MALEC . . . . . APPELLANT;
PLAINTIFF,

AND

J. C. HUTTON PROPRIETARY LIMITED . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1990.

Feb. 15; *May* 29; *June* 26.

Brennan, Deane, Dawson, Gaudron and McHugh JJ.

Damages — Assessment — Tort — Personal injuries — Pain and suffering — Future or potential events — Likelihood of occurrence — Relevance to measure of damages.

In assessing damages where questions arise as to the future or hypothetical effect of physical injury or degeneration, the degree of probability of the occurrence of associated future or hypothetical events will be evaluated by the court (except in the extreme cases of mere speculation or of practical certainty). Where proof is necessarily unattainable, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability, leading to an increase in or decrease of the amount of damages otherwise to be awarded. The approach is the same whether it is alleged that the event would have occurred before, or might occur after, the assessment of damages takes place.

Per Brennan and Dawson JJ. It is undesirable that damages be assessed on the footing of an evaluation expressed as a percentage, or that "probability" be used to describe a minimal possibility.

Decision of the Supreme Court of Queensland (Full Court), varied.

APPEAL from the Supreme Court of Queensland.

Joze Malec was employed by J. C. Hutton Pty. Ltd. as a labourer at a meatworks between 1972 and 1980. In 1977 he was diagnosed as suffering from brucellosis. He instituted an action for damages against the company. In the Supreme Court of Queensland, Kelly S.P.J., in awarding damages of $19,468.54, found that the disease had been contracted between 1975 and 1977 as a result of the company's negligence, it being equally probable that the plaintiff's supervening neurotic condition was "precipitated by brucellosis" or attributable to other unrelated circumstances. The Full Court of the Supreme Court (Matthews, Carter and Ambrose JJ.) reversed the latter finding. Matthews and Ambrose JJ. concluded that the plaintiff's personality might have led to a similar neurotic condition irrespective of brucellosis, but increased the

award to $36,928.47. Carter J., in dissent, considered that damages should have been assessed in part at $148,277.63 and an inquiry should have been ordered to assess a further award. Malec appealed further, by special leave, to the High Court.

H. G. Fryberg Q.C. and *D. O. J. North*, for the appellant, referred to *Mallett v. McMonagle* (1); *Wilson v. Peisley* (2); *McIntosh v. Williams* (3); *Hotson v. East Berkshire Area Health Authority* (4).

C. E. K. Hampson Q.C. and *A. J. Williams*, for the respondent, referred to *Watts v. Rake* (5) and *Purkess v. Crittenden* (6).

Cur. adv. vult.

May 29.

The following written judgments were delivered:—

BRENNAN AND DAWSON JJ. We are in agreement with the judgment of Deane, Gaudron and McHugh JJ. and with the order that they propose, subject to some brief observations. The judgment of the majority in the Full Court seems to us to overlook the difference between the fact that the plaintiff had not been working for some time before the trial and an evaluation of the plaintiff's earning capacity which was destroyed in consequence of the defendant's negligence. The fact that the plaintiff did not work is a matter of history, and facts of that kind are ascertained for the purposes of civil litigation on the balance of probabilities: if the court attains the required degree of satisfaction as to the occurrence of an historical fact, that fact is accepted as having occurred. By contrast, earning capacity can be assessed only upon the hypothesis that the plaintiff had not been tortiously injured: what would he have been able to earn if he had not been tortiously injured? To answer that question, the court must speculate to some extent. As the hypothesis is false — for the plaintiff has been injured — the ascertainment of earning capacity involves an evaluation of possibilities, not establishing a fact as a matter of history. Hypothetical situations of the past are analogous to future possibilities: in one case the court must form an estimate of the likelihood that the hypothetical situation would have occurred, in the other the court must form an estimate of the likelihood that the possibility will occur. Both are to be distinguished from events

(1) [1970] A.C. 166, at p. 176.
(2) (1975) 50 A.L.J.R. 207; 7 A.L.R. 571.
(3) [1979] 2 N.S.W.L.R. 543, at p. 550.
(4) [1987] 1 A.C. 750.
(5) (1960) 108 C.L.R. 158.
(6) (1965) 114 C.L.R. 164.

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which are alleged to have actually occurred in the past. Lord Diplock said in *Mallett v. McMonagle* (7):

> "The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards."

In assessing the plaintiff's earning capacity in the present case, what had to be evaluated was the prospect that the deteriorating back condition would have precluded him from engaging in gainful employment had he not contracted brucellosis. An evaluation of that prospect had to be made. To make a finding on the balance of probabilities as though the prospect were something that had occurred in the past was to misconceive the process of evaluation.

Although we agree with the general thrust of the reasoning on this point in the judgment of Deane, Gaudron and McHugh JJ., we think it undesirable for damages to be assessed on the footing of an evaluation expressed as a percentage. Damages need not be assessed by first determining an award on the footing that the hypothetical situation would have occurred and then discounting the award by a selected percentage. Damages founded on hypothetical evaluations defy precise calculation. We should add that we would not favour the use of the term "probability" to describe the possibility of occurrence of a situation when the possibility is minimal.

Subject to these observations, we agree in the order as formulated in their Honours' reasons for judgment.

DEANE, GAUDRON AND MCHUGH JJ. The issue in this appeal concerns the valuation of a plaintiff's damage, caused by the tortious conduct of the defendant, after it is found that it is more likely than not that the damage would have occurred in any event as the result of conditions or events for which the defendant is not legally responsible.

The appeal is brought by the plaintiff in an action for damages against his employer. The plaintiff contends that the sum of

(7) [1970] A.C. 166, at p. 176.

$36,928.47, substituted by the majority of the Full Court of the Supreme Court of Queensland (Matthews and Ambrose JJ.) for the sum of $19,468.54 awarded by the trial judge, is inadequate. Carter J., the dissentient, would have assessed part of the plaintiff's damage at $148,277.63 and ordered an inquiry to assess the rest of his damage.

The Plaintiff's Condition

Between October 1972 and April 1980, the defendant employed the plaintiff as a labourer in a meatworks. In July 1977 the plaintiff was diagnosed as suffering from brucellosis, a disease acquired from animals. One possible sequela of brucellosis is the development of depressive illness. Another possible sequela of brucellosis is the development of an organic condition which results in a degenerative-like condition in the spine.

The trial judge found that sometime between 1975 and 1977, as the result of the defendant's negligence, the plaintiff had contracted acute brucellosis, but that by June 1983 that condition was no longer present. His Honour also found that, since at least 1982, the plaintiff had suffered from symptoms in his cervical and lumbar spine, but he was not satisfied that the plaintiff's spinal condition was a consequence of contracting brucellosis. He was satisfied, however, that a neurotic illness which was diagnosed in 1979 "was precipitated by brucellosis". Nevertheless, he found that it was at least as probable as not that the neurotic condition from which the plaintiff suffered at the time of the trial (September 1987) was not related to the brucellosis which he had contracted in the period 1975-1977. However, this finding was reversed by all members of the Full Court. They held that the plaintiff's damages should be assessed on the basis that his neurotic condition at the time of the trial was caused by depression induced by acute brucellosis. But Matthews and Ambrose JJ. went on to conclude that, by reason of the plaintiff's personality, it was "likely that the development of symptoms from his deteriorating back condition would have produced a similar neurotic condition even if he had never contracted the brucellosis". Their Honours said:

> "[I]t is likely that, quite apart from his suffering from brucellosis, by age forty-four he would have become unemployable as a result of his back condition and indeed would have developed as a result a neurotic condition of the sort from which he presently suffers."

At the date of the trial, the plaintiff was forty-nine years old. Consequently, Matthews and Ambrose JJ. awarded the plaintiff damages for economic loss only until May 1982. Their Honours

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awarded $15,000 damages for pain and suffering but, somewhat surprisingly in view of their approach to economic loss, they apportioned "that sum as to $12,000.00 pre-trial and $3,000.00 post-trial". They refused to award damages for the care and attention given to the plaintiff by his wife. Their Honours said:

> "He regarded himself as unemployable as the result of this back condition by mid-1982. By that time whatever care and attention was necessary or given to him by his wife was quite unrelated in our opinion to the onset of brucellosis or its attendant neurosis which gave him a cause of action against the respondent and we are of the view that to expound damages on the basis of *Griffiths v. Kerkemeyer* (8) is quite unjustified."

In his dissenting judgment, Carter J. held that the plaintiff's damages should be assessed on the basis that, as a result of contracting brucellosis, he suffered a neurotic decompensation which would continue and which had rendered, and would continue to render, him unemployable. His Honour said that in making such an assessment it would be necessary to take account of two discounting factors: first, that some of the plaintiff's present symptoms were referable to the condition of the lumbar and cervical regions of his spine which was unrelated to brucellosis and, secondly, that by reason of his personality the plaintiff was vulnerable and predisposed to the onset of psychiatric disability as a result of the occurrence of some other event, whether at work or elsewhere. On the authority of *Griffiths v. Kerkemeyer*, his Honour would also have awarded the plaintiff $70,000 for the care and attention given to him by his wife.

In our opinion the majority of the Full Court erred in holding that the plaintiff was not entitled to damages for economic loss after May 1982. Furthermore, we think that their Honours fell into error in their assessment of the damages for pain and suffering and in refusing to award the plaintiff damages for the care and attention given to him by his wife.

Assessing Damages for Future or Potential Events

When liability has been established and a common law court has to assess damages, its approach to events that allegedly would have occurred, but cannot now occur, or that allegedly might occur, is different from its approach to events which allegedly have occurred. A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event

(8) (1977) 139 C.L.R. 161.

having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred. Hence, in respect of events which have or have not occurred, damages are assessed on an all or nothing approach. But in the case of an event which it is alleged would or would not have occurred, or might or might not yet occur, the approach of the court is different. The future may be predicted and the hypothetical may be conjectured. But questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof. If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. The probability may be very high — 99.9 per cent — or very low — 0.1 per cent. But unless the chance is so low as to be regarded as speculative — say less than 1 per cent — or so high as to be practically certain — say over 99 per cent — the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability. The adjustment may increase or decrease the amount of damages otherwise to be awarded. See *Mallett v. McMonagle* (9); *Davies v. Taylor* (10); *McIntosh v. Williams* (11). The approach is the same whether it is alleged that the event would have occurred before or might occur after the assessment of damages takes place.

The Assessment of Damages in the Present Case

In the present case, the majority of the Full Court fell into error in concluding that the plaintiff was not entitled to damages for economic loss sustained after May 1982. The plaintiff proved that, at the date of the trial, as the result of the defendant's negligence, he suffered from a psychiatric condition which rendered him unemployable. On the evidence there was little, if any, chance that he would either recover or ever be employable. Subject to an allowance for the ordinary vicissitudes of life, the plaintiff was prima facie entitled to be compensated for the near certainty that, as the result

(9) [1970] A.C. 166, at p. 174.
(10) [1974] A.C. 207, at pp. 212, 219.
(11) [1979] 2 N.S.W.L.R. 543, at pp. 550-551.

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of the defendant's negligence, he will suffer from his psychiatric condition and be unemployable for the rest of his life. However, the majority in the Full Court found that it was "likely" that, independently of the defendant's negligence, by May 1982 the plaintiff would have been unemployable and suffering from a similar neurotic condition. By the term "likely", their Honours no doubt meant that there was more than a 50 per cent chance that this would have occurred. On that hypothesis, the damages otherwise recoverable by the plaintiff would have to be reduced to provide for that chance. On the evidence, it is impossible to conclude that it is 100 per cent certain that the plaintiff's back condition would have rendered him unemployable if he had not contracted brucellosis. So, on the majority's finding, the reduction in his damages for loss of earning capacity would be somewhere between 51 per cent and 99 per cent. But whatever the precise chance of the plaintiff's back condition totally or partially reducing his earning capacity, the majority in the Full Court erred in refusing to award him any damages for economic loss suffered after May 1982.

Matthews and Ambrose JJ. also found that it was more likely than not that, as the result of the plaintiff's back condition and consequent unemployability, he would have developed a similar neurotic condition. As a result, they refused to award any damages for the care and attention which his wife gave to him and, although the basis of their award for pain and suffering is not clear, they obviously took the view that all effects of the defendant's negligence would be spent shortly after the date of trial. It is impossible to conclude, however, that it was 100 per cent certain that the plaintiff's back condition and consequent unemployability would have precipitated a similar neurotic condition. On the evidence and the findings of the majority of the Full Court, the chance that a similar neurotic condition would actually have resulted from these two events occurring may well be thought to have been far from overwhelming. True it is that the plaintiff developed a neurotic condition as the result of contracting brucellosis. But that disease resulted in suffering which was prolonged and severe. It by no means follows from what occurred as the result of his contracting brucellosis that there is an overwhelming likelihood that another event or other events would have precipitated a similar neurotic condition. First, there was a substantial chance that, even if the plaintiff's back had made him unemployable, he would have gone through life without suffering from a neurotic condition similar to his present condition. Secondly, in determining the chance that unemployability as the result of his back condition would have

precipitated a similar neurotic condition, it is necessary to bear in mind that more than one probability is involved. There is the degree of probability that the plaintiff would have become unemployable in any event as the result of his back condition and there is the degree of probability that the happening of that occurrence would have precipitated a neurotic condition. When those probabilities are combined, the chance that the plaintiff would develop a neurotic condition decreases exponentially. If, for example, and only by way of illustration, there was a 75 per cent probability of his becoming unemployable by reason of his back condition even if he had not contracted brucellosis and a 75 per cent chance that that unemployability would have caused a similar neurotic condition, there was only a 56.25 per cent chance (75 per cent x 75 per cent) that, if he had not contracted brucellosis, he would have developed a similar neurotic condition.

Whatever the precise chance that the plaintiff would have developed a similar neurotic condition, the majority in the Full Court erred in refusing to award him any damages for the care and attention given to him by his wife and for the neurotic condition from which he presently suffers. The plaintiff is entitled to damages for pain and suffering on the basis that his neurotic condition is the direct result of the defendant's negligence. Those damages must be reduced, however, to take account of the chance that factors, unconnected with the defendant's negligence, might have brought about the onset of a similar neurotic condition. Likewise, the plaintiff is entitled to compensation for the care and attention provided by his wife. Again that award must be reduced to take account of the chance that factors, unconnected with the defendant's negligence, would have necessitated similar care and attention.

The appeal must be allowed. The plaintiff submitted that the matter should be referred to the Master to assess the damages in accordance with the findings of Carter J. Subject to one qualification, we consider that that is the appropriate course in the circumstances. Indeed, we did not understand counsel for the respondent (defendant) to contest that course of action in the event that the approach of the majority of the Full Court was held to be erroneous. The qualification arises from the fact that Carter J. did not expressly find, as did the majority of the Full Court, that it was probable, in the sense of more likely than not, that the plaintiff would in any event have developed a back condition which would have rendered him unemployable from 1982. Nor did Carter J. expressly find that it was also probable that the combination of such unemployability and such a back condition would have given rise to

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a similar neurotic condition. The views of the majority of the Full Court on those matters were open to their Honours on the evidence and should be accepted by the Master as providing guidance about the chances of what would or would not have occurred if the plaintiff had not contracted brucellosis.

Deane J.
Gaudron J.
McHugh J.

Order

The appeal is allowed. The judgment entered for the appellant (plaintiff) in the sum of $36,928.47 is set aside. In lieu thereof, judgment is entered for the appellant in such sum as is assessed by the Master of the Supreme Court of Queensland in accordance with the evidence, the findings of Carter J. in the Full Court and the judgment of this Court. The appellant's costs of the trial (limited to seven days), his costs of the appeal and cross-appeal to the Full Court, his costs of the appeal to this Court and his costs of the assessment of damages before the Master are to be paid by the respondent.

June 26.

THE COURT delivered the following addendum to the judgments:—

The trial judge ordered that the plaintiff recover his costs of the action limited to seven days. His Honour was of the view that, having regard to the findings which he made and the limitation which those findings placed on the plaintiff's damages, he should in the exercise of his discretion restrict the costs which the plaintiff should recover. On appeal to this Court it was held that the plaintiff's recoverable losses were not limited in the manner in which his Honour had found. The basis for the restriction on the order for costs was thus removed. Consequently, the order for costs should be reformed to reflect the reasons for judgment of this Court.

The limitation contained in the order of the trial judge should be deleted. The order of this Court should be amended accordingly.

Appeal allowed with costs.

Vary so much of the orders of the Full Court of the Supreme Court of Queensland by —

(1) setting aside the order "that the Plaintiff recover against the Defendant the sum of THIRTY SIX THOUSAND NINE HUNDRED AND TWENTY EIGHT DOLLARS AND FORTY SEVEN CENTS *($36,928.47) together with interest*

thereon at the rate of ten per cent (10%) per annum for a period of 4½ years" and substituting in lieu thereof an order that the plaintiff recover against the defendant such sum as is assessed by the Master of the Supreme Court of Queensland in accordance with the evidence, the judgment of this Court and, subject to what is said in that judgment, the findings of Carter J. in the Full Court; and

(2) further ordering that the costs of the assessment of damages before the Master be paid by the defendant.

(3) and omitting the words and figure: "which costs for the hearing shall be limited to seven (7) days".

Solicitors for the appellant, *Carter Capner & Co.*
Solicitors for the respondent, *Dowling & Dowling.*

J.M.B.