

# High Court shifts in treatment of partnership losses

On 9 September 1999, the High Court unanimously held in *Husher v Husher* [(1999) HCA 43, 9 September 1999] that the decision by the Queensland Court of Appeal in *Seymour v Gough* [(1996) 1 Qd R 89] should be overruled. The Court ruled that *Seymour v Gough* should be overruled insofar as the decision deals with the assessment of loss of future earning capacity of an injured Plaintiff who at the time of the accident was an equal partner in a business and yet provided skill or labour which produced virtually the entirety of the income of the partnership. A joint judgment was given by Gleeson CJ, Gummow, Kirby and Hayne JJ, and a separate judgment was given by Callinan J. Both judgments set out the proposition that where a Plaintiff at the time of the accident is a partner in a business, the Plaintiff's loss of future earning capacity should be assessed upon the basis of the Plaintiff's capacity to earn income for the partnership rather than by reference to the Plaintiff's past share of the partnership income.

The decision represents a significant departure from the previous principles in this area as established in Queensland by *Seymour v Gough*. In that case, the Plaintiff had been in partnership with his wife in an electricity meter reading business prior to the accident, and the partnership had provided for equal division of profits, even though the Plaintiff's efforts had been principally productive of the income of the partnership. A short time after the accident, a company was formed wherein the Plaintiff and his wife held equal interests and the business which had been conducted by the partnership was conducted by the company. As the Plaintiff had been injured, the partnership and later the company was

required to employ additional labour, which diminished the income earned by the business and therefore the amounts distributed to the Plaintiff and his wife.

The Queensland Court of Appeal found that damages for the Plaintiff's loss of future earning capacity should be assessed in accordance with the sum of the Plaintiff's share of the net profits of the business and then the company. Pincus JA, with whom all members of the Court agreed, stated that the Plaintiff had genuinely entered into an equal partnership with his wife, albeit most probably for tax reasons. In his Honour's view, this arrangement meant that the profits and losses of the business were to be shared equally between the Plaintiff and his wife. Pincus JA then stated that the fact that the partnership had in all probability been formed purely for taxation benefits and the fact that the Plaintiff was the dominant partner could not justify treating a partnership loss as if it were a loss to that partner (the Plaintiff) alone (at 95-96).

The facts of *Husher v Husher* were as follows. The Plaintiff, Mr John Husher (the appellant in the High Court) was injured in November 1994 when a car driven by his wife, Mrs Wendy Husher (the first respondent) was involved in an accident. The Plaintiff brought an action for damages for personal injury in the Supreme Court against his wife and Transport Accident Commission Insurance (the second respondent). Liability was admitted. The Supreme Court gave an assessment of damages and entered judgment in favour of the Plaintiff. The only question which was to be determined by the High Court was how the appellant's loss of future earning capacity should be assessed.

Prior to the accident, the appellant had been a block layer and had carried on this business in a partnership with his wife. There were no employees of the business. The partnership was terminable at will and provided for equal division of the profits between the appellant and his wife, despite the fact that the income of the partnership derived solely from the appellant's skill and labour, with his wife contributing only minor book-keeping and message-taking tasks. The Court noted that such income-splitting partnership arrangements are extremely com-



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mon among skilled workers who are self-employed, due to the taxation benefits that result from these arrangements.

The partnership stopped operating in early March 1996 after the appellant, who had resumed work shortly after the accident, found himself unable to continue the heavy lifting required for block laying. The trial judge, Cullinane J, found that the appellant was incapable of performing the work of a block layer or any heavy work due to the injuries he had suffered in the accident. His Honour also found that but for the accident, it was highly probable that the appellant and his wife would have continued in the partnership, which they had formed some years prior to the accident, until the end of the appellant's working life.

Cullinane J recognised that this partnership arrangement may have altered and that in this event the appellant may 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" [(1999) HCA 47 at 2]. However, his Honour thought that any such change was unlikely.

Cullinane J assessed the sum to be awarded to the appellant for past and future economic loss in accordance with

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what he perceived to be the principles established in *Seymour v Gough*. In particular, his Honour made a calculation of the sum to be awarded for loss of earning capacity based on the fact that the appellant would in all probability have received only half of the partnership

profits. Under this head of damages the appellant was allowed an amount based on that half share of the profits. The amount was adjusted to take into account various contingencies, such as the possibility that alternative business arrangements might have been made.

The appellant appealed to the Court of Appeal against the judgment given by the trial judge. However, the Court of Appeal dismissed the appeal, finding that Cullinane J had applied *Seymour v Gough* correctly. The appellant then appealed to the High Court.

The High Court in the majority judgment mentioned two particular principles of the decision in *Seymour v Gough* which the Court considered were wrong and should be overruled. Firstly, the Court said that if the decision was intended to establish a proposition that a Plaintiff who was a partner in a business at the time of the accident was precluded from recovering a sum for loss

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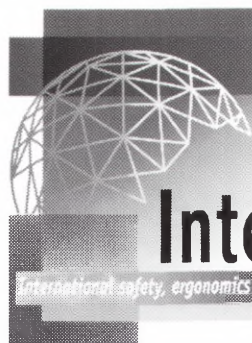
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of future earning capacity which was greater than a sum calculated by reference to the Plaintiff's past share of partnership profits, this was wrong and the decision should be overruled (at 4). Secondly, the Court said that if the decision was intended to establish a principle that the calculation of the damages to be allowed for loss of future earning capacity must be restricted by reference to the sum of the Plaintiff's share of partnership profits, this was also wrong and the decision should be overruled (at 5).

In explaining why *Seymour v Gough* should be overruled in relation to these two principles, the Court stated that it was necessary to identify what earning capacity had been impaired or lost by the appellant and what financial loss had been occasioned by that impairment or loss. The Court stated that "the financial loss occasioned by impairment of earning capacity is the loss of what 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" (at 5). The Court referred to "control" and "disposal" because it considered that what the Plaintiff had lost were the financial benefits of the Plaintiff's efforts which the Plaintiff would have been able to direct wherever and to whatever purpose he or she chose.

The Court identified two critical elements in this regard. Firstly, the Court said that essentially the entirety of the income of the partnership in this case came from the work of the appellant and the utilisation of his earning capacity. In practical terms, the contribution of his wife to the partnership income was minimal. Secondly, the Court said the partnership was a partnership at will, and that while the appellant would most likely have decided to maintain this arrangement, this was effectively up to him, and if he had decided to make some alternative arrangement, this arrangement would be given effect, regardless of the view of his wife. In essence, what the Court was saying was that but for the accident, what the appellant would have had under his control and at his disposal was the entirety of the benefits of his

skill and labour, and it was the entirety of these benefits that he had lost as a result of the accident. The Court believed that both the appellant's "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" (at 6).

Finally, the Court mentioned that close attention must be given to the facts of each individual case in assessing the loss of future earning capacity of an injured Plaintiff. The Court said that this task was not to be fulfilled by endeavouring to classify cases as relating to "sole traders" or "partnerships" or "wage earners" or "trading trusts" and then seeking to determine and apply some rule of general application to all cases within each classification. The Court said that the inquiry was about "what the Plaintiff could have done in the workplace but for the accident and what sum of money would the Plaintiff have had at his or her disposal", with appropriate regard given to all the contingencies of life that might reasonably be expected to have an effect on the course of future events (at 6).

The appeal was allowed with costs, and the appellant was awarded judgment against the respondents in the amount of \$261,958.85 along with interest. As the appellant had offered to settle his claim for less than the sum awarded, the appellant was allowed his costs of trial to be taxed on a solicitor and client basis.

Callinan J was in agreement with the majority judgment, having considered a number of similar decisions concerning the assessment of damages for economic loss which arose from the inability of injured Plaintiffs to continue a partnership business. His Honour made a salient observation in relation to cases where the injured Plaintiff is either a partner or an employee of a company which he or she also controls or in which he or she also holds a substantial proprietary interest. In assessing damages for loss of earning capacity in these

cases, his Honour commented, it is always important 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." (at 12) His Honour was of the view that consideration of these factors would always be important, if not decisive, in assessing this form of economic loss.

By way of contrast to the appellant's situation, which his Honour thought relatively straightforward in light of the above factors, Callinan J made reference to hypothetical scenarios where an injured Plaintiff had entered into arrangements from which he or she was completely or virtually unable to extricate himself or herself. His Honour mentioned such scenarios as the Plaintiff having 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" (at 12-13). In these scenarios, his Honour opined, the Plaintiff may well be in a considerably different position than that of the appellant in the present case when it comes to assessment of damages for economic loss.

In closing, having effectively overruled *Seymour v Gough*, the High Court's decision in *Husher v Husher* has important implications for the way in which plaintiff lawyers in Queensland frame their clients' personal injury claims in relation to future partnership losses. This is particularly so in cases where the partnerships have been structured to provide equal division of profits amongst the partners but the Plaintiff has contributed skill or labour from which virtually all of the partnership income has derived. Such income-splitting partnership arrangements are, as the Court noted, extremely common among skilled workers who are self-employed, due to the taxation benefits. As such, this decision has a potentially wide-reaching application for plaintiff lawyers who are claiming future partnership losses for their clients. **PL**