

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

JOHN LESLIE HUSHER

APPELLANT

AND

WENDY JOAN HUSHER & ANOR

RESPONDENTS

Husher v Husher [1999] HCA 47
9 September 1999
B10/1999

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the order of the Court of Appeal of Queensland made on 21 August 1998 and in lieu order:*
 - (a) *Appeal allowed with costs.*
 - (b) *Set aside the judgment and orders of Cullinane J made on 1 October 1997 and in lieu order that:*
 - (i) *the plaintiff have judgment against the defendants in the sum of \$261,958.85 together with interest pursuant to s 48 of the Supreme Court Act 1995 (Q) from 1 October 1997 until payment on so much of the said sum as remains unpaid on and after 22 October 1997;*
 - (ii) *the defendants pay the plaintiff's costs of and incidental to the action at trial to be taxed on a solicitor and client basis.*

On appeal from the Supreme Court of Queensland

Representation:

D B Fraser QC with R W Trotter for the appellant (instructed by Messrs Dempseys)

J S Douglas QC with A M Daubney for the respondents (instructed by Quinlan, Miller & Treston)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Husher v Husher

Damages – Tort – Personal injuries – Quantification – Loss of future earning capacity – Husband and wife partnership at will – Equal division of profits – No significant contribution by wife to partnership's business activity – Whether loss of future earning capacity calculated by reference to plaintiff's past share of partnership profits.

1 GLEESON CJ, GUMMOW, KIRBY AND HAYNE JJ. In November 1994, Mr John Husher (the appellant) was injured when a car driven by Mrs Wendy Husher, his wife (the first respondent) was involved in an accident. He brought an action in the Supreme Court of Queensland against her and "Transport Accident Commission Insurance"¹ (the second respondent) claiming damages for personal injury. Liability was admitted. Damages were assessed and judgment entered in favour of the appellant by the Supreme Court of Queensland. The only question in this Court is how that part of the damages to be awarded to the appellant for loss of future earning capacity should be assessed.

2 Before the accident the appellant was a block layer. He carried on this business in partnership with his wife. Subject to some qualifications that are now irrelevant, the appellant and his wife engaged no employees for the purposes of the business. It was the appellant's skill and labour which generated income for the partnership and his wife's only contribution to the business was to perform some minor bookkeeping and message-taking tasks. Nevertheless the partnership, which was a partnership at will, provided for equal division of profits. That is, the appellant and his wife made arrangements of a kind very common among self-employed skilled workers. The taxation benefits of such income-splitting arrangements are well known.

3 Although the appellant returned to work for a short time after the accident, he found that he could not continue the heavy lifting that had to be done in the course of block laying. Accordingly, the partnership ceased operations in early March 1996. The trial judge found that because of the injuries the appellant had suffered in the accident, he was incapable of performing the work of a block layer or any heavy work. His Honour found that but for the accident "all the probabilities are that the [appellant] and his wife would have continued in partnership as they had been for some years prior to the accident" and would have done so "until the end of his working life". The trial judge acknowledged that these arrangements might have changed and that in that event the appellant may then have been "entitled to the whole or a substantially greater part of the product of his earnings than he would have been as an equal member of the partnership with his wife". But it is clear that the trial judge thought it unlikely that there would have been any such change.

1 This description of the second respondent may be a misnomer for the body corporate established by s 10 of the *Transport Accident Act* 1986 (Vic) under the name "Transport Accident Commission" and which appears to have had the carriage of the defence of the claim. No point was made about the name or identity of the second respondent and we do not notice it further.

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Kirby J
Hayne J

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4 The trial judge assessed the amount to be allowed to the appellant in respect of past and future economic loss in accordance with what he took to be the principles established by the Court of Appeal of Queensland in *Seymour v Gough*². In particular he calculated the amount to be allowed for loss of future earning capacity on the basis that the appellant would probably have received only half of the profits of the partnership. Under this head of damages the appellant was awarded a sum based on that half share of profits, adjusted to reflect various contingencies, including the possibility that some other business arrangements might have been made.

5 The appellant appealed to the Court of Appeal against the judgment entered by the trial judge but that appeal failed, the Court holding that the trial judge had correctly applied *Seymour v Gough*. By special leave, the appellant now appeals to this Court.

Impairment of earning capacity productive of financial loss

6 Before dealing with *Seymour v Gough* and some of the decisions in Queensland that preceded it, it is as well to recall some matters that are well settled. A person who is physically injured by the negligence of another may suffer damage in a number of ways. As has long been established, the damages to be awarded to the victim are "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation"³. If the victim's pursuit of gainful employment is interrupted or affected because of the negligent infliction of physical injury, the victim is to be compensated by an amount that reflects the financial consequences that follow from the impairment.

7 Since at least *Graham v Baker*⁴ it has been recognised that it is convenient to assess an injured plaintiff's economic loss "by reference to the actual loss of wages which occurs up to the time of trial and which can be more or less precisely ascertained and then, having regard to the plaintiff's proved condition at the time of trial, to attempt some assessment of his future loss"⁵. But damages for both past loss and future loss are allowed to an injured plaintiff "because the diminution of

2 [1996] 1 Qd R 89.

3 *Livingstone v Rawyards Coal Company* (1880) 5 App Cas 25 at 39 per Lord Blackburn.

4 (1961) 106 CLR 340.

5 (1961) 106 CLR 340 at 346-347 per Dixon CJ, Kitto and Taylor JJ.

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his earning capacity is or may be productive of financial loss"⁶. Both elements are important. It is necessary to identify both what capacity has been lost and what economic consequences will probably flow from that loss. Only then will it be possible to assess what sum will put the plaintiff in the same position as he or she would have been in if injury had not been sustained.

- 8 No doubt the past may provide important evidence about the plaintiff's earning capacity and what economic consequences will probably flow from what has happened⁷. What a worker earned in the past may provide very useful guidance about what would have been earned if that worker had not been injured. But the inquiry is an inquiry about the likely course of future events and evidence of past events does not always provide certain guidance about the future. There may be many reasons why an injured plaintiff's past work history provides no assistance in deciding what that plaintiff has lost through diminution of future earning capacity. The student who is yet to enter the workforce is an obvious case of that kind. That student may have no history of paid work. Important as evidence of past events may be, that evidence is not determinative of an issue about loss of future earning capacity.

The course of authority in Queensland

- 9 Against this background it is convenient to turn to the course of authority in Queensland on this issue and to look first at two cases that preceded *Seymour v Gough*. In the first of these, *Lago v Lago*⁸, the injured plaintiff was a beneficiary under a discretionary trust. The trustee of that trust owned half the units in a unit trust; the other half of the units were owned by a trustee of a discretionary trust controlled by or in the interests of the plaintiff's brother. The trustee of that unit trust conducted a substantial business. The plaintiff's injury prevented him working for the business and extra labour was employed to do that work. The Full Court held that the trial judge had rightly refused to allow the plaintiff any damages in respect of the costs incurred before trial of employing the extra labour because, so it was found, given the way in which the trust income was distributed, no part

6 (1961) 106 CLR 340 at 347 per Dixon CJ, Kitto and Taylor JJ. See also *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649 at 658 per Barwick CJ; Atiyah, "Loss of Earnings or Earning Capacity?", (1971) 45 *Australian Law Journal* 228.

7 *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649 at 658 per Barwick CJ.

8 [1983] 2 Qd R 29.

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of that expense would fall upon the plaintiff. Nevertheless, an amount was allowed for future loss - apparently on the ground that in due course some (but not all) of the estimated costs of that future labour would fall on the injured plaintiff.

10 In the second case, *Batt v Wilkinson*⁹ (which was decided shortly after *Lago*) the plaintiff and his wife had been equal partners in a newspaper agency. The plaintiff was injured and he was left able to work to only about half of his former capacity. The Full Court held that it was wrong to measure the loss of his future earning capacity by reference to the share of profits he would have received from the partnership. The financial loss was said to be "the combination of what he was entitled to receive and, as a matter of his choice, to give away" under the partnership arrangements¹⁰. Accordingly, the Court held that damages for loss of future earning capacity had been correctly calculated by reference to the whole of the net income of the partnership and not just the plaintiff's share of that net income. The decision in *Lago* was referred to in *Batt* but it was not suggested that some departure from *Lago* was intended. Each case was treated as depending on its own facts, not on some difference in applicable principles.

11 Nevertheless, in *Seymour v Gough*, decided some 11 years after *Lago* and *Batt*, Pincus JA said that he found the decisions in those cases difficult to reconcile and declined to follow *Batt*¹¹. The other members of the Court agreed that *Batt* should not be followed¹².

12 The plaintiff in *Seymour v Gough* had been in equal partnership with his wife. The income of that partnership was derived principally from the plaintiff's labours. Soon after the plaintiff was injured, a company was formed in which the plaintiff and his wife held equal interests and thereafter the business which had been conducted by the partnership was conducted by the company. Because the plaintiff had been injured, the partnership (and later the company) employed extra labour and this reduced the profit earned by the business and the amounts distributed to the plaintiff and his wife.

13 The Court of Appeal held that damages for the plaintiff's loss of future earning capacity should be assessed by reference to the amount of his share of net profits of the joint enterprises in which he had participated before and after the

9 [1983] 2 Qd R 619.

10 [1983] 2 Qd R 619 at 624 per Derrington J.

11 [1996] 1 Qd R 89 at 95.

12 [1996] 1 Qd R 89 at 92 per Fitzgerald P, 98 per Davies JA.

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accident. The members of the Court differed about exactly how much should have been allowed to the plaintiff for past economic loss and for loss of future earning capacity, but the detail of those differences does not matter. It seems, however, that all members of the Court agreed¹³ in the reasoning of Pincus JA, which he expressed as follows¹⁴:

"It is plain that loss of working capacity does not necessarily justify an award for economic loss; a person who is injured after retirement may be able to show a considerable, perhaps complete, loss of earning capacity as a result of the injury, but will receive nothing for that if the court finds that he would never have worked again. But the decision in *Batt v Wilkinson* rests on narrower ground than the proposition that it is always loss of earning capacity, not loss of earnings, for which the plaintiff must be compensated; it can be regarded as deciding that where the worth of the working capacity lost is higher than the amount which, because the plaintiff is working in a partnership, is lost to him, then the defendant should pay that higher sum. It would remain for consideration whether, if partnership arrangements resulted in the plaintiff losing more rather than less than the true value of his lost earning capacity - which is by no means inconceivable - the principle could be used against a plaintiff.

The defendant must take the plaintiff as he finds him and, prima facie, one would expect that rule to apply to the plaintiff's working arrangements as well as his physical condition. If a plaintiff is, under provisions in a partnership agreement, excluded from the partnership because he or she is so injured as not to be able to work full-time, one would expect the whole loss to be recoverable, even if disproportionate to the diminution of working capacity.

...

I do not understand how the respondent in the present case can be treated as having lost more than the records of the business, whose accuracy is unchallenged, show. Perhaps purely for tax reasons, but nevertheless genuinely, the respondent entered into a partnership with his wife. The consequence of his having done so is that the profits and losses of the business are shared between the partners; one cannot, simply on the grounds that the partnership was probably formed for tax reasons and that the

13 [1996] 1 Qd R 89 at 92 per Fitzgerald P, 98 per Davies JA.

14 [1996] 1 Qd R 89 at 95-96.

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respondent is the dominant partner, justify treating a partnership loss as if it were a loss to that partner alone."

14 This part of the reasons in *Seymour v Gough* appears to focus upon the evidence of the past earning history of the plaintiff. As we have said, evidence of past earning history is often important in assessing damages for loss of future earning capacity but it is not determinative. For that reason alone, if the decision in *Seymour v Gough* was intended to establish some principle that a plaintiff, who at the time of the accident was a partner in a business, can never recover more for loss of future earning capacity than a sum calculated by reference to the plaintiff's past share of partnership profits, it is wrong and should be overruled. While it is generally true to say that "the defendant must take the plaintiff as he finds him"¹⁵, that does not mean that the focus of an inquiry about loss of future earning capacity is upon the plaintiff's position at the time of the injury, any more than it is upon the plaintiff's position in the past. The assessment of damages for loss of future earning capacity requires consideration of what would have happened in the future if injury had not been sustained.

15 Here, of course, it was found that the existing partnership arrangements would very probably have continued into the future. In this case, then, it was found that, but for the accident, the future would have reflected the past. But finding that past partnership arrangements would probably have continued into the future, had the plaintiff not been injured, does not *inevitably* mean that the calculation of the damages to be allowed for loss of future earning capacity *must* be limited by reference to the amount of the plaintiff's share of partnership profits. Again, if *Seymour v Gough* was intended to establish such a proposition, it is wrong and should be overruled.

16 To explain why that is so, it is necessary to return to basic principles. Those principles are not in doubt. It is the application of those principles that has produced differences of opinion. The appellant submitted that contrary views to those in *Seymour v Gough* have been expressed elsewhere in Australia¹⁶. And it may well be that the dominant view in States other than Queensland, and, indeed,

15 [1996] 1 Qd R 89 at 95 per Pincus JA.

16 *Szittner v Harriott* (1967) 85 WN (Pt 1) (NSW) 461; *Taroporewalla v Berkery* [1983] 3 NSWLR 28 at 39 per Mahoney JA; *Spargo v Haden Engineering* (1993) 60 SASR 39; *Cole v Ellis* (1992) 60 SASR 481 and unreported, Full Court of the Supreme Court of South Australia, 13 May 1993; *Schick v Abbott* [1976] WAR 54; *Randall v Dul* (1994) 13 WAR 205; *Dal Zotto v Bonnani* (1980) 47 FLR 239.

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in other common law jurisdictions¹⁷, is not the view adopted in *Seymour v Gough*. But the decisions reached in particular factual contexts must not be permitted to obscure what we have referred to as the basic principles.

- 17 Those principles require identification of what earning capacity has been impaired or lost and what financial loss is occasioned by that impairment or loss. In the present case there is no doubt that the *capacity* that the appellant lost was a capacity to earn whatever he *could* have earned working as a block layer. But the inquiry does not stop at what the appellant *could* have earned. It is necessary to ask what loss the appellant suffered because of the diminution of that capacity and that invites attention to what *would* have happened but for the negligent infliction of injury (as best a court can predict that future course of events). The latter question (what *would* have happened but for the negligent infliction of harm) was said to be answered, in this case, by identifying that it was highly probable that the partnership at will would have been maintained but for the occurrence of the accident. But it is necessary to consider the content and consequences of that conclusion with some care.

Impairment causing loss

- 18 The financial loss occasioned by impairment of earning capacity is the loss of what (if there had been no accident) the injured plaintiff *would* (as opposed to *could*) have expected to have had under his or her control and at his or her disposal by exercising that capacity. We refer to "control" and "disposal" because what the plaintiff has lost are the financial rewards from work that are rewards the plaintiff would have been able to direct to whatever purpose or destination he or she chose.
- 19 The finding in this case about probable continuance of the partnership reveals how the appellant would, in all probability, have ordered his financial affairs - by an arrangement terminable at will under which, in return for services of negligible value, he would have shared with his wife 50% of the net proceeds of his endeavours. But the finding about probable continuance of the partnership, standing alone, does not reveal how much the appellant would have had under his control and at his disposal.
- 20 There are two critical elements. First, the whole of the income of the partnership came from the efforts of the appellant and the exploitation of *his* earning capacity. As a matter of practical reality, his wife's contribution to the income was negligible. Secondly, the partnership was a partnership at will. The

17 Waddams, *The Law of Damages*, 3rd ed (1997) at 195-196. But cf *Lee v Sheard* [1956] 1 QB 192.

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appellant would very probably have chosen to maintain those arrangements but that was *his* choice. If he chose to make some other arrangement concerning the fruits of his labour, effect would be given to that choice, whatever view his wife may have held. What the appellant would have had under his control and at his disposal but for the accident was, therefore, the whole of the fruits of his skill and labour. And it is, then, the whole of those fruits that he has lost. In this regard, the case is no different from the injured plaintiff who would probably have devoted some or all of the income earned in the future to charity¹⁸.

21 So long as the partnership subsisted, the income derived by the appellant was limited to his share of the partnership profits. In this respect his fiscal position was different from that of a wage-earner who, having first derived income, then disposes of it in whole or in part. In *Federal Commissioner of Taxation v Everett*¹⁹ this Court disapproved of the suggestion that, for income tax purposes, income from personal exertion is necessarily derived by the person whose activities give rise to the income, and that a partnership arrangement entered into by such a person involves a disposal of income previously derived. That decision has stood for many years. Its correctness was not, and could not be, challenged in this appeal. The tax arrangements between the appellant and his wife therefore meant that the appellant did not derive the whole of the partnership income. Nevertheless, his capacity to terminate the partnership at will, and to bring an end to, or vary, the arrangements made with his wife concerning the manner in which income generated by his activities was derived, resulted in an effective control which is of critical significance in measuring his earning capacity and his financial loss.

22 In this case it was probable that the appellant would have exploited only his own earning capacity to generate net income of a particular amount and that he would have been able to control the destination of that net income as he chose. In those respects, this case differs from some other hypothetical examples mentioned in the course of argument. No true comparison can be made between this case and that of a person expected to remain a member of a partnership not terminable at will or a partnership in which persons other than the injured plaintiff contribute significantly to the firm's business activity, either by capital contribution or by contribution of skill and labour. In those cases other considerations intrude in deciding what is the loss occasioned by the impairment of the plaintiff's future earning capacity. In at least some cases of the kinds mentioned it may be that the plaintiff's probable exploitation of earning capacity to generate income over which the plaintiff would have had control would be limited to the amount of the benefits

18 See, for example, *Turenne v Chung* (1962) 36 DLR (2d) 197.

19 (1980) 143 CLR 440 at 453.

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the plaintiff could have expected to receive under the partnership arrangements (for as long as those arrangements were likely to have persisted) but each case will turn on its own facts.

The importance of the facts in each case

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

Adjustment for taxation consequences?

- 24 One other point, mentioned in the course of argument, but not falling for decision in this case, should be noted. Should any account be taken of the taxation consequences of income-splitting arrangements like those the appellant had made?
- 25 The assessment of damages for loss of future economic capacity involves questions of judgment and estimation. Being an attempt to predict what would have happened, the process can never be exact. The fact that calculations are made by multiplying present values of net income by the expected duration of remaining working life should not obscure that the process is necessarily inexact. Even so, the assessment of lost earning capacity requires some care in identifying (as best one can) what net income the plaintiff would have had at his or her disposal. That may require some consideration of the taxation consequences of different arrangements.
- 26 In the course of argument, reference was made to *Spargo v Haden Engineering*²⁰. There the Full Court of the Supreme Court of South Australia considered the assessment of lost earning capacity of a plaintiff who had been employed as a sheet metal worker by a company which was trustee of a discretionary family trust. The plaintiff had generated the only income received

20 (1993) 60 SASR 39.

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by the trustee company and that income was distributed to the plaintiff and members of his family. The Court held that the damages to be allowed to the plaintiff for loss of future earning capacity should be calculated by reference to the whole of the income he had generated. Perry J said²¹:

"But it does not follow that if the Court should properly have regard to the total income produced in the business in assessing the plaintiff's loss of earning capacity, in determining the net income for the purpose of calculating the amount to be allowed for loss of earning capacity, only the small amounts of tax, if any, paid by the various family members with reference to the amounts allocated to them, should be deducted. To do so, is to be over-generous to the plaintiff. If he is to be given the benefit of aggregating the distributed income for the purposes of measuring his earning capacity, the allowance for income tax in determining the net earnings should approximate the amount which he might have paid on the gross earnings if they had been brought to account by him rather than by the family trust."

We accept that an adjustment of the kind proposed by Perry J was not inappropriate in that case. But neither party suggested that any question of the different taxation consequences of different arrangements (of the kind considered by Perry J) arose here.

Conclusion

27 In our opinion the appeal should be allowed with costs. The parties to the appeal agreed that in that event the judgment entered at trial should be varied by substituting in the calculation of damages the sums of \$45,000 and \$160,000 respectively for past and future economic loss. Having offered to compromise his claim for less than the sum to be awarded, the appellant should have his costs of trial taxed on a solicitor and client basis.

28 We would therefore order:

1. Appeal allowed with costs.
2. Set aside the order of the Court of Appeal of Queensland made on 21 August 1998 and in lieu order:
 - (a) Appeal allowed with costs.

21 (1993) 60 SASR 39 at 54.

Gleeson CJ
Gummow J
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- (b) Set aside the judgment and orders of Cullinane J made on 1 October 1997 and in lieu order that:
 - (i) the plaintiff have judgment against the defendants in the sum of \$261,958.85 together with interest pursuant to s 48 of the *Supreme Court Act* 1995 (Q) from 1 October 1997 until payment on so much of the said sum as remains unpaid on and after 22 October 1997;
 - (ii) the defendants pay the plaintiff's costs of and incidental to the action at trial to be taxed on a solicitor and client basis.

- 29 CALLINAN J. This case is concerned with an assessment of damages for loss of earning capacity suffered by a partner in a business whose efforts were productive of virtually the entirety of the profits of the partnership. The question is whether the appellant, a tradesman in a partnership at will with his wife, was entitled to recover damages for the impairment of his earning capacity undiscounted by reason of his wife's entitlement to a half share in the partnership profits.
- 30 The partnership carried on a block laying business. The partnership was formed to enable the appellant to split his income for taxation purposes. The appellant was effectively the sole income earner although he estimated that his wife did provide some services for the partnership to a limited value of about \$1,000 per annum. The income from the partnership was deposited in bank and credit card accounts in the joint names of the appellant and his wife. The whole of the income received by the business was used for family purposes.
- 31 In November 1994, when he was 52, the appellant was injured in a motor vehicle accident. As a result, he suffered significant permanent disability and stopped working in the block laying business. The partnership ceased carrying on business in March 1996. Since that time the appellant has unsuccessfully attempted to conduct a furniture making business. He has been unable to find work less physically demanding than block laying. The trial judge found that, were it not for the accident, it was highly probable that the appellant and his wife would have continued in partnership in the block laying business until the end of the appellant's working life.
- 32 In the Supreme Court of Queensland, the appellant sought damages for pain and suffering and for past and future economic loss. The appellant argued that damages for past and future economic loss should be assessed by reference to the total income of the partnership. However his Honour the primary judge Cullinane J rejected this argument and assessed damages for past economic loss by reference to the share of the income of the partnership that the appellant would have received had he continued working. Cullinane J was of the view that the decision of the Court of Appeal in *Seymour v Gough*²² overruled the decision of the Full Court in *Batt v Wilkinson*²³, and therefore obliged him to award damages for economic loss having regard to half of the partnership income only. Cullinane J also held that a similar principle should apply with respect to damages for future economic loss, but his Honour thought that substantial allowance (25 per cent) for the possibility that the partnership might have terminated before the appellant ceased work should be made.

22 [1996] 1 Qd R 89.

23 [1983] 2 Qd R 619.

33 In the Court of Appeal, Derrington J (with whom Thomas JA and McPherson JA agreed) upheld the decision of Cullinane J. Their Honours declined to overrule the decision in *Seymour* because they were of the view that they should depart from previous decisions "cautiously and only when compelled to the conclusion that the earlier decision is wrong"²⁴.

34 The appellant also contended in the Court of Appeal that the allowance made by Cullinane J for the possibility that the partnership might terminate was inadequate. Relying on the proposition that the Court will not speculate as to future events when their result is known at the time of trial²⁵, the appellant argued that because the partnership in fact terminated before the trial, the assessment of damages should be made on the basis of that ascertained fact. The Court of Appeal held that if the partnership had terminated as a result of events unconnected with the appellant's injuries, then speculation would have been inappropriate; however, as the termination was a direct consequence of the injuries, it was correct to take a position on whether, but for those injuries, it would still have occurred.

35 The appellant submits that the Court of Appeal was in error in three respects:

- (i) in applying the principles stated in *Seymour v Gough* in preference to those in *Batt v Wilkinson*;
- (ii) in failing to distinguish between the position where the partnership between the appellant and his wife was in force and the position after its dissolution;
- (iii) alternatively, in failing to give effect to the evidence that all of the earnings of the business were applied to family purposes.

36 In *Batt v Wilkinson*, the plaintiff and his wife were partners in a newspaper agency. The partnership was, as here, established for taxation purposes. The trial judge awarded damages for economic loss measured by reference to the entitlement to receive half of the profits of the partnership. The Full Court (Matthews, Kneipp and Derrington JJ) unanimously held that the trial judge was in error in this respect. Derrington J there said²⁶:

"The plaintiff here has lost not only his earning capacity, but also the opportunity to put that capacity to work for the benefit of himself and the

24 Quoting from *Nguyen v Nguyen* (1990) 169 CLR 245 at 269.

25 cf *McCathie v Federal Commissioner of Taxation* (1944) 69 CLR 1 at 16-17 per Williams J; *In re Bradberry*; *National Provincial Bank Ltd v Bradberry* [1943] Ch 35 at 45 per Uthwatt J.

26 *Batt v Wilkinson* [1983] 2 Qd R 619 at 624.

partner with whom he has chosen to share in the business the fruits of, inter alia, his labour. The financial loss which he suffers is the combination of what he was entitled to receive and, as a matter of his choice, to give away. ...

In the case where there is no specific agreement and so no obligation upon the plaintiff to contribute any particular work to the partnership, then the part of his earning capacity which he subscribes is his choice. His work is his to give, not only for his own benefit, but for that of his partner. That part which he gives to his partner is obviously something of value, and if he loses it, he loses a thing of that value. The basic tenet of the opposing view is that, because the plaintiff chooses to make a gift of part of his asset, that part has no value to him. In logic and ordinary human values, this proposition is unacceptable."

37 In *Seymour v Gough*, the plaintiff and his wife operated an electricity meter reading business in partnership. This partnership too was set up for taxation purposes. Although almost all of the partnership's income was derived from the plaintiff's efforts, the profits were split equally between the plaintiff and his wife. The plaintiff was injured, and as a result the partners had to employ replacement labour. In awarding damages for economic loss, the trial judge allowed the plaintiff's claim for the full amount of the cost of the replacement labour. The Court of Appeal overturned this aspect of the trial judge's decision. Pincus and Davies JJA held that the plaintiff was only entitled to half what the replacement labour cost to the partnership. Fitzgerald P agreed with respect to damages for past economic loss; but as to future economic loss, his Honour was of the view that some allowance should be made for the possibility that the partnership might be dissolved²⁷.

38 The appellant gains some support, albeit in some instances qualified, from cases in other jurisdictions. After referring to *Haines v Bendall*²⁸, Mullighan J in *Cole v Ellis* said this²⁹:

"Another basic principle with respect to damages is that the plaintiff is to be compensated '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'³⁰. It is that principle which may pose difficulty in some partnership cases. If, by reason of the nature of the partnership, an

27 *Seymour v Gough* [1996] 1 Qd R 89 at 92.

28 (1991) 172 CLR 60.

29 (1992) 60 SASR 481 at 491-492. See also at 494-497.

30 *Graham v Baker* (1961) 106 CLR 340 at 347; see also *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 165 per Gibbs J.

incapacitated partner has not suffered, and is not likely to suffer, any financial loss, the diminution of earning capacity will not sound in damages except, where appropriate, with respect to the loss of a chance. However, it must always be borne in mind that the task of the court is to assess damages for the loss of earning capacity. If it is productive of financial loss, then it is compensable. In *Batt v Wilkinson*³¹ Derrington J, with whom the other members of the Court agreed, regarded a person's earning capacity as an asset provided it is used 'in such a way that the deprivation of it causes him a loss of something which he [otherwise would] have had'³², no doubt applying the observation of Barwick CJ in *Cullen v Trappell*³³:

'The problem is to value the capital asset of the injured person, namely, his capacity to earn money.'

It is the loss of that asset, as it would have been utilised but for the injury which must be valued. I do not think that any of these principles can be doubted. It is their application to particular factual circumstances which gives the impression of differing approaches. In some cases the circumstances require assessment on the basis of the loss of profit from a partnership. There are cases where it is appropriate to measure the loss by the share of the partner in the cost of the replacement labour. In other cases it is appropriate to measure the loss by the total cost of replacing that labour. The approach in each case depends upon the circumstances."³⁴

31 [1983] 2 Qd R 619.

32 [1983] 2 Qd R 619 at 623.

33 (1980) 146 CLR 1 at 7.

34 On appeal the Full Court of South Australia (Bollen, Mohr and Millhouse JJ) affirmed his Honour's reasons and decision (*Cole v Ellis* unreported, 13 May 1993). Section 34(1) of the *Wrongs Act* 1936 (SA) confers a special benefit upon the spouse of an injured person. It provides:

"Where a husband and wife are engaged in the conduct of a business, and either of them suffers an injury as a result of which his or her participation in the conduct of the business ceases or is impaired, the other spouse shall be entitled to recover from a person whose wrongful act, neglect or default caused the injury compensation for loss that he or she has suffered or continues to suffer by reason of the fact that the participation of his or her spouse in the conduct of the business has ceased or has been impaired."

39 *Randall v Dul*³⁵ and *Dal Zotto v Bonnani*³⁶ were relied upon by the appellant. They are cases which turn upon their own facts and do not really assist in the resolution of the question here.

40 In *Ward v Newalls Insulation Co Ltd*³⁷ the facts were these: the plaintiff worked for the defendants for 10 years, during which he was exposed to asbestos. As a result of the defendants' negligence he developed a progressive lung disease. After leaving employment with the defendants the plaintiff entered into business with a third party, setting up a number of companies owned and controlled by him and the third party equally. On their accountant's advice the two original partners declared that their wives were also partners in the business, and, by agreement with the Inland Revenue, paid tax on the basis of four separate and equal incomes from the partnership profits, although the wives contributed no capital and did no work for the partnership. In assessing the plaintiff's damages for personal injury arising from exposure to asbestos the primary judge concluded that, as a result of the arrangement with the Inland Revenue, the plaintiff's loss of earning capacity should be reduced from 50 per cent to 25 per cent of the partnership profits.

41 On appeal the Court of Appeal (Butler-Sloss, Henry and Potter LJJ) held that the partnership arrangement between the earning partners and their wives was an informal arrangement which existed from year to year, terminable at will; that the two earning partners who controlled the companies which provided the remuneration could have terminated the arrangement with their wives at any time; that there was no reason to assume that the four-way division of partnership income accurately reflected the comparative values of each partner's contribution to the partnership; and that there was no reason of public policy to hold that the plaintiff's damages should be confined to a measure based upon a quarter share of the profits. The arrangement was a matter between the parties and the Revenue authorities; in reality the wife's contribution to the profitability of the partnership had been nil; and, accordingly, the plaintiff's damages for loss of earning capacity fell to be calculated by reference to 50 per cent of the partnership profits.

35 (1994) 13 WAR 205.

36 (1980) 46 FLR 239.

37 [1998] 1 WLR 1722; [1998] 2 All ER 690.

42 In the course of their judgment³⁸ their Lordships cited with approval parts of the judgment of Mahoney JA in the Court of Appeal of New South Wales in *Taroporewalla v Berkery*³⁹ a case to which I will soon refer.

43 *Taroporewalla* was also applied by the Court of Appeal of New South Wales in *Future Look Landscaping Pty Ltd v Hanlon*⁴⁰. In that case, Giles JA with whom Spigelman CJ and Sheller JA agreed said this⁴¹:

"In *Taroporewalla v Berkery*⁴² it was said that no single rule governs the assessment of damages for economic loss arising from inability to continue a partnership business. It was held that although a partner who had suffered economic loss was entitled only to 50 per cent of the partnership profits, it was proper in the circumstances to assess economic loss by reference to 80 per cent of the potential earnings of the partnership business. In the circumstances of that case, the partner would have devoted his capacities to the partnership, and therefore his loss was to be measured by reference to the value of what he would have had from the partnership: again in the circumstances of that case, the value of what he would have had from the partnership was to be assessed not merely as his equal share of the partnership profits, but by regard to his relationship to the partnership and his capacity and practice to take whatever profits it earned. The judgment of Mahoney JA, with which Glass JA agreed and Hutley JA substantially agreed, included⁴³ -

'Thus, in a husband and wife partnership, the wife may apply her share of the profits in reduction of household expenses which the plaintiff otherwise would have borne. But a defendant is not to be readily burdened with such indirect benefits: cf *Szittner v Harriott*⁴⁴. In the present case, the Master, in assessing this part of the plaintiff's loss, had regard to 80 per cent of the partnership profits. It may be that he did this for a reason of this kind. There was, I think, no significant evidence

38 *Ward v Newalls Insulation Co Ltd* [1998] 1 WLR 1722 at 1731-1732; [1998] 2 All ER 690 at 699-700.

39 [1983] 3 NSWLR 28.

40 Unreported, 8 July 1998.

41 Unreported, New South Wales Court of Appeal, 8 July 1998 at 18-19.

42 [1983] 3 NSWLR 28.

43 [1983] 3 NSWLR 28 at 38-39.

44 (1967) 85 WN (Pt 1) (NSW) 461 at 463.

as to what the [plaintiff's wife] did or would do with her share of the partnership profits and I do not take this factor into consideration.'

This passage may have been influential in the trial judge's reasoning, although it seems that in the result Mahoney JA's regard to the partner's capacity and practice to take whatever profits the partnership earned did not include an element of the wife's payment of household expenses. It was, however, a matter which could be taken into account, if the evidence was there for the relevant finding, the distinction from the dictum in *Szittner v Harriott*⁴⁵ being that the partner would otherwise have borne the household expenses."

- 44 In Manitoba in *Turenne v Chung*⁴⁶ the Court of Appeal of that Province had no hesitation in applying a very broad principle which directed attention exclusively to the earning capacity of the injured plaintiff. The judgment of the Court (Miller CJM, Schultz, Freedman, Guy and Monnin JJA) was given by Miller CJM who said⁴⁷:

"Concerning the special damages, the only item in dispute is an allowance of \$3,700 representing one year's loss of pay, which the plaintiff would have earned in her profession as a teacher. This award is challenged on the ground that plaintiff, who is a teaching sister of a religious order, had directed that her salary be paid to the order, from which order she received her board, room, and other maintenance. Counsel for the defendants contend that she suffered no personal loss. We cannot accept this contention, for it is basic that a person may do what he wishes with his earnings, and plaintiff could, as she voluntarily did, direct that her salary go for the benefit of the order. It would be wrong to permit the defendant tortfeasors to invoke this arrangement for the purpose of reducing their own liability."

- 45 In Victoria and Tasmania the issue does not appear to have been considered at appellate level. However, in *Gensicke v Keep*⁴⁸ Wright J of the Supreme Court

45 (1967) 85 WN (Pt 1) (NSW) 461 at 463.

46 (1962) 36 DLR (2d) 197.

47 *Turenne v Chung* (1962) 36 DLR (2d) 197 at 197-198.

48 Unreported, Supreme Court of Tasmania, 5 May 1994 at 16.

of Tasmania endorsed the view expressed by Mullighan J in *Cole v Ellis*⁴⁹. There seems to be no clear authority either way in Victoria⁵⁰.

46 I come now to the decision of the Court of Appeal of New South Wales in *Taroporewalla v Berkery*⁵¹, the reasoning of which I find persuasive and am disposed to adopt if it can be reconciled with such relevant statements of principles as have been made by this Court.

47 Mahoney JA in *Taroporewalla* expressed his conclusions (and statement of principle) in these terms⁵²:

"In the present case, the plaintiff would in my opinion have devoted his relevant capacities to the partnership and therefore his loss is to be measured by reference to the value of what he would have had from the partnership. This, for the reasons to which I have referred, is to be measured not merely by his equal share of partnership profits; the court should take into account the other factors to which I have referred. The plaintiff's relationship to the partnership and, as I infer, his capacity in practice to take whatever profits it earned, warrant the conclusion that his loss should be calculated by reference to the whole or substantially the whole of the profits which the partnership would have derived. Approaching the matter in this way, I do not think that the amount of the past economic loss attributable to the partnership profits was excessive."

48 The view of Mahoney JA in *Taroporewalla v Berkery* is not discordant with the approach of this Court in *O'Brien v Dunsdon*⁵³ although the point in issue there does not appear to have been the subject of submissions of the kind which the Court entertained here. In *O'Brien* the Court (Barwick CJ, Kitto and Taylor JJ) said this⁵⁴:

"[The plaintiff] can no longer, as he formerly did, undertake many of the active duties in or about the shop or in connexion with the business. Consequently, it has been necessary to engage an additional employee."

49 (1992) 60 SASR 481.

50 See *Slonim v Mizrachi Nominees Pty Ltd* unreported, Supreme Court of Victoria, 24 November 1998 per Coldrey J.

51 [1983] 3 NSWLR 28.

52 *Taroporewalla v Berkery* [1983] 3 NSWLR 28 at 39.

53 (1965) 39 ALJR 78.

54 *O'Brien v Dunsdon* (1965) 39 ALJR 78 at 78-79.

Further, the appellant's brother has undertaken additional responsibilities in the partnership business and his efforts to date seem to have contributed to a situation which might lead one to think that the appellant's economic loss to date has not been unduly great. But this cannot disguise the fact that the appellant's earning capacity has been very gravely diminished and that this factor will have a marked effect on his future income whether the partnership continues or whether it comes to an end. If it does continue it is plain that it will be necessary to continue to employ additional staff and there is no reason for thinking that the expenditure incurred in doing this will not fall on the appellant's share of profits. Indeed this is, in effect, what has already happened for, whereas formerly the appellant and his brother shared the net profits of the business equally, the latter, in view of the additional responsibilities and duties he has assumed because of the appellant's disabilities, is now receiving a salary of twenty-five pounds a week before division of the net profits. On the other hand if, because of the plaintiff's disabilities, the partnership does not continue the appellant will no longer have an interest in a profitable business and will find himself most seriously handicapped in attempting to engage in any other. In our view the amount awarded under this heading was quite inadequate to compensate the appellant for his probable future economic loss. We think that the award should have included a sum, discounted to some extent, which would represent the present value of a weekly sum for twenty-five years considerably in excess of £8 a week."

- 49 The respondent argues that *Seymour v Gough* is correctly decided. It is contended that it is consistent with a key passage in *Graham v Baker* in this Court in which Dixon CJ, Kitto and Taylor JJ said⁵⁵:

"[A]n 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."

- 50 It is true that the passage, if taken literally and in isolation, might be capable of founding an argument in favour of the respondents. However, in the context overall of that case, I do not think that the passage is to be taken literally. There are clear indications in other passages in the reasons, and in the reasons of this Court in other cases, which support a contrary view⁵⁶. In analysing the reasoning in *Graham v Baker* it is important to keep in mind that the case was concerned

⁵⁵ (1961) 106 CLR 340 at 347.

⁵⁶ See, for example, *Cullen v Trappell* (1980) 146 CLR 1 at 7 per Barwick CJ; cf *Rosecrance v Rosecrance* (1998) 8 NTLR 1 (special leave refused 18 June 1999).

with a claim for compensation by way of damages in respect of a lost sick leave credit or entitlement. Dixon CJ, Kitto and Taylor JJ said⁵⁷:

"In the present case the sick leave credit or entitlement is not such that it can be converted into cash if the employee does not otherwise find it necessary to avail himself of it."

51 The negative characteristics of the entitlement under consideration there immediately distinguish it from a plaintiff's physical or mental capacity to earn income, which unlike a sick leave credit or entitlement is readily convertible into income.

52 In *Medlin v State Government Insurance Commission*, Deane, Dawson, Toohey and Gaudron JJ said this⁵⁸:

"Nor are we persuaded that ... the learned trial judge ... lost sight of the fact that in an action in negligence in this country an injured plaintiff recovers damages for loss or impairment of earning capacity as distinct from the direct recovery of past or future lost earnings ..."

53 To compensate the plaintiff in this case upon the basis of his actual capacity to earn income rather than by reference to the income that was actually attributed to him in the partnership accounts does not offend the well-established principle that a defendant takes the plaintiff as he finds him⁵⁹. That principle must hold good whether it is to the disadvantage or the advantage of the defendant. But I do not think that it has such an application here as to lead to any reduction in the appellant's damages. How in truth did the defendants find the plaintiff in this case? At the time of the accident the plaintiff was choosing to employ the whole of his earning capacity for the benefit of his family. He chose to do that because there were income tax advantages in doing so. However in so acting he was also discharging the moral and legal obligations that he owed to his spouse. There was nothing to hold the appellant to that arrangement indefinitely. Both during the period before the trial and in the future the appellant was free to disengage himself from the partnership and to utilise his earning capacity in whatever way he saw fit. It is almost inconceivable that, when it ceased to be to his financial advantage or other than a convenient means of discharging his spousal obligations, he would have continued in the partnership. This was therefore the plaintiff whom the first defendant injured in this case: a person who was free in all respects to utilise his

57 *Graham v Baker* (1961) 106 CLR 340 at 349.

58 (1995) 182 CLR 1 at 4.

59 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 406-407 per Windeyer J.

earning capacity in whatever way he chose and who would undoubtedly have utilised it sensibly in his own financial interests as he saw them from time to time.

54 A case of this kind is a relatively simple one. However it will always be important in assessing the damages in cases in which the plaintiff is a partner or an employee of a company which he or she controls, or in which he or she has a substantial proprietary interest, to have regard to the realities and motivations underlying the arrangements which have been made, the plaintiff's capacity to disentangle himself or herself from them, and the likelihood that such a plaintiff would be foolish to act at any time other than in his or her own best financial, matrimonial, and familial interests. On the other hand, an injured person who has entered into inextricable or virtually inextricable arrangements may be in a different position. Such a person may be one who has bound himself or herself under a restraint of trade or other negative obligation not to exploit his or her earning capacity for a period of years, or at all, or to do so in some limited way only. It is true, as many of the statements in the cases repeat, that each case will depend upon its own facts but the possibilities and likelihood of disentanglement from arrangements, and the virtual certainty that an injured plaintiff will look to his or her own total interests will always be important, if not conclusive factors in assessing economic loss.

55 It follows that in this case the appeal should be allowed. The parties are agreed that in accordance with the trial judge's provisional assessment of damages upon the basis that his Honour was not bound by *Seymour v Gough*⁶⁰ the appellant's damages should be increased by \$76,710 made up of an additional \$15,000 for past economic loss, \$60,000 for future economic loss and interest of \$1,710. The appellant also made an offer under Order 26 of the Rules of the Supreme Court of Queensland as they then stood to settle his action for \$240,000, an amount which the amended assessment now clearly exceeds⁶¹. There is no reason why the appellant should not therefore have his costs at the trial on a solicitor and client basis.

56 The costs of the appeal to the Court of Appeal, the application for special leave to appeal, and the appeal to this Court require separate consideration. The Court of Appeal (McPherson JA, Thomas and Williams JJ) in *Tamwoy v*

60 [1996] 1 Qd R 89.

61 Order 26 r 9(1) provided:

"Where the plaintiff makes an offer to settle which is not accepted by the defendant and the plaintiff obtains a judgment no less favourable than the offer to settle the Court shall order the defendant to pay the plaintiff's costs fixed on a solicitor and client basis, unless the defendant shows that another order for costs is proper in the circumstances."

*Solomon*⁶² held that Order 26 had no application to that Court notwithstanding the decision to a contrary effect on similar New South Wales rules in *Maitland Hospital v Fisher [No 2]*⁶³. Whether the decision of the Court of Appeal of Queensland regarding the proper construction of the Rules is correct or not, it is desirable for reasons of principle and policy that costs be awarded on a solicitor and client basis when a party on the conclusion of proceedings after an appeal obtains judgment for an amount in excess of a previous offer of settlement. Unless costs are awarded on a solicitor and client basis in this situation, there is no incentive over and above the ordinary pressures of litigation to accept offers of settlement before proceedings⁶⁴. This Court has the power to award such costs in this case in the exercise of its untrammelled discretion⁶⁵ or, perhaps, on the application of the Queensland Rules (as to the costs in the Court of Appeal) if *Tamwoy v Solomon*⁶⁶ is not correctly decided. Because the appellant did not, in his draft notice of appeal, in his submissions or in argument request costs on a solicitor and client basis in respect of the proceedings in the Court of Appeal, or for the proceedings in this Court, it would be inappropriate to make such an order at this stage. However the parties should be given leave to present argument on these matters. I would order accordingly.

62 [1996] 2 Qd R 93.

63 (1992) 27 NSWLR 721.

64 See *Maitland Hospital v Fisher [No 2]* (1992) 27 NSWLR 721 at 726-727.

65 See O 71 r 1 of the High Court Rules; *Quick on Costs* (1996) at [7:1110].

66 [1996] 2 Qd R 93.