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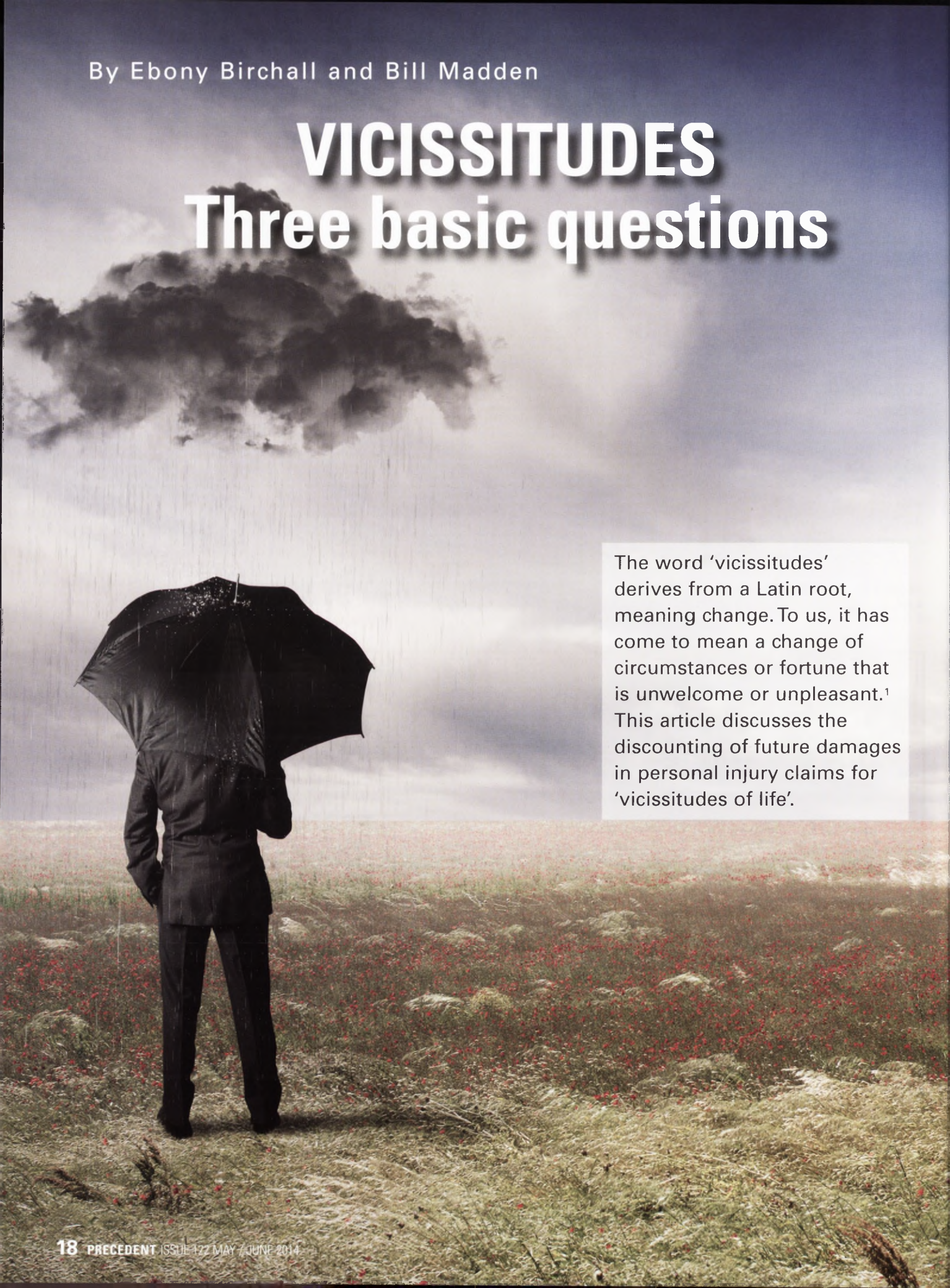
VICISSITUDES
Three basic questions



The word 'vicissitudes' derives from a Latin root, meaning change. To us, it has come to mean a change of circumstances or fortune that is unwelcome or unpleasant.[1] This article discusses the discounting of future damages in personal injury claims for 'vicissitudes of life'.

We examine three basic questions:

- For loss of earning capacity awards, what is the rationale for the vicissitudes discount?
- For loss of earning capacity awards, should a customary discount (such as the 15 per cent discount adopted in NSW) always be applied?
- For future damages awards that are not for loss of earning capacity, such as future care and future treatment, is a vicissitudes discount appropriate and, if so, is the customary discount relevant?

FOR LOSS OF EARNING CAPACITY AWARDS, WHAT IS THE RATIONALE FOR THE VICISSITUDES DISCOUNT?

A useful expression of the rationale for the vicissitudes discount can be seen in the remarks of Barwick CJ in *Arthur Robinson (Grafton) Pty Ltd v Carter.* His Honour refers to factors relevant to loss of earning capacity awards such as 'ill health, unemployment, road or rail accidents, wars, changes in industrial emphasis, so that industries move their location, or are superseded by new and different techniques, the onset and effect of automation and the mere daily vicissitudes of life…'[2] Perhaps more commonly recalled is *Malec v J C Hutton*, in which the High Court reversed the decision of the court below, which had awarded Mr Malec no damages for loss of earning capacity on the basis that he probably would have developed a psychiatric condition and been unemployable in any event. However, Deane, Gaudron & McHugh JJ (Brennan CJ & Dawson J relevantly agreeing), said:

> '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.'[3]

The use of vicissitudes in the context of future damages highlights the different standards for a finding on causation compared to assessing future damages. In *Tabet v Gett,* Kieffel J succinctly stated (omitting footnotes):

> 'Different standards apply to proof of damage from those that are involved in the assessment of damages. *Sellars v Adelaide Petroleum NL* confirms that the general standard of proof is to be maintained with respect to the issue of causation and whether the plaintiff has suffered loss or damage. In relation to the assessment of damages, as was said in *Malec v J C Hutton Pty Ltd*, "the hypothetical may be conjectured". The court may adjust its award to reflect the degree of probability of a loss eventuating. This follows from the requirement that the courts must do the best they can in estimating damages; mere difficulty in that regard is not permitted to render an award uncertain or impossible.'[4]

The above passages explain readily enough the rationale for the vicissitudes discount for loss of earning capacity awards, allowing us to move on to the second question.

FOR LOSS OF EARNING CAPACITY AWARDS, SHOULD A CUSTOMARY DISCOUNT (SUCH AS THE 15 PER CENT DISCOUNT ADOPTED IN NSW) ALWAYS BE APPLIED?

Some variation between Australian jurisdictions in quantification of the customary discount clearly exists, as mentioned in various cases and discussed by authors such as R Cumpston & H Sarjeant.[5] The practice in NSW, from a starting point that is difficult to trace,[6] is to proceed on the basis that a 15 per cent discount is generally appropriate.[7] Professor Harold Luntz undertakes a calculation of statistics which relate to income loss in the average case:

> 'To sum up, a reasonable allowance in the average case of a person in regular employment for contingencies other than death causing loss of income, after taking into account sick leave, social security and other benefits, appears to be less than 5.5 per cent, being at most 0.4 per cent for sickness, injury and unpaid holidays; at most 0.1 per cent for industrial disputes; and at most 5 per cent for reduction of income consequent on unemployment. A larger contingency allowance would be appropriate for children and others who were not in regular employment at the time of the injury… The maximum discount for all contingencies should thus be under 10 per cent in the average case. This is obviously much less than the standard 15 per cent employed in New South Wales and other jurisdictions.'[8]

The unthinking use of the 15 per cent or indeed any customary discount has been criticised, such as in *Moran v McMahon*, where Kirby P commented:

> 'Why there should be any conventional discount, and why it should be 15 per cent regardless of the infinite variety of chances which may befall an injured party, has never been adequately debated. In *Mae v McDonnell* (Court of Appeal, 12 August 1985, unreported), I reserved the consideration of this convention whilst acknowledging that, whatever appeal courts said, conventional rules of thumb would be derived, if only from the aggregation of awards made over time.'[9]

Kirby P's observation that the conventional discount has never been adequately debated is particularly thought-provoking in light of Professor Luntz's comments, cited above, that the maximum discount based on statistics would only be 10 per cent. Almost 30 years have passed since *Moran v McMahon* – would President Kirby (as he then was) make the same observation today? It would still appear that this debate has not occurred. However, there are certainly a number of recent case examples where different discounts have been applied, although the discount has almost always been greater, not less, than the customary 15 per cent.

Whether a 50 per cent discount was manifestly excessive was addressed in *Transfield Services (Australia) Limited v Wieland.* In that case, it was. The passage warrants setting out in full (citations omitted) as it also touches on factors relevant to the calculation of the discount and raises the risk of double-counting:

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'[26] Because the appeal should be allowed, the following observations are provisional. The cross-appeal concerns the discounting by the trial judge of future economic loss. The respondent claimed he would have worked until he was 67 years of age, which was a further eight years and 35 weeks from the date of judgment. Her Honour rejected that evidence and said that the respondent would have retired at 65 years of age. Her Honour then applied a discount of 50 per cent for contingencies. This was an extraordinary discount. The discount for ordinary adverse vicissitudes of life is usually between 2 per cent and 10 per cent: *Villasevil v Pickering* [2001] WASCA 143; (2001) 24 WAR 167 [38]; and *Lawson v Flavel* [2001] WASCA 272 [35]. The trial judge referred to the respondent's pre-existing condition which may have caused early retirement, but that had already been addressed by a reduction in the respondent's anticipated working life.

[27] The main contingencies to be allowed for were the possibilities of sickness, some other accident, unemployment or industrial dispute. There was no evidence that the appellant's job was at risk. The discount of 50 per cent for those contingencies was manifestly excessive.

[28] An appropriate discount for contingencies would have been in the order of 10 per cent.'[10]

A similar double-counting criticism appears in *Ziliotto v Hakim* per Tobias AJA:

'In my view, in determining the appellant's most likely future circumstances but for the injury on the basis that her pre-injury health problems would have prevented her from working full time past the age of 60, whilst allowing a greater than usual discount for vicissitudes due to those same problems, his Honour did engage in "double discounting". I do not accept the respondent's submission that the discount for vicissitudes accounted for matters not considered in his Honour's determination of the appellant's likely future circumstances, in the light of the fact that (at [178]) that discount was stated to have been made "bearing in mind her age and other health problems, including her depression". That statement makes no distinction between the physical health problems which had been taken into account in assessing her most likely future circumstances and the depression which arguably had not.'[11]

Notwithstanding the appellate intervention in *Transfield Services (Australia) Limited v Wieland*, substantial discounts have recently been applied. In *Paul Robert Rankin v Tower Scaffolding (ACT) Pty Limited & Anor*,[12] the court applied a discount of 30 per cent for a claimant aged 50 at trial who was projected to retire at age 60 having regard to the ordinary vicissitudes of life and the factors specific to the plaintiff.

An example of a 25 per cent discount for a person aged 48 years working as a cleaner in an abattoir appears in *Berkeley Challenge Pty Ltd v Howarth*,[13] so as to reflect a pre-existing degenerative condition of the elbow. Similarly, 25 per cent was applied as the discount in *Stephen John Roberts v DRB Holdings*.[14]

In *Tony Marentis v Gallagher Bassett Services Workers Compensation NSW Pty Limited*,[15] the court applied a 25 per cent discount having regard to onset of a serious disease, non-Hodgkins lymphoma. This is consistent with more longstanding appellate authority applying a greater discount because of a pre-existing medical condition, such as *Stepanovic v GIO*,[16] where a reduction for vicissitudes of 30 per cent was made by the NSW Court of Appeal given the claimant's family history of heart disease, the degenerative condition of his spine and his consumption of alcohol.

When it comes to the application of a discount less than the customary figure, case examples are harder to find. However, it may be arguable that a 15 per cent discount should not automatically be applied where civil liability legislation has already resulted in the reduction of an award for loss of future earning capacity, such as the cap of three times average weekly earnings under s12, *Civil Liability Act* 2002 (NSW).[17]

FOR FUTURE DAMAGES AWARDS THAT ARE NOT FOR LOSS OF EARNING CAPACITY, SUCH AS FUTURE CARE AND FUTURE TREATMENT, IS A VICISSITUDES DISCOUNT APPROPRIATE AND, IF SO, IS 15 PER CENT RELEVANT?

Following the passage from *Malec v J C Hutton* quoted above, Deane, Gaudron & McHugh JJ in their judgment (Brennan CJ & Dawson J relevantly agreeing), having dealt with future economic loss, went on to deal with vicissitudes discounts for damages for future care, stating:

'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.'[18]

Notwithstanding that passage, arguably the application of a discount, even more so an 'accepted' 15 per cent discount, should not be seen as automatic in respect of future damages awards such as for care and treatment. Unemployment, road or rail accidents, wars, changes in industrial emphasis and the like cannot be relevant. Perhaps the most common justification for a reduction of such awards will be a pre-existing medical condition which may have given rise to equivalent care and treatment needs.

A vicissitudes discount should not be confused with the court's determination of life expectancy as a factor relevant to quantification of future damages. The court said as much in *James v Grant*:

'Once the plaintiff's probable life expectancy has been decided, I must not reduce allowances for future care and expenses for the vicissitudes of life: *Sharman v Evans* (supra) per Gibbs and Stephen JJ 587. This is because the chances of the plaintiff living longer or shorter will have already been taken into account by me in arriving at the plaintiff's probable life expectancy.'[19]

Even if some quantum of discount is warranted, the potential for applying a different discount to future economic loss than to other future damages awards was highlighted in *Overland Sydney Pty Ltd v Piatti*.[20] The plaintiff suffered a whiplash injury when she was aged 41. Her physical symptoms were

overtaken by an extreme psychiatric condition. Accepting that the usual discount for vicissitudes in relation to future economic loss was 15 per cent, the trial judge applied a total discount of 30 per cent to reflect the contingency that a different event could have triggered a similar depressive disorder. On appeal, Kirby P, with whom the other members of the court agreed, held that an appropriate discount was 7.5 per cent, as it was uncertain whether such a condition, triggered by another trauma, would have produced similarly extensive symptoms.

Silvester v Husler & Suncorp Metway Insurance Limited[21] saw North J consider a plaintiff aged 51 who had a prior accident and a progressive degenerative condition in her cervical spine, with some prospect that it may become symptomatic and impact on her capacity to work as a medical receptionist. A 12.5 per cent discount was applied to her future economic loss,[22] but a more substantial discount of 25 per cent was applied to her award for future care.[23] It may be relevant to note that the plaintiff's lifespan to age 85 was used to project her future care needs with a higher discount, whereas her future economic loss with a lesser discount was projected only to age 65.

CONCLUSION

There is clearly a risk in simply accepting that a 15 per cent discount, or indeed any customary discount, should be applied to future economic loss awards. Where a plaintiff is 'trained for and experienced in work of a character which is largely immune from industrial disturbances and which is not as exposed to the effects of economic depression as are many other occupations',[24] it may be appropriate to apply a lesser percentage reduction for contingencies. Some regard should be had to the age of the claimant and hence the time to retirement, and the nature of the employment, such as its duration and vulnerability to disruption by disability.

By way of example, a claimant aged 62 years who has pursued a sedentary occupation with the same employer for 20 years may not warrant a significant discount in the short time available before retirement at age 65.

Discounts for other future damages awards, such as for care, ought be considered in light of factors of a medical nature, such as the prospect of ill health usually through pre-existing medical conditions. Having said that, the damage award for care may on occasion warrant a higher discount should it continue for the claimant's lifespan, towards the end of which an increased risk of deteriorating health arises.

Suspicion of an unduly arbitrary approach may be raised where the same discount is suggested for all future losses. ■

Notes: **1** The first use of the word in this sense seems to have been in the High Court in 1907 in *Francis v Lyon* [1907] HCA 12 (1907) 4 CLR 1023, but not in a way that is relevant to the present topic. **2** *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649 at [659]. **3** *Malec v J C Hutton* (1990) 169 CLR 638 at [10]. **4** *Tabet v Gett* [2012] HCA 12 at [136]. **5** 'Deductions for vicissitudes when calculating the value of future earnings', available online at www.cumsar.com.au/docs/deductionsforvicissitudes.pdf. **6** *Moran v McMahon* (1985) 3 NSWLR 700 at 706 is the earliest commonly cited acknowledgment of a conventional discount of 15% in NSW. **7** *Wynn v NSW Insurance Ministerial Corporation* [1995] HCA 53; (1995) 184 CLR 485 at 19: 'Even so, the practice in New South Wales is to proceed on the basis that a 15% discount is generally appropriate, subject to adjustment up or down to take account of the plaintiff's particular circumstances.' **8** H Luntz, *Assessment of damages for personal injury and death: General principles*, 4th edition, LexisNexis Butterworths 2006, p386. **9** *Moran v McMahon* (1985) 3 NSWLR 700 at [706]. **10** *Transfield Services (Australia) Limited v Wieland* [2014] WASCA 41. **11** *Ziliotto v Hakim* [2013] NSWCA 359 at [78]. **12** *Paul Robert Rankin v Tower Scaffolding (ACT) Pty Limited & Anor* [2014] ACTSC 5. **13** *Berkeley Challenge Pty Ltd v Howarth* [2013] NSWCA 370 at [23]. **14** *Stephen John Roberts v DRB Holdings* [2013] ACTSC 268. **15** *Tony Marentis v Gallagher Bassett Services Workers Compensation NSW Pty Limited* [2014] NSWDC 10 at [71]. **16** *Stepanovic v GIO* (1995) 21 MVR 327. **17** B Madden & T Cockburn, 'Full compensation no longer sacrosanct: reflections on the past and future economic loss 'cap' for high income earners' (2012) *Torts Law Journal*, 20(2), pp90-109. Available online at http://eprints.qut.edu.au/55963/1/Cockburn_FullCompensationArticle.pdf. **18** *Malec v J C Hutton*, see note 3 above, at [10]. **19** *James v Grant* [2009] WADC 201 at [135]. **20** *Overland Sydney Pty Ltd v Piatti* (1992) Aust Torts Reports [81–191]. **21** *Silvester v Husler & Suncorp Metway Insurance Limited* [2013] QSC 26 at [63]. **22** *Ibid*, at [63]. **23** *Ibid*, at [67]. **24** *Sharman v Evans* (1977) 138 CLR 563, [42] (Gibbs and Stephen JJ).

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