SUPREME COURT OF QUEENSLAND

CITATION:	*AAI Limited & Anor v Marinkovic* [2017] QCA 54
PARTIES:	**AAI LIMITED** (first appellant) **JOHN McNAUGHTON** (second appellant) **v** **JACK MARINKOVIC** (respondent)
FILE NO/S:	Appeal No 6205 of 2016 DC No 2239 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2016] QDC 136
DELIVERED ON:	31 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	16 November 2017
JUDGES:	Fraser and Morrison JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal to the extent of awarding $16,824.10 for interest on past economic loss instead of $19,545.** **2. Set aside the judgment entered on 3 June 2016 and substitute judgment for $458,528.10.** **3. Otherwise dismiss the appeal.** **4. The appellants are to pay the respondent's costs of and incidental to the appeal on the standard basis.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – METHOD OF ASSESSMENT – GENERALLY – where the respondent was injured in a motor vehicle accident caused by the second appellant – where the respondent had pre-existing injuries and suffered multiple injuries – where a number of injuries had to be assigned an ISV value under the *Civil Liability Regulation* 2014 (Qld) – where the appellant contended that the trial judge erred in determining which was the dominant injury for the purpose of the *Civil Liability Regulation* 2014 (Qld) – where the appellant contended that this error was due

to a lack of medical evidence – where the trial judge adopted an uplift of 25 per cent – where the uplift was awarded so that a psychiatric injury, which was not assessable under the ISV scales was accounted for – where the appellant contended there were no proper reasons for adopting an uplift – whether the trial judge correctly applied the ISV tables in the *Civil Liability Regulation* 2014 (Qld) – whether the amount award was the proper quantum of damages

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – METHOD OF ASSESSMENT – GENERALLY – where the respondent claimed to have suffered psychologically and physically – where the respondent claimed he was no longer capable of working – where the respondent refused a number of job offers – where the appellant challenged the respondent's contention that he would have worked until he was 70 – where the trial judge made various findings as to the respondent's credibility and reliability, including that the respondent had tendered false tax returns as part of his evidence of lost earning capacity – where the trial judge found that there was nonetheless a reduced earning capacity – where the appellants contended that the inconsistencies in the respondent's evidence should have resulted in a finding that the respondent was unreliable – where the focus of the grounds of appeal was whether the findings made by the trial were against the evidence – whether sufficient evidence was available to form a judgment on the issue of lost earning capacity – whether the trial judge's findings are supported by the evidence

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – METHOD OF ASSESSMENT – GENERALLY – where the respondent did not include loss of superannuation in the pleadings or the statement of loss and damage – where loss of superannuation was plead at trial – where the total award made by the trial judge was more than that in the pleadings or in the statement of loss and damage – whether the trial judge was correct to award damages for loss of superannuation – whether the trial judge erred in calculating the final award

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – METHOD OF ASSESSMENT – GENERALLY – where a minor mathematical error was made in the assessment of damages – where the trial judge failed to make deductions for Centrelink payments received by the respondent – whether the impact of that error is such that the award should be changed

Civil Liability Act 2003 (Qld), s 54, s 55
Civil Liability Regulations 2014 (Qld), sch 3, s 3, s 4, sch 4
Uniform Civil Procedure Rules 1999 (Qld), r 151(1)(b), r 155, r 547

Abalos v Australian Postal Commission (1990) 171 CLR 167; [1990] HCA 47, cited
AMP General Insurance Ltd v Kull [2005] NSWCA 442, followed
Elford v FAI General Insurance Company Limited [1994] 1 Qd R 258; [1992] QCA 41, followed
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited
Giorginis v Kastrati (1988) 49 SASR 371, distinguished
Matar v Jones [2011] NSWCA 304, followed
Medlin v State Government Insurance Commission (1995) 182 CLR 1; [1995] HCA 5, followed
O'Brien v McKean (1968) 118 CLR 540; [1968] HCA 58, followed
Williams v Partridge [2009] QSC 278, distinguished

COUNSEL: M I Grant-Taylor QC, with R D Green, for the appellants
K N Wilson QC, with P J Goodwin, for the respondent

SOLICITORS: Bray Lawyers for the appellants
Bartels Lawyers for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the orders proposed by his Honour.

[2] **MORRISON JA:** On 30 April 2010 Mr Marinkovic was in a car, stationary in a line of traffic, when it was struck from behind by another car driven by Mr McNaughton. Mr Marinkovic said he sustained personal injuries from the collision and started proceedings for damages.

[3] The only issue at the trial was the proper quantum of damages.

[4] The assessment of damages was made more complicated by the fact that in October 2008 Mr Marinkovic had suffered an injury in another accident. As the learned trial judge said, the assessment of damages depended essentially on the extent to which his condition has been made worse as a result of the second collision. Mr Marinkovic's case was that by the time of the second accident he had largely recovered from the first, whereas the appellants submitted that his current problems were really the result of the first accident, or pre-existing degeneration.

[5] At trial he was awarded a total of $461,249 in damages, plus interest of $19,852. The damages were assessed under the following heads:

(a) general damages: $35,000;

(b) past economic loss: $240,000;

(c) past superannuation: $15,000;

(d) interest on those components: $19,545;

(e) future economic loss: $135,000;

(f) special damages: $4,577; interest on that: $307; and

(g) future expenses: $12,000.

Some background facts

[6] There was no challenge to the learned trial judge's summary of the background facts, and I gratefully adopt them below.

[7] Mr Marinkovic was born on 6 November 1956 and came to Australia in 1969. He left school at about age 16 and did a range of jobs, including qualifying as a boilermaker welder in a car factory. He also spent time driving trucks at a mine, and went overseas for three years, then worked for a time as a tiler's labourer before obtaining a tiler's license in 2004. He described various jobs associated with tiling work, some of which sounded quite physically demanding. He worked as an independent tradesman, doing both domestic and commercial jobs. In about 2005 he built a house as an owner builder, doing some of the work himself and helping other tradesmen do their work. The house was sold in 2009, at a reasonable profit.

[8] The first accident occurred on 7 October 2008. Mr Marinkovic had parked his van in front of the new house, and was reversing in order to U-turn it when there was a collision with a four wheel drive which was driven down the driveway of the house next door. He said that he suffered a sore neck as a result of the accident which interfered with his work for a time. Mr Marinkovic said that at the time when the second accident he was getting better again and doing lots of exercises on medical advice, and was wanting to do more work.

[9] The second accident occurred on 30 April 2010 when he was stationary behind traffic waiting for a traffic light when his vehicle was struck from behind with some force and without any warning. He hit his head on the windscreen, and his breath was knocked out of him. He was taken by ambulance to the QE2 Hospital where he was given morphine, but discharged early the next morning. The next day his neck and back felt sore, and he went to see a GP. He was treated initially with bed rest and hydrotherapy, but after a time shortage of funds drove him back to work, though he had great difficulty in working and needed to take frequent rest breaks.

Findings at trial

[10] Having reviewed the medical evidence in some considerable detail,[1] the learned trial judge found that Mr Marinkovic suffered injuries in the second accident,[2] which caused an adverse psychological reaction,[3] that he has since suffered, and continues to suffer, significant pain, and that he was significantly worse off after the second accident, in terms of his physical condition, particularly his pain, his psychiatric condition (which was new) and the effect on his ability to work.[4]

[11] The learned trial judge found that as at the trial, Mr Marinkovic's ability to work had not improved. He was getting pain in his neck, right shoulder and lower back, aggravated any activity, and he took painkillers when required.

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1 *Marinkovic v McNaughton* [2016] QDC 136 (**Reasons**) [5]-[34].

2 To the lower back and right shoulder, and an aggravation of a pre-existing condition of the neck.

3 An adjustment disorder with anxiety and depressed mood.

4 Reasons [60].

The issues on appeal

[12] The appellants challenged the award of damages on a number of grounds, contending that the award was erroneously too high. It was contended that there were two findings by the learned trial judge that should have affected the award, at least under various heads of damage. The first was that Mr Marinkovic's tax returns were essentially works of fiction.[5] The second was that Mr Marinkovic was not a reliable witness.[6] The contention was that "those findings incidental to the assessment of damages reflected an acceptance of matters that were glaringly improbable or contrary to compelling inferences" and the award was contrary to those findings.[7]

[13] The grounds were many and varied, and there were two contended mathematical errors in the calculation of the damages. Including those grounds added by amendment at the hearing of the appeal, they can be summarised as shown below:

(a) the awards under the various heads of damage were against the evidence, principally because of the findings that Mr Marinkovic was an unreliable witness, and that his tax returns were a work of fiction;

(b) as to general damages, learned trial judge:

(i) was in error to hold that the dominant injury was the shoulder injury and to adopt ISV 25 item 97 in the *Civil Liability Regulations* 2002 (Qld);

(ii) failed to give proper reasons were given for adopting an uplift in excess of 25 per cent; and

(iii) erred in finding that the residual earning capacity was $16,000;

(c) the evidence of Ms Coles (as to the symptoms Mr Marinkovic reported to her) should not have been rejected on the basis that she was neither a psychiatrist nor psychologist;

(d) the awards for past economic loss, lost superannuation and future expenses were in error because they did not accord with the amounts specified in the Statement of Claim and/or the Statement of Loss and Damage;

(e) as to the award for past economic loss, there was error in using a notional working life to age 70;

(f) the awards were not determined with proper regard to ss 54 and 55 of the *Civil Liability Act* 2003 (Qld), in that the evidence did not support the findings as to average weekly earnings and the loss of earnings.[8]

[14] The mathematical errors concerned the weekly rate adopted for past economic loss, and interest on that component.

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5 Reasons [47].
6 Reasons [53].
7 Appellants' Further Amended Outline, paragraph 5.
8 As oral argument progressed it became apparent that the grounds based on a failure to properly apply ss 54 and 55 of the *Civil Liability Act* had no scope beyond those contending that findings were against the evidence.

[15] The relief sought by the appellant was that this Court assess the damages itself.[9]

Discussion

[16] Because of the interaction of various grounds of appeal, and the breadth of the challenge, it is convenient to deal with the evidence, contentions and discussion of each area in categories.

Findings as to credit and reliability

[17] The learned trial judge made a number of specific findings concerning the credit and reliability of Mr Marinkovic, principally based on inconsistencies between his account and what was revealed in his tax returns:

(a) the tax returns for 2004 – 2014 "raised more questions than they answered"; the returns had been lodged late, the 2004 return in 2011, the 2005 and 2007 returns in 2009;[10]

(b) his explanation that he did not do much paid work between 2005 and 2009 because he was working on the house was not consistent with the documentary material in the form of his owner builder records; "I cannot accept that in 2008 he was working on the home 75-80% of his time, as he claimed";[11]

(c) in his evidence he "was very vague about his business earnings, and suggested in effect that he had no idea what money he was making at any given time, though he maintained that before the first accident he was a fast and efficient tiler who always had plenty of work to do"; "evidence that his capacity for work has not improved since the second accident, indeed that if anything his symptoms have become more severe as time has passed since the second accident, is not consistent with the increase in net income in 2013 and 2014";[12]

(d) his Honour could not accept his explanation for the relatively high turnover for the 2008 tax year, namely that he recalled adding something for his labour when building his own house to his income because he made a profit when he sold the house, saying that:[13]

> "Apart from the fact that the house was supposed to have been sold in 2009, after the relevant period, at all times [Mr Marinkovic's] tax returns were prepared by accountants or tax agents, and I cannot believe they would have prepared a return in that way, whatever [Mr Marinkovic] might have indicated to them. I think this was just an exercise in his trying to distance himself from the content of the income tax returns. As well, the figures given in the notice of accident forms for average weekly income are quite inconsistent with the tax returns."

(e) the evidence of Mr Pantic and Mr Siljegovis "supports the proposition that [Mr Marinkovic] was able to work successfully as a tiling contractor prior to

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9 Amended Notice of Appeal, paragraph 3.
10 Reasons [35].
11 Reasons [38]; internal references omitted.
12 Reasons [41].
13 Reasons [42]; internal references omitted.

the first accident, which seems inconsistent with some of the turnover figures in the income tax returns";[14] and

(f) looking at the inconsistency between what the tax returns revealed and what Mr Marinkovic said, "I must say that overall I think that the most plausible explanation for the inconsistency between [Mr Marinkovic's] evidence and the content of the tax returns is that the latter are essentially works of fiction".[15]

[18] The approach of the appellants was to urge that the tax returns be accepted as reliable, but the learned trial judge rejected that:[16]

> "Counsel for the defendants submitted that I should reject [Mr Marinkovic's] oral evidence for various reasons including that it was inconsistent with the content of the tax returns, which I should accept as reliable. He did not advance any plausible reason for my accepting the tax returns as reliable, and I do not do so."

[19] The learned trial judge then turned to the question of Mr Marinkovic's credibility, noting the inconsistencies between the medical practitioners' histories and what Mr Marinkovic said in evidence, and suggested evasiveness. His Honour continued:[17]

> "Overall I am wary about the reliability of [Mr Marinkovic's] evidence. Nevertheless, I consider that [Mr Marinkovic's] basic complaints about his symptoms are reliable, for a number of reasons. Dr Morris did accept that [Mr Marinkovic] had suffered real injuries in the second accident, and they were the sort of injuries one would expect to produce pain. It is commonplace that soft tissue injuries are not detectable by x-rays etc., so a lack of objective evidence of the injuries is not in itself of particular significance. I thought of greater significance was the fact that both psychiatrists considered that [Mr Marinkovic] was suffering from real pain, and appeared to regard his complaints of pain as genuine. In addition, there was evidence of [Mr Marinkovic's] behaviour from other witnesses who had had dealings with [him] since the accident which would be consistent with his suffering real problems after the second accident. **Overall, therefore, although I am wary about [Mr Marinkovic's] evidence, I am prepared to accept his evidence in relation to the back, neck and shoulder symptoms that he has suffered since the second accident, and his evidence of his psychiatric symptoms.**"

[20] The learned trial judge then dealt with some specific submissions of the appellants, as to the reliability of Mr Marinkovic's evidence, particularly as to the extent of his recovery after the first accident, and rejected them.[18] In the course of that exercise his Honour made some specific findings:

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14 Reasons [43].
15 Reasons [47].
16 Reasons [48]. Internal reference omitted, where his Honour noted an inconsistent submission that the returns were inaccurate.
17 Reasons [53]; internal references omitted; emphasis added.
18 Reasons [54]-[60].

(a) referring to a GP's notes: "None of the right shoulder, right arm or lower back problems had been present before the second accident. That was quite soon after the second accident, and I regard that as sufficiently contemporaneous documentation of the existence of these complaints promptly after the second accident to confirm their relationship to the second accident, and to show they reflect injuries suffered in that accident.";[19]

(b) "Overall, I consider that the evidence supports a finding that [Mr Marinkovic's] symptoms had been improving prior to the second accident, but that he was still to some extent limited in the work that he could do, in that he had difficulty with the heavier aspects of tiling work.";[20]

(c) "The bulk of the medical evidence supports the view that [Mr Marinkovic] suffered additional injuries in the second accident, and I accept that he did so, in particular suffering a right shoulder injury and low back pain which would be further obstacles to any hands on tiling work, that is, work other than "supervision". The evidence also supports the view that [Mr Marinkovic's] pre-existing neck condition was aggravated by the second accident, and there was the further difficulty of his psychiatric condition. In relation to this, the main difference between the psychiatrists is as to the severity of the condition, rather than its existence and its connection with the second accident.";[21] and

(d) the psychiatric condition was one "I would expect would be likely to impair his earning capacity after the second accident".[22]

[21] The learned trial judge then made his ultimate finding on the question of the causative link between the second accident and the symptoms and condition of Mr Marinkovic:[23]

> "Although there is a good deal of [Mr Marinkovic's] evidence which I do not regard as reliable, I do accept, in the light of all of the evidence, that he suffered and continues to suffer pain since the second accident, to a significant extent, and that in the second accident he suffered injury to his lower back, his right shoulder, and an aggravation of a pre-existing condition of the neck, and that as a result of those injuries he has suffered an adverse psychological reaction, namely an adjustment disorder with anxiety and depressed mood. It was submitted for the defendants that [Mr Marinkovic's] injuries in the first accident had been significantly affecting his ability to work, and that it was not clearly shown that the situation was significantly different after the second accident. I reject that submission, and consider that [Mr Marinkovic] was significantly worse off after the second accident, in terms of his physical condition, particularly his pain, his psychiatric condition (which was new) and the effect on his ability to work."

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19 Reasons [55].
20 Reasons [57].
21 Reasons [58].
22 Reasons [59].
23 Reasons [60]; internal references omitted.

[22] One aspect relied upon by the appellants were alleged inconsistencies in the histories given by Mr Marinkovic to different medical practitioners.[24] This was a springboard for the submission that Dr Byth's report should not have been relied upon, nor what was reported to him. I have reviewed those passages, and believe the contention cannot be sustained.

[23] There is no significant difference in what was related to Ms Coles and what was related to Dr Byth, allowing for the fact that each had expertise in different fields and only Dr Byth was qualified in the field of psychiatry, the field to which the relevant parts of the history were concerned. No doubt the way in which the questions were posed had an influence on the way in which information was given. Each were told that Mr Marinkovic: had become angrier and more depressed; was upset with his work; had become moody; had low self-esteem; was less confident; had become forgetful; had flashbacks to the accident; had reduced concentration; felt less capable; was limited in his hobbies and leisure activity; lacked energy; avoided driving; and lacked energy and interest in housework.

[24] The reference to the GP records[25] does not assist at all. It simply records a time when Mr Marinkovic mentioned feeling depressed in January 2014. That hardly establishes that the psychiatric condition first manifested itself in January 2014. Nor is the reference to Mr Siljegovic's evidence[26] (as to when he and Mr Marinkovic played in a poker tournament) of any assistance. Whilst Mr Marinkovic said that playing helped him take his mind off things, it hardly establishes when the psychiatric condition started.

[25] What is evident is that the learned trial judge did not make a blanket rejection or acceptance of the evidence of Mr Marinkovic. His Honour was quite careful to make express findings on matters where he rejected his account, either because it was inconsistent with documents or evasive, or simply because he was not persuaded of its reliability. However, the learned trial judge was equally careful to make findings as to what he accepted from that evidence and whether Mr Marinkovic was credible and reliable.

[26] A significant proportion of the appellants' attack on Mr Marinkovic's credit at trial (and on appeal) was based on the learned trial judge's findings as to the tax returns. The essential parts of those findings are set out in paragraph [17] above. The appellants' contention on appeal was that to find that the tax returns were works of fiction was tantamount to a finding of dishonesty, and that should have influenced the learned trial judge to wholly reject Mr Marinkovic's evidence:[27]

> "One cannot accept that returns submitted to the Australian Taxation Office in accordance with statutory obligations connoting candour, frankness and honesty, are works of fiction without at the very least the suggestion of reckless inaccuracy or at the worst, sheer dishonesty. The grounds of appeal articulate complaints essentially to the effect that these findings, having been made, did not inform

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24 Appellants' outline on appeal, paragraph. The instances given were as between Dr Byth (AB 244-247, 874), Ms Coles (AB 800-803) and the GP records (AB 123-124, 181-182 and 1180).

25 AB 1180.

26 AB 123-124.

27 Appellants' outline on appeal, paragraph 4.

> the reasoning process through which the damages were assessed, to the extent that such findings were required."

[27] In my view that misunderstands what was meant by the learned trial judge in his findings.

[28] As noted above in paragraph [18], the appellants were urging the learned trial judge to find that the returns were, in fact, accurate. No doubt that was part of the reason why the learned trial judge spent some time analysing the tax returns, noting aspects that told against their acceptance, because they "raised more questions than they answered". The issues raised included:

(a) many had been lodged well after the years to which they related;[28] for example, the 2004 return was lodged in 2011, and the 2005 and 2007 returns in 2009;

(b) one contained a substantial item of expense simply labelled "Bob", and contained an apparently doubled up entry for materials and supplies;[29]

(c) the expenses listed in all returns since the first accident did not show any payment to employees or contractors;[30]

(d) Mr Marinkovic's explanation for the low income in the years between 2005 and 2009 was that he was building his house; that explanation was inconsistent with his owner/builder records, and was rejected, at least for the 2008 year (the year in which the first accident occurred);[31] the finding was that the house was completed by the end of 2006 and Mr Marinkovic was living in it by the end of 2007;[32]

(e) there were substantial variations in gross income "which are not clearly explained by the evidence", and also an unexplained "wide variation in the ratio of gross earnings to expenses";[33]

(f) Mr Marinkovic's explanations for the discrepancies were largely rejected;[34] specifically the explanation for the relatively high turnover in the 2008 year (that he added a component for his labour while building his house) was rejected:[35]

> "… at all times [Mr Marinkovic's] tax returns were prepared by accountants or tax agents, and I cannot believe they would have prepared a return in that way, whatever [he] might have indicated to them. I think this was just an exercise in his trying to distance himself from the content of the income tax returns."

(g) Mr Marinkovic admitted that he sometimes worked on a barter basis, and evidently did not declare the value of the benefits received as income;[36] and

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28 Reasons [35].
29 Reasons [36]. Another witness said he was "Bob" and the item was a payment to him for materials: Reasons [40].
30 Reasons [37].
31 Reasons [38].
32 Reasons [39].
33 Reasons [40].
34 Reasons [41]-[43].
35 Reasons [42].
36 Reasons [44].

(h) Mr Marinkovic's passing up of job offers, which would have earned him more than the "almost insignificant amounts which he was earning from his tiling business", seemed strange "if that were really all that he was making from it".[37]

[29] Those matters led the learned trial judge to make the comment referred to above in paragraph [17](f). However, that was not a finding to that effect. There was no occasion to make such a finding as neither side were seeking it. Immediately following that comment, in paragraph [48] of the Reasons, the learned trial judge referred to the submission by the appellants (that he should accept the returns "as reliable") and said "I do not do so". The extent of the finding was that the learned trial judge did not accept the tax returns as reliable. All that his Honour was doing in paragraph [47] of the Reasons was to express a view about what the most plausible explanation was, not that it was so.

[30] In any event, a finding that there has not been honest compliance with taxation laws does not inevitably mean that loss of earning capacity or economic loss cannot be made on other evidence.[38]

[31] The learned trial judge then went on the make the findings about Mr Marinkovic's credit and reliability, which are set out above in paragraphs [19] to [22]. At trial the appellants urged that Mr Marinkovic's evidence should be rejected, but on the basis that the tax returns were true, not false. However, there can be no credible suggestion that his Honour did not weigh the impact of his conclusion (that the tax returns were works of fiction) on the issue of the credit and reliability of Mr Marinkovic's evidence otherwise. Plainly it was taken into account, and, notwithstanding that finding, Mr Marinkovic's evidence was accepted on particular matters.

[32] Thus, the findings in paragraphs [19]-[22] above reveal a careful analysis of the evidence and acceptance of it on critical matters, such as: (i) complaints about his symptoms, especially evidence in relation to the back, neck and shoulder symptoms that he has suffered since the second accident, and his evidence of psychiatric symptoms; (ii) that he was significantly worse off after the second accident, in terms of his physical condition, particularly his pain, his new psychiatric condition and the effect on his ability to work; and (iii) his symptoms had been improving prior to the second accident, but he was still to some extent limited in the work that he could do, in that he had difficulty with the heavier aspects of tiling work, and the right shoulder injury and low back pain would be further obstacles to any hands-on tiling work, that is, work other than "supervision".

[33] Moreover, the learned trial judge did not base his acceptance of Mr Marinkovic's evidence on his evidence alone. Support was derived from his Honour's preference for, and acceptance of, the evidence of medical practitioners and other witnesses: (i) his Honour accepted Dr Morris's evidence that Mr Marinkovic had suffered real injuries in the second accident, and they were the sort of injuries one would expect to produce pain; (ii) he accepted the evidence of both psychiatrists that Mr Marinkovic was suffering from real pain, and that his complaints of pain were

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37 Reasons [47].

38 *Matar v Jones* [2011] NSWCA 304 at [16] per Macfarlan JA; *AMP General Insurance Ltd v Kull* [2005] NSWCA 442, at [1], [70].

genuine; and (iii) his Honour accepted the evidence of other witnesses who testified as to their dealings with Mr Marinkovic after the second accident, which were consistent with his suffering real problems after the second accident. Those findings were open on the evidence.

[34] It is of significance that the learned trial judge did not accept all of the evidence of the medical practitioners, but engaged in a careful dissection of it. For example:

(a) whilst his Honour accepted Dr Morris' evidence as set out in the preceding paragraph, his Honour also rejected part of it; specifically his Honour rejected Dr Morris' evidence to the extent that it was inconsistent with Mr Marinkovic's evidence about the extent to which his symptoms had been improving prior to the second accident, but his ongoing limitations in the work that he could do;[39]

(b) Dr Morris' assessment of the permanent impairment associated with the cervical spine was rejected, and that of Dr Pentis and Dr Todman was preferred, though the reverse was the case with their whole of person assessment of impairment;[40]

(c) had the learned trial judge been called upon to assess the psychiatric injury alone, his Honour would have preferred the evidence of Dr Byth to that of Dr Chalk;[41] and

(d) it is evident that his Honour preferred the evidence of other practitioners to that of Dr Staines.[42]

[35] Given these matters the contentions that the learned trial judge should have rejected the evidence derived from the histories given to the medical practitioners, and that the psychiatric and psychological aspects of his presentation should have been rejected, cannot be sustained.

[36] Similarly, the contention that that the learned trial judge should have found that Mr Marinkovic's earning capacity had not deteriorated from the first accident, cannot be sustained. In truth this submission relied principally upon the finding as to the tax returns and the contended flow-on effect on Mr Marinkovic's credit. That is a too simplistic an approach to the analysis carried out by the learned trial judge.

[37] In reaching his conclusion on the question of Mr Marinkovic's credit and reliability, the learned trial judge accepted the evidence of other witnesses who testified as to their dealings with Mr Marinkovic after the second accident. This evidence was consistent with his suffering real problems after the second accident. That evidence included that which is summarised below in paragraphs [52] to [55]. There can be no real doubt that in weighing that evidence the learned trial judge also weighed what Mr Marinkovic said about the job offers.

[38] As to this aspect, senior counsel for the appellants referred to the differing accounts that Mr Marinkovic gave. In response to Mr Pantic's various offers he said: (i) first, that he told Mr Pantic that he would have to wait and see what was happening with

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39 Reasons [57].
40 Reasons [62]-[63].
41 Reasons [65].
42 Reasons [23]-[24].

his health;[43] (ii) that in 2008 he couldn't leave his house unfinished (though he did not say that he told Mr Pantic this);[44] and (iii) that whilst he could not remember whether he declined the offer in September 2008, he thought he had told Mr Pantic that he preferred to work for himself, but he then corrected that to say that he refused it because of the first accident.[45] As for Mr Cowen's offer, his evidence was that was declined because he could not do the work.[46]

[39] None of that evidence compelled a conclusion contrary to the finding made by the learned trial judge; to the contrary, it provided an ample foundation for it.

[40] The last aspect of this category is the contention that the learned trial judge was in error to reject the evidence of Ms Coles (as to the symptoms Mr Marinkovic reported to her) on the basis that she was neither a psychiatrist nor psychologist. In order to consider this further one needs to see exactly what his Honour said.

[41] In cross-examination by counsel for the second defendant, it was suggested to Dr Byth that there were complaints to Ms Coles about symptoms of depression after the first accident but prior to the second, which suggested that the absence of an allowance for any pre-existing condition in the PIRS assessment was not appropriate.[47] It was being suggested that things reported to Ms Coles laid a foundation for concluding that there was a pre-existing psychological condition.[48]

[42] The learned trial judge expressed some difficulty with the submission:[49]

> "There are two difficulties with this. The first is that Ms Coles is an occupational therapist, not a psychiatrist or a psychologist, and was not in a position to say whether [Mr Marinkovic's] complaints reflected some real physiological problem prior to the second accident. The second is that Ms Coles saw [Mr Marinkovic] about the first accident only after the second accident had occurred, indeed fairly soon after it had occurred, at which time it might have been particularly difficult even for her to perform an assessment of his occupational capacity prior to the second accident."

[43] It seems plain that the reference to a "physiological problem" in that passage was intended to mean a "psychological problem". In my view the learned trial judge was doing no more than pointing out the obvious. Ms Coles was not a psychiatrist or psychologist, but rather an occupational therapist. Plainly she was unqualified to extract a history that related to or revealed such matters, let alone comment on them. His Honour was simply saying that whatever she asked to elicit the responses that were the subject of the cross-examination, was not asked by a relevantly qualified person. In other words Ms Coles did not ask questions aimed at assessing psychological impact. In my view that is an unexceptional observation and logical obstacle to the proposition being put to Dr Byth.

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43 AB 61 line 45 to AB 62 line 9.
44 AB 62 lines 15-20.
45 AB 62 lines 29-40; AB 63 lines 19-32; AB 166 line 45 to AB 167 line 10.
46 AB 164 lines 23-42. That was supported by Mr Cowen's evidence: AB 151 lines 40-44.
47 Reasons [28]-[29].
48 AB 74 line 36 – AB 75 line 20.
49 Reasons [28]; internal references omitted.

[44] The learned trial judge's second point (that Ms Coles only saw Mr Marinkovic about the first accident fairly soon **after** the second accident had occurred) was an obvious qualification on her ability to assess his occupational capacity **prior** to the second accident. His Honour was simply highlighting the reservations that followed from the timing of her contact with Mr Marinkovic compared to when the second accident happened. The learned trial judge referred to the problem specifically when reviewing her evidence:[50]

> "[Mr Marinkovic] was seen by an occupational therapist, Helen Coles, on 31 May 2010 for the purposes of an assessment for [his] solicitors. This assessment was undertaken in relation to the first accident, though in fact it occurred one month after the second accident, when [Mr Marinkovic] would have been particularly affected by the consequences of that accident. In those circumstances, I would expect this to have interfered with her ability properly to assess the consequences of the first accident. Indeed, Ms Coles stated in her report that because of the second accident his functional capacities could not be retrospectively assessed."

[45] In my view the learned trial judge cannot be shown to have been in error in this respect.

Findings against the evidence?

[46] The focus of these grounds were the findings as to Mr Marinkovic's lost earning capacity as reflected by his ability to work (before and after the first accident), his employment and offers of employment. In terms of specific employment issues the contentions attacked findings as to Mr Marinkovic's reasons for rejecting certain employment with Mr Cowen, and the prospect of employment with Mr Pantic.

Existence of lost earning capacity

[47] Subsequent to the first accident the histories given to the medical practitioners and Ms Coles pointed to limitations on Mr Marinkovic's capacity to work. For example, the learned trial judge summarised the evidence from the GP,[51] Dr Todman,[52] Dr Morris,[53] Dr Pentis,[54] and Dr Tho.[55] His Honour also had regard to the evidence of Ms Coles.[56] The summaries are accurate reflections of their evidence.

[48] Subsequent to the second accident Mr Marinkovic was examined by some of the same medical practitioners, and others, giving them histories that revealed his limitations. For example, the learned trial judge summarised the evidence from Dr Todman,[57] Dr Morris,[58] Dr Pentis,[59] Dr Saines,[60] Dr Byth,[61] and Dr Chalk.[62] His

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50 Reasons [32]; internal references omitted.
51 Reasons [5].
52 Reasons [6], [9].
53 Reasons [10]-[11].
54 Reasons [14], [18].
55 Reasons [19].
56 Reasons [32], [56].
57 Reasons [7]-[9].
58 Reasons [12]-[13].
59 Reasons [15]-[17].
60 Reasons [20]-[24].

Honour also referred to the evidence of Ms Coles.[63] Once again, the summaries are accurate reflections of their evidence.

[49] The learned trial judge expressed the need for caution about the inconsistencies between Mr Marinkovic's evidence and the histories given to the medical practitioners.[64]

[50] The learned trial judge also examined the documents relating to the claim from the first accident to see what they may reveal. His Honour concluded that:[65]

> "My view is that [Mr Marinkovic] in his oral evidence was inclined to minimise the effect of the first accident immediately prior to the second accident, but I think the more likely explanation for the documents used in the earlier proceeding is that they did not reflect such improvement as had occurred. A better indication is that that earlier claim was settled for a modest sum, a very modest sum in the light of the claims in the documents, which is consistent with [Mr Marinkovic's] condition having in fact improved prior to the second accident so that his subsequent problems were not principally associated with the first accident."

[51] There was evidence from other witnesses that provided some support for the finding that Mr Marinkovic had limited capacity to work. The learned trial judge referred to the evidence from Mr Siljegovis, concluding that his evidence supported the proposition that Mr Marinkovic was able to work successfully as a tiling contractor prior to the first accident.[66] Mr Siljegovis gave evidence that before the second accident Mr Marinkovic was "a good tiler and a very hard working man", whereas afterwards "he couldn't work anymore … if I get him to do something he'll probably come in two, three hours … And he used to sit down and he'd say mate, I can't help you any more".[67] The limited way in which Mr Marinkovic could work was expressed in this way: "He was trying to help us, you know … trying whatever he could to help us …".[68]

[52] His Honour also referred to the evidence of Mr Pantic[69] (who had offered Mr Marinkovic a job in 2007) and Mr Cowen, who gave evidence as to a job offer shortly before the trial, which was rejected by Mr Marinkovic on the basis that he could not manage it.[70] That part of Mr Cowen's evidence to which the learned trial referred included the following, applicable to Mr Marinkovic's work capacity:

(a) he did not do heavy work;[71]

(b) Mr Cowen had offered him permanent employment doing "maintenance, cleaning and a bit of welding … something small … and he declined. He said he

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61 Reasons [25]-[27].
62 Reasons [30]-[31].
63 Reasons [33]-[44].
64 Reasons [50].
65 Reasons [52].
66 Reasons [43], [53].
67 AB 179 lines 20-30.
68 AB 183 line 19.
69 Reasons [44].
70 Reasons [45].
71 AB 151 line 18.

wouldn't be able to do that … he said he would like to do it but he can't";[72] he said "that with his condition that he has that, you know, sort of two/three hours a day would be maybe maximum and that wouldn't be a definite thing either";[73] he said that he "wouldn't be physically capable of doing it";[74] and

(c) the offer was made about six weeks before the trial and was for a 40 hour week as a general maintenance caretaker;[75] it was made because Mr Cowen thought the job would be easy enough for Mr Marinkovic to do.[76]

[53] The learned trial judge noted that there was no real attack on the credit of witnesses such as Mr Siljegovis, Mr Pantic and Mr Cowen.[77]

[54] Mr Marinkovic also testified to the ways in which his capacity to work was impaired. For example he said that he refused the offer from Mr Cowen because there was too much heavy work involved. His Honour considered that the refusal was because Mr Marinkovic did not feel that he was up to working on a full time basis, even doing the sort of relatively light work that he had previously been doing for Mr Cowen.[78]

[55] Ultimately his Honour accepted the evidence of Mr Marinkovic as to the injuries he suffered in the second accident, and impact of the second accident on his capacity to work. The learned trial judge was able to assess the evidence of Mr Marinkovic, and other witnesses, at first hand, a considerable advantage this Court does not enjoy. This Court must respect those advantages.[79]

[56] The learned trial judge's findings were expressed in the context of his Honour's assessment of economic loss.[80] They were based on:

(a) acceptance of the weight of the medical evidence as to Mr Marinkovic's reduced work capacity after the first accident and prior to the second;[81]

(b) that the already reduced work capacity was reduced even further by the second accident; Mr Marinkovic moved from a position where he could generally cope with tiling work apart from the heavier aspects of it, to a position where he had difficulty in doing even light tiling work other than to a limited extent;[82] and

(c) Mr Marinkovic was left in a situation where he was quite limited in his ability to do anything physical associated with tiling, and particularly a loss of a willingness to persevere because of his psychiatric state.[83]

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72 AB 151 lines 28-43.
73 AB 152 lines 27-28.
74 AB 154 line 33.
75 AB 153 lines 1-9, 30-31.
76 AB 154 line 10-14.
77 Reasons [76].
78 Reasons [46].
79 *Abalos v Australian Postal Commission* [1990] HCA 47; (1990) 171 CLR 167, at [28]; *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118, at [26]-[29].
80 Reasons [72]-[76].
81 Reasons [73].
82 Reasons [74].
83 Reasons [76].

[57] There is no good reason to depart from the learned trial judge's findings on credit and reliability, and his Honour's acceptance of the medical evidence, particularly in so far as it revealed the symptoms suffered by Mr Marinkovic and the impact on his work capacity.

[58] For these reasons and those given earlier in respect of the findings concerning Mr Marinkovic's credit and reliability, (paragraphs [17]-[45] above) the learned trial judge's findings[84] as to impaired capacity to work were open and cannot be said to be against the evidence.

Assessment of economic loss

[59] The appellants contended that the learned trial judge erred in assessing the value of the lost earning capacity by reference to Mr Pantic's offer of employment. In addition to points made in relation to credit and reliability, and the attack on the evidentiary basis for a finding as to work incapacity, the appellants pointed to the findings about the tax returns, the unexplained absence of business or tax records (that might evidence wages and expenses), and the fact that the assessment was based on a finding that Mr Marinkovic was unable to work commercially as a tiler in his own business.[85]

[60] The start point for this discussion is the fact that the learned trial judge found that there was a loss of earning capacity as a consequence of the second accident. For the reasons given earlier that finding is not shown to be in error.

[61] The learned trial judge acknowledged the difficulties in the task in assessing economic loss. On the one hand not only was there no reliable evidence of what money Mr Marinkovic was making, but there was really no reliable evidence as to what sort of money one might reasonably expect a self-employed tiler to make, either working on his own or in a position where he had to employ someone to do the heavier parts of the work.[86]

[62] On the other hand, the finding was that he was quite limited in his ability to do anything physical with tiling, particularly because of the psychological problems, and that would have significantly impacted on his working capacity. In the work he was doing for Mr Cowen, at $20 per hour, he was earning less than a tiler who could not do the heavier work. His Honour found that the fact that he was doing that sort of work for Mr Cowen at all, for such modest remuneration, suggested that he really was struggling to do any sort of tiling work after the second accident.[87]

[63] Notwithstanding that difficulty his Honour's task was to assess the economic loss that resulted from the reduced earning capacity. Therefore the position that Mr Marinkovic was actually in at trial had to be compared to the position he would have been in, but for the second accident.

[64] The learned trial judge started with the actual position. It was earning less than about $40,000 per annum, based on the rate he earned while working for Mr Cowen, and the fact that he turned down a full-time job at that rate. As noted

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84 Particularly in Reasons [58]-[60] and [73]-[76].
85 Appellants further amended outline, paragraphs 12-21.
86 Reasons [75].
87 Reasons [76].

elsewhere the evidence of Mr Cowen was accepted. The actual level was expressed in this way:[88]

> "I conclude on the basis of the evidence that the true position is that [Mr Marinkovic] could do that sort of work for about half a day on most days, but occasionally there would be a bad day when he would not be able to cope, or perhaps a couple of bad days when he would only be able to do less work. If [Mr Marinkovic] were able to move into working just on a supervisory basis that would be less physically demanding, but I think it is very likely that that would require a much better head for business than [Mr Marinkovic] has, particularly given the restriction associated with his psychiatric condition. Realistically I think his current working capacity is about half a days work four days a week at about $20 per hour, or about $16,000 per annum. The tax on an income of $16,000 was $1,500 in 2011 and 2012; thereafter no tax was payable on that income: Ex 22."

[65] In my respectful view the reasoning to reach that finding is unimpeachable. His Honour has worked on accepted evidence as to a rate, applied to an assessment, based on his Honour's findings as to credit and reliability, of how long Mr Marinkovic was likely to work for each day and week.

[66] The learned trial judge then turned to an assessment of what could have been earned but for the second accident. His Honour observed that there was "no evidence of what a self-employed tiler ought to be able to earn, either with or without the limitation which arose after the first accident, and … no reliable evidence as to what [Mr Marinkovic] was earning between the first and second accident".[89] So his Honour turned to the evidence he did have:[90]

> "The evidence that I do have that I can regard as reliable is that in early 2010, prior to the second accident, [Mr Marinkovic] was offered a position by Mr Pantic at a salary of $86,000 per year, which initially he had been interested in taking up, but which he could not take up following the second accident. I accept this evidence. $86,000 per annum would carry a liability to pay $19,770 tax in 2011, so is the equivalent of $66,230 net of tax."

[67] Three things are to be noted from that passage. First, adoption of it was a consequence of his Honour's acceptance of Mr Pantic as a witness of credit. As noted earlier, there was no real attack on his credit.[91] Secondly, his Honour found that the evidence was reliable.

[68] Thirdly, the passage of evidence referred to by his Honour supports the finding. Mr Pantic said: he made the offer in May or June 2010; it was for full-time employment at $86,000 per year; he gave details as to the particular job it was for; Mr Marinkovic said that whilst he was interested in taking it up, he could not do so because of the second accident; he anticipated that it would involve continual employment as he believed Mr Marinkovic would be a good employee; in fact his

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88 Reasons [77].
89 Reasons [78].
90 Reasons [78]; internal references omitted.
91 Reasons [76].

company had continued to grow since that time so there would have been continual employment.[92]

[69] On the appeal the appellants' criticism of the tax returns and absence of adequate business records placed particular reliance on the passage below from *Giorginis v Kastrati*,[93] where von Doussa J said:

> "In a case like the present one, it is incumbent on the plaintiff to show how he has used his capacity for work both before and after the accident. The plaintiff will be well advised to produce the best evidence available. … If a plaintiff attempts to give oral evidence on these topics from memory, unaided by records which are in his possession or power, he invites the opposing party, and the court, to question his evidence. …
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> If a plaintiff does not adduce evidence of this kind which is in his power or possession many uncertainties are likely to remain. … However, the assessment is likely to be a modest one having regard to the uncertainties unnecessarily left open by the evidence. The plaintiff will usually not be heard to complain on appeal that the loss may have been greater. In some cases the failure to adduce the supporting evidence may well cause the court to feel unable to accept the oral evidence of the plaintiff, at least at face value. …
>
> There will be cases where the nature and extent of the loss alleged will make it difficult or impossible to adduce evidence that permits the court to proceed to calculate damages in a precise way. …
>
> But cases where the damages are, by the nature of the loss, difficult to calculate, are to be distinguished from cases, like the present, where precise calculation is rendered impossible, and even broad assessment difficult, not by the nature of the loss, but by a paucity of evidence where it is clear that it lies within the power of the plaintiff to produce business and taxation records usually maintained by people in employment or business or other evidence which could clarify the extent of his income."

[70] This was in support of a submission that the findings "did not permit an approach to the assessment of damages for economic loss as undertaken by his Honour, and permitted only an assessment on a global basis".[94] There are several important things to note about the parts relied upon above, and that submission.

[71] First, there was a qualification in the second paragraph, omitted from the passage in the outline:

> "It does not necessarily follow, as a matter of law or fact that proof of the plaintiffs claim for lost earning capacity will fail. The evidence may nevertheless establish, on the balance of probabilities, the likelihood of some substantial element of loss, and the court will take that into account in assessing general damages: *Russell v J Hargreaves and Sons Pty Ltd* (1956) 30 ALJ 533."

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92 AB 156 line 13 to AB 157 line 20.

93 (1988) 49 SASR 371, at 375; King CJ and Legoe J concurring. The passage is as set out in the appellants' outline.

94 Appellants' outline on appeal, paragraph 12.

[72] Secondly, there was another (omitted) qualification in the third paragraph:

> "In these cases, the plaintiff is not to be deprived of damages because the evidence does not permit a mathematical calculation: *Hamlyn v Hann and Heagney* [1967] SASR 387 per Mitchell J at 401. As Lord Devlin said in *Yorkshire Electricity Board v Naylor* [1968] AC 529 at 548: "... difficulty in calculation is not ordinarily taken as a ground either for reducing or for increasing the award.""

[73] Thirdly, *Georginis v Kastrati* is not authority for the proposition that a court cannot make an assessment of economic loss and lost earning capacity in all cases where records are absent and tax returns are unreliable. If there is sufficient evidence to form a judgment on those issues the court is entitled to do so. In addition to the passage set out in paragraph [72] above, von Doussa J said:[95]

> "However, where the fact of the receipt of other income is proved, then, in my view, the plaintiff is entitled to have that exercise of his earning capacity brought to account, although subject to reduction for the income tax which should have been paid, and subject to the question whether the plaintiff would have continued to exercise that capacity had he been required to pay tax on the additional income:…"

[74] In this case there was evidence of the employment of Mr Marinkovic, his work capacity, and the income he could have earned had he accepted job offers, from Mr Pantic,[96] Mr Siljegovis,[97] and Mr Cowen.[98]

[75] Finally, it must be recalled that there is a distinction between loss of earning capacity, which is what an injured plaintiff is being compensated for, and loss of earnings. As McHugh J said in *Medlin v State Government Insurance Commission*:[99]

> "In Australia, a plaintiff is compensated for loss of earning capacity, not loss of earnings. In practice, there is usually little difference in result irrespective of whether the damages are assessed by reference to loss of earning capacity or by reference to loss of earnings. That is because "an injured plaintiff recovers not merely because his earning capacity has been diminished but because the diminution of his earning capacity is or may be productive of financial loss". Nevertheless, there is a difference between the two approaches, and the loss of earning capacity principle more accurately compensates a plaintiff for the effect of an accident on the plaintiff's ability to earn income. Earning capacity is an intangible asset. Its value depends on what it is capable of producing. Earnings are evidence of the value of earning capacity but they are not synonymous with its value. When loss of earnings rather than loss of capacity to earn is the criterion, the natural tendency is to compare the plaintiff's pre-accident and post-accident earnings. This sometimes means that no

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95 *Georginis v Kastrati* at p. 376.

96 In the years 1994-1996, 1997-1999 and 2005-2009: Reasons [43], [44].

97 Reasons [43].

98 Reasons [45].

99 (1995) 182 CLR 1, [1995] HCA 5, at 16; internal citations omitted. See also the joint decision of Deane, Dawson, Toohey and Gaudron JJ at 4.

> attention is paid to that part of the plaintiff's capacity to earn that was not exploited before the accident. Further, there is a tendency to assume that if pre-accident and post-accident incomes are comparable, no loss has occurred."

[76] That passage reflects what was said by Barwick CJ in *O'Brien v McKean*:[100]

> "... I have elsewhere pointed out in relation to this aspect of economic loss in cases of personal injury, that it is the loss of earning capacity which has occurred by reason of the accident which is to be the subject of compensation by an award of damages: it is not a case of replacing the wages which would have been earned in the future by a sum of money which represents the present value of the total of such wages: see *Arthur Robinson (Grafton) Pty Ltd v Carter*. That loss of earning capacity has already occurred and is either permanent or likely to continue for some estimable time. The fair compensation for it is to be determined as a matter of judgment and not of calculation. But it is of course to be an informed judgment. Though the damages as I have said are not to be a replacement of the future wages, part of the relevant information for the purpose of forming a judgment as to the fair and reasonable compensation is a broad estimate of what that earning capacity before its destruction or diminution was capable of producing during such time as it would have been likely to be gainfully exercised. In obtaining such a conspectus, the vicissitudes of life, as it has been said, must not be lost sight of."

[77] That is the approach taken by the learned trial judge. That being so, there is no good reason to doubt the finding set out in paragraph [66] above.

[78] A second submission based on *Georginis v Kastrati* was made, to the effect that damages should have been assessed on the basis of the income disclosed in the tax returns. It relied on this passage:[101]

> "A court should not, generally speaking, make a finding favourable to the plaintiff in a personal injury case that his income is otherwise than he has disclosed to the revenue authority unless the plaintiff admits the nondisclosure. A fortiori, such a finding should not be made where the plaintiff denies that he has failed to properly disclose his income. Unless the plaintiff admits the falsity of his income tax returns the court should not speculate in his favour, for example that his pre-accident earnings were probably higher than he has disclosed. Rather, the court should adopt the income figures actually disclosed and base the assessment of damages on them. Again, if this results in a low assessment, that is the consequence of the plaintiff adhering to the accuracy of his income tax returns."

[79] In my respectful view, that line of reasoning should not be followed. First, it seems to take a censorious approach that imposes a form of curial punishment for actions

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100 (1968) 118 CLR 540, at 545-546.

101 *Georginis v Kastrati* at 376.

taken out of court, and in that sense is a triumph of form over substance.[102] Secondly, it is wholly inconsistent with the obligation on the court to make an assessment of the damages that will adequately compensate the plaintiff for the injury caused by the defendant. As is made plain by *Medlin*, the court's task is to compensate for the loss of earning capacity that is or may be productive of financial loss. Thirdly, it seems contrary to what was said earlier in *Georginis v Kastrati*, at page 376: see paragraph [73] above. Fourthly, it has not been followed, or disapproved, subsequently.[103]

[80] The learned trial judge then turned to discounting factors, the first of which was the possibility that Mr Marinkovic would have declined the position anyway even if he had thought he was fit to take it and his tiling business was less remunerative, if he preferred to be self-employed. For that his Honour discounted the yearly figure by 30 per cent, to $60,000.[104]

[81] His Honour then dealt with other potentially discounting factors, such as: (i) the job was not a permanent full time position, but rather for the life of the project; (ii) the (fairly unlikely) prospect that Mr Pantic's enthusiasm for Mr Marinkovic might have waned as a result of his work on that project; (iii) the prospect of further employment would depend on the continuing prosperity of Mr Pantic's business (noting that current employees were earning $150,000 per annum); (iv) the fact that if he had stayed he might have been promoted to higher earning work; (v) the possibility that there might be no job if things got tight; and (vi) that the work may have turned out to be too heavy for him.[105]

[82] The finding ultimately made, balancing those various factors, was:[106]

> "It is tempting to deal with the uncertainties by allowing a further discount, but the fact that the current holder of such a position is being paid so much suggests that there was some significant probability of beneficial uncertainties as well as harmful uncertainties, and of course if [Mr Marinkovic] had been able to take the job there would have to be a reasonable chance that he would still be working for Mr Pantic and receiving that more generous salary now, if he was not in a better paid position. In those circumstances I am probably if anything erring on the side of caution in assessing [Mr Marinkovic's] earning capacity at the date of trial, had the second accident not occurred, at $60,000 net of tax per annum."

[83] The important aspect of that finding is that it is the measure of earning capacity at the date of trial, had the second accident not occurred. The actual earning capacity at trial (that is, because of the impact of the second accident) was reflected in the figure of $16,000 per annum, or $14,500 nett after tax: see paragraph [64] above.

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102 *Morvatjou v Moradkhani* [2013] NSWCA 157, at [84].

103 *Cohen v Ninkovic* [2000] WASCA 169, at [14]-[15]; *AMP General Insurance Ltd v Kull* [2005] NSWCA 442, at [1] per Giles JA; *Matar v Jones* [2011] NSWCA 304, at [16]; *Morvatjou* at [55]-[84]; *Pham v NMRA Insurance Ltd* [2014] NSWCA 22, at [21]; cf *Fine v Geier* [2003] QSC 73, where this passage was cited as part of a larger passage, but it is not evident that Wilson J approved this particular approach.

104 Reasons [80].

105 Reasons [81]-[82].

106 Reasons [82].

[84] As part of the exercise of assessing the past economic loss the learned trial judge considered whether he should apply any further discount. His Honour's finding and calculation is as follows:[107]

> "[84] What is less clear is what the actual earnings would have been had the second accident not intervened, but even here, on the approach that I am adopting, the likelihood is that if [Mr Marinkovic] had not accepted Mr Pantic's offer, it would have been because he was earning much the same money anyway, or more, as a self-employed tiler, and therefore his economic loss would have been in the same order or greater than on the assumption that he would have accepted that offer of employment had the second accident not intervened. To the extent that there is a possibility to the contrary, I am taking that into account in applying a discount. Accordingly, although I do not have any reliable evidence of the actual earnings of [Mr Marinkovic] between the first and second accidents, and after the second accident, or evidence which shows clearly what the actual earnings would have been had the second accident not intervened, I am confident that there is no real risk that if I assess damages for past economic loss on the basis of the difference between the estimates that I have made above, I am assessing a loss which is greater than the actual loss suffered by [Mr Marinkovic] as a result of the injuries in the second accident.
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> [85] Over a period of six years and one month since the second accident, a loss at the rate of $44,500 per annum comes to about $270,000. That I think should be discounted by about 10% to accommodate the vicissitudes of life, including the risk that, had the second accident not happened, something else might have happened to further aggravate [Mr Marinkovic's] neck condition, or stir up lower back pain, or otherwise impair his earning capacity anyway. I will round the result down to $240,000, and allow past economic loss in that figure."

[85] In my view, the challenge to the learned trial judge's assessment of this aspect of the damages cannot be shown to be in error. His Honour has accepted particular evidence as to what could have been earned, based on an acceptance of the evidence of particular witnesses including Mr Marinkovic, and then applied an orthodox analysis, applying a number of discounting factors to take into account the varying probabilities for and against the continuity of the loss. Contrary to the appellants' submissions, the evidence as accepted by his Honour was cogent and reliable.

Superannuation not pleaded or in the Statement of Loss and Damage

[86] The only contention to be addressed in respect of the heads of damage referred to in this category is that they were either not pleaded or mentioned in the Statement of Loss and Damage.[108]

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107 Reasons [84]-[85] internal citation omitted.

108 All other contentions have been separately dealt with in respect of other heads, and do not need repetition.

[87] It is true to say that a claim for superannuation was not pleaded in the Statement of Claim, and the Statement of Loss and Damage said that no claim was made for future or past loss of superannuation on the basis that Mr Marinkovic was self-employed.[109] However, the case was litigated on the basis that such a claim was made, as it was included expressly in the written submissions on behalf on Mr Marinkovic,[110] and addressed in the appellants' written submissions below.[111]

[88] That is sufficient to dispose of this ground.

Award of damages over that pleaded or in the Statement of Loss and Damage

[89] The three heads relevant here are the amounts awarded for general damages, past economic loss and future expenses. In each case the relevant contention is that a different figure from that awarded was in the Statement of Claim (general damages) or the Statement of Loss and Damage (future expenses).[112] Reliance was placed on *Williams v Partridge*[113] for the proposition that the pleading rules do not permit an award of damages in excess of what was pleaded.

[90] As for general damages $35,000 was awarded whereas the Statement of Claim referred to $18,000, and the Statement of Loss and damage said nothing by way of a figure. As for past economic loss $240,000 was awarded whereas the Statement of Claim did not quantify a figure and the Statement of Loss and Damage nominated $130,000. As for future expenses, $12,000 was awarded whereas the Statement of Claim sought $5,000, and the Statement of Loss and Damage nominated $10,000.

[91] It is useful to note that the total damages claimed in the Statement of Claim was $586,722.05. The damages awarded at trial were less than that, totalling $461,249.

General damages

[92] The figure pleaded in the Statement of Claim was $18,000.[114] In the Statement of Loss and Damage details of "the pain and suffering … and the loss of amenities" were set out, but no new figure was mentioned.

[93] The Statement of Loss and damage was required by r 547 of the *Uniform Civil Procedure Rules* 1999 (Qld), which relevantly provides:

> "**547 Plaintiff's statement of loss and damage**
>
> (1) The plaintiff must serve on the defendant a written statement of loss and damage, signed by the plaintiff, within 28 days after the close of pleadings.
>
> (2) The statement must be served before a request for trial date is filed.
>
> (3) The statement must have the following information—

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109 AB 1783, paragraph 5(iv).
110 AB 1795-1796, paragraph 40.
111 AB 1799, paragraph 3; AB 1834, paragraph 81; AB 1845.
112 All other contentions have been separately dealt with in respect of other heads, and do not need repetition.
113 [2009] QSC 278, at [130]-[134].
114 AB 1761, paragraph 8.

(a) details of any amount claimed for out of pocket expenses and documents in the possession or under the control of the plaintiff about the expenses;

(b) if there is a claim for economic loss—

(i) the name and address of each of the plaintiff's employers, the period of employment by each employer, the capacity in which the plaintiff was employed by each employer and the plaintiff's net earnings for each period of employment—

(A) in the 3 years immediately before the injury; and

(B) since the injury; and

(ii) if the plaintiff is self-employed, details of the plaintiff's net income—

(A) in the 3 years immediately before the injury; and

(B) since the injury; and

(iii) details of the amount the plaintiff claims (if any) for loss of income to the date of the statement; and

(iv) details of any disability resulting in loss of earning capacity and of the amount the plaintiff claims for future economic loss; and

(v) if the plaintiff is self-employed—additional details substantiating the plaintiff's claim for economic loss; and

…

(c) details of the pain and suffering experienced by the plaintiff and the loss of amenities caused by the injuries (including the physical, social and recreational consequences of the injuries sustained);…"

(d) details of any other amount sought as damages;"

[94] A defendant has similar obligations: UCPR r 550-551. The Statement of Loss and Damage[115] must be accurate when given, and supplemented if there is a significant change to the information in it: UCPR r 549, 552. And it must identify particular categories of documents, which the other party can obtain: r 548 and r 551.

[95] Once a Statement of Loss and Damage has been given a party to the proceedings may give notice calling a conference "to discuss, and, if possible, reach agreement on, all matters in dispute in the proceeding": UCPR r 553(1). At that conference if the parties agree on a resolution of their dispute a signed written agreement must be produced, and it has effect as a compromise: *Civil Proceedings Act* 2011 (Qld), s 35. However, absent such a compromise the conference is confidential in the

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115 From plaintiff or defendant.

sense that evidence of things said or admitted and documents produced at it can only be given in evidence if all the parties agree: s 36 *Civil Proceedings Act*.

[96] If a party unreasonably refuses or neglects to attend the conference, any party otherwise ready for trial can apply to have a trial date set, and any necessary directions: UCPR r 553(3).

[97] That review is sufficient to show that the purpose and utility of a Statement of Loss and Damage is directed to timely disclosure of information in a personal injuries case, so that parties can attempt to settle the case, have it brought on for trial, frame offers to settle on a more informed basis than might otherwise be the case,[116] and have a framework within which to prepare for trial. However, it is not a pleading and should not be treated as one. Nor does it supplant a pleading. UCPR Ch 6 contains express rules dealing with pleadings, and they do not apply to a Statement of Loss and Damage.

[98] *Williams v Partridge* concerned a claim for expenses that were not referred to in the Statement of Loss and Damage, but the real vice was that the pleading simply referred the reader to the Statement of Loss and Damage. In other words, the pleader used the Statement of Loss and Damage as the particulars of the pleading, and as a consequence contravened UCPR r 151(1)(b) and r 155. So much is evident from what was said at paragraph [131] of the decision. The result was that the other party did not cross-examine on the topic (raised for the first time in a doctor's report) as it appeared not to be relied upon.

[99] Particular reliance was placed on what McMeekin J said in *Williams v Partridge* at [134]:

> "In my view there is no answer to this complaint. The Plaintiff is bound by the particulars given in the Statement of Loss and Damage."

[100] However, once the proper context is understood, that the Statement of Loss and Damage was expressly used as particulars of the pleading, the case is distinguishable from the current case.

[101] The appellants spent considerable time and effort at the trial contesting each part of the claim, including the nature of the physical and psychological impairments, and whether what injury was the dominant injury for ISV purposes. Given that that there always was a claim for general damages, there can be no credible suggestion that the topic was the subject of cross-examination and submissions. None was advanced on the appeal.

[102] Further, the identification of the dominant injury, the impact of the psychological injury and the potential uplift of more than 25 per cent was the subject of submissions.[117] Given it was the learned trial judge's assessment of those matters that led to the identification of the dominant injury and the increased uplift, there can be no

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116 In oral address senior counsel for the appellants identified only two aspects of the "mischief" if Statements of Loss and Damage were not enforced so as to limit what could be awarded. One was the effectiveness of offers to settle and the other was the need to send a message to other litigants that parties ought to be able to have confidence in the statements: appeal transcript T 1-5 to 1-6.

117 For Mr Marinkovic, AB 1788, paragraphs 7-11; for the appellants, AB 1822, paragraphs 42-43; AB 1824, paragraphs 48-51. The submissions were not exchanged but served sequentially, Mr Marinkovic's first.

legitimate complaint that the figure used in the June 2014 pleading happened to be below that awarded. The appellants did not identify any prejudice sustained by them, apart from the mere fact that the award was higher than the figure in the pleading. There was no suggestion that any documents had been delivered otherwise than as required, nor that full particulars had not been given.

[103] Further, the learned trial judge referred to the fact that the award exceeded the figure sought by counsel for Mr Marinkovic, and explained:[118]

> "The second point is that the amount awarded is substantially in excess of the amount sought by counsel for [Mr Marinkovic], but counsel for [Mr Marinkovic] identified as the dominant injury the lower back injury which he correctly placed in item 93. I think counsel for [Mr Marinkovic] failed to appreciate that the identification of the dominant injury is not by reference to which is the most severe injury, but simply which injury has the highest ISV at the top of the range for that injury in Schedule 4. Once that is appreciated, in my opinion the dominant injury is the shoulder injury under item 97, because that has the highest maximum ISV for its range, of 15. The other problem with the approach of counsel for [Mr Marinkovic] is that it appears to have disregarded the consequences of the application of s 5 and the significance in assessing the ISV for the physical injuries of the significant feature of those injuries produced by the adverse psychological reaction."

[104] On that basis the error in framing the proper claim was the neglect of the client's lawyer, and the client should not be punished for that.

[105] For those reasons this ground fails and in my view, the award may be upheld without requiring any amendment to the Statement of Claim. I note also that the total amount awarded is under the total in the Statement of Claim.

Economic loss

[106] The Statement of Claim set out the claim as follows:[119]

> "The Plaintiff will further claim the sum of $169,600.00 damages for past economic loss calculated by the Plaintiff as an *average* loss of not less than $800.00 nett per week from self-employment as a tiler from the time of the incident particularised in paragraph 3 hereof to the date of issue of this Claim and Statement of Claim and ongoing at a rate of not less than $800.00 nett per week."

[107] One notes immediately that the pleaded claim under this head is an ongoing one and on the basis of being self-employed. Further, the Statement of Claim was delivered in June 2014, about 18 months prior to the trial. The claim specified the ongoing rate at $800 nett per week. From 14 June 2014 to judgment (3 June 2016) that would add about 103 weeks at $800 per week, or an additional $82,400. Therefore the total covered by the pleaded claim was $252,000, in excess of that amount awarded.

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118 Reasons [71].

119 AB 1761, paragraph 9 emphasis added.

[108] In the Statement of Loss and Damage, a figure of $130,000 is nominated,[120] after a recitation of the details of the amount claimed. The basis set out is as a self-employed contractor.

[109] For the reasons given in respect of the general damages award *Williams v Partridge* does not apply.

[110] Here both parties litigated the question of the economic loss, dealing with the evidence of Mr Marinkovic, and Mr Pantic and Mr Cowen, and the chances of Mr Marinkovic taking employment as opposed to trading as a contractor.[121] Once again no prejudice was identified apart from the fact that the award was higher than the figure in the pleading and the Statement of Loss and Damage.

[111] There is no merit in this ground. For the reason expressed earlier the award may be upheld without requiring any amendment to the Statement of Claim.

Future expenses

[112] This ground is different from the others in this category, as the Statement of Claim specified an amount ($5,000), as did the Statement of Loss and Damage ($10,000). There can be no suggestion that *Williams v Partridge* applies. Further, beyond referring to the fact that the award was greater than the figures mentioned, nothing was said to identify any prejudice on the appellants' part or mischief arising from the figures stated in the two documents.

[113] The learned trial judge expressed his findings on this head of damage in this way:[122]

> "There was also an argument about future expenses. Dr Byth recommended specialist psychiatric treatment at a cost of $6,000. I generally accepted Dr Byth's evidence, and see no reason not to allow this amount. Apart from that, I think it likely that there will be a continuing need for anti-depressant medication, and a continuing need for painkillers, probably for the rest of his life and probably increasing over time, even allowing for the plaintiff's statements that he is reluctant to take medication. Presumably once the plaintiff qualifies for the age pension his medication costs will diminish. In that context I think the $4,000 conceded in submissions on behalf of the defendants is too low. In all the circumstances I allow $12,000 for future expenses."

[114] As is evident both parties had the opportunity to litigate this head of damage, and did so. Submissions addressed the point.[123] The appellants' submission below confined their calculation to medication that Mr Marinkovic used before the second accident, and only for pain relief, and attributed nothing to the cost of medication dealing with the psychological injury.[124] It is somewhat surprising that the

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120 AB 1781.

121 For Mr Marinkovic, from AB 1789, paragraphs 12-30, and 40; for the appellants, from AB 1799, paragraphs 3, 6, 52-76.

122 Reasons [92]; internal reference omitted.

123 For Mr Marinkovic, AB 1795, paragraphs 36-40; for the appellants, AB 1835, paragraph 83.

124 AB 1835, paragraph 83. Though the appellants' written submission noted Dr Byth's recommendation for the treatment and its $6,000 cost: AB 1814.

appellants did not deal with the extra component, as in cross-examination Dr Byth was not challenged as to the recommendation for treatment or the cost. The submission for Mr Marinkovic dealt only with the actual cost of medication.[125] Consequently neither side dealt with the costs of psychiatric treatment recommended by Dr Byth.[126] In my view, it was a proper component of the award once Dr Byth's evidence was accepted, as it was. To have not allowed it would have resulted in inadequate compensation for the injury.

[115] I consider there is no merit in this ground.

The application of the Civil Liability Regulation

[116] There were a number of injuries that had to be assigned an ISV range under the *Civil Liability Regulation*. One was the injury to the lower back, another was the shoulder injury.

[117] The learned trial judge reviewed the evidence as to the lower back injury and assigned it an ISV range of 5-10.[127] That finding was not challenged on appeal.

[118] His Honour then turned to the shoulder injury, and reviewed the medical evidence as well as what Mr Marinkovic said about it in evidence. The finding in respect of it was as follows:[128]

> "The medical evidence is not clear but I accept that there is some injury which is persisting in the right shoulder. In those circumstances, it clearly does not fall within item 98, so the appropriate item in schedule 4 is item 97 which has an ISV range of 6 to 15. Assessed separately this injury would fall towards the bottom of that range, but because of the way the scheme works this becomes the dominant injury because it has the highest ISV at the top of the range for that injury."

[119] The contention on appeal was that the learned trial judge was in error to assign this injury an ISV according to item 97 and should have applied item 98. In my respectful view that contention cannot be accepted.

[120] Item 98 applies to a "minor shoulder injury", and the examples for a soft tissue injury (which this was) state: "soft tissue injury with considerable pain from which the injured person makes an almost full recovery in less than 18 months". This was not such an injury as there had not been an almost full recovery.

[121] By contrast item 97 refers to a "moderate shoulder injury", and the example for a soft tissue injury refers to "permanent and significant soft tissue disruption". The learned trial judge's finding fits with item 98, as there was still a persisting injury.

[122] The appellants contended that "there was no evidence, medico-legal or otherwise, suggesting the presence of any of the injuries regarded as applicable to Item 97". In

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125 AB 1795, paragraphs 36-40.
126 AB 876, report dated 11 November 2015, paragraphs 8.1-8.2.
127 Reasons [63].
128 Reasons [64].

support of this proposition they referred to various parts of the medical evidence.[129] The contention has no merit. I have reviewed all of the medical evidence to which reference was made, and more, and it uniformly reveals a soft tissue injury to the cervical and lumbar spine, affecting the shoulder, the symptoms of which were ongoing at trial.[130] That takes the injury out of item 98 and puts it into item 97.

[123] Senior counsel for the appellant contended that the shoulder injury should not have been taken to be the dominant injury. That also cannot be sustained. As the learned trial judge pointed out, the dominant injury is not assigned by reference to which is the most severe injury, but simply which injury has the highest ISV at the top of the range for that injury in Schedule 4.[131] The shoulder injury had an ISV at the top of the range of 15. The top of the range ISV for the back injury was 10.

[124] Senior counsel then attacked the uplift assessed by the learned trial judge, contending that no or insufficient reasons had been given for doing so. It was not contended that there was no power to do so. The power to find a higher ISV and the need for reasons are found in ss 3 and 4 of the *Civil Liability Regulation*:

> "**3 Multiple injuries**
>
> (1) Subject to section 4, in assessing the ISV for multiple injuries, a court must consider the range of ISVs for the dominant injury of the multiple injuries.
>
> (2) To reflect the level of adverse impact of multiple injuries on an injured person, the court may assess the ISV for the multiple injuries as being higher in the range of ISVs for the dominant injury of the multiple injuries than the ISV the court would assess for the dominant injury only.
>
> **4 Multiple injuries and maximum dominant ISV inadequate**
>
> (1) This section applies if a court considers the level of adverse impact of multiple injuries on an injured person is so severe that the maximum dominant ISV is inadequate to reflect the level of impact.
>
> (2) To reflect the level of impact, the court may make an assessment of the ISV for the multiple injuries that is higher than the maximum dominant ISV.
>
> (3) However, the ISV for the multiple injuries—

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129 Appellants' outline on appeal, paragraph 6. Dr Todman at AB 222-225, 780-783, 785; Ms Coles at AB 229-230, 233, 236, 270, 274, 796 and 799; Dr Pentis at AB 238-240, 790-792; certificate at AB 279; hospital admission form at AB 283; Dr Morris at AB 843, 845-848, 849; Dr Saines at AB 852-854; report at AB 881; medical records at AB 1180, 1190-1194.

130 Dr Todman at AB 222, 223-224, 265, 780, 790, 1200; X-Ray (right shoulder) AB 292, 881; Mr Marinkovic AB 16 line 3, AB 18 line 6, AB 21 line 19, AB 22 lines 15-17, AB 28 line 25, AB 38 line 33; Dr Pentis AB 91 line 43, AB 97 line 9, AB 256, 259, 261; Dr Morris AB 103 lines 14-25, AB 104 lines 12-20, AB 843, 845-849; Ms Coles AB 109 line 26, AB 228-230, 233, 235-237, 270, 274, 276-277, 795-799, 801, 806-807, 810; Dr Saines AB 138 line 35, AB 852-854; Dr Byth AB 244, 254, 874; hospital records AB 282-283, 288-290; Employment Services Assessment Report AB 775; GP records AB 1180.

131 Reasons [71].

(a) must not be more than 100; and

Note—

Under section 61(1)(a) of the Act, an ISV is assessed on a scale running from 0 to 100.

(b) should rarely be more than 25% higher than the maximum dominant ISV.

(4) If the increase is more than 25% of the maximum dominant ISV, the court must give detailed written reasons for the increase."

[125] The learned trial judge referred to the difficulties in the assessment, caused by the fact that Mr Marinkovic also suffered from a psychological injury. First, the psychiatric injury could not be assessed as an injury in itself.[132] That was a reference to s 5 of Schedule 3 of the *Civil Liability Regulation*, which provides:

"(1) This section applies if a court is assessing an ISV where an injured person has an adverse psychological reaction to a physical injury.

(2) The court must treat the adverse psychological reaction merely as a feature of the injury."

[126] Secondly, if it had been assessed as an injury caused directly by the accident, "it would have fallen within item 11, a serious mental disorder having an ISV range of 11 to 40, and given the PIRS rating would probably have produced an ISV of 20 or more". In other words it would then have been the dominant injury.

[127] Thirdly, his Honour was confronted by the fact that he should assess separately the part of Mr Marinkovic's psychiatric condition which was not attributable to his reaction to his pain. This part was not caught by Schedule 3 s 5 of the *Civil Liability Regulation*, but his Honour concluded: "I have no separate PIRS assessment for that and expect that any such assessment would not support a characterisation of that psychiatric injury other than in item 13 in Schedule 4 of the *Regulation*, so it will not be the dominant injury".[133]

[128] The learned trial judge then dealt with the way to resolve the assessment and the difficulties referred to. His Honour's reasoning is set out at some length:[134]

"[67] I regard this as a significant feature of this case. If the psychiatric injury could have been assessed as a separate injury it would clearly have been the dominant injury, and bearing in mind the extent and severity of the other injuries, the assessment of an ISV for the multiple injuries would probably have been 30 or more. I do not think however that the mere fact that the psychiatric consequences of the other injuries is to be treated as an feature of the other injuries, means that physical injuries which might well justify something towards the top of the relevant ISV

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132 Reasons [65].
133 Reasons [66].
134 Reasons [67]-[69]; internal references omitted.

range anyway cannot receive any or any significant additional ISV allowance, because of the existence of a significant psychiatric effect. It certainly demonstrates that an ISV limited to 15 for the three injuries including the impact of this psychological feature is quite inadequate, so that this is a case where the ISV assessment should be higher than the maximum dominant ISV.

[68] A further 25% of 15 is only 18, so the limitation in s 4(3)(b) produces an ISV of 18, bearing in mind that an ISV must be a whole number. If there were no psychiatric injury, I consider that the multiple physical injuries could be adequately accommodated within the limit imposed by s 4(3)(b), and would assess the physical injuries alone as producing an ISV of 17. It seems to me that there must be some significant further allowance in the present case to accommodate the fact that there is a physiological effect which is of such significance. I appreciate that there has to be some tapering involved and it is not simply a question of adding separate ISV's when assessing multiple injuries, indeed significant tapering, but I consider that in the present case in order properly to reflect that severity of the psychiatric condition developed by the plaintiff as a consequence of his physical injuries, it is appropriate to allow an ISV which is in excess of 25% higher than the maximum dominant ISV.

[69] I appreciate that this should rarely be done, but I consider that in light of the analysis set out above it is justified in the particular circumstances of this case. For what it is worth, in my experience it has certainly been rare for there to be an assessment which is more than 25% higher than the maximum dominant ISV since this system was introduced. In my judgment, after having regard to the content of the relevant provisions of Schedule 4, and the requirements in the sections in Schedule 3, to the regulation, and having regard to all of the relevant circumstances in the present case, I assessed an ISV for the plaintiff's injuries in the second accident of 25. The plaintiff's general damages are then to be assessed by reference to table one in Schedule 7, given that the injury arose on 30 April 2010. From that table an ISV of 25 converts to $35,000."

[129] When those reasons are examined it becomes clear why his Honour assessed an uplift higher than 25 per cent. The inability to separately assess an ISV for the psychiatric injury meant that there was a real risk of the award not properly reflecting the true extent of the injuries. Such a separate assessment would likely have produced an ISV of 30 or more. Instead the application of the scheme meant that the dominant injury (the shoulder) attracted an ISV of 15, which was "quite inadequate". An uplift of only 25 per cent still produced an inadequate assessment. Therefore the uplift was higher and produced an ISV of 25.

[130] In my respectful view, the contention that appropriate reasoning was absent, or less than sufficient, cannot be sustained.

[131] The remaining aspect of this ground depends on the contention that the learned trial judge should have rejected the medical evidence in so far as it reflected what Mr Marinkovic said to the practitioners. That can be conveniently dealt with as part of a separate ground.

Minor mathematical error?

[132] The appellants contended, and it was accepted by senior counsel for Mr Marinkovic, that in reaching his figure for future economic loss the learned trial judge made a slight mathematical error. The award was reached by using an annualised amount of $44,000.[135] His Honour calculated that as $880 per week, when it should have been $844.50. It was contended that it would have the effect of reducing the award by about $5,000.[136]

[133] In my view, whilst there is an admitted error its impact is not such that this Court should alter the award. That is so for several reasons.

[134] First, it is doubtful that it should be characterised as a mathematical error in that it is simply the weekly representation of what had actually been estimated, that is, the annualised loss. In fact the annualised figure was $44,500,[137] so there is an inbuilt benefit to the appellants. Secondly, there is no substantive impact on the award of damages arising from the error. The resultant correction is very small compared to the total award. Thirdly, the figure of $44,000 was, itself, a moderate estimate, and a substantial discount of one third was applied to arrive at the figure of $135,000.

[135] Fourthly, it falls within the principle in *Elford v FAI General Insurance Company Limited*.[138] There this Court held that where there is nothing more than a wrong estimate of one component of an award of damages which had no substantial effect on the total the appeal on that point should be dismissed. Referring to previous decisions in *Keefe v R. T. & D. M. Spring Pty Ltd*[139] and *Calder v Boyne Smelters Limited*,[140] the Court said:

> "There are other questions, as to the proper approach of appellate courts to awards of damages for personal injuries or death, than those dealt with in *Keefe*. But it is our opinion that this Court should not be deterred by *Calder* from continuing to apply *Keefe* as authority for the view that, if a particular component of such an award is plainly an under-estimate or over-estimate *and* if substituting a proper figure for that component will substantially alter the total, then the substitution should be made; but if there is nothing more than a wrong estimate of one component which has no substantial effect on the total, the award stands. The pointing out of a relatively small error in one estimated component of a judgment which is in substance a sum of estimates does not necessarily make the judgment as a whole wrong. It may be that some types of mistakes, for example arithmetical errors, will require correction irrespective of their effect on the total award, but the general rule should be as we have stated."

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135 Reasons [89].
136 Appellants' outline on appeal, paragraph 33.
137 Reasons [85].
138 [1994] 1 Qd R 258 at 265.
139 [1985] 2 Qd R 363.
140 [1991] 1 Qd R 325.

[136] In my view this ground should not result in any alteration to the award of damages.

Failure to deduct Centrelink benefits

[137] This point arises from the appellants' outline on appeal.[141] Though it was raised, it was not the subject of any ground of appeal, even in those added on the hearing.

[138] Nonetheless, the parties agreed that the learned trial judge failed to take into account the receipt of Centrelink benefits when assessing the interest on past economic loss, and that an adjustment should be made.

[139] The resultant amendment that is called for is by deducting the agreed sum ($21,375) from the award ($240,000), and then applying the agreed interest rate (1.265%) over six years and one month.[142] That calculation is: $218,625 x 1,265% = $2765.61 per annum. Over six years and one month, that is $16,824.10.

[140] The actual awarded for this interest was $19,545, which together with the $307 for interest on special damages led to the total award of interest ($19,852) which is part of the judgment.[143] That part of the judgment should be set aside and the figure of $16,824.10 substituted for interest on past economic loss. When that is done the total award of damages is $458,528.10.

Future economic loss to age 70?

[141] Ground 2.12.6 is that there was error in that "the awards were based on a notional working life to age 70 which was not supported by the evidence or the weight of the evidence or was highly improbable".

[142] That is not the ground advanced in the appellants' outline on appeal. One can understand that given there was no finding or award based on a notional working life to age 70. Instead, the outline alleges error in the finding that Mr Marinkovic would have continued to work another five years. The basis of the challenge is that the medical evidence revealed degenerative changes in the spine, and therefore the five years is "glaringly improbable having regard to the collateral medical issues experienced by [Mr Marinkovic], the nature of the work that he had undertaken for many years, the difficulties experienced by Mr Siljegovic in performing such work and the other accidents in which [Mr Marinkovic] had been involved".[144]

[143] The learned trial judge's finding on this aspect is:[145]

> "My impression overall is that the plaintiff s expectation of being able to work until 70 (p 19) was probably optimistic, but the various possibilities can I think adequately be reflected by taking as a starting point an assumption of five years effective loss. That would take him to something like the traditional retirement age, …".

[144] The passage of evidence to which reference was made was in answer to how long Mr Marinkovic expected to "keep doing this tiling job in my later age". His response was as follows:[146]

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141 Paragraph 32.
142 Reasons [87].
143 Reasons [94], AB 1872.
144 Appellants' outline on appeal, paragraph 31.
145 Reasons [89].
146 AB 19 lines 35-43.

> "The answer, your Honour, … I felt that I could probably work till I was 70. We've had few tilers … that have worked till they're 70 and past. Maybe not the bigger jobs, but they were doing smaller, easier jobs like kitchen splashbacks … you can make the daily wages on a kitchen splashback at today's prices. This is when you get old and it's not kneeling down. You can do those jobs standing up.
>
> HIS HONOUR: Yes?---I just felt that I … will – one way or another … I will keep working, even to the capacity that I have now, till as long as I can."

[145] Given Mr Marinkovic was born on 6 November 1956, he was about 59 years seven months at judgment. Five years would have taken him to 64 years seven months, hence "something like the traditional retirement age". A short synopsis of his history is at paragraph [7] above.

[146] As to the degeneration issue, the learned trial judge clearly had it in mind, as he dealt with the evidence, and made findings about it. His Honour referred to that evidence in his review of the medical reports and evidence. Thus, doctors referred to normal age-related degenerative changes in the spine.[147] However, their evidence did not suggest that it would impair working until normal retirement age.[148]

[147] The other witnesses who had seen Mr Marinkovic work did not suggest that he was the type who would not work as long as he could. In fact the contrary is the case.[149] There was no suggestion on appeal that the learned trial judge's summary of their evidence was wrong, and there was no real challenge to their credit.

[148] Mr Marinkovic's evidence as to the impact on his physical and mental state was, with few qualifications, accepted by the learned trial judge. That led to the finding that he was "significantly worse off after the second accident, in terms of his physical condition, particularly his pain, his psychiatric condition (which was new) and the effect on his ability to work".[150] That supports the finding made as to working to retirement age.

[149] As to accidents that Mr Marinkovic had been in, he referred to some relatively minor work accidents.[151] The others were "old claims for compensation dating mostly from the 1980's". They were dismissed by the learned trial judge, as were any other medical conditions:[152]

> "It is sufficient to say that there was no medical evidence suggesting that any of those incidents was of any continuing significance in relation to the state of his back at the time of the second accident or subsequently, and I therefore regard them as irrelevant. There was

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147 Dr Todman, Reasons [6]-[7]; Dr Morris, Reasons [10]-[11]; Dr Pentis, Reasons [14]-[17].

148 Dr Todman, AB 131 line 44 to AB 132 line 6, Reasons [9]; Dr Pentis, AB 94 lines 6-18, AB 96-97, Reasons [18]. Dr Morris, called by the appellants, was not asked to address the issue in his evidence.

149 Mr Siljegovic, Reasons [43], he was a good tiler and a very hard worker; Mr Pantic, Reasons [44]; Mr Cowen, Reasons [45], he was a good worker and wanted to take up the job offer but physically couldn't.

150 Reasons [60].

151 AB 20 lines 9-20.

152 Reasons [72]; internal references omitted. The other medical conditions were: gastric reflux, high blood pressure, haemorrhoids, and umbilical hernia. The "other matters" included: Ross River virus, Epstein Barr virus, gout, and some inconsequential accidents.

> evidence the plaintiff had a number of other medical conditions over the years, most of which would have obviously been of no real concern to his earning capacity, or relevant to the various injuries suffered in the second accident. There were also a number of other matters which may well have interfered with his ability to work for a time, but where there was no medical evidence to show that they were of any continuing relevance at the time of the second accident."

[150] The reference in the appellant's argument to "difficulties experienced by Mr Siljegovic in performing such work" is puzzling. He was 63 at the trial, and did commercial tiling work, which he carried out himself.[153] He gave some general evidence about tiling work, and that the hardest part was being on the knees,[154] but apart from that said nothing that would suggest he experienced any particular difficulty. Nothing he said could have an impact on the likelihood of Mr Marinkovic working to retirement age.

[151] In my view, there is no merit in this challenge to the learned trial judge's findings.

One additional matter

[152] One further matter needs be mentioned.

[153] The appellants' outline on appeal included a submission, relying on a passage in *Georginis v Kastrati*, that "when tax fraud or tax evasion is disclosed on the evidence there is a duty upon the court to refer the matter for appropriate investigation".[155] The relevant passage is as follows:[156]

> "A failure to disclose income as required by s 161 of the *Income Tax Assessment Act* 1936, constitutes an offence which may attract heavy penalties: see s 223 of the *Income Tax Assessment Act* and ss 8c, 8k and 8p of the *Taxation Administration Act* 1953. Where a tax fraud or evasion of this kind is disclosed in evidence, it is the court's duty to draw the evidence to the attention of the executive branch of government for such action as may be appropriate: *Petera Pty Ltd v EAJ Pty Ltd* (1984) 7 FCR 375."

[154] The topic was addressed during oral submissions by senior counsel for the appellants. It was acknowledged that there was no such step taken by the learned trial judge. When pressed as to whether the appellants were seeking to have this Court take that step, senior counsel answered in the negative.[157]

[155] I would be reluctant to take such a step. First, it was not sought below, and eschewed in this Court. Therefore there was no exploration of the issue or the relevant authorities, and whether any such "duty" is engaged. Secondly, the passage in *Georginis v Kastrati* speaks of established "tax fraud or evasion". As explained earlier, the findings here stop short of that, and the reason why the returns were in the form they were (having been prepared by accountants) was not

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153 AB 178-179.
154 AB 184-185.
155 Appellants outline on appeal, paragraph 28.
156 *Georginis v Kastrati* at 376.
157 Appeal transcript T1-11 lines 1-19.

explored. It is possible that the circumstances would fall short of evasion of fraud. That being so, there is no need to address the question of whether this Court should do so.

Disposition of the appeal

[156] For the reasons set out above I would allow the appeal only to the extent of substituting the correct interest figure for interest on past economic loss. I propose the following orders:

1. Allow the appeal to the extent of awarding $16,824.10 for interest on past economic loss instead of $19,545.

2. Set aside the judgment entered on 3 June 2016 and substitute judgment for $458,528.10.

3. Otherwise dismiss the appeal.

4. The appellants are to pay the respondent's costs, of and incidental to the appeal, to be assessed on the standard basis.

[157] **MULLINS J:** I agree with Morrison JA.