PARTIES:	BARCLAY BROS PTY LTD
	v
	SELLERS, Wayne Edward
TITLE OF COURT:	FULL COURT OF SUPREME COURT
JURISDICTION:	COURT OF APPEAL
FILE NO:	No 4 of 1993
DELIVERED:	16 JUNE 1994
HEARING DATE:	10 DECEMBER 1993
JUDGMENT OF:	MARTIN CJ., GALLOP AND ANGEL JJ.

CATCHWORDS:

Appeal - General principles - Interference with Judge's finding of fact - Where inference of fact involved -

Appeal - General principles - Interference with discretion of Court below - General principles - Judge mistaken or misled - Strong reason for interference -

Appeal - General principles - In general - Right of appeal - Interference with discretion of Court below - Interference with Judge's finding of fact - Admission of fresh evidence - Excessive or inadequate damages -

Appeal - General principles - Excessive or inadequate damages - General principles - Damages excessive -

Assessment of damages for personal injuries -

Shaw v Commonwealth of Australia (unreported, Court of Appeal, 24.11.93), applied.
Calder v Boyne Smelters Ltd (1991) 1 Qd R 325 at 346 and 352, applied.

Damages - General principles - General and special damages -

Damages - Measure of damages - In general - personal injuries - General principles - Method of assessment - generally - Mitigation of damages -

Damages - Measure of damages - Personal injuries - Loss of earnings and earning capacity - Legal principles - Onus of proof - re-employment of worker -

Damages - Particulars - Awards of general Damages - Northern Territory

Damages - Measure of damages - Personal injuries - Non-pecuniary damage - Pain and suffering -

Damages - Measure of damages - Personal injuries - Specific benefits and amounts - Superannuation benefits -

Damages - Measure of damages - Personal injuries - Loss of earnings and earning capacity - Calculating part loss of earning capacity -

Damages - Measure of damages - Personal injuries - Loss of earnings and earning capacity - Calculating future economic loss - Use of tables -

Burnicle v Cutelli (1982) 2 NSWLR 26 at 30, referred to.
Victorian Stevedoring Pty Ltd v Farlow [1963] VR 594 at 598, 599, referred to.

Supreme Court Act 1979 (NT), s51

Wilson v Peisley (1975) 7 ALR 471 at 576, referred to.
Gamser v The Nominal Defendant (1977) 136 CLR 145 at 149, referred to.
Moran v McMahon (1985) 3 NSWLR 700, referred to at 706.
Burden v Rath (1986) Aust Torts Reps 80-050
Arthur Robinson (Grafton) Pty Ltd v Carter (1968) 122 CLR at 658, applied.
Lai Wee Liam v Singapore Bus Service (1978) Ltd [1984] AC 729 at 739, 740, referred to.

REPRESENTATION:

Counsel:

Appellant: S Walsh QC
Respondent: T Riley QC

Solicitors:

Appellant: Cridlands
Respondent: Philip & Mitaros as agents for McBride & Stirk

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IN THE COURT OF APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA

No. 4 of 1993

BETWEEN:

BARCLAY BROS PTY LTD
Appellant

AND:

WAYNE EDWARD SELLERS
Respondent

CORAM: Martin CJ, Gallop and Angel JJ.

REASONS FOR JUDGMENT
(Delivered 16 June 1994)

MARTIN CJ.: The facts giving rise to the respondent's cause of action and the injuries he sustained, are described in the judgment of Gallop J. which I have had the advantage of reading. In *Shaw v The Commonwealth of Australia* (Court of Appeal, unreported, delivered 24 November 1993) the Court expressed general agreement with the analysis of the conflicting authorities, and with the summary of principles which are applicable to a case such as the present as expressed by Cooper J. in *Calder v Boyne Smelters Limited* (1991) 1 Qd R 325 at 346 and 352. The general principles were summarised by his Honour as follows:

> "(a) an appellate court will not interfere with an assessment of damages simply because it would have awarded a different figure had it tried the case at first instance;

(b) an appellate court will not interfere unless there is shown error in the reasoning of the court at first instance which has led to an award of damages which is beyond the limits of what a sound discretionary judgment could reasonably adopt;

(c) the error may be either an error of principle or the misapprehension of the facts;

(d) where no apparent error can be shown, error will be inferred if the court is satisfied that the trial judge has made a wholly erroneous estimate of the damages;

(e) once it is demonstrated that error has led to an assessment of damages beyond the relevant limits, the appellate court will intervene and itself assess an award which represents fair compensation as between the plaintiff and the defendant for all the detriment suffered by the plaintiff; and

(f) if the error is such that the appellate court cannot determine the relevant limits of an assessment based upon the proper application of legal principle and a proper appreciation of the facts, or the appellate court does not feel it is in a position to itself assess damages, then the appellate court will remit the matter for further consideration by the trial court in accordance with the law as declared by the appellate court and in accordance with its directions, if any, as to the facts found or to be found."

Pain and Suffering

As to general damages, I agree for the reasons given by Gallop J. that the trial Judge made a wholly erroneous estimate of the damages and that it should be reduced, but not by one half. I do not think sufficient weight has been given to pain and difficulty associated with the respondent's work. His job requires heavy labouring including bending and lifting heavy loads. It is not suggested that those problems will

diminish. I would not maintain the equal apportionment between the past and the future, considering that the respondent's continuing damage will be more burdensome then the past. Under this heading I would tentatively award $40,000, $15,000 for the past and $25,000 for the future.

Loss of Earning Capacity - Prior to Trial

The distinction between loss of earning capacity and loss of earnings assumes importance in this case beyond that which it might in the ordinary run of cases, as Gallop J. observes. There is no doubt that the respondent suffered a loss of earning capacity. Dr White estimated, in November 1988, that taking into account the possible contribution of the fall to the respondent's then low back disability, his permanent physical disability (that is, neck, low back and left ring finger problems) was equivalent to a loss of 20% of his capacity for work and general activities, adding that his condition could then be regarded as being stable. His estimate was not related directly to the respondent's capacity to work as a bricklayer's labourer, it is nevertheless a clear indication that he had lost some capacity to work in a job in which the respondent's ability to perform is restricted in the manner found to be a result of his injuries. The respondent's evidence in relation to his work related disabilities was that he had problems lifting weighty objects and objects above his head, and that the pain experienced in his neck and back with stretching caused him to tend not to stretch as far as he might

otherwise have done. Notwithstanding those difficulties, he said that he was trying to adjust the manner in which he went about doing things. Upon his own assessment, he was at that time 70% able to do the work compared with his ability prior to the accident.

The learned trial Judge took into account the whole of the evidence and found that apart from the five months after the accident there was no occasion when the respondent had lost employment or was dismissed because he was physically unable to do the work of a bricklayer's labourer. He was off work because of his injuries for about five months, for which he must be compensated, but thereafter, his intermittent work pattern was not shown to have arisen because of his disabilities from injuries sustained in the accident. The respondent denied that that was the case when it was specifically put to him in cross-examination in relation to each of the occasions that he ceased to be employed after the accident. He explained that the loss of those jobs was due to the employer having run out of work or fallen on hard times financially. Her Honour put it:

> "Mr Sellers has had difficulty obtaining employment over the last few years. However, I am not able to find that this is because of his physical disability but rather because of the difficult economic circumstances and the downturn in the construction industry. I do, however, accept that with a known back problem Mr Sellers has and will find it more difficult to obtain employment than if he were completely fit. I accept that gaining employment in the construction industry is very much by word of mouth recommendation and that particularly following a contested court case Mr Sellers' back problem will

> be known by a number of employers in the construction industry."

The only difficulty in that passage is that there was no evidence to support a finding that the respondent had, up to trial, found it more difficult to obtain employment than if he were completely fit.

I agree with Gallop J. that the finding that the respondent was dismissed from employment by Mr Colangelo because Mr Colangelo became aware of the respondent's back problem, is contrary to the evidence of Mr Colangelo and can not be supported. There is no evidence that the respondent was not employed after he ceased work with Mr Colangelo until trial, because of his disabilities. He registered with the Commonwealth Employment Service as a bricklayer's labourer. His evidence, supported by others, is that there had been a downturn in the building industries from 1989.

Approaching the matter on that basis, the calculations of time off work between accident and trial, details of wages payable to a bricklayer's labourer during that period, and the making of allowances for a variety of happenings in the meantime, are irrelevant. The respondent is entitled to an allowance by way of damages for loss of earning capacity during the period of time he was off work immediately after the accident, which may be conveniently assessed by reference to his earnings immediately prior to it.

I agree with Gallop J. for the reasons he gives that the respondent's average weekly earnings at the time of the accident were about $270 per week after tax, and allowing 22 weeks for the period he was off work I would award $5,940 for past loss.

Loss of Earning Capacity - After Trial

The fact that he was re-employed, when work was available, with no apparent loss of earnings up to trial due to the accident, does not mean that he is not entitled to an award for loss of earning capacity for the future. He was partially disabled as demonstrated by the medical evidence and his own assessment of his abilities. Her Honour found he exaggerated, but accepted his complaints as being basically genuine. Her Honour found that the injuries "significantly reduced the number of years that he can continue to work as a bricklayer's labourer", which is a reasonable inference to draw from facts found on the evidence. There are other findings which could be understood as meaning that his ability to work in that occupation had ceased at the time of trial, for example, "in December 1992 Mr Sellers was suffering a level of discomfort and restriction of movement to his neck and lower back that preclude him from continuing as a bricklayer's labourer". In the light of the evidence and the earlier finding referred to, I understand her Honour to have meant that he was precluded from continuing as a bricklayer's labourer for as long as might be otherwise expected, that is, his future working life in that

occupation was not going to be as long as it might have been if he had not been injured.

Her Honour noted that the fact that the respondent had suffered the injury with the consequent disabilities as found will become more widely known in the building industry and that that will make it more difficult for him to find an employer prepared to take him on. He will be competing with fitter men. There is evidence, which was open to her Honour to accept, that some bricklayer's labourers continue in that capacity, notwithstanding the arduous nature of the job, until 50 to 55 years of age (the respondent was 42 at the time of judgment). There is a variety of employment available to retired bricklayer's labourers, and the learned trial Judge was not satisfied that the respondent was so disabled that he would not be able to work in the range of occupations which are normally taken on by retirees, for example, working in the housing construction industry. On the basis of the whole of the evidence, it would not matter when the respondent was to retire from being a bricklayer's labourer, or for what reason, since other avenues of employment are available, including for a person suffering from the disabilities which the respondent has. There is no evidence that upon retirement from his present occupation, the respondent will not be capable of earning as much as he was capable of earning up to the accident or trial.

There was much debate before her Honour and upon appeal as to the amount which the respondent was capable of earning and had earned since the accident. There were some difficulties with the evidence (such as using Northern Territory wage rates where the respondent normally worked in South Australia), and in making allowances for periods of time during which the respondent would normally not work in any event by his own choice, the vagaries of the building industry and other matters. To my mind the best guide as to the respondent's earnings at the time of the trial arises from his own evidence as to the time he was working for Mr Colangelo, when he was receiving between $450 and $500 per week, which I understand to be after tax. Wages could vary depending upon a variety of award conditions and particularly hours worked per week. Mr Doran, who had employed the respondent, gave evidence that at that time a bricklayer's labourer on a normal site would earn around $500 per week, it could be increased by another $100 if various allowances were paid, and up to a further $130 for working on Saturday, before tax is deducted.

With respect to those who may hold other views, I do not think this is a case in which mathematical calculations are likely to bear any result which would represent a fair award as between the appellant and the respondent. There is just no evidentiary basis upon which such calculations can be made. Nevertheless, there may well be loss of income. The field of work in which the respondent engages involves heavy labouring, the sort of activity which could cause aggravation of his

accident related injuries; the evidence shows that, so far as he is concerned, frequent changes of employer occur; as word spreads regarding his disability it may take longer to obtain new jobs and he may be obliged to accept jobs at lesser wages. The difficulties in assessment and lack of precision are no reason for denying an award of damages, taking these considerations into account. I consider that it is likely that future events, caused by his disability, will lead to a diminution in the respondent's earning capacity from time to time, but it is impossible to say with any degree of certainty when those events will occur or for what period they will operate to his detriment. However, the respondent has been "putting him into a class of workers potentially more vulnerable to the risk of unemployment" (per Sholl J. *Victorian Stevedoring Pty Ltd v Farlow* [1963] VR 594 at 598. That case concerned a worker who had suffered injury at his place of employment, which led to his being disabled for a time, but worked continuously thereafter at the same wage, though in a different capacity. There was a possibility that at some time his injuries may interfere with his employment or reduce his earnings. Each of Herring CJ., Sholl and Hudson JJ. held that he was entitled to be compensated for that possibility, Sholl J. suggesting that it be "to the extent of a reasonable and moderate evaluation in money of the mere chance or risk of further unemployment or less remunerative employment" (at 599). Applying that to the circumstances of this case should lead to an award of the order of $30,000.

Superannuation

As to superannuation, I would allow for 22 weeks at $11 per week ($242) in respect of the period prior to trial, for the reasons already given. As to the potential loss of that benefit after trial, I again adopt a different approach to that adopted by the learned trial Judge and Gallop J., and, consistent with the views expressed in relation to loss of future earning capacity, it is not appropriate, in my view, to proceed upon some mathematical basis, but rather taking a broad approach and endeavouring to be fair as between both the appellant and the respondent. I would under this heading allow a sum of $3,000.

Special Damages

These were agreed at $5,254.

Interest

Interest should be allowed on the sum of $15,000 for past pain and suffering, at the rate of 4% from accident to trial, amounting to approximately $2,600. No interest should be allowed for loss of earnings between acident and return to work because the respondent was paid workers' compensation in respect of that period, and it is not shown that there was any delay in respect of those payments. A nominal amount of interest of $50 should be awarded in respect of the loss of

past superannuation.

The appropriate award should be made taking into account:

Pain & Suffering	-	past	$15,000
	-	future	25,000
Loss of Earning Capacity	-	to trial	5,940
	-	after trial	30,000
Superannuation	-	to trial	242
	-	after trial	3,000
Special Damages			5,254
			$84,436

which I would round up to $85,000 and to which should be added interest of $2,650.

GALLOP J.: This is an appeal by the defendant from a judgment of a single Judge of the Supreme Court of the Northern Territory against an award of damages in favour of the present respondent in the sum of $330,477.94 delivered on 12 March 1993. The components of the award of damages were as follows:

Special Damages	$ 5,254.00
Pain and Suffering (incl interest)	70,500.00
Past Economic Loss	71,954.95
Past Superannuation	2,725.00
Interest on Past Economic Loss (including superannuation)	22,403.99
Future Economic Loss	146,380.00
Future Superannuation	11,260.00
	$330,477.94

The appellant appeals against each component of the award of damages except the component for special damages.

The appeal is brought pursuant to s.51 of the **Supreme Court Act** 1979 which confers a right of appeal on fact and law on the evidence given in the proceedings out of which the appeal arose with power to receive further evidence.

The principles to be applied are well settled and have been stated time and time again in the cases. If, from the judge's reasons, it appears that any error of principle was made or there was any misapprehension of the facts, the appellate court is bound to interfere. It will not interfere merely because the judges of the appellate court would themselves have awarded a different sum. Allowance must be made for the advantages of the trial judge in seeing and

hearing the witnesses.

Nevertheless, like any other finding of fact, the assessment of damages is open to review. If the amount awarded by the trial judge is a wholly erroneous estimate of the damage suffered, so that the scale goes down heavily against the figure attacked, the appellate court will interfere. In **Wilson v. Peisley** (1975) 7 ALR 471 at 576, Barwick CJ went so far as to say that in the absence of error of law or demonstrated misconception of the evidence by the trial judge, the award has to be "quite unreasonable" or indeed, "outrageous" before the appellate court may interfere.

Since then, however, various Judges of the High Court have not been prepared to state such a high test: see, for instance, Gibbs J., as he then was, in **Gamser v. The Nominal Defendant** (1977) 136 CLR 145 at 149. In the same case, Aickin J. said that the proper approach (for an appellate court reviewing an award of damages for personal injuries) is to look at the total sum awarded as general damages and at all the circumstances, the pain and suffering, past, present and future, the effect on the earning capacity and the kinds of additional costs which the appellant will necessarily incur, and to ask oneself whether the total award of damages is "out of all reason" or "wholly disproportionate to the circumstances".

In **Moran v. McMahon** (1985) 3 NSWLR 700, Priestley JA

endeavoured to analyse the role of appellate courts and distinguished between inferences from facts and the exercise of discretion. He said that, with regard to decisions involving the exercise of a discretion, appellate courts are not to act on their own conclusions but are to alter the trial judges' decisions only where the judges have acted on wrong principles, misapprehended facts, or made a wholly erroneous estimate of the damage suffered. He said that damages for non-pecuniary loss fall into the exercise of discretion category but damages for future loss of earning capacity fall into the category of inferences from facts. Those distinctions have not always been followed in later cases in the Court of Appeal of New South Wales: see for instance, **Burden v. Rath** (1986) Aust Torts Reps 80-050.

The principles to be applied by appellate courts in respect of assessments of damages for personal injuries were encapsulated by Cooper J. in **Calder v. Boyne Smelters Limited** (1991) 1 Qd R 325 at 346. Those principles were adopted by this Court in **Shaw v. The Commonwealth of Australia**, delivered 24 November 1993.

The respondent's cause of action arose out of an accident at work when he fell from a scaffolding on 6 March 1984. The injuries he sustained, as found by the trial judge, were:

. concussion;

. a crush fracture of the seventh cervical vertebrae;

- contusion of the left shin which required a skin graft;
- lumbo-sacral ligament strain;
- a fracture of the left ring finger;
- scattered abrasions and bruises.

He was unfit to return to work until 30 July 1984, a period of almost five months from the date of the accident. The trial judge found that the respondent has been left with a 25% loss of function to his left ring finger, a 10-15% loss of function to his spine and a 5% loss of function of the lumbar spine. With regard to the scar to the shin of his left leg, the trial judge found it is a relatively minor cosmetic disfigurement. She described the disabilities as significant, but not as severely debilitating as many other injuries for which the court is asked to assess damages. She further found that the respondent suffers some limitation to movement of his neck and back, and that the level of pain and discomfort is becoming more severe, although not as severe as he portrays.

She took into account that the injuries have affected his sex life, that he cannot now participate in games of cricket and football which he formerly enjoyed, but held that at the age of 42 it is unlikely that he would have been able to take part in such sports with the same vigour as a young man. She held that not all of his disabilities can be attributable to his accident. His age and the degenerative changes to his back also play a part.

General Damages

Taking into account all those matters, she awarded the sum of $60,000 "for pain and suffering and loss of amenities of life", apportioned 50% of that sum for past pain and suffering and fixed an interest rate of 4% on the sum of $30,000 for a period of 8 years and 9 months, thus rendering a figure of $10,500 for interest. The total amount awarded for pain and suffering and loss of amenities of life was $70,500.

On any view this is a large amount for injuries and disabilities that were not severe. That they were not severe is the proper conclusion from all the medical evidence. That evidence was in the form of reports from treating doctors and appropriately qualified specialist medical practitioners. There was no oral evidence about the respondent's treatment or medical assessments of his condition from time to time.

That medical evidence establishes that, having suffered the accident on 6 March 1984 at Yulara Village, Ayers Rock, the respondent was evacuated and admitted to the Alice Springs Hospital on the afternoon of the same day. His injuries having been diagnosed, he was treated with a cervical collar to support the neck, antibiotics and analgesics. Dressings were applied to the wound on his leg. No initial surgical treatment was carried out and he was discharged just three days later on 9 March 1984 and followed up in the out-patients department of the hospital. After a period of treatment as an outpatient he was transferred to Queen

Elizabeth Hospital in Adelaide. He was admitted and remained in hospital for a period of 16 days from on or about 26 March to on or about 11 April 1984.

When seen at the Queen Elizabeth Hospital by Dr Rodney White, Specialist Surgeon, on 3 April 1984, the fracture of the seventh cervical vertebrae was stable and it was anticipated that he would make an almost full recovery of function of his neck in another four weeks.

He was next seen by Dr White at that hospital on 14 June 1984 complaining of some neck pain when he attempted to resume work as a bricklayer's labourer two weeks previously. On examination he had two-thirds of the normal range of neck movements with no tenderness and no sign of pain. As his treating specialist, Dr White expressed the opinion then that the respondent would make a good recovery and be able to undertake his pre-accident work and activities. Permanent disability was expected to consist of some restriction of neck movement and neck discomfort.

Two years later the respondent was examined by Dr White on 3 February 1986. After examination Dr White expressed the view that permanent physical disabilities consisted of restricted movements and neck discomfort. The fracture of the seventh cervical vertebrae had healed with bony ankylosis to the sixth cervical vertebrae. This could cause some acceleration of the normal degenerative changes which take

place in the adult cervical spine. There was no clinical or X-ray sign of any significant damage or disability in his lumbar spine.

In his last report of 18 April 1989 Dr White said that he thought the respondent had suffered some lower lumbar spine ligament strain in the accident but that he had recovered because when he was examined on 3 February 1986 almost two years after the accident, he was found to have normal clinical and radiological findings as far as his lumbar spine was concerned. He thought it possible that the injury made his back more vulnerable to the stresses and strains of work and that he had a loss of 5% of function of the lumbar spine.

Dr Harold Schaeffer, Neuro-surgeon, of Adelaide examined the respondent on behalf of the present appellant on 1 August 1988. He concluded that he had a moderately vulnerable spinal column and that he does have difficulties performing work such as that of builder's labourer, although his unfitness for that type of work was relative rather than absolute. He was able to work under some difficulties, putting up with a certain amount of discomfort.

Dr Schaeffer examined the respondent again on 3 April 1989. The result of that examination was to confirm that the respondent had made a good recovery from his injuries. As to the lumbar spine, he expressed the opinion that there was very little to account for his continuing allegation. He had good

lumbar mobility and there was no nerve root tension. He considered that his lower lumbar symptomatology had only a subjective basis. He accepted that the respondent had some residual disability relating to his cervical spine, but once again that the respondent appeared to have made a very good recovery. He had been left with a mild to moderate degree of restriction of certain movements of the cervical spine. He assessed the loss of function as 10-15%.

Dr Schaeffer, noting that the respondent had been in fairly regular employment, for the most part doing normal types of work, stated that the respondent would prove to be sufficiently fit for normal duties in the building trade in the future, although he would accept that he may experience some intermittent discomfort in the neck area while working and that this could prove to be an occasional source of nuisance to him. Generally, he regarded the respondent as being in a stable medical condition and was of the opinion that the degree of discomfort was rather less than the respondent seemed to suggest.

Dr Schaeffer examined the respondent again on 7 September 1992. His conclusion on that occasion was that the plaintiff had suffered a significant joint injury in the lower cervical region and as a result had been left with a moderate degree of intermittent discomfort and stiffness of the neck which could be reasonably well tolerated. In relation to the lumbar spine he noted that there was no evidence of any nerve

root tension and that lumbar spinal mobility was reasonably well preserved. He observed that subjective symptoms relating to the lumbar spine appeared to have become more prominent in the later stages, suggesting that they were more likely attributable to naturally occurring aging processes of the usual type rather than to a specific effect of the subject accident. He accepted the possibility that the incident may have had a slight contributory effect.

Dr Schaeffer concluded that on the whole the respondent had made a good recovery from his injury with only mild to moderate permanent disability and that his prognosis from a physical point of view was reasonably satisfactory. He believed that given reasonable motivation and resourcefulness the respondent retained the capacity for work in the building trade in the future, although he may from time to time experience some symptoms of discomfort, particularly in the neck region while doing his work.

The respondent was examined by Dr P.L. Fry, Orthopaedic Surgeon, on 11 July 1986. Dr Fry concluded that the respondent's condition was stable and that no further medical interference was warranted. He expressed the opinion that it was most unlikely that the respondent would be disbarred from any normal forms of work to which he might reasonably aspire.

Dr Fry saw the respondent again on 2 September 1992. His

findings as to disability were very similar to his previous findings. He could not relate any different features to the accident, but did relate them to the respondent being eight years older. In short, he said that the accident-caused symptoms had settled and stopped.

As a result of all that evidence, the trial judge concluded that the respondent's condition had been stable for a number of years and was not likely to change over the next few years. She found that he had made a good recovery and suffered a mild to moderate disability.

On the whole of the evidence I would not be prepared to conclude that the trial judge misapprehended the facts relevant to general damages. In my opinion she found the primary facts in accordance with the evidence. But an amount of $60,000 plus interest of $10,500 is, in my opinion, in all the circumstances quite unreasonable and wholly disproportionate to the circumstances. The award for general damages and interest has to be reduced. I would halve the amount awarded to the figure of $35,000, inclusive of interest. But for the sake of unanimity, I am prepared to accept Martin CJ's assessment of $40,000 for general damages.

Past economic loss

A person injured and incapacitated is entitled to have included in his award of damages a component for past loss of earning capacity. It is important to note that the entitlement relates to loss of earning capacity and not merely

to the loss of earnings in the past. The conceptual distinction may be of little importance in the ordinary run of cases, but it does have some relevance in the present case: see the observations of Barwick CJ in **Arthur Robinson (Grafton) Pty Limited v. Carter** (1968) 122 CLR 649 at 658).

In assessing damages for past loss of earning capacity due regard must be paid to any contingencies, including whether or not work would have been available to the plaintiff during the period of disability. If the injured worker was not disabled in the period between when the cause of action arose and the award of damages, but was unemployed because of a downturn in the industry or unavailability of work, his earning capacity has not been affected as a result of the defendant's fault and the defendant cannot be held liable for the earnings lost due to any such contingency.

The onus was on the respondent to prove his loss of earning capacity. It would have been helpful for him to have proved his average weekly earnings at the date of the accident. But in his evidence in chief he gave no evidence of his actual earnings at the date of the accident except to put in evidence a copy of his group certificate for the year ended 30 June 1984. It was not possible to ascertain from that document what his actual earnings were at the date of the accident, namely 6 March 1984.

An appropriate method of calculating past loss of

earning capacity is by assessing the plaintiff's notional earnings, allowing for the vicissitudes of life, and deducting therefrom his actual past earnings, at the same time making allowance for other contingencies. Such a method involves findings of fact as to the net weekly earnings at the date of the accident and based on that figure, the amount that the plaintiff could have earned between the date of accident and date of judgment. A starting figure is thus arrived at. From that figure there has to be deducted the plaintiff's actual earnings between the date of accident and date of judgment and in calculating that figure due regard has to be had to known contingencies. Of course, if the basic facts as found are not supported by evidence or are otherwise wrong, the calculation by that method produces a wrong result. That was the substance of the appellant's attack upon the trial judge's assessment for past economic loss.

I turn to the trial judge's assessment of damages for past economic loss. The method that she adopted to arrive at the amount of $71,954.95 was to commence by establishing the basis for the respondent's average weekly wage at the time of the accident. She took his gross income for the financial year 1983-84, which was $16,916, noted that the accident occurred on 6 March 1984, which was approximately 35 weeks into the financial year. She then assessed his average gross weekly income by dividing the gross income of $16,916 by 35, rendering a figure of $483.31 gross or $377.70 net. The starting figures were taken from the respondent's income tax records.

The next step was to take account of the total average male weekly earnings in the Northern Territory since August 1985, extracted from Volume 1 of the Australian Family Law and Practice Report, CCH 27-535. She found that the respondent's average gross weekly income up to the date of accident of $483.31 increased in proportion to the increase in total average male weekly earnings in the Northern Territory and adumbrated gross and net figures up to the date of trial in order to arrive at the plaintiff's potential total net earnings between the accident and date of trial. That exercise rendered a total of $189,939.90. From that figure she deducted the plaintiff's actual (some estimated) total net earnings in the same period, namely $73,972.15, rendering a figure of $115,967.75.

The trial judge then found that since the accident the respondent's total period of unemployment was 51 months, or four years three months. She then found that 36 months, or three years of that period was not primarily due to his physical incapacity. She then took into account other factors and instead of applying the finding of three years' unemployment since the accident, purported to take into account other factors, namely that the respondent was dismissed from employment by Mr Colangelo, in all probability that Mr Colangelo became aware that the respondent had a back problem and, further, that because the respondent's disability would have been known to a number of employers in the industry the

competition for jobs would have made the respondent's chances of employment more difficult. Accordingly, she allowed a period of two years instead of three years as the period of unemployment since the date of accident that was not primarily due to the respondent's physical incapacity. Based on her earlier calculations, she arrived at a figure for past economic loss of $71,954.95.

I turn to the appellant's criticisms of the trial judge's method of calculation for past loss of earning capacity and errors in the components relied upon. First, it was submitted that the trial judge fell into error in calculating the respondent's average weekly wage at the date of accident, taking as a starting figure the sum of $16,916 as shown on his group certificate for the year ended 30 June 1984 and dividing that figure by the number of weeks up to the date of accident. The notice of assessment for the year ended 30 June 1984 (Exhibit 16) shows the taxable income of $16,916 to be in respect of the whole year. The assessment issued on 6 May 1987.

There was evidence before the trial judge that weekly payments of workers' compensation had been paid to the respondent between the date of accident and the end of the 1983/84 financial year (see, for example, the letter from the Territory Insurance Office to the respondent's Alice Springs solicitors dated 31 May 1984 (Exhibit 17) enclosing payment of $3,507.84 in respect of the period ending 25 May 1984). One

would have to assume that payments of workers' compensation from the date of accident to the end of the financial year were taken into account in the assessment of tax payable and, accordingly, the sum of $16,916 was the respondent's taxable income for the whole year not just till the date of accident.

In my opinion, it was an error for the trial judge to assess the respondent's average weekly earnings on the basis that the notice of assessment covered only the period up until the date of the accident. Accordingly, the base figure of $377.70 as found by the trial judge as the respondent's average weekly earnings at the date of the accident, was factually incorrect. In addition, the $377.70 net weekly wage does not accord with the net weekly wages payable under the Building and Construction Employees (State) Award, which lists the net weekly wage up to 30 June 1984 to be $233,47. The award also tends to show that the figure adopted as the net weekly earnings was wrong and contrary to the evidence.

It is further to be noted that in the group certificates in evidence in respect of his various employments after he resumed employment following the initial period of incapacity, various allowances which would not be taxable are itemised. Allowances of that nature are not earnings and, accordingly, cannot be used for the purpose of calculating the respondent's average weekly earnings at the date of accident.

The proper inference from the whole of the evidence

is that the base figure of $377.70 assumed by the trial judge is a gross over-estimate. A more realistic figure, particularly having regard to the award rates, is no more than $270 per week net. The respondent's evidence was that he was normally paid the award rates.

The next error is the method used to increase the base figure in proportion to the increase in total average male weekly earnings in the Northern Territory. The evidence establishes that on his return to work following the initial period of incapacity, the respondent was employed in the State of South Australia and not in the Northern Territory. Furthermore, even if the respondent had returned to employment in the Northern Territory, the assumed increase in his average net weekly income in proportion to the increase in total average male weekly earnings in the Northern Territory seems an inappropriate means of allowing for indexation. The best evidence was in the award (Exhibit D6), which shows increases from $233.47 to $354.90 as at the date of trial.

Incidentally, the trial judge has not been consistent because, having found that the respondent's average net weekly income was $377.70, she has increased the sum of $347.14 as his average net weekly income in proportion to the increase in total average male weekly earnings in the Northern Territory. To be consistent the starting figure to be increased should have been $377.70.

Be that as it may, the figures adopted assume an increase of about $173 between March 1984 and February 1992, whereas the award figures show an increase of $120 in round figures. Without embarking upon the arithmetical exercise which the trial judge did, the difference in figures has resulted in the potential past earnings being too high by about 35%. In all the circumstances, an appropriate figure to determine the respondent's potential total net earnings since the accident is in the order of $120,000.

Continuing the exercise, there has to be deducted from that notional figure of $120,000 the respondent's actual earnings assessed by the trial judge and itemised in her reasons, namely $73,972.15, say $74,000 in round figures, leaving a figure of $46,000 in respect of which contingencies are to be taken into account. The contingency in respect of the period in gaol was properly taken into account by the trial judge. The periods of unemployment due to lack of work and not because of physical incapacity likewise should be taken into account. It is in that respect that the appellant contends, and I agree, that the trial judge fell into error.

The contingencies were itemised by the trial judge as follows:

(1) The respondent was in gaol for one month from 14 January 1988 to 14 February 1988 and not in a position to earn income.

(2) In April 1989 he received a lump sum workers' compensation payment of $50,000 from his workers' compensation claim, which was settled for $75,000. He did not resume work until 1 August 1990.

The trial judge then set out in her reasons the evidence of the respondent about his reason for not working and found that he was unemployed between April 1989 and August 1990 because, in his own words, "there was no work around", not because he was physically unable to do the work. She found that between March 1991 and 2 December 1992, which was the date of the hearing of his action, he was unemployed for a period of almost 20 months primarily as a result of lack of available work and not because of any physical incapacity. She found that the total period of unemployment since the accident was 51 months, or four years and three months.

(3) She then found that the respondent was dismissed from employment by Mr Colangelo, in all probability because Mr Colangelo became aware that the respondent had a back problem. She went on to find that although the respondent did find work and was not dismissed from any other employment because of his disability, he did adapt his work practices to allow for his restricted ability to move his neck and lower back. She found that this detracted from his level

of competency as a bricklayer's labourer and because of his back problem his injury would have been known to a number of employers in the industry and the competition for jobs would make the respondent's chances of employment more difficult.

The findings of fact relating to the dismissal by Mr Colangelo do not sit comfortably with the evidence of Mr Colangelo at the trial. In his evidence he confirmed that he employed the respondent from 12 August 1992 to 21 September 1992 in building a gaol on the Cavan site. He said that one of the labourers mentioned to him that the respondent was a good labourer. The foreman did speak to him about the respondent and claimed that he was a bit slack, a bit lazy but he was doing his work all right. Mr Colangelo said that in his observation the respondent was a good worker and he had no complaint about him. He finished work on 21 September 1992 because of lack of work. Under union regulations, the last person employed was the first asked to leave, and after the respondent, 15-20 other persons, being bricklayers and bricklayers' labourers were laid off. They had been employed prior to the respondent.

Mr Colangelo said that he discussed with the respondent what the foreman had said about his work performance and told the respondent that he was happy with his work and that that was what counted. At the time of giving evidence in December 1992, Mr Colangelo employed 14 people. In December

1991 he had employed 80-100 people. Things had been very tough in the construction industry in the previous couple of years.

In cross-examination, Mr Colangelo denied that he had moved the respondent from one site to another because he wanted to put him off.

On the whole of the evidence, the finding that the respondent was dismissed by Mr Colangelo because Mr Colangelo became aware that the respondent had a back problem was not in my opinion supported by any evidence and was wrong.

The major criticism that I have with the assessment of past economic loss is not in the methodology but in the assessment of actual earnings due to the respondent's disabilities. I have carefully examined the whole of the evidence and cannot accept that the respondent was incapacitated for work except for the initial period of four to five months immediately after the accident. Apart from that period, any periods of unemployment were due to the economic downturn in the building trade, minor gaps between jobs which are to be expected in the building industry, the period in gaol and periods in which the respondent chose not to work, for example when he decided to live to some extent on the lump sum workers' compensation payment of $50,000 received in April 1989.

I have read the judgment of Martin CJ and accordingly

agree with his calculation of $5,940 for the initial period of 22 weeks when the respondent was off work following the accident. I would assess past economic loss accordingly.

In the ordinary case a plaintiff would be entitled to interest on past economic loss after making due allowance for the fact that the loss was not all suffered at the one time. In this case, however, the evidence establishes that pursuant to an agreement between the appellant as employer and the respondent as worker dated 27 April 1989, the appellant paid to the respondent an amount of $75,000 in settlement of the respondent's entitlement to workmen's compensation pursuant to the **Workmen's Compensation Act**. The Memorandum of Agreement in evidence (Exhibit D4) recites:

> "The settlement figure is a compromise between the best positions for which each party could contend, but represents arrears of weekly payments, a redemption of future liability for weekly payments and all other expenses including medical and like expenses and a 5.10 assessment for the Applicant's left ring finger of 25% disability."

It is not possible to discern the amount included for past entitlement to weekly payments of compensation. It is likely, however, that the amount for past entitlement to weekly compensation was in excess of the figure which I have assessed for past economic loss, namely $21,500. In my judgment, therefore, it would be inappropriate to award interest to the respondent on his past economic loss, because he has already received at least that amount as part of the workmen's

compensation settlement.

Future economic loss

As for the period between cause of action and assessment of damages, an injured worker is entitled to damages for the difference between his earning capacity as it would have been if there had not been an injury and his earning capacity as it now is. Again, what is to be compensated for is the loss of earning capacity, which is frequently measured by assessing the loss of future earnings.

The starting point of the calculation is what the injured worker would have been earning at the date of the assessment if there had been no injury. One needs to predict the number of years for which he would probably have gone on working, including the age at which retirement was likely. The potential earnings have to be discounted because the money will be received immediately and can be invested so as to earn interest, theoretically until the time when it would ordinarily have been received.

The trial judge assessed the sum of $146,380 for future loss of earning capacity, calculated by adopting a present weekly wage of $520 continuing until age 55 years (the plaintiff was 42 years at the date of judgment) and discounting the result by 50% to take account of the respondent's residual earning capacity.

The relevant findings of fact were that the respondent is capable of physical work in a range of employment. His injuries are not so disabling as to prevent him from undertaking other forms of labouring work but his physical disabilities do preclude him from continuing in the occupation of bricklayer's labourer. Even if he did obtain work as a bricklayer's labourer, his disabilities have significantly reduced his level of competence. That reduced level is a combination of his age, degenerative changes and the effects of the accident.

It was submitted on behalf of the appellant that the assumption that the respondent would have worked to 55 years of age, which is the very best for an experienced labourer, was not justified and in any event his disabilities do not prevent him from working as a bricklayer's labourer. Reference was made to the medical evidence.

In my opinion the trial judge's approach to the assessment of loss of earning capacity was correct, except that she has not taken account of the usual contingencies which should be taken into account in assessing future loss of earning capacity. In addition, for the reasons I have stated, the base figure of $520 per week net is too generous and should be in the order of $330 per week. Using the appropriate tables, as did the trial judge, the rendered figure is $92,895.

The usual practice in the assessment of damages for

future loss of earning capacity is to make substantial reductions for the vicissitudes of life. The New South Wales courts have adopted a convention of reducing the award for future loss of earning capacity by 15%, though recognising that there may be circumstances justifying a departure in some cases (see, for example, **Burnicle v. Cutelli** (1982) 2 NSWLR 26 at 30 and **Moran v. McMahon**, supra, at p.706 where the convention is mentioned by Kirby P). The Supreme Court of the Australian Capital Territory has adopted a similar practice.

In **Arthur Robinson (Grafton) Pty Limited v. Carter**, supra, at p.659, Barwick CJ referred to all sorts of contingencies and "the mere daily vicissitudes of life". It is generally recognised that (apart from death) sickness, accident, unemployment and industrial disputes are the four major contingencies which expose employees to the risk of loss of income. Of course, favourable contingencies also have to be taken into account but, in the present case, there is little to indicate favourable contingencies for this respondent.

In the circumstances it seems reasonable to round the figure of $92,895 to an amount of $80,000 for future loss of earning capacity.

Superannuation

The trial judge awarded the respondent amounts for past and future entitlements based upon the employer's contributions to superannuation. With regard to the past, she

noted the period of unemployment as 51.25 months, the reduction of that period by two years for contingencies and calculated the entitlement as being for 27.25 months at the average figure of $25 per week, resulting in the sum of $2,725 for past superannuation contributions.

As appears earlier from these reasons, I think that the trial judge should have found that the period of unemployment due to incapacity was four to five months on account of contingencies. The appellant conceded on the hearing of the appeal that the sum of $25 per week was an appropriate figure for the past. Accordingly, the calculation is $25 x 22 weeks = $550 for past superannuation contributions.

The appellant did not contend that the trial judge was in error in awarding interest at 6% for past superannuation contributions. I would allow the sum of $100.

With regard to the future, the trial judge adopted a figure of $40 per week to age 55, rendering a figure of $11,260. No sufficient reason has been demonstrated to disturb the award for loss of the employer's superannuation contributions in the future. Accordingly, I confirm the figure of $11,260.

In summary, therefore, I think the appropriate components of the award of damages should be:

Special damages	$ 5,254.00
Pain and suffering (incl interest)	40,000.00
Past economic loss	5,940.00
Past superannuation (incl interest)	650.00
Future economic loss	80,000.00
Future superannuation	11,260.00
	$143,104.00

I have considered the above total as a global sum and think it is appropriate in all the circumstances.

I would allow the appeal, set aside the assessment of damages in the sum of $330,477.94 and substitute an award in favour of the respondent in the sum of $143,104.00.

I would order that the respondent pay the appellant's costs of the appeal.

ANGEL J.: I agree with Gallop J that the appeal should be allowed and that judgment for the respondent against the appellant in the sum of $143,104.00 should be substituted for the judgment of the learned trial Judge. I generally agree with the reasons of Gallop J.

Reference has been made to the principles referred to by Cooper J in *Calder v Boyne Smelters Limited* [1991] 1 Qd R 325 at 352. In the present case, the learned trial Judge erred in a number of respects in the assessment of damages. This has led, as it is said, to an assessment of damages above the limits of which a sound discretionary judgment could reasonably adopt. I would particularly wish to emphasise what this Court said in *Shaw v The Commonwealth,* Northern Territory Court of Appeal, unreported, 24 November 1993, at 5-6:

> "... this Court's task is not to discern errors in particular heads of damage and consequently to re-arrange the aggregation of sums separately allocated; the Court's task is to ascertain whether the appellant has demonstrated error which has led to a lump sum award which is outside the limits of what a sound discretionary judgment could reasonably adopt. That is not to say that if an error under a particular head, which can be readily isolated from other heads, is demonstrated, a single arithmetical adjustment can not be made, provided the consequential assessment is not significantly more or less than the assessment appealed from: cf Luntz, *supra*, para 12.4.4. An error leading to a significant adjustment will call for an overall reassessment."

The reference to Luntz is to the third edition (1990) of Professor Luntz's work, 'Assessment of Damages for Personal Injury and Death'. Like Gallop J, having considered the sum of $143,104.00 as a global sum, I think it is appropriate in all the circumstances.

I agree with Gallop J that $80,000.00 is an appropriate sum for future loss of earning capacity. Gallop J has made reference to "a convention" for reducing the award for future loss of earning capacity arrived at by the use of tables, by 15%. As the Court of Appeal said in *Shaw v The Commonwealth*, supra, at 21:

> "As to future losses, there is no rule of law requiring a discount for contingencies in every case. Each case depends upon its own facts: see *Teubner v Humble* (1962-3) 108 CLR 491 at 508-9 per Windeyer J (with whom Dixon CJ and McTiernan J agreed). Not all contingencies or vicissitudes are harmful: see *Bresatz v Przibilla* (1962) 108 CLR 541 at 543-4 per Windeyer J; *Elia v O'Byrne* (1990) Aust Torts Rep 81-050 at 68, 180-68, 181."

I agree with Gallop J that in the present case the use of tables is not inappropriate - cf *Lai Wee Liam v Singapore Bus Service* (1978) Ltd [1984] AC 729 at 739, 740 - and that there is little to indicate favourable contingencies for this respondent. I agree with the reduction for the vicissitudes of life that Gallop J proposes in respect of the assessment of damages for future loss of earning capacity.

I agree that the respondent should pay the appellant's costs of the appeal.