SUPREME COURT OF QUEENSLAND

CITATION:	*Ballesteros v Chidlow & Anor* [2006] QCA 323
PARTIES:	**MICHELLE THERESE BALLESTEROS** (plaintiff/appellant) v **HERBERT HUGH CHIDLOW** (first defendant) **RACQ INSURANCE LIMITED** ACN 009 704 152 (second defendant/respondent)
FILE NO/S:	Appeal No 9344 of 2005 SC No 10080 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury - Quantum Only
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 August 2006
DELIVERED AT:	Brisbane
HEARING DATE:	31 March 2006
JUDGES:	McMurdo P, Fryberg and Douglas JJ Separate reasons for judgment of each member of the Court, McMurdo P and Douglas J concurring as to the orders made, Fryberg J dissenting in part
ORDER:	**1. Appeal allowed** **2. Vary judgment sum from $99,819 to $124,979** **3. Parties are allowed seven days in which to make submissions as to the appropriate costs orders in the appeal and at first instance in accordance with Practice Direction No 1 of 2005, par 37A**
CATCHWORDS:	DAMAGES - MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT - MEASURE OF DAMAGES - PERSONAL INJURIES - GENERAL PRINCIPLES - where appellant was a passenger in a motor vehicle accident - where appellant brought an action for damages in negligence - where defendants admitted liability for the accident - where appellant contends that the primary judge's assessment of general damages, damages for past and future economic loss and damages for future care was wrong and inadequate - whether primary judge erred in the assessment of a number of heads of damages *Civil Liability Act* 2003 (Qld), s 55, s 61, s 62

Elford v FAI General Insurance Co Ltd [1994] 1 Qd R 258, applied
Malec v JC Hutton Pty Ltd (1990) 169 CLR 638, applied
New South Wales v Zerafa [2005] NSWCA 187; Appeal No 40378 of 2004, 3 June 2005, distinguished
Rogers v Brambles Australia Ltd [1998] 1 Qd R 212, cited

COUNSEL: M Grant-Taylor SC, with P L Feely, for the appellant
R J Douglas SC for the respondent

SOLICITORS: McInnes Wilson for the appellant
Cooper Grace Ward for the respondent

[1] **McMURDO P:** The appellant plaintiff, Ms Ballesteros, was a passenger in a Corolla sedan driven by her mother when it collided with the first defendant Mr Chidlow's vehicle at an intersection at Dutton Park on 18 February 2003. She was injured and brought an action in the Supreme Court in Brisbane for damages in negligence. Mr Chidlow and the respondent second defendant, RACQ Insurance Limited, admitted liability for the collision. After a three day trial the primary judge assessed damages at $99,819 and ordered that the respondent pay the appellant's costs on the standard basis on the applicable District Court scale where the sum recovered exceeds $50,000.

[2] The appellant contends that the primary judge erred in concluding that the appellant's complaints of lower back, hip and leg pain were not related to the motor vehicle accident and in the subsequent assessment of her general damages. The appellant also contends that the judge's assessment of damages for past economic loss was manifestly inadequate; that the judge should have awarded damages for future care beyond December 2005; and that the judge's assessment of damages for future economic loss was manifestly inadequate.

[3] The respondent in its notice of contention claims that the judge erred in finding that the appellant would not have resigned from her employment but for her injuries received in the accident. This was in any case a hypothetical fact in respect of which the court was obliged to assess a loss of a chance. Her Honour should have found that there was a very significant chance that the appellant would have resigned and suffered economic loss regardless of the accident and assessed damages for economic loss in a correspondingly reduced amount.

The judge's findings

[4] The primary judge's reasons are set out in a thorough and thoughtful judgment. The judge noted that the impact of the collision was severe; the Corolla sedan was written off. The appellant was in the rear passenger seat and was restrained by a seatbelt. She hit her head against the roof of the car as she was thrown backwards and forwards and her left foot was jammed underneath the passenger seat in front.[1] The appellant suffered a graze to the left shoulder; bruising to the left ankle, left lower leg, left hip, chest and stomach; a cracked back tooth; a cervical spine injury with associated muscle tension headaches and a lumbar spine injury.[2]

---

1 *Ballesteros v Chidlow & Anor* [2005] QSC 280; SC No 10080 of 2004, 10 October 2005, [3].
2 Above, [65].

[5] At the time of the accident in February 2003 the appellant was employed as an administrative officer in the Queensland Department of Education and Training at Southbank TAFE. She had been in that position for some years. She returned to work after three weeks.

[6] She had married in 1997 and later that year her first child was born. She took maternity leave, returning to her position in mid-1998. She gave birth to a second child in September 2001 by which time her marriage was over because of her husband's infidelity. The day before the accident she had applied for a loan, which she subsequently obtained, to assist her in divorcing her husband.

[7] Before the accident she was a very energetic young woman in good health who enjoyed her work. She was an organized working mother who relied upon her mother and a close-knit family to assist her in caring for her children and for some driving as she did not have a licence. She attended to all household tasks including washing, ironing, marketing, cooking and cleaning.[3]

[8] After the accident she needed assistance completing her work and domestic tasks. Her biggest problem was an inability to sleep because of neck pain and headaches. She thought she would manage better in a different position at work and applied for and obtained a promotion to become assistant to the Director of Education and Training. She would not have changed jobs but for the accident.[4] The appellant's symptoms did not improve in her new role. She took 45 days of sick leave between the accident in February and her resignation on 4 August 2003. In contrast to her efficiency prior to the accident she was then not managing at work.[5] She had constant fatigue, sleep problems, neck pain and headaches.[6]

[9] She gave as her reason for leaving employment in her separation notice "Domestic and other pressing necessity ... Recently involved in car accident going through divorce and facing financial hardship and facing eviction [from] rental property." In an attached memo requesting access to her long service leave for domestic and other pressing necessity she added:

> "• I am currently going through a separation and divorce to follow within the next month as my marriage has failed due to financial hardship and lies.
>
> • My ex has left me with an outstanding rent debt of $3,760.00 and I need to vacate the premises, as I do not have access to the money to pay the outstanding amount. As of 1st August.
>
> • I still have injuries that are still being attended to by doctors & physio and I am currently on sick leave as of 23/7/03 to 1/8/03 for neck pain. This is a long process with lawyers and RACQ third party insurance and is very stressful and will not be finalised until March 2004.
>
> • The stress of these circumstances has left me totally drained and my injuries are worst [sic] due to lack of sleep and nerves. I need to stress the importance of this approval as I am at a loss of

---

3 Above, [6] - [9].
4 Above, [11].
5 Above, [12].
6 Above, [14].

> what else to do and I need to get my life together for my two little children and me."[7]

She agreed in cross-examination that her long service leave entitlements were a source of funds to enable her to meet her outstanding rent. She maintained that this was not the reason she resigned from her employment: she wanted to spend more time with her children during the divorce and they needed her in the good health she was in prior to the accident.[8]

[10] The judge found that the appellant would not have resigned her employment merely to access her long service leave entitlements but for the injuries she received in the accident. Prior to the accident she was coping well as a working mother with the support of her own mother and family. Had she not been vulnerable because of her injuries she may have been able to negotiate an arrangement with her landlord to pay the overdue rent in instalments or she could readily have looked for other accommodation or sought a commercial loan. Her capacity to see what was in her best interests was compromised by her fatigue and pain and distress at her increasing failure to cope both at work and at home. She left her employment because she needed to remove the stress of work to attempt to restore herself to the competent and loving mother she had previously been to her children.[9]

[11] After the appellant left work her symptoms remained much the same. Her mother did the household tasks, looked after the children and assisted her in organizing her finances and shopping. This was because the appellant's sore neck and back caused sleeplessness and resulting lack of concentration.[10] She gradually improved and from about the middle to the end of 2004 was able to function better, although she was still dependent on her sister and mother to assist in outings with the children, grocery shopping and planning her finances. By the time of trial she was having some good and some bad days but she still found it hard to remember things and to have a really good night's sleep.[11] The pain in her back was not as severe. She constantly felt exhausted and if she over-exerted herself the pain would return so that she could not sleep. She still felt completely dependent on her mother and sister and had lost her self-confidence and independence.[12] She could no longer manage money and was very forgetful so that she was not functioning properly or independently.[13]

[12] The judge noted that the appellant's claim was not based on any psychiatric or psychological injury and that occupational therapist Mr Steven Hoey explained that an inability to get a good night's rest was a common complaint from those who had injured their back or neck. Techniques to reduce muscle spasm during the day could be learnt at pain clinics.[14]

[13] The judge found the appellant was distressed giving evidence and at times during cross-examination appeared resignedly compliant when agreeing with counsel's questions. Her Honour concluded that she was an honest person who was anxious

---

7 Above, [15].
8 Above, [18].
9 Above, [27].
10 Above, [28].
11 Above, [29].
12 Above, [30].
13 Above, [33].
14 Above, [34].

to resume a more personally productive life; she needs professional assistance to do this.

[14] Mr Hoey, whose expert evidence the judge found of greatest assistance because of his practical expertise in placing persons with back or neck injuries in the workplace, concluded that the appellant was capable of working in sedentary to light occupations for about four days a week and would be assisted by cognitive behaviour-based pain clinic treatment at a cost of $2,800. She might also be assisted by a writing slope and a special typing chair. He noted that in reality it was difficult for injured people to be offered positions if they were honest about their special equipment needs and physical limitations.[15]

[15] The judge reviewed the evidence of the medical specialists. Whilst reaffirming her belief in the appellant's honesty, the judge considered that without some pain management treatment the appellant would continue to see herself as dependent and this would inhibit her rehabilitation. She had been fortunate in many respects in having the support of her mother, sister and extended family but she may have managed her domestic life better had she been compelled to do things herself. Without the assistance of any psychological assessment the judge could not comment further on the issue.[16]

[16] As to domestic care and assistance, it was common ground that the appellant needed personal assistance of 20 hours a week from the date of the accident on 18 February 2003 until August 2003. The appellant then claimed assistance of seven hours a week until the date of judgment and six hours a week for future care, conceding that the latter claim should be discounted to two and a half hours per week to take account of her children's growing independence and other contingencies.

[17] The judge found that from mid-2004 the appellant remained unnecessarily dependent upon her mother and sister for assistance[17] and that she required care and assistance for four hours a week from June to December 2004. Her need for assistance then diminished although it was offered and accepted by her. The judge considered that two hours per week from then until December 2005 was needed for heavy cleaning and carrying. Anticipating that the appellant would by then have undertaken a course at a pain clinic and learned management techniques, the judge made no allowance for future domestic care and assistance.[18] The judge assessed past gratuitous care at the agreed rate of $18.10 per hour at $17,846.

[18] The judge next assessed general damages in accordance with the *Civil Liability Act* 2003 (Qld) ("the CLA") and the *Civil Liability Regulation* 2003 (Qld) ("the Regulation")[19] which have substantially altered the common law. Section 61 CLA required the judge to assign an injury scale value ("ISV") from zero to 100 in accordance with the Regulation and to calculate general damages according to the formulae set out in s 62 CLA.

[19] The appellant takes no issue with the judge's findings on the more minor injuries so that I need not make further reference to them. Of significance in this appeal are the

---

15 Above, [38] - [40].
16 Above, [48].
17 Above, [52].
18 Above, [53].
19 Insofar as these provisions were in force at the date of injury (18 February 2003).

judge's findings as to the lumbar spine injury. The judge noted that a MRI scan showed desiccation at L4/5. Orthopaedic specialist Dr White considered it was likely that the L4/5 desiccation had been caused by the accident. Dr White noted that the appellant complained of lumbar tenderness shortly after the accident and that age-related trauma would more likely have an onset in discs lower than L4/5. Neurologist Dr Todman also thought the appellant's intermittent symptoms of midline left hip and leg pain were associated with trauma from the accident.[20] Orthopaedic surgeon Dr Morgan thought it more likely that the desiccation was age-related because the appellant had the same limitations in movement after the accident as before. Dr Morgan noted Schmorl's nodes at L2, L3 and L4 levels which are development defects, not related to a specific traumatic event. Dr Morgan considered that the MRI showed her spine was essentially normal with only minor degenerative changes consistent with age, including the degeneration at L4/5.[21] The judge accepted Dr Morgan's view and was not satisfied on the evidence that the desiccation shown on the MRI at L4/5 was related to the trauma in the accident.[22]

[20] The judge in any case assessed each of the appellant's lumbar spine injury and the cervical spine injury as being within the ISV range under the CLA of five to 10[23] but then disregarded the lumbar spine injury for the purposes of the assessment as she was not persuaded of its causal link to the accident. Her Honour concluded that an ISV of seven was appropriate for the cervical spine injury and increased this to an ISV of nine to take into account the other more minor injuries.[24] Using the formula in s 62(b) CLA her Honour assessed general damages at $9,800.[25]

[21] The judge accepted that the appellant's injuries sustained in the accident were the relevant cause of her leaving her employment.[26] Whilst her Honour accepted that physically the appellant was able to engage in some part-time work from about August 2004, she accepted Mr Hoey's evidence that, with her disability and her failure to understand her symptoms and deal with them, it would have been difficult for her to find part-time work; she needed professional assistance to which she was not directed and which she could not afford.[27] Her Honour accepted evidence from Ms Jordan, for whom the appellant had previously worked at Southbank TAFE, that should the appellant seek a position there she would be considered sympathetically. Her Honour considered that the appellant should be compensated for past economic loss from when she left her employment on 4 August 2003 until 31 December 2004 on the basis of what she was earning as an AO2 ($516.95 nett per week). Her Honour then assumed that from January 2005 the appellant was able to undertake part-time work, consistent with Mr Hoey's evidence that she could work four days per week at the time of his assessment in February 2004.[28] Her Honour then allowed for a loss of one day per week ($103.39) from 1 January 2005 to judgment. Her Honour calculated past loss of earning capacity on this basis at $40,116, although the parties agree that this figure in fact should have been $42,276. That

---

20 *Ballesteros v Chidlow & Anor* [2005] QSC 280; SC No 10080 of 2004, 10 October 2005, [79].
21 Above, [80].
22 Above, [81].
23 Above, [83].
24 Above, [85] and see the Regulation, Sch 3, s 4.
25 Above, [86].
26 Above, [27] and [89].
27 Above, [89].
28 Above, [90].

mathematical error of $2,160, standing alone, would not justify this Court's interference and the allowing of the appeal: *Elford v FAI General Insurance Co Ltd*.[29] The judge considered that that award should not be discounted because the appellant had talent and ambition and was well regarded at work and might well have secured at least an AO3 position had she not been injured.[30]

[22] The judge stated that she calculated the loss of past and future superannuation benefits at 12.9 per cent. It is common ground that the correct percentage should have been 12.75 per cent but nothing turns on this as the final figure determined by her Honour was in fact calculated at 12.75 per cent.[31]

[23] As to future loss of earning capacity, in the absence of any psychological or psychiatric evidence the judge rejected Dr Todman's analysis that the appellant would be unlikely to return to full-time work at all, preferring Mr Hoey's opinion given in February 2004 that the appellant was then capable of up to four days work per week with good prospects of further rehabilitation after completing the pain clinic course and the evidence of Doctors Morgan, Weidmann and White that there were no physical barriers to her returning to the type of work she had done before the accident, at least with, as Dr White suggested, the ability to sometimes move around. The judge considered, however, that the appellant may well experience difficulty from time to time with her work due to neck pain, especially when sitting at a computer desk or easel. Referring to s 55(2) CLA, her Honour accepted the respondent's submission that this was an appropriate case to award a global figure to take account of the real possibility that the appellant would, from time to time, be unable to work because of intermittent pain due to injury sustained in the accident. The judge allowed $20,000 including future superannuation losses under this head of damage.[32]

Was the judge entitled to disregard the lumbar injury in assessing damages?

[24] The appellant concedes that the judge was entitled to conclude that the more serious damage to the lumbar back was age-related and not linked to the accident. She also concedes that the cervical spine injury was the most serious of her multiple injuries. She contends, however, that the evidence compelled the conclusion that there was at least some persisting soft tissue injury to the lower back in the accident so that the lumbar injury should not have been disregarded. The lumbar spine injury should have been taken into account in determining the appropriate ISV assessment under the CLA and resulted in a higher award of general damages for pain and suffering and other heads of damage.

[25] Notes made by the appellant's general practitioner record that when she attended about six days after the accident on Monday 24 February 2003 her symptoms included "lower back ache and tenderness worse on the right". When she next attended on 3 March 2003 the notes do not record any mention of lumbar pain. The appellant gave evidence that her ongoing sleeping difficulty was caused by stiffness in the upper part of her body, indicating her neck area, and with her back.[33]

---

29 [1994] 1 Qd R 258, 265.

30 *Ballesteros v Chidlow & Anor* [2005] QSC 280; SC No 10080 of 2004, 10 October 2005, [92].

31 Above, [94].

32 Above, [97].

33 Appeal Book 54 - 55.

[26] The judge's findings, which were open on the evidence and not disputed, were that the ongoing lumbar back and associated pain suffered by the appellant was not related to the accident. There was certainly uncontested evidence that the appellant suffered some soft tissue injury to the back immediately after the accident but the medical reports of 3 March 2003 do not suggest that this continued for more than a few days. The more significant later lumbar back symptoms were not accident-related. In context, the suffering of a few days of back pain was minimal. The case was conducted on the basis that the lumbar injury received in the accident caused ongoing problems. This was rejected by the judge. The few days of lower back tenderness were unlikely to have resulted in a higher ISV assessment and the judge was not required to take it into account. This ground of appeal fails.

Past economic loss

[27] In contending that the judge erred in the assessment of economic loss, the appellant emphasizes the report of occupational therapist, Mr Hoey, upon which the primary judge placed considerable reliance.

[28] Mr Hoey assessed the appellant on 3 February 2004, almost a year after the accident. He found she had occupational restrictions including decreased tolerance for long periods of sitting or standing; was unfit for lifting general loads greater than 10 kgs; had reduced capacity for handling loads repetitively; was restricted with forward bending (stooping); and was restricted with holding the head and neck in fixed postures. She was capable of occupations in the sedentary to light range only. She presented as an anxious person with a poor understanding of her injury and its treatment. Her maximum capacity was about four days of occupational activity per week. She would have difficulty with static postures in sedentary office-based jobs. She required the assistance of an occupational rehabilitation provider. Suitable occupations would include service station attendant, courier driver or library assistant. Mr Hoey contended that a hypothetical physical capacity for work does not always translate to commercial employment. The 33 year old appellant had only worked in low or semi-skilled office-based occupations in which she would now have severe difficulties. She had no experience in the occupations suggested as suitable. She had ongoing occupational restrictions on tasks as basic as sitting and standing for long periods. She had been out of the commercial workforce as a result of her injuries with a history of a compensation claim. Most employers are reluctant to employ such a worker. As a requirement for her rehabilitation she should attend a multi-disciplinary cognitive behaviourally-based pain clinic and use a writing slope and middle back typists' chair.

[29] In cross-examination by the respondent's counsel, Mr Hoey agreed that he was not suggesting the appellant was incapable of undertaking the administrative-type work she did before the accident. After completing a pain clinic course her ability to engage in day to day living and in her employment would be advanced. Many people after an injury like the appellant's lack an understanding of it and lose confidence in their ability to do things. The course increases confidence and understanding of the injury with a view to better managing the underlying problem but it does not change or cure the underlying condition. Some people are not assisted by the course. His assessment of the appellant's capacity to work four days a week did not take into account the commercial reality of the difficulty of obtaining employment.

[30] Because the judge accepted that the appellant could not have been expected to attend a pain clinic prior to trial as she had not been directed to it and nor could she afford it, the appellant contends the judge was wrong to conclude that from 1 January 2005 until judgment on 10 October 2005 she should be assumed to have been able to have completed such a course and obtained four days work per week.

[31] The respondent rightly points out that the judge accepted the preponderance of specialist medical evidence that as of 4 August 2004 the appellant was able to return to work at least part-time; the judge put that date back until January 2005 to acknowledge the matters referred to by Mr Hoey, namely the likely difficulty in the appellant obtaining employment and her failure to understand and deal with her symptoms.

[32] The judge accepted the appellant's evidence that from mid-2004 her symptoms had eased.[34] The judge found that the appellant could not have been expected to complete before judgment the pain management course because she had not been directed to it and nor could she afford it. Mr Hoey's report was to the effect that at the date of his assessment on 3 February 2004 she then had a maximum capacity for four days work per week but that the pain clinic course was required for her rehabilitation. His evidence was not to the effect that only after having completed the pain clinic course could she work four days per week. The judge referred to the difficulty in precisely quantifying past economic loss and the need to balance the respective interests of the parties.[35]

[33] Her Honour's approach to assessing past economic loss was a reasoned one, well open on the evidence. It reflected the commercial difficulty in the appellant finding work referred to by Mr Hoey by notionally allowing her until January 2005 to do so, even though Mr Hoey considered her physically capable of four days work per week in February 2004. The only error is the minor mathematical one to which I have referred[36] which, on its own, does not warrant the allowing of the appeal and this Court's interference: *Elford v FAI General Insurance Co Ltd*.

The claim for future care

[34] The appellant disputes her Honour's finding of fact that the appellant would not need assistance after 31 December 2005 and makes the following submissions. This finding anticipates that the appellant would by then have successfully undertaken a course at a pain clinic. There was no evidence that a suitable pain clinic course was available at that time between mid-October and late December 2005. In any case, as Mr Hoey conceded, the pain clinic course may not have been successful. In determining future economic loss, the judge accepted that the appellant would have at least intermittent episodes of pain, keeping her away from paid work in the future.[37] The judge should have made some allowance in the form of a global award of about $20,000 damages for future care.

[35] The respondent emphasizes the concessions, made by the appellant in cross-examination, which suggested that if she did not have someone available to assist her she could make meals and manage the household cleaning and shopping.

---

34 *Ballesteros v Chidlow & Anor* [2005] QSC 280; SC No 10080 of 2004, 10 October 2005, [37].
35 Above, [90], [92].
36 See these Reasons [21].
37 *Ballesteros v Chidlow & Anor* [2005] QSC 280; SC No 10080 of 2004, 10 October 2005, [97].

[36] The judge seems to have accepted those answers, noting that after December 2005 "reflecting the [appellant's] evidence, the 'necessity' for [future] assistance has not been demonstrated"[38] despite earlier observing the appellant's resigned compliance during cross-examination. Her Honour's reference to "necessity" appears to refer to s 59(1)(a) of the CLA, which unsurprisingly requires that damages for gratuitous services can only be awarded where the services are necessary.

[37] There is, however, an inconsistency in her Honour's finding that there is a real possibility that from time to time in the future the appellant will be unable to work because of intermittent pain due to the injuries sustained in the accident and her Honour's conclusion that the appellant would have no need of intermittent future assistance with domestic tasks. The appellant was 37 years old at trial. As she ages any required assistance with household tasks is less likely to be accident-related but she must be compensated for the real possibility that she will need some future assistance as a result of the injuries she received in the accident. In all the circumstances a small global award of about $3,000 was warranted. Such a modest sum would not, on its own, justify allowing the appeal and this Court's interference with the damages award: see *Elford v FAI General Insurance Co Ltd*.

Future economic loss

[38] The appellant contends the judge's approach to future economic loss erroneously assumed as certain that the appellant would successfully find full-time permanent employment at an income equivalent to her previous position by the date of judgment (10 October 2005). Her Honour anticipated that the appellant's pain clinic course would be completed by December 2005, over two and a half months after judgment; some allowance should have been made to take into account the real possibility that she may not be able to obtain and manage full-time employment,[39] especially if the pain clinic course was either not immediately available or not successful. Mr Hoey accepted that the course may not be successful. The assessment of Doctors Morgan and Weidmann that there were no physical barriers to her return to work did not take into account her pain, sleeplessness and lack of concentration. The amount awarded is effectively only six months loss of full-time income ($589 nett per week contended for by the appellant) over an anticipated future working life of 28 years. She had an excellent work history prior to the accident. If she has a residual earning capacity and is able to work only four days per week, the loss to her over this time is in itself about $80,000.

[39] The appellant was unemployed at trial, although she had started to seek part-time work. Her good work history, the preponderance of medical evidence accepted by the judge and the promising prospects of a successful outcome through her completion of a course at a pain clinic supported the judge's finding that on balance she had excellent prospects of obtaining and keeping full-time work in the future, despite her accident-related injuries. This was, however, by no means certain and may not have been achieved by January 2006. It was unknown when she would be able to complete the pain management course, which may in any case have proved to be unsuccessful. Furthermore, the appellant may be unemployed for substantial periods over her 28 year future working life as a result of her accident-related injuries, especially in between jobs: as Mr Hoey explained, in reality it is difficult for injured people to find employment if they are honest about their special needs

---

38 Above, [53].

39 Above, [82].

and physical limitations. These possibilities should be reflected in an award of damages: *Malec v JC Hutton Pty Ltd*;[40] *Rogers v Brambles Australia Ltd*.[41]

[40] As the primary judge recognized, it was impossible to calculate with mathematical precision an exact award for future economic loss on the facts of this case. This brought into play s 55 CLA which relevantly provided:

> **"55 When earnings can not be precisely calculated**
>
> (1) This section applies if a court is considering making an award of damages for loss of earnings that are unable to be precisely calculated by reference to a defined weekly loss.
>
> (2) The court may only award damages if it is satisfied that the person has suffered or will suffer loss having regard to the person's age, work history, actual loss of earnings, any permanent impairment and any other relevant matters.
>
> (3) If the court awards damages, the court must state the assumptions on which the award is based and the methodology it used to arrive at the award.
>
> ..."[42]

[41] Because even judges cannot accurately predict the future, the calculation of such an award invariably involves informed guesses but s 55 requires that the reasons supporting the damages award must state the assumptions on which the award is based and the methodology used to arrive at it: s 55(3). I do not apprehend that the appellant has suggested the judge did not sufficiently state the assumptions on which she based her award but in his oral argument counsel for the appellant made a secondary submission that the judge erred in not setting out the arithmetical methodology of how she came to an award of $20,000. Section 55(3) must be read in the context of the whole section. The heading of the section is **When earnings can not be precisely calculated**. Section 55(1) makes plain that the section only applies to "an award of damages for loss of earnings that are unable to be precisely calculated by reference to a defined weekly loss". Whilst her Honour could have chosen to more fully state her method of reaching an award of $20,000 damages for future economic loss including future superannuation losses, from the modesty of that award and the assumptions and facts stated previously in her reasons, her Honour's methodology is plain enough:[43] cf *New South Wales v Zerafa*.[44]

[42] The damages award arrived at by the primary judge was, however, in my view manifestly inadequate. It did not sufficiently reflect the possibility, albeit fairly unlikely, that the pain clinic course may not be effective and that the appellant may have considerable periods over her remaining 28 year working life of future unemployment attributable to her accident-related injuries. Bearing in mind her previous earning capacity ($589 nett per week) an award of $40,000 including future superannuation losses (roughly 15 months lost wages and superannuation entitlements with some discounting because of the present receipt of damages for

---

40 (1990) 169 CLR 638, 642 - 643.

41 [1998] 1 Qd R 212, 220 - 221, Pincus JA, McPherson JA agreeing.

42 Section 55(4) concerns s 54(2) which did not commence until 9 April 2003, after the date of the accident; similarly s 56 - s 60.

43 *Ballesteros v Chidlow & Anor* [2005] QSC 280; SC No 10080 of 2004, 10 October 2005, [89] - [97].

44 [2005] NSWCA 187, [126] - [145] where the court discusses the judicial approach to be taken under a broadly analogous statutory provision.

future losses) better reflects the various contingencies and more adequately compensates the appellant for the competing hypothetical chances relating to the effect of her accident-related injuries on her future employment.

The notice of contention

[43] In its notice of contention, the respondent makes the following submissions. First the respondent contends that the judge wrongly allowed full economic loss from the appellant's termination of employment on 4 August 2003 up until 31 December 2004, even though Mr Hoey thought she could have worked four days per week from February 2004. The judge also found that the appellant left her employment because of the accident and not because of the breakdown of her marriage. The respondent's second contention is that this finding and the subsequent assessment of damages do not properly reflect the contingency that she may have left her employment because of the breakdown of her marriage regardless of the accident; some specific discount should have been made for this: *Malec v JC Hutton Pty Ltd*.[45]

[44] As to the first contention, in assessing past economic loss the judge was right to allow, consistent with her Honour's reasoning, at least two and a half months from the date of judgment for the appellant to complete a course at a pain clinic. Indeed, as the appellant points out, there was no evidence whether or not the appellant would have been able to complete an appropriate pain clinic course in that period. The judge's approach on this issue was conservative. This contention is without substance.

[45] As to the second contention, the judge was unquestionably entitled to find on the evidence that it was unlikely the appellant would have left her employment but for the injuries she suffered in the accident. The judge's assessment of the various heads of damages were sufficiently modest so as to reflect the various contingencies, including the reasonably remote possibility that the appellant may have left her steady employment, which she enjoyed, regardless of the accident. The judge specifically recognized the need to balance the respective interests of the parties when assessing the major head of damage, past economic loss. This contention is also without substance.

Conclusion

[46] The appellant has demonstrated an entitlement to a 25 per cent increase in the damages awarded, sufficient to warrant this Court's interference. The appellant is entitled to an award of $3,000 for future care and, instead of an award of $20,000 for future economic loss including superannuation, is entitled to an award of $40,000. The mathematical error in calculating past economic loss should also be corrected in the amount of $2,160 in favour of the appellant. The damages awarded should be increased by $25,160 to $124,979.

[47] I would allow the appeal and vary the judgment sum from $99,819 to $124,979. Consistent with the parties' request at the appeal hearing, I would allow the parties seven days in which to make submissions as to the appropriate costs orders in the appeal and at first instance in accordance with Practice Direction No 1 of 2005, par 37A.

---

45 See fn 41, 642 - 643.

[48] **FRYBERG J:** The trial judge (White J) found, in effect, that the appellant was totally deprived of her earning capacity until August 2004, and partially deprived for a period thereafter, as a result of the injuries which she sustained in the accident, and that this deprivation was productive of economic loss after her resignation from her employment in early August 2003. In support of its notice of contention, the respondent submitted that the judge should have found that the appellant would then have resigned in any event, in order to cash in her long service leave entitlements. It did not spell out the consequences of such a finding. Rather, it seemed to assume that any such resignation would have been productive of economic loss equal to that which the appellant actually sustained. That assumption is unjustified. Had she been uninjured, the appellant could have obtained other employment after any such resignation; and there is no reason to think that she could not have done so promptly. In these circumstances it was unnecessary for the purposes of calculating damages for loss of earning capacity to make a finding as to whether the appellant would have resigned in any event (although such a finding may have been relevant to credibility). A fortiori it was unnecessary to consider the chance of that hypothetical event's occurrence, as the respondent submitted White J should have done.

[49] In any event, Her Honour found that the plaintiff's injuries were "the" cause of the resignation. It is implicit in that finding that there was no significant chance that the appellant would have resigned had she not been injured. That finding depended essentially upon Her Honour's assessment of the appellant. There was evidence which supported it. The respondent's submission in relation to the notice of contention should be rejected.

[50] As regards loss of earning capacity for the future, White J wrote (after summarising counsels' submissions):

> "In the absence of any psychological or psychiatric impairment which would preclude the plaintiff from working in the future I am unable to accept Dr Todman's analysis that the plaintiff will be unlikely to return to full-time work at all. As I have mentioned previously Mr Hoey, with his extensive experience, thought in February 2004 the plaintiff was capable of some work – up to four days a week, and Drs Morgan, Weidmann and White considered that there were no physical barriers to her engaging in similar kind of work to that which she did prior to the accident. In Dr White's case he conditioned his opinion upon the plaintiff being able to move around from time to time. It is the case, however, that the plaintiff may experience difficulties from time to time due to neck pain because the nature of the work in which she is proficient requires her to sit at a computer or at a desk or at an easel. Section 55(2) of the CLA deals with the situation where earnings cannot be precisely calculated. I accept Mr Douglas' submission that it is appropriate, for the future, to award a global figure to take account of the real possibility that from time to time the plaintiff will be unable to work because of intermittent pain due to the injuries sustained in the accident. I allow a figure of $20,000 to include future superannuation losses under this head of damage."[46]

---

[46] *Ballesteros v Chidlow* [2005] QSC 280 at [97].

[51] Section 55(2) of the *Civil Liability Act 2003* provides, so far as relevant:

> "55 (1) This section applies if a court is considering making an award of damages for loss of earnings that are unable to be precisely calculated by reference to a defined weekly loss.
>
> (2) The court may only award damages if it is satisfied that the person has suffered or will suffer loss having regard to the person's age, work history, actual loss of earnings, any permanent impairment and any other relevant matters.
>
> (3) If the court awards damages, the court must state the assumptions on which the award is based and the methodology it used to arrive at the award."

Both parties to the present appeal accepted that the appellant was entitled to some award for loss of future earning capacity, that it was impossible to calculate a mathematically precise amount for such an award (whether by reference to a defined weekly loss or otherwise) and that s 55 applied in the circumstances.

[52] For the appellant, Mr Grant-Taylor SC submitted that Her Honour failed to comply with s 55(3), at least in so far as she did not state the methodology used to arrive at the figure of $20,000. Mr Douglas SC for the respondent did not challenge that submission (although he did not concede its correctness), but argued that there was, in any event, adequate mathematical justification for the award.

[53] In my judgment the submission on behalf of the appellant is correct. Nothing in Her Honour's reasons for judgment indicates how the figure of $20,000 was derived. Presumably it took into account what appeared earlier in the paragraph quoted above. How this was done does not appear. What calculations if any were carried out are not referred to. The figure may have been calculated as an average of weekly losses using a number of alternative assumptions, or it may simply have been a guess based on experience. In the absence of a statement of the methodology, the provisions of s 55(3) were not complied with.

[54] What is sufficient to enable compliance with the subsection? "Assumptions" and "methodology" operate in tandem in the provision, and the one throws light on the other. Both words have overtones of at least quasi-mathematical meaning. "Assumptions" could, of course, refer to the facts found by the judge upon which the award is based. In my view that would be a most inappropriate use of the word, and it seems unlikely that it was intended in this context. Apart from anything else, the subsection would be unnecessary if that were the meaning, since judges must in any event state their findings of fact. In the context of making a global award where, ex hypothesi, precise calculation by reference to a defined loss is impossible, it is much more likely to have been intended to refer to assumed facts underlying one or more hypothetical calculations which a judge might use in order to get a general idea of what might constitute a suitable global figure; or to similar facts or sets of facts used by the judge to confirm or cross-check a global figure selected by making an experienced guess. That in turn suggests that "methodology" does not refer to anything too demanding. In this context, an experienced guess is a legitimate methodology, although if possible it should be dissected in a manner appropriate to the circumstances of the case in order to understand what it might imply in those circumstances and thereby to confirm that the figure is of an appropriate order of magnitude.

[55] "Assumptions" is used in relation to future economic loss in s 13 of the *Civil Liability Act 2002* (NSW). However that section is concerned primarily with the situation where it is possible for damages to be precisely calculated. It is used in a way which suggests that its meaning might include circumstances found as a matter of fact to have a probability of occurring. For that reason I do not think the discussion on the point in *New South Wales v Zerafa*[47] presently of assistance.

[56] What is the consequence on appeal of a breach of s 55(3) by the trial judge? It cannot be that there must necessarily be a new trial or a reassessment of damages. Such an approach has been rejected on the more difficult wording of provisions in New South Wales;[48] a fortiori it should be rejected here. I agree with the presumption made by Giles JA[49] that the intention of such a provision is to promote intellectual rigour. If it is not complied with, a court of appeal will be obliged to scrutinise the award rather more closely than ordinarily it would do in such cases. After all, the purpose of requiring the assumptions and methodology to be stated must surely be to expose them clearly, including to a court on appeal.

[57] Most of the facts relevant to assessing the appropriate award in this case have been set out in the reasons for judgment of the President.[50] Her Honour has referred to a number of possible future events and to the need to have regard to the possibility of their occurrence. The Court was referred to a view that this approach is prevented by s 55(2) of the *Civil Liability Act 2003*, but no argument in support of that view was advanced. The President has implicitly rejected it. I agree.

[58] At the date of her accident, the appellant's full-time weekly earnings were $516.95 per week. At the date of her resignation, they were $552.60 per week. At the date of trial, had she not ceased her employment, they would have been $589.00 per week. All of these figures are net of tax. It is appropriate to use net earnings on the assumption that the global award will not be subject to tax notwithstanding that it is a lump sum not calculated by reference directly to a wage amount.[51]

[59] The loss of earning capacity was productive of future loss because of the chance that it would in the future deprive the appellant of both earnings and superannuation benefits. It was agreed between the parties that the appellant was entitled to superannuation at 12.75 per cent per annum. The lump sum award of $20,000 can therefore be dissected into about $17,740 in respect of earnings and $2,260 in respect of superannuation benefits.

[60] A number of the events by which future loss may be realised have been described by the President. In particular, if the appellant is unable to manage her pain, it will be more difficult for her to find and keep employment; and she may need to take time off because of pain. Counsel for the respondent supported the trial judge's award first by comparison of the amount of the award with $19,760, the amount which would be awarded for a loss of $104 per week for four years. The theory underlying that comparison was: let it be assumed that the appellant's disabilities will cause her to lose one day's work a week; that this will continue for a period of

---

47 [2005] NSWCA 187.

48 *Nominal Defendant v Lane* [2004] NSWCA 405 at [67]; *Zerafa* at [143].

49 *Lane*, loc cit.

50 Paragraphs [38] - [39].

51 See generally Luntz, H: *Assessment of Damages for Personal Injury and Death*, 4th ed (2002), para 5.7.2.

four years from the date of trial; and that the appropriate starting point is the appellant's wage at the time of the accident ($516.95 per week). Applying the five per cent tables, that equates to $19,760, approximately the amount of the award. In that light, the award was reasonable.

[61] For a number of reasons I find that comparison unhelpful. It considers a scenario too remote from the facts of the case. The factors likely to cause loss are not more likely to occur within the next four years, but are likely to be spread over the remainder of the appellant's working life (28 years). If anything, one might expect them to be more likely to become manifest as the appellant ages. Second, the trial judge's reasons do not support a view that a loss of the order of one day a week could conceivably be regarded as an average for the future. The probabilities are simply not that high. Third, the appropriate starting point is not the appellant's wage at the time of the accident, but what she would have been earning at the time of trial had she not been injured ($589 per week). Finally, the comparison takes no account of superannuation; yet the award includes such a component.

[62] Counsel for the respondent submitted an alternative comparison. It started with the appellant's net earnings at the time of her resignation ($552.60 per week). On that basis, went the submission, the appellant would earn just over $20,000 net income in any one year. Therefore the award represented a full year's loss of income in the future.

[63] That submission is also unhelpful, for three reasons. As I have said, the appropriate starting point is what the appellant would have been earning at the time of trial had she not been injured. Second, 52 x $552.60 is $28,735 (ignoring any additional holiday loading), which is substantially over $20,000. Third, it is difficult to relate a full year's loss of income to the contingencies to which the appellant is exposed.

[64] Counsel for the appellant submitted that the judge's award was the equivalent of slightly more than six months' loss of income for the rest of the appellant's working life of 28 years. On my calculations it is in fact the equivalent of a little over 30 weeks' loss ($17,740/$589 per week ≈ 30 weeks). However that calculation ignores discounting. Over a 28 year period, the $17,740 is the present value of a loss of $21.90 per week, discounting at five per cent. At the daily rate of pay of $117.80 ($589/5), that loss represents 9.7 days per annum ($117.80/$21.90 x 52).

[65] Does an average loss of about 10 days per annum sit comfortably with White J's findings regarding the risks which the appellant faces in the future? Her Honour made no assessment of the chances that treatment at a pain clinic would be successful in completely alleviating the appellant's problems, but the tenor of her judgment suggests that she thought the chances were good. The award was to cover the contingency that the treatment might not be successful. In that event the main potential difficulties faced by the appellant were the prospect of time off work without pay and longer between jobs if she became unemployed because of the increased difficulty in finding a new position. There was little risk that the plaintiff would lose her position in the public service even if required to take time off from time to time because of pain. Apart from absences to have her children she had been employed in the service since 1992 and had a stable work history. An allowance for this aspect of the matter need not be large. Time off work would presumably be taken in increments of not less than half a day, but having regard to her condition, seldom more than a day. Disregarding the need to make some

allowance for additional time as might be needed to find a new job in the event of unemployment, the award represents on average 10 to 20 occasions per annum of time off for pain - and that assumes no such occasion could be absorbed in her sick leave entitlement.

[66] Looked at in this light, an award of $20,000 does not seem to me insufficient for loss of future earning capacity.

[67] In relation to the other grounds of appeal, I agree with what has been written by the President.

[68] It follows that I would dismiss the appeal.

[69] **DOUGLAS J:** I agree with the reasons of the President and with the orders proposed by her.