was not available to be used by the trial judge to resolve the conflict in the evidence. It was contended that the markings were equivocal and equally consistent with the possibility that the respondent momentarily lost control of the vehicle because of his own tiredness and inattentiveness. While the evidence as to road markings could not exclude that scenario as a possible cause of the accident, it could be used to exclude the suggestion also raised by the appellant that the vehicle simply failed to take the curve and ran off the road, and as supporting the view that the vehicle travelled at an angle across the roadway. It seems that was the primary use made by the trial judge of that evidence - to exclude the possibility of the respondent having fallen asleep at the wheel.

[57] As to the matters raised by the appellant concerning the inconsistencies in the description of the other vehicle, these discrepancies are, as the learned trial judge identified, minor ones and also such as might occur with a plaintiff being truthful or untruthful as to the actual accident.

[58] Of greater moment are the inconsistencies concerning the respondent's activities in the period leading up to the accident, on Wednesday, 24 September and Thursday, 25 September 1997. It was argued that his Honour gave no satisfactory basis for reconciling the divergent accounts as to the period leading up to the accident and that given the rejection of the respondent's evidence as to not consuming alcohol on the night preceding the accident, his Honour's finding that the respondent was nevertheless telling the truth as to how the accident occurred called for an explanation.

[59] It is certainly the case that very different accounts were given as to the respondent's activities leading up to the accident, particularly in relation to:

(a) the period over which the respondent had been drinking - whether the respondent had a "big night" the Wednesday night drinking until 10 or 11 am the following Thursday morning (the March 1998 version) or only until 10 or 11 pm on the Wednesday night (the version at trial).

(b) how the respondent had spent the day before the accident - whether the respondent had slept for 6 or 7 hours on the Thursday, after which he had a meal and embarked on the trip which culminated in the accident (the March 1998 version) or instead had lunch accompanied by two beers, a short sleep of perhaps one hour then went shopping for several hours in the afternoon followed by a visit to the hotel that evening, where he did or did not consume alcohol (trial version).

[60] It was contended on behalf of the appellant that, there being two possible causes for the accident (one that the respondent's attempt to avoid the oncoming truck travelling on, or substantially on, his side of the roadway, the other that the respondent simply losing control through inadvertence as a result of tiredness or falling asleep) the accuracy of the respondent's evidence of his activities over the preceding days was important in determining the likely cause of the accident. It was submitted by the appellant that, when the evidence of what the respondent had been doing over the preceding period was taken into account, the more probable explanation for why the respondent's vehicle left the roadway was either his inattention or his falling asleep. The discrepancies in the respondent's evidence, it was said, supported a conclusion that he had no true recollection of what had occurred, and that he was not describing an event which he actually observed, for the reason that he was momentarily dozing or inattentive before becoming aware of the presence of another vehicle. It was contended that the account given to the Magistrates Court strongly supported an inference that, at the time of the accident, the respondent would have been exhausted.

[61] There is some force in the complaint that the learned judge failed to deal adequately with or opine why there was such an inconsistency between the March 1998 version and the version given at trial. The variations between these versions prima facie made the respondent an unreliable witness generally. The trial judge failed to consider in any detail the fact of the two differing versions, let alone why they both existed. The first version included, as well, the description of the road surface as "wet", as an implied explanation contributing to the respondent's loss of control of his vehicle. That explanation was simply untrue, on any view of the facts and could have been demonstrated to be untrue had it been given at trial. Additionally, the respondent was not believed by the learned trial judge when he said he had had no alcohol on the Thursday night.

[62] The account given at trial, makes it less obviously likely that the respondent fell asleep at 1.00 am on Friday, but possible. The first account given in March 1998 does make it more probable that the respondent would have been tired and in need of sleep at 1.00 am on Friday morning. If the respondent's evidence at trial of how the accident occurred was true, it is peculiar that such a different account could have been given in March 1998. If the evidence at trial concerning the accident itself was untrue, those changes of story are readily explicable; the respondent simply wanted to diminish the apparent likelihood of his falling asleep.

[63] It follows that there were grave difficulties with the respondent being a reliable witness as to the events of Thursday and Friday, unless the March 1998 account could be explained as caused by his counsel having misunderstood and enlarged upon his instructions. The appellant contended that no explanation was offered

for the divergent accounts. However, the possibility that counsel had misunderstood and or enlarged upon instructions cannot be excluded, and was actually established to the extent that the respondent gave evidence that he would not have given his barrister instructions that he had drunk until 10.00 am or 11.00 am in the morning.

[64] It also remains that in support of the respondent there is the undeniable fact of the respondent's statement made to the ambulance officer who attended the accident site. The ambulance report records a statement by the respondent that he "swerved to avoid [a] truck" and lost control of his vehicle and rolled. It was submitted by the appellant that his Honour gave undue weight to this statement, which the appellant stressed did not contain the statement that the other vehicle was on the incorrect side of the road. It was said that the version given to the ambulance officer was thus equally consistent with the respondent having momentarily lost concentration or with his having fallen asleep, and being surprised to see an oncoming truck, even though it was on its correct side of the roadway, such that the respondent on approaching the curve overcorrected his vehicle, swerved to the left, and eventually lost control.

[65] In respect of this submission, it must be noted that the statement was made to the ambulance officer when the respondent was in extreme pain, sufficient for him to be given three shots of morphine over about a 10 minute period in the first 15 minutes or so of the ambulance arriving at the accident site. If the respondent's purpose in giving the version to the ambulance officer was to fabricate a version as to how the accident occurred which favoured him, then he omitted the additional statement that the truck was on the wrong side of the road. It is in any event difficult to conclude that the respondent consciously lied on that occasion when so badly injured and in such pain.

[66] Even if the statement can be seen as equivocal, it nevertheless remains that the statement tended to exclude a number of possibilities raised at trial by the appellant. That is, that no unidentified vehicle was involved or that the accident was the result of the respondent driving off the road because he was tired and influenced by alcohol. Furthermore, his Honour interpreted the statement to the ambulance officer as implying that the other vehicle was on the incorrect side of the road and that was certainly the thrust of what the respondent in fact told Constable Church some three days later when still in hospital and while still highly sedated for pain.

[67] Also in support of the respondent is the fact that the trial judge assessed him as actually trying to tell the truth in the witness box. Some people are simply poor witnesses even when telling the truth.

[68] The trial judge's finding as to liability, based as it is on the respondent's credibility, is not liable to be set aside simply because this Court thinks that the probabilities of the case are against, even strongly, against that finding. I consider that the evidence of the ambulance officer as to the statements made to him by the respondent makes it impossible for this Court to conclude that the respondent's evidence was incapable of belief, and the judge believed him. Nor can it be said that the respondent's account was glaringly improbable or that the trial judge misused his advantage to reach a conclusion which was glaringly improbable.

Quantum

The judgment below on quantum

[69] The awarded damages of $523,481.65, comprised, *inter alia*, of an award of $45,000 for general damages, $125,000 for past economic loss and $300,000 for future economic loss.

[70] A few months prior to the accident the respondent had been posted as a rifleman to Infantry Battalion 1RAR, having completed a rifleman's course in mid 1997. His Honour found that the respondent placed great store in his membership of 1RAR and accepted his evidence that he intended to continue in the army and aspired to advance to more specialised units. The evidence indicated that after a period of recuperation the respondent had returned to work and had undergone various medical assessments in 1999, but that on each occasion he was assessed as level 3R, which precluded him from certain physical activities required of a rifleman posted to 1RAR. His Honour considered that these restrictions had had a major impact on the respondent's life and his perception of himself, in that he saw his life in the army disintegrating and was depressed by his inability to do what was necessary to retain his life with his colleagues. His Honour stated that it was common ground amongst the psychiatrists and the psychologist that the respondent had been left with a psychiatric condition which was a consequence of the accident and that the evidence indicated that the condition was stable but permanent.

[71] In assessing economic loss, his Honour accepted the evidence of Dr Chalk that because of the psychiatric consequences which the respondent suffered as a result of the accident (the adjustment disorder with depressed mood) he would be limited to part time work, noting that the respondent had no skills or experience in sedentary employment. His Honour observed that it was also the evidence of Mr Zemaitis and Mrs Coles that the respondent was limited to part time work.

[72] There were two important issues concerning the assessment of damages which arose below. They related to the evidence concerning the respondent's use of drugs and the circumstances of the respondent's discharge from the army. The appellant's case before the trial judge was that, to the extent that the respondent's condition had been made worse as a result of his abuse of drugs, that was not compensable and that the respondent's discharge from the army was not a consequence of the accident.

[73] The evidence as to drug use was that the respondent commenced using amphetamines shortly before his discharge and was seriously abusing amphetamines and other drugs following his discharge. The respondent had sought treatment in late 2001 and had thereafter ceased using drugs, although he continued to suffer ongoing consequences as a result of his drug abuse.

[74] As regards the issue of the respondent's drug use, his Honour held, relying on the evidence of Professor James, a consultant psychiatrist, that the respondent's resort to drugs was to alleviate depression resulting from the accident, stating [at 67]:

> "It was the view of Professor James, which I accept, that the plaintiff became increasingly aware following the accident that

> he was not going to be able to continue his army career as his physical restrictions excluded him from the role of rifleman in the 1 RAR. He developed a major depression as the inevitability of his discharge struck him and he was in fact discharged. He resorted to drugs to alleviate his depression and his use grew until it reached a serious stage resulting in a psychosis."

[75] His Honour held that to the extent that damages had been increased by the respondent's drug abuse that was not compensable, accepting the appellant's submission that the use of the drugs was neither foreseeable nor reasonable. However, relying on Professor James' evidence, the learned judge stated that he was not prepared to approach the assessment of damages on the basis that the drug-induced events would have happened in any event; that is, that they were supervening events occurring independently of the accident. Rather, the learned judge took the approach that, in assessing damages, regard was to be had to the risk that the respondent may have reacted in a similar way if faced with setbacks of a serious nature which threatened or brought about the termination of his career in the army.

[76] As regards the issue of the respondent's discharge from the Army, this occurred on 26 October 1999. There was evidence concerning a number of incidents leading up to his discharge. Apart from the respondent's conviction of drink driving arising out of the accident, he was convicted of drink driving in August 1998 and was convicted of driving whilst suspended in September 1998. In November 1998, the respondent received an "administrative warning for discharge" from the army, placing him on notice that his performance generally would be monitored over the following 12 months and that his discharge would be recommended if during that period he was convicted of any offence, civil or military or there was any instance of alcohol abuse. He subsequently failed to comply with a general order, which required him to attend a parade in July 1999, resulting in his conviction of that charge on 23 July 1999 and triggering a show cause notice also issued on 23 July 1999.

[77] His Honour accepted that the appellant should not be regarded as liable for the commission by the respondent of the criminal offences leading up to his discharge for reasons similar to those given in relation to the use of illicit drugs. However, his Honour considered that it was not entirely clear that the respondent was discharged on those grounds.

[78] His Honour accepted that the show cause process was based upon the offences committed by the respondent, and that a decision to discharge him was based upon his failure to show cause. However, his Honour referred to a document on the respondent's file requesting a "new discharge" to be on 25 October 1999 "due to pre-administration and med board confirmation." His Honour observed that it showed the date of 5 October 1999 as being the date of the Board meeting and assessed the respondent as "class 4," a medical classification, an assessment relating entirely to his physical condition and one which would necessarily have resulted in discharge. His Honour found that, on the face of things, the respondent had been discharged for two reasons. His Honour observed that the "certificate of discharge or transfer" stated that the discharge was authorised under *Australian Military Regulation* 176(1), which deals with a discharge of a

person whose retention is not in the interests of the Army and also deals with discharge generally, including discharge on medical grounds.

[79] The learned trial judge found that "to the extent the [respondent] was discharged on grounds other than medical grounds, it must be taken that this was triggered by his disciplinary breach or breaches". As to those disciplinary breaches, his Honour found that the evidence of Professor James[10] and Mr Zemaitis[11] "suggests that those matters are directly related to the [respondent's] psychiatric condition which is the consequence of the injuries he sustained". His Honour therefore concluded that, "taking the evidence as a whole, the [respondent's] discharge could be regarded as flowing from his injury and the psychiatric consequences to him of them, and the [appellant] should be held responsible for any loss flowing to him from that."

[80] His Honour therefore assessed future economic loss on the basis of the loss of opportunity to continue employment in the Army. His Honour had regard to the figure of $630,000, "as at best a starting point", being the amount calculated by Mr Coco, as the present value of the salary and entitlements to age 60 (premised on certain assumptions as to the respondent's career path including promotions at various stages). Although having reservations about the respondent's claimed intention to stay in the Army to age 60, his Honour accepted that he would have been likely to have remained in the army at least for 20 years, when he would have been entitled to a discharge. However, his Honour discounted the figure of $630,000 by 50% to $300,000 to take into account, *inter alia*, the risk that the respondent "may not have lasted very long at all in the army", especially given the adverse comments of the respondent's superiors to which his Honour made specific reference and taking into account "the risk that he may have continued to commit offences involving alcohol and been discharged in any case" and his vulnerability to reacting in the way that he did to any set back of serious physical injury.

Grounds of appeal

[81] The appellant raised three principal grounds of appeal on the assessment of damages.[12] The first ground of appeal concerned the consequences flowing from the respondent's drug use in respect of the assessment of damages. The appellant argued that his Honour failed to properly take into account that the respondent's ongoing incapacity and reduction in earning capacity was attributable to his consumption of illicit drugs, which was not compensable. Further, the appellant contended that to the extent to which his Honour had assessed the respondent's damages taking into account a psychiatric disorder said to have been caused by the accident, his Honour erred as any psychiatric problems experienced by the respondent were caused by his consumption of illicit drugs and thus also not compensable. In written submissions the appellant also contended that the award for pain, suffering and loss of amenities should be reduced to $30,000 because of the on-going effects of the non compensable drug abuse.

---

[10] At record page 137.

[11] Incorrectly giving page 143 of the record. The matter is dealt with at p 112 – 113 of the record.

[12] The appellant did not press its challenge to the award of $17,500 for future care and assistance raised in its written submissions.

[82] Secondly, it was contended that his Honour erred in finding that the respondent's injuries and their physical consequences that led to the respondent's discharge from the Army, as that was contrary to the documentary evidence produced by the Army, and that accordingly the respondent's damages were assessed on an erroneous premise. It was contended that the actual basis for discharge, namely the disciplinary breaches, was one for which the appellant was not liable.

[83] In making the first two submissions, the appellant contended that the awards for past and future economic loss should be disallowed, relying on the decisions of *State Rail Authority of New South Wales v Weigold*[13] and *Beard v Richmond*[14].

[84] Thirdly, the appellant submitted that his Honour erred in assessing damages for past economic loss and future impairment of earning capacity on the basis of the reports of Mr Coco, since the reports were based on various assumptions, none of which were proved by evidence.

Did the learned trial judge err in the assessment of quantum?

The issues concerning the respondent's use of illicit drugs

[85] This was not a case where damages were recoverable for drug addiction, even though there was medical evidence linking their use to the accident, since the learned trial judge found that the use of illicit drugs was not foreseeable, nor reasonable.[15]

[86] The appellant contended that damages, including damages for loss of earning capacity, flowing from the use of drugs was not compensable and that although his Honour had accepted that proposition, his Honour had erred in the actual approach taken in assessing damages. In particular, his Honour, it was said, assessed damages on the basis that the effects of the drug addiction were but a manifestation of a contingency. In making these submissions the appellant relied on evidence of Professor James which indicated that it was the consumption of illicit drugs which was the most likely cause of his ongoing psychiatric disability and in fact destructive of the respondent's earning capacity (R 138).

[87] Professor James' view was that the respondent suffered from a post-traumatic stress disorder resulting from the direct effect of the traumatic experience of the accident, with features of anxiety and depression. He gave a bleak outlook in respect of the respondent's drug use. He stated that the respondent's presentation of detachment and withdrawal and his disordered "concept formation" were more likely to be due to his drug use than to his post-traumatic stress disorder or depressive disorder (R 129-130). His opinion was that, while the drug induced psychosis had subsided, the more enduring effect of the drug use concerned the adverse consequences for the respondent's processing abilities, which he considered rendered the respondent completely unemployable (R 138).

[88] This picture of the respondent's situation is different from that put forward by Dr Chalk. In his report Dr Chalk noted that the respondent had been a heavy user of illicit drugs and that that had led to the development of a psychotic illness. However, he also noted that the respondent was not taking any psychotropic

---

13 *State Rail Authority of New South Wales v Weigold* (1991) 25 NSWLR 500, 515-7.

14 *Beard v Richmond & Ors* (1987) Aus Torts Reporter 80-129.

15 Cf *Grey* and *Beard v Richmond & Ors* (1987) Aus Torts Reporter 80-129.

medication, that there was no evidence at the time of examination of any psychotic illness and that drug testing had revealed that the respondent was free of illicit substances. Dr Chalk did not appear to view the drug taking as having consequences which limited the respondent's employability and concluded in his report (R 452) that:

> "… the accident and its sequelae have led to the development of a psychiatric condition. This is in the nature of an adjustment disorder with depressed mood … He has no neurocognitive deficits and from the psychiatric point of view, is able to return to the work force following suitable retraining and would be able to hold down a job. …this man is employable though there are clearly orthopaedic restrictions as a result of his accident."

[89] In cross-examination Dr Chalk clarified that "the development of the psychiatric disorder" was a result of a combination of factors, one being the way the respondent perceived he had been treated by the Army and the other having to do with his ongoing pain and disability (R 149). Dr Chalk also expanded on his views as to the respondent's employability stating that, while the respondent would, with the passage of time, be able to return to part-time employment, he would require retraining and "a very understanding employer" (R 147).

[90] It is clear that in preferring Dr Chalk's opinion over that of Professor James, his Honour rejected the more pessimistic views of Professor James concerning the long term effects and consequences of the respondent's drug use. I see no difficulty in his Honour taking that approach while accepting other aspects of Professor James' evidence. His Honour was entitled to proceed on the basis that the respondent's drug use had not diminished his earning capacity other than as a matter to be taken into account in the general manner he proposed. In the circumstances, I do not consider that it has been shown that his Honour erred in the manner in which he treated the issue of the respondent's drug use in the assessment of damages.

The respondent's discharge from the Army

[91] The initial discharge determination was made on 24 September 1999 for disciplinary breaches and stated to be effective from 20 October 1999. The respondent's discharge was delayed to 25 October and then to 26 October 1999, for the purpose of obtaining the final medical board assessment. That assessment was made on 5 October 1999 and was received on 26 October 1999, assessing the respondent as class 4, which, as his Honour found, was an assessment which would result in an inevitable discharge. However, while it is true that that medical assessment would have also led to the respondent's discharge, it remains that the actual discharge determination made on 24 September 1999 was not made on the basis of the respondent's medical condition, but for the disciplinary breaches specified in the show cause notice.

[92] The trial judge took the view that the evidence of Professor James and Mr Zemaitis suggested that the disciplinary breaches leading to his discharge were directly related to the psychiatric condition from which the respondent suffered resulting from the accident. Counsel for the appellant conceded that in so concluding his Honour had correctly summarised that medical evidence, but

argued that, even so, the appellant could not be liable for loss resulting from the respondent's discharge for disciplinary breaches.

[93] The decisions of *State Rail Authority of New South Wales v Weigold*[16] and *Beard v Richmond & Ors*[17] support the appellant's submission. In *State Rail* Authority *of New South Wales v Weigold,* Samuels JA, with whom Handley JA agreed, stated:[18]

> "If the plaintiff has been convicted and sentenced for a crime, it means that the criminal law has taken him to be responsible for his actions, and has imposed an appropriate penalty. He or she should therefore bear the consequences of the punishment, both direct and indirect. If the law of negligence were to say, in effect, that the offender was not responsible for his actions and should be compensated by the tortfeasor, it would set the determination of the criminal law at nought … Hence, the application of the simple "but for" test to determine causation would be singularly inappropriate in this case. In all the circumstances, it will be quite unreal to find the appellant caused the respondent to engage in criminal conduct."

[94] His Honour summarised the relevant principle of law in the following terms:[19]

> "To my mind, a defendant should not be held responsible for the losses a plaintiff sustains that result from a rational and voluntary decision to engage in criminal activity. Such losses, to echo the words of *Chapman,* fall outside the limits for which the wrongdoer should be held responsible."

[95] There is no suggestion that the conduct of the respondent listed in the show cause notice and resulting in the discharge was other than rational and voluntary. Even accepting that the expert evidence indicated that the conduct was also directly related to the psychiatric condition from which the respondent suffered resulting from the accident, the appellant cannot, on the authority mentioned, be liable for economic loss suffered by the respondent flowing from the conduct resulting in his discharge.

[96] It follows that even if there were two basis for the respondent's discharge, any assessment of economic loss cannot be made on the basis of the likelihood of the respondent remaining in the Army. To take such an approach would be to ignore not only possible contingencies, but also actual occurrences, that is, the fact of the respondent ceasing to remain in the Army because of conduct for which the appellant is not legally liable.[20]

[97] But the matter does not rest there. As I have mentioned, his Honour found that, as a result of the injuries for which the appellant is liable, the respondent was

---

16 *State Rail Authority of New South Wales v Weigold* (1991) 25 NSWLR 500.

17 *Beard v Richmond & Ors* (1987) Aust Torts Reports 80-129.

18 *State Rail Authority of New South Wales v Weigold* (1991) 25 NSWLR 500 at 514.

19 *State Rail Authority of New South Wales v Weigold* (1991) 25 NSWLR 500 at 517. In stating these principles, Samuels JA adopted dicta of Ambrose J to the same effect in *Beard v Richmond & Ors* (1987) Aust Torts Reports 80-129.

20 *State Rail Authority of New South Wales v Weigold* (1991) 25 NSWLR 500 at 515.

only able to undertake part-time work. In my view, the correct approach to the assessment of economic loss is to consider the matter in terms of what employment, other than in the Army, the respondent could have undertaken but is no longer able to undertake because of the incapacity resulting from his injuries. Counsel for the appellant conceded that that approach was correct,[21] but submitted that there was no evidence to support any loss of residual earning capacity on such a view. It appears that the question of economic loss was approached solely on the basis of loss of opportunity to pursue employment with the Army.

[98] I consider that, in the circumstances of this case, it is appropriate that the course adopted by Jerrard JA in respect of the assessment of damages be followed. It follows that it is unnecessary to consider the issues raised on appeal concerning the report of Mr Coco.

[99] I agree with the assessment of damages made by Jerrard JA and with the orders proposed by his Honour.

[21] At transcript 53.