[2001] WASCA 143

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE FULL COURT (WA)
CITATION	**:**	VILLASEVIL -v- PICKERING [2001] WASCA 143
CORAM	**:**	MALCOLM CJ ANDERSON J GROVE AJ
HEARD	**:**	2 MARCH 2001
DELIVERED	**:**	4 MAY 2001
FILE NO/S	**:**	FUL 36 of 2000
BETWEEN	**:**	JOSEFA VILLASEVIL Appellant AND JOSEPH HENRY PICKERING Respondent

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Catchwords:

Torts - Damages for personal injury - Severe leg injury - Assessment of non-pecuniary loss by reference to "a most extreme case" - Plaintiff not working but intending to rejoin workforce - Economic loss - Loss of past earnings - Claim for interest - Loss of future earning capacity - Excessive discount for contingencies - Loss of future superannuation benefits - ***Jongen's*** case - Award increased from $118,575.12 to $187,587.12

Legislation:

Motor Vehicle (Third Party Insurance) Act 1943, s 3C, s 3C(2), s 3C(3), s 3C(5)
Motor Vehicle (Third Party Insurance) Amendment Act 1994, s 3D
Superannuation Guarantee (Administration) Act 1992, s 20, s 21

Result:

Appeal allowed

Representation:

Counsel:

Appellant	:	Mr I L K Marshall
Respondent	:	Mr D M Bruns

Solicitors:

Appellant	:	S C Nigam & Co
Respondent	:	Jackson McDonald

Case(s) referred to in judgment(s):

Arthur Robinson (Grafton) Pty Ltd v Carter (1968) ALR 257
Black v Motor Vehicle Insurance Trust [1986] WAR 32
Dews v National Coal Board [1988] AC 1
Donovan v Port Macquarie Base Hospital [1999] NSWSC 1274
Forsberg v Maslin [1968] SASR 432
Gamser v The Nominal Defendant (1977) 136 CLR 145
Grimsey v Southern Regional Health Board (1997) 7 Tas R 67
Heather v Vita Pacific Ltd (1996) 6 Tas R 52
Jongen v CSR Ltd (1992) Aust Torts Rep 61,706
Kelly v Fletcher, unreported; FCt SCt of WA; Library No 970535; 22 October 1997
Kember v Thackrah [2000] WASCA 198
Love v Clarona Pty Ltd, unreported; FCt SCt of WA; Library No 970012; 24 January 1997
Mott v Boggan [1998] QSC 265
Nolan v Hamersley Iron Pty Ltd [2000] WASCA 304
NSW Insurance Ministerial Corporation v Wynn (1994) Aust Torts Reports, 61,735
Paul v Rendell (1981) 55 ALJR 371
Re Baker v Hanlon, Evans & United Dairy Foods [1999] QSC 142
Ryan v State Rail Authority of New South Wales [1999] NSWSC 1236
Thomson v Mybner Pty Limited [2000] NSWSC 766
Todorovic v Waller (1981) 150 CLR 402
Welsh v Cotton Seed Distributors [2000] NSWSC 861

Zappara v Jones, unreported; FCt SCt of WA; Library No 970264; 22 May 1997

Case(s) also cited:

Bowen v Tutte (1990) Aust Torts Rep 68,079
Cardiff Corporation v Hall [1911] 1 KB 1009
Dettenmaier v Minister for Works [1979] WAR 203
Hinnen v Atwood Oceanics Australia Pty Ltd, unreported; FCt SCt of WA; Library No 7378; 18 November 1988
Newman v Nugent (1995) 12 WAR 119
Van Gervan v Fenton (1992) 109 ALR 283
Wade v Allsop (1976) 10 ALR 353
Wynn v NSW Insurance Ministerial Corporation (1995) 184 CLR 485

1 **MALCOLM CJ**: In my opinion this appeal should be allowed and the damages awarded in the District Court of $118,575.12 should be increased to $187,557.12 as follows:

Non-pecuniary loss	$ 43,800.00
Future economic loss	$ 70,000.00
Loss of superannuation benefits	$ 3,400.00
Past loss of earnings	$ 29,580.00
Future medical expenses	$ 10,000.00
Past and future gratuitous services and interest	$ 8,709.12
Special damages	$ 22,068.00
	$187,557.12

2 I have reached this conclusion for the reasons to be published by Anderson J with which I am in entire agreement.

3 **ANDERSON J**: The appellant appeals from an assessment of damages in her favour in the District Court. The appeal is on the grounds that each of the amounts awarded under the several heads of claim, apart from the award for special damages, is unreasonably low.

Injuries

4 The appellant sustained a quite serious lower limb injury on 17 March 1996 when she was run over whilst weeding the road verge in front of her home. She was seated at the time, with her legs outstretched. She gave the following account of the events by which she was injured (AB 51):

> "I was with my legs spread out like that and my hands in the middle and I was weeding just sitting on the lawn. I heard something bang in the kerb like a big bang. I looked, and by the time I looked I saw a car coming towards me. I didn't have time to do anything. I didn't have time to get up or anything, although I think I made the attempt to get out of the way, but by the time I looked at it the car would have been about a metre and a half, 2 metres away from me. I had not time to get away. That's all I remember from that stage. Then obviously I got hit and run over. I woke up and I tried to move. I tried to move and to see if there was anybody there. I couldn't see anybody. I

> tried to turn my head to the left to see if there was a car there to help me. There was nobody there and I was on my own. The cars were going by. I could hear them but I couldn't move."

5 She was taken to Fremantle Hospital in severe pain where, on x-ray, she was found to have sustained an "almost horizontal fracture at the junction of mid and distal thirds of [the right] tibia with approximately one-third a shaft width posterolateral displacement, and no significant angulation. There was an associated fracture of the neck of the right fibula, and a slightly depressed fracture of the lateral aspect of the lateral tibial plateau at the knee". The appellant also sustained multiple bruising and abrasions.

6 She came under the care of the orthopaedic surgeon, Mr Bath, and under general anaesthetic he inserted an intramedullary tibial nail to stabilise the right leg fracture and placed her in a Richards splint. The appellant remained in hospital until 26 March (about nine days). Thereafter, she attended the outpatients' clinic and underwent an intensive period of physiotherapy, including hydrotherapy. She was unable to place any weight on her injured leg until early May 1996 and for some time, she could only manage partial weight-bearing with the assistance of a Zimmer frame. She required treatment from time to time for leg swelling, extreme tenderness of the right shin and oedema consequent upon non-movement of the right leg. It was not until October 1996 that the appellant was assessed by the hospital as being fit to return to "light duties". Even at that stage, she was walking with a limp (as she still does), although she was described as having "a good range of movement in the knee and ankle". The appellant had to go back to hospital for a day or two in April 1997 for removal of the right tibial nail and this required her to be on crutches again for a while with further physiotherapy.

7 By May 1997, Mr Bath thought that the leg fracture itself was well-healed. However, there were continuing problems with respect to the knee and in the ankle. The appellant was at that time recorded to be still complaining of "difficulty with fully dorsiflexing the right ankle, diffuse pain extending up the right leg to the right side of the trunk and some back pain". Mr Bath thought that these symptoms would eventually resolve.

8 In her evidence, the appellant detailed a range of continuing disabilities. It was her case, which his Honour appeared to accept, that Mr Bath's optimistic prognosis concerning the resolution of her symptoms was not fulfilled and that she continues to have marked symptoms of pain

and stiffness, not only in her right leg, but also in her neck, back and shoulders. It was the appellant's case that the accident had aggravated injuries sustained in an earlier accident in September 1993, which had become largely asymptomatic by the time of the second accident. The injuries sustained in the 1993 accident were injuries to her cervical spine, upper thoracic spine and right shoulder. His Honour accepted that "there was aggravation [of these injuries] as a result of having to use a Zimmer walking frame for four to five months after the [second] accident and subsequently using crutches after the steel pin was removed".

9 The appellant claims to now have constant aches and pains, with very much reduced mobility, inability to stand for more than about 10 minutes and little or no capacity to engage for any length of time in ordinary physical activities such as housework and gardening. These claims appear to have been accepted by the learned trial Judge. He said in par 44 of his judgment:

> "In her evidence the plaintiff described her present complaints as including 'pains and difficulties with my walking and my arms and my neck and my hips and my knee and my ankle, my foot … most of the time I'm in great pain'. She described back pain if she stood for a long time or in a queue, after 10 minutes she would be looking around for a chair. In a motor vehicle she is very nervous and as well her back hurts while she is sitting in a car. She also complained of neck pain which she said was something 'that doesn't really go away'. As to her right knee she described it as numb in that she has no feeling on the right hand side of the right knee. She gets shooting pains the minute she starts walking a little fast which go down from her right knee to her ankle. The leg feels cold and she described her knee and ankle as always swollen. She is not able to walk for long periods and has difficulty climbing or descending stairs, is not able to climb a ladder and is not able to bend her knee to bend down and pick things up at a low level. Mentally she was very depressed following the second accident and her sleep pattern has been impacted by having nightmares about the accident. She finds that the medication efexor has helped her in these areas."

10 Nowhere in his judgment does his Honour indicate that he did not accept this evidence.

Employment History

11 At the time she sustained her injuries in March 1996, the appellant was doing a computer skills course in order to enhance her prospects of employment in the clerical field. She was of the age of 46 years - nearly 47 - and intended to return full-time to the workforce. She had been divorced in 1991 and although both her children were living at home they were now adult.

12 The appellant's employment history starts in her early teens. Until her marriage, she had worked continuously, mostly as a shop assistant. After her marriage in 1972, she appears to have worked full-time for a period of about 18 months as a sales assistant in a chemist shop. The first of her two children was born in December 1974 and her second child (daughter) in November 1978. In the period between the birth of her two children, there is evidence that she worked for approximately 2-1/2 years with the Health Insurance Commission as a bill processor. After the birth of her daughter, her periods of employment were somewhat intermittent, but, nevertheless, there is a substantial history of employment. From November 1984 to November 1987, she was again employed by the Health Insurance Commission as a bill processor. In 1987, she started up her own coffee shop, which she managed until January 1989. In that year, she obtained qualifications as a real estate and business sales representative and worked on a part-time basis as a real estate agent, on and off, until November 1994. From then until April 1995, she worked as a housekeeper for Asia Securities Pty Ltd. When that employment was terminated, she applied for a number of jobs in various occupations and in September 1995 succeeded in obtaining employment as a housekeeper with Satterley Real Estate. She held that job until January 1996 and left it because, as his Honour found, she was "unable to physically continue with the work". By this time, she had had her first accident. It was after leaving that employment that she decided to acquire new skills and, in particular, computer skills with a view to returning to clerical work, hopefully with the Health Insurance Commission, but if not with that organisation, then in similar work.

13 She did not return to the computer skills course after the accident and claims that she is now unable to do so.

The Award

14 The learned trial Judge assessed damages in a total sum of $118,575.12, made up as follows:

1. Non-pecuniary loss - $22,350

2. Past economic loss, including interest and loss of past superannuation entitlements - $17,500

3. Future economic loss - $37,948

4. Future medication, consultations and treatment - $10,000

5. Past and future gratuitous services and interest - $8,709.12

6. Special damages - $22,068

15 As I have said, each of the heads of damage, save for the award for special damages, is challenged for inadequacy.

16 The main submissions were that the award for non-pecuniary loss and the award for future economic loss were well below the amount that should have been awarded.

Non-pecuniary loss

17 The amount which may be awarded under this head is not at large. It is limited by statute. Under s 3C of the *Motor Vehicle (Third Party Insurance) Act 1943*, a maximum amount that may be awarded for non-pecuniary loss is prescribed. At the relevant time it was the sum of $219,000 and by s 3C(2), it is provided that:

> "The amount of damages to be awarded for non-pecuniary loss is to be a proportion, determined according to the severity of the non-pecuniary loss, of the maximum amount that may be awarded."

18 The "maximum amount" that may be awarded (viz $219,000) is to be awarded "only in a most extreme case" (s 3C(3)).

19 This means that the Court is required to compare the case with "a most extreme case" and decide what proportion of $219,000 is to be awarded on that basis.

20 I observe in passing that the statutory requirements to undertake discrete exercises in relation to particular heads of detriment may have a fundamental consequence with respect to the appellate review of assessments in personal injury cases. The received doctrine prior to the

enactment of s 3A to s 3D was that the judgment for damages for personal injury is a global award, not a series of awards under particular heads. Appeals were treated as appeals against the total sum awarded (more accurately the discretionary judgment reflected in that sum), the question being whether judgment for that total sum is or is not within the limits of a sound exercise of discretion: ***Gamser v The Nominal Defendant*** (1977) 136 CLR 145 at 149 - 150; ***Paul v Rendell*** (1981) 55 ALJR 371 at 376 - 377. Underlying the provisions of s 3A to s 3D introduced into the Act in 1994 appears to be a legislative assumption that awards of damages in personal injury cases are not global awards, but are indeed a series of distinct assessments. How the courts should now approach assessments in order to give effect to the legislative intention expressed in the new provisions may need to be reviewed. The point was not argued in this case.

21 In applying s 3C(3), his Honour said:

> "When the plaintiff's injuries and associated symptoms are compared with what may be regarded as a most extreme case it seems clear that the plaintiff's initial injuries and symptoms, their progression and treatment, the prognosis for their improvement and the effect that they have had on her enjoyment of life places her case at no more than 15 per cent of the most extreme case."

22 After making adjustments required by the provisions of s 3C(5) which essentially involved deducting $10,500 from 15 per cent of $219,000, his Honour arrived at an amount of $22,350.

23 It is not contended that his Honour was in error in deducting $10,500 from the calculation. The complaint is that 15 per cent was far too low and did not represent a proper assessment of the extent of the appellant's non-pecuniary loss when compared with "a most extreme case" - for example, a case of quadriplegia.

24 With all due respect to his Honour, I believe he did make too severe a comparison between the plaintiff's case and "a most extreme case". This was a very painful and disabling injury which required two episodes of surgery and many weeks of rehabilitative treatment and has resulted in quite significant residual disabilities, some of which appear now to be permanent. On the learned trial Judge's findings, the fractures of the right fibula, right tibia and right lateral tibial plateau (that is to say, to the lower right leg and ankle region) were serious and the appellant's right foot now,

when she is standing, is splayed outwards five degrees and the right knee is turned inwards when the feet are held parallel. The injuries have set off pre-existing, but previously asymptomatic, degenerative changes in the right knee and right ankle. There is now what would appear to be permanent pain and stiffness in the right knee and ankle. There is an unsightly vertical scar some 10 centimetres long and one centimetre wide from the centre of her right knee, down the right shin, as well as other scarring on the inside of her right knee and ankle. The appellant has sustained an aggravation to previously asymptomatic degenerative conditions in her back, neck and shoulder area. The appellant walks with a significant limp and must put up with a moderate degree of chronic pain in the various parts of her body and limbs for the foreseeable future. In addition to all of this, there was uncontested expert evidence that the appellant has sustained a psychiatric disorder which the psychiatrist Mr Skerritt described as follows (AB 113):

> "The accident was followed by nervous symptoms right from the moment that it happened … she had some attempted psychological treatment by the time I saw her, but the history given to me when I saw her was quite a well-established and very common illness consisting of a mixture of symptoms of quite severe depression and anxiety, so one would have diagnosed it formally as major depressive disorder and panic disorder."

25 Mr Skerritt was guarded about his prognosis. At AB 117, he said:

> "The medication I would think would probably be a couple of years after full resolution of her symptoms, and it could be permanent. That's again something that's not easy to predict."

26 In a report he prepared for the appellant's solicitors in December 1998, Mr Skerritt said:

> "Mrs Villasevil also described feeling low in spirits with a great deal of worry. She had reached the point of feeling hopeless and felt guilty about not being able to do more for her family. The thought had come to her that she might be better off dead … sleep is disturbed with difficulty getting off to sleep because of a combination of pain and worry as the thoughts run through her head. Once asleep she dreams and is restless and might awaken for periods of four hours. She may not get off to sleep until 4 am, but will still awaken at 6 or 7 am and will not feel

> rested … In my opinion Mrs Villasevil was precipitated into a psychiatric disorder by the accident and its consequences. She has quite significant depressive and anxiety symptoms. While these areas of symptomatology coincide in most people, conventionally frightening experiences, such as the accident, are associated with the provocation of the anxiety part and chronic pain, which she also has, with the depressive part. These have caused quite considerable distress in their own right and I am sure that they have added to the experience of the pain itself."

27 It must be said that taking Mr Skerritt's evidence as a whole, he was reasonably optimistic that within a fairly short time after resolution of her litigation the appellant's psychiatric disorders could be managed by the appellant's general medical practitioner and that within a year or two she may no longer require medication. However, there remains a possibility that some permanent psychiatric harm has been done.

28 Having regard for the frightening nature of the events by which she was injured, the extreme pain which she initially sustained, the long and troublesome period of convalescence, the aggravation that has been caused to asymptomatic degenerative conditions, the continuing nature of the physical disabilities and the moderate symptoms of pain which are likely to persist indefinitely, coupled with the psychiatric condition and the possibility that it may endure, I think the case should have been assessed at 20 per cent of a most extreme case.

29 Under s 3C, this would have resulted in an award of $43,800 and, in my opinion, that sum should be substituted for the sum of $22,350 awarded by his Honour.

Future Economic Loss

30 The learned trial Judge adverted to the appellant's evidence that after retraining she intended to work in a clerical vocation until the age of 70. He did not consider that it was likely that she would have done so. That is a conclusion with which I would not interfere. The assessment that must be made of the likely duration of a plaintiff's normal (uninjured) working life is, no doubt, very much influenced by the trial Judge's assessment of the character and personality of the plaintiff - the kind of person the plaintiff appears to be as regards her motivation and her capacity, if uninjured, to compete on the labour market to an advanced age. His Honour was, of course, in a much better position than this Court to make a judgment about that. His Honour approached the assessment of

pecuniary loss on the assumption that the appellant would not have engaged in remunerative employment after the age of 65 and I am not persuaded that he was wrong to do so.

31 As to what her capacities for gainful employment would have been had she not been injured, it is not in dispute that the appellant's last employment was as a housekeeper with Satterley Real Estate, which she left at the end of January 1996, about seven weeks before the second accident. According to exhibit 2, which is a chronology put into evidence as part of the appellant's case, she started her computer skills course on 12 February 1996, about two or three weeks after leaving her housekeeping job. Her evidence was that this was an eight-week course, and that she was within a week of completing it. On the strength of this evidence, it was contended on her behalf in argument before us that she had completed seven weeks of this course at the time of the second accident. However, it would appear from the chronology that she had in fact completed only five weeks of it. This is a curious inconsistency, but nothing turns on it. It is not in dispute that she was more than halfway through the course when she was injured.

32 The housekeeping job which she had left was not full-time and she left it because, as his Honour found, it was too hard for her physically. There is no evidence as to which particular aspect of this particular job was beyond her, or exactly why it was beyond her. It is not possible from the scant evidence on the subject to draw an inference that she was generally incapable of doing work of a housekeeping nature before sustaining the injuries for which she is now to be compensated. Thus, even if she had not succeeded in equipping herself to compete for work in the clerical field, she might have found other suitable employment such as housekeeping, had she not been injured.

33 As has been said, his Honour judged that the appellant would not have worked beyond the age of 65 years. That gave her a maximum working life after trial of about 15 years. He assessed the value of the appellant's loss of earning capacity over that period at $37,947.91. His Honour found the weekly multiplier for 15 years on the six per cent table to be 520.8. When $37,947.91 is divided by 520.8, the result is about $73 per week. On the face of it, that is a very low figure in light of the uncontradicted evidence as to current rates of pay in the workforce. It was proved that the minimum adult wage was $346.70 per week before tax. His Honour found that if the appellant earned that wage, she would pay about $57 per week in tax, leaving a net after tax amount of $290.90 per week. There was evidence that a "temporary full-time employee"

engaged in clerical work with the Health Insurance Commission presently earned $24,575 per annum, or approximately $473 per week before tax. There was no finding as to the net after tax amount of that wage, but I would infer from the tax applicable to the minimum adult wage that the take-home pay from $473 gross for a person in the position of the appellant would be not less than $400 per week. So there was a range of between $291 per week and $400 per week for full-time work of the kind to which the appellant might be suited. Yet, the amount awarded by his Honour reflects a lost earning capacity of only about $73 net per week.

34 It is difficult to see what justification there was in the evidence, or in his Honour's findings of fact, to make an award for lost earning capacity of such a low order. The award was not based on a rejection of the appellant's case as to her residual disabilities or of her case as to the effect of these disabilities on her capacity to function physically and mentally. As has been pointed out, in assessing the amount that should be awarded for non-pecuniary loss, the learned trial Judge appeared to accept the appellant's evidence as to her residual disabilities and their effect on her capacity to function. As I understand his reasons, the learned Judge's calculations are not based on, nor do they contain any allowance for, a retained earning capacity. There is a passage in the judgment which, at first glance, might seem to be to the contrary. It appears at par 64 to par 65 of his Honour's reasons for judgment as follows:

> "When asked why she was not able to do any work she responded:
>
> > 'Well … I don't feel that I'm able to work at the moment because I have still got pains and difficulties with my walking and my arms and my neck and my hips and my knee and my ankle, my foot, and I just don't feel I can do it because most of the time I'm in great pain and I can't even concentrate.'
>
> It is not an easy task to ascertain the retained earning capacity in a case such as this. Mr Thrum was of opinion that whilst the plaintiff has a permanent partial incapacity she nevertheless has a capacity for sedentary work. Likewise Prof Harper concluded that she was partially fit for a sedentary occupation, eg as a receptionist or computer operator. It was Mr Brash's opinion that the plaintiff was fit to return to work as a claims officer, direct bill processor or real estate agent on a full-time basis. **In effect her retained earning capacity is not very much**

> **different from her situation which existed as a result of the first accident**. I have referred earlier in these reasons to the assessments made prior to settlement of her claim for damages in respect of the first accident."

35 Whilst the sentence to which I have given emphasis might appear to be a finding that the appellant's ability to earn money was much the same after the second accident as it was before that accident, when properly understood in the context of the judgment as a whole, it cannot be taken to be such a finding. I understand it to be merely the learned Judge's construction of the medical evidence without taking account of the appellant's own evidence. Her own evidence was that she was not able to work at all and the learned Judge quoted that evidence in his judgment (see above) in terms which indicate that he did not reject it. Furthermore, if his Honour had found that the appellant had retained her pre-accident earning capacity and therefore had sustained no measurable loss of earning capacity, there would have been no point in embarking on the exercise which he later embarked on. He calculated an award for lost earning capacity based on total loss of capacity to earn the adult minimum wage. It is true that he heavily discounted that, but there is nothing which indicates he did so because he concluded that she had a high retained earning capacity.

36 I would take it that his Honour accepted that the appellant has been left with no useful earning capacity. That is the purport of her own evidence which, as I have said, his Honour did not reject but, on the contrary, appeared to accept.

37 The award under this head is the product of an actual calculation which the learned trial Judge did. It is set out in par 72 as follows:

> "Assuming that the plaintiff were to work to age 65 she would have a further 15 years ahead of her. I calculate this loss also on the basis of adopting the current minimum adult wage. The multiplier for 15 years on the 6 per cent table of multipliers on the weekly income table is 520.80.
>
> | | |
> |---|---|
> | $290.90 x 520.80 = | $151,791.62 |
> | Less 75% | -$113,843.71 |
> | Net loss | $37,947.91" |

38 The discount of 75 per cent is, with respect, an extraordinarily heavy discount if it was intended to cover only the usual contingencies or "vicissitudes of life". The discount for ordinary contingencies is rarely more than 15 per cent and usually between five and 10 per cent. Nowhere does his Honour really explain by what process of reasoning he came to apply a discount of 75 per cent. It is expressed in the judgment as being a discount for the "vicissitudes of life". His Honour said at par 61:

> "Having regard to these considerations and the need to take account of the ordinary vicissitudes of life I would apply a discount of 75 per cent to the figure assessed in relation to the economic loss aspects of the plaintiff's claim."

39 The reference to "these considerations" is a little unclear, but would appear to be a reference to the considerations referred to in ***Black v Motor Vehicle Insurance Trust*** [1986] WAR 32, a lengthy extract from which appears in his Honour's judgment immediately before he stated his conclusion that the discount should be 75 per cent. None of the considerations referred to in the passage in ***Black v MVIT*** which his Honour quoted could justify the discount which his Honour arrived at.

40 His Honour made a quite detailed examination of the appellant's work history. He went back over some seven years prior to the accident and calculated that the appellant had earned an average of $3,799.25 per annum in those years. As it happens, $3,799.25 per annum is $73 per week.

41 If what his Honour has really done is to calculate the appellant's average earnings over the previous seven years and take that to be her unimpaired earning capacity for the next 15 years, I think, with respect, that such an approach takes too little account of the real circumstances. There is not much doubt that the appellant had been under-employed in the seven years leading up to the second accident; that is, from about 1989. But this is an unreliable guide to the future in this case. In 1989, her son would have been 15 and her daughter only 11. The appellant gave evidence that she could not work full-time while her children were at that stage of growing up. The appellant's marriage was breaking down. There was a divorce in February 1991. After that she said she carried the full burden of sole parenthood. In September 1993, she had her first accident in which it appears she sustained a moderate to severe whiplash injury. There is evidence that this, too, affected her working capacity for quite some time. Although it is unclear to what precise extent these factors contributed to the appellant's under-employment between 1989 and 1996,

they had passed into history by the time of trial. Her children were adult and although living at home, they were financially independent and quite able to look after themselves and the appellant had made a decision to get herself back into the workforce. She had actually taken positive steps towards doing so. The fact that she had engaged in a skills training course and was more than halfway through it when she was injured is compelling evidence of a genuine desire and intention to rejoin the workforce. There is nothing to suggest that she did not have the innate ability to do so. Her history of employment includes responsible positions in clerical work, real estate and housekeeping, as well as running her own business. The injuries sustained in the first accident had settled and there is no reason why she would not have been physically and mentally capable of performing remunerative work at a clerical level following upon her retraining. There is no evidence that such work was unavailable to her, although there was some evidence that her old position at the Health Insurance Commission had changed to the extent that, unless she did acquire new skills, she would not be qualified for the new position.

42 On these facts it is with respect unfair to hold that in the future the appellant would probably have earned only at the rate of her actual earnings over the previous seven years. It diminishes to vanishing point her changed circumstances and her prospects of improving her skills and using them to earn money. I think she should have been compensated on the basis that there was a good chance that she would have successfully retrained and a reasonable prospect that she would have obtained at least part-time work of a clerical nature - some kind of office work - for most of the remainder of her working life. She cannot be awarded damages as if she would certainly have become a full-time clerical officer, working continuously to earn the full salary of a clerical officer. Nor should the measure of her compensation be arrived at by assuming that had she not been injured she would have joined the full-time workforce and worked continuously for the rest of her working life on the minimum adult age. Regard must be had to her past history of under-employment. As a person who had not worked full-time for many years, it would be unfair to the respondent to base an award on an assumption that the appellant would have fully utilised any enhanced working capacity which retraining might have given to her. She probably would have looked for part-time work of the less demanding kind. There was some risk that retraining would not have equipped her to compete effectively for higher levels of employment in the clerical field.

43 It is not a case for precise mathematical computations. In light of all of the evidence, including the evidence of wage rates, to which reference

has been made, I am of the opinion that there should have been a finding that the appellant has suffered a severe diminution in her earning capacity, if not a complete loss of it and there should have been a finding that that diminution or loss is productive of financial loss to the extent of at least $150 per week net after tax. The appropriate lump sum award for that loss is the present value calculated on the six per cent tables, using the multiplier chosen by his Honour of 520.8. This produces an amount for future pecuniary loss of $78,120.

44 The question is whether this should be scaled down for adverse contingencies. In truth, there is nothing at all scientific in the determination of the appellant's lost earning capacity in this case. To scale it down on account of the risk that through misfortune the appellant might not earn at what is, in any event, a very uncertain rate seems a little unreal. Nevertheless, it is part of the conventional method of "calculating" the loss of earning capacity to make a downward adjustment of the lump sum for contingencies. I do not think there should be a substantial discount. I would reduce the figure of $78,120 to $70,000, which is a discount of a little more than 10 per cent.

Loss of future superannuation benefits - *Jongen's Case*

45 It is common practice to make an allowance for loss of past and future superannuation benefits.

46 In this case the learned trial Judge made an allowance for lost superannuation benefits in respect of the period between the accident and trial. He did not precisely quantify it or say how he calculated it. What he said (after calculating past economic loss at $13,677) was:

> "The plaintiff also claims loss of superannuation benefits for that period together with interest. In the circumstances taking into account those matters a total appropriate allowance inclusive of those additional items for past economic loss is $17,500"

47 In the grounds of appeal the appellant pleads that the award for loss of past superannuation benefits is inadequate. This complaint can be dealt with later.

48 His Honour made no allowance at all for loss of future superannuation benefits and counsel for the appellant submitted that he was in error in failing to do so. Counsel for the respondent answered that

there was no error in not making an award for loss of future superannuation benefits because no evidence was led in support of the claim. To this counsel for the appellant replied that in light of the fact that all employers must contribute to a superannuation fund for the benefit of every employee at a certain rate of their wage or salary it was a matter of determining the rate at which the appellant would have earned in the future and then doing a calculation, using what has become known in practice as the ***Jongen*** formula. This is a reference to the method of assessment which was adopted as the preferred method to arrive at a just allowance for loss of future superannuation benefits in the case of ***Jongen v CSR Ltd*** (1992) Aust Torts Rep 61,706.

49 It is not disputed that no evidence was led as to the value of the loss of superannuation benefits - past or future. Therefore this ground of appeal raises the general question whether courts can and should make an allowance for loss of superannuation benefits in personal injury actions where no direct or specific evidence of the value of that loss is given.

50 It is convenient to take as a starting point the relevant legislation which is the *Superannuation Guarantee (Administration) Act 1992 (Cwth).* This Act is popularly believed to oblige all employers to make superannuation contributions on behalf of all employees. This is not strictly correct although it is the practical effect of the legislation. The scheme of the Act is that all employers are required to pay to the Commissioner of Taxation a superannuation guarantee surcharge, but the liability to do so in respect of any particular employee is reduced or eliminated by contributions made by the employer to a defined superannuation fund for the benefit of the employee. To the extent that this contribution is less than the amount of the applicable superannuation guarantee surcharge, the difference must be paid to the Commissioner and is paid by the Commissioner to an appropriate superannuation fund for the benefit of the employee. In this way all employees in the Australian work force are guaranteed the benefit of superannuation. For all practical purposes the surcharge prescribed by the Act can be regarded as the minimum employer superannuation contribution and I will call it that. Under the Act the minimum employer contribution until July 1997 was 6 per cent of gross wage. It then rose to 7 per cent until July 2000, since when it has been 8 per cent of gross wage. It will rise to 9 per cent in July 2002 and, as the Act presently stands, it will remain at that level thereafter.

51 This being part of the law of the land, it follows that an employee who is incapacitated for work suffers a detriment over and above his or

her loss of wage or salary, namely the value of the benefit of whatever superannuation arrangements are applicable to his employment, which will be at least the arrangements guaranteed by the Act.

52 There is room for a difference of opinion as to how the assessment of this detriment should be approached in personal injury actions. The choice that was presented to the Court by the opposing actuaries in ***Jongen's Case*** was between (a) valuing the contributions which would have been made by the employer had the plaintiff been able to keep working and (b) valuing the loss of the anticipated end benefits that the employee might have enjoyed had he continued as a member of a fund until retirement age, after bringing to account benefits actually received. Authority for the proposition that either approach is acceptable can be found in ***Dews v National Coal Board*** [1988] AC 1, especially per Lord Griffiths at 15 and per Lord Mackay at 18. That was a case involving a compulsory pension scheme for coal miners.

53 Assessing the present value of the loss of superannuation benefits by reference to the anticipated end benefits payable from the fund many years hence may involve making predictions about the future performance of the fund. This in turn may involve complex and costly actuarial calculations based on uncertain assumptions about many things - such as rates of return on investment, the risk levels with respect to classes of investment, inflation rates, taxation rates, cost of fund management and so on. In ***Jongen's Case*** I held (on the evidence in that case) that it was preferable to take a less sophisticated approach and to assess loss of superannuation benefits by reference to the likely employer contribution, treating that contribution as in the nature of an addition to salary the enjoyment of which was postponed. A relatively simple formula was adopted which was derived from the evidence given by the plaintiff's actuary in that case.

54 The reasons for preferring the less elaborate of the two methods put forward by the opposing actuaries were explained in some detail in the judgment. Basically they were that it is desirable as a matter of policy that courts should keep the calculation of damages in personal injury cases simple: ***Dews v National Coal Board*** (*supra*) per Lord Griffiths at 13. The head of claim in question is often a relatively small component of the overall award. An assessment approach to this head of claim which adds disproportionately to the cost and complexity of the overall assessment should not be favoured if there is a simple and realistic alternative that will do substantial justice without departing from principle. To this may be added the point that in determining the overall award the court is

engaged in estimating a fair compensation by an exercise of discretionary judgment. The process is inherently inexact and involves many uncertainties. The pursuit of mathematical precision cannot be taken too far. Any mathematical calculation of financial loss which is likely to result from injury is usually based on figures which are themselves highly speculative. Whilst actuarial calculations will often be helpful, in the end they can only be a guide.

55 It would seem that the simple approach preferred in ***Jongen*** has found favour amongst practitioners in this field in this State. Derivations of the formula that was used in ***Jongen*** are now apparently quite often used in the District Court where the parties do not wish to go to the expense of obtaining and adducing actuarial evidence. The precise method of computation that was used in ***Jongen*** is not always exactly followed but the general approach is commonly adopted and has received approval in this Court: ***Zappara v Jones***, unreported; FCt SCt of WA; Library No 970264; 22 May 1997; ***Love v Clarona Pty Ltd***, unreported; FCt SCt of WA; Library No 970012; 24 January 1997.

56 A common version of the ***Jongen*** formula takes the prevailing minimum employer's contribution rate prescribed by the Act, applies that percentage rate to the lump sum figure determined as the present value of the loss of future earning capacity and deducts 30 per cent to cover the income tax that is levied on contributions (which was then, and, I think, still is, 15 per cent), the fact that the plaintiff is not entitled to the benefit of the contributions until retirement and other contingencies such as the risk that fund administration costs may exceed investment income and the risk of the failure of the fund.

57 This rough and ready method of arriving at a figure for loss of superannuation benefits is not without its critics. In an article published in (1996) 17 Queensland Lawyer 5, Jonathan Dooley and Anthony Cassimatis expressed the opinion that it was too simplistic in two main respects; firstly in its treatment of the various taxation issues that can arise and secondly in its disregard of benefits that may be paid to a plaintiff on early retirement. In the latter respect the authors considered the ***Jongen*** approach to be unfavourable to defendants and inconsistent with the approach of the High Court in ***Todorovic v Waller*** (1981) 150 CLR 402 and in ***NSW Insurance Ministerial Corporation v Wynn*** (1994) Aust Torts Reports, 61,735 at 61,740. In those cases, it was held to be necessary, in order to arrive at a fair result to the defendant, to deduct the benefits actually received by the plaintiff by reason of early retirement on account of his or her injury. Of course, they were cases in which that

evidence was available to the court. It was not suggested by the learned authors that the cases are authority for the proposition that unless such evidence is produced no allowance at all can be made under this head of claim.

58 Notwithstanding the criticism of the ***Jongen*** approach which is contained in the article above referred to, it is worth noting that the approach which is currently taken by the courts in Queensland is, if anything, even simpler and less favourable to the defendant than the ***Jongen*** approach. It has become the practice there to allow for lost superannuation benefits by simply adding to the overall award a sum which is equivalent to 6 per cent of the amount awarded for future economic loss. In most cases that would produce a slightly higher award than would the ***Jongen*** formula. The approach is frankly acknowledged to be a "rough guide only" but appears to be widely used in the general run of personal injury cases where no actuarial evidence is tendered: ***Hedge v Trenerry***, unreported; Court of Appeal, SCt Qld, 7 November 1997; ***Mott v Boggan*** [1998] QSC 265 at par 48 and 49; ***Re Baker v Hanlon, Evans & United Dairy Foods*** [1999] QSC 142 at par 23.

59 It would appear from recent decisions handed down in the Common Law Division of the Supreme Court of New South Wales that the failure to produce actuarial evidence will not stop the Court making an award for loss of superannuation benefits. Thus, for example, in ***Donovan v Port Macquarie Base Hospital*** [1999] NSWSC 1274 Dunford J made an allowance with respect to this head of claim, notwithstanding that no actuarial evidence or calculations were presented to him. He disposed of the matter by saying (at par 29):

> "In regard to loss of superannuation benefits, no figures have been placed before me but doing some rough calculations similar to those used in some other cases and based on a wage loss of $230 per week gross I allow under this head $19,690."

See also ***Ryan v State Rail Authority of New South Wales*** [1999] NSWSC 1236 at par 38 where Dunford J awarded $19,000 for loss of superannuation benefits without any actuarial evidence, the award being based on "some rough calculations…along the lines suggested by counsel."

60 In ***Thomson v Mybner Pty Limited*** [2000] NSWSC 766 and ***Welsh v Cotton Seed Distributors*** [2000] NSWSC 861 the head of claim was expressly formulated as a claim for loss of employer contributions rather than loss of superannuation benefits. There was no attempt to calculate

the end benefit. The head of claim was quantified by capitalising the notional weekly contribution and discounting this sum for deferred payment; ie, on account of the fact that the plaintiff would not enjoy the benefit of the weekly contributions until retirement from the workforce. In ***Welsh v Cotton Seed Distributors*** (*supra*), Grove J applied further discounts for other contingencies, including on account of the possibility that the plaintiff might utilise his residual earning capacity and thereby obtain superannuation contributions from a new employer.

61 The point of mentioning the Queensland and New South Wales cases is to show that although the methodology used in those States is slightly different from that adopted in ***Jongen***, there is no great difference in point of principle.

62 The practice may be different in Tasmania. In ***Heather v Vita Pacific Ltd*** (1996) 6 Tas R 52 at 65 and ***Grimsey v Southern Regional Health Board*** (1997) 7 Tas R 67 at 116 it was held by Zeeman J and Wright J respectively that loss of superannuation benefits must be assessed by reference to the loss of the anticipated benefits from the fund. On the face of it, this approach rules out simple methodology and obliges plaintiffs to produce actuarial evidence in proof of loss of anticipated benefits in every case in which there is a claim for loss of superannuation benefits. It would appear from the judgments that there was extensive actuarial evidence in both of those cases.

63 I have not been able to find a case in the other States or in the Territories which is informative as to the practice in those jurisdictions.

64 This Court (differently constituted) has on at least one occasion rejected a claim for lost superannuation benefits on the ground that no evidence or argument was presented in support of the claim: ***Kelly v Fletcher***, unreported; FCt SCt of WA; Library No 970535; 22 October 1997. However, as has been observed, the Court has also in other cases approved the ***Jongen*** approach and has made an allowance for lost superannuation benefits where no actuarial evidence was produced.

65 It can be seen, therefore, that the question whether an allowance should be made for loss of superannuation benefits where no actuarial evidence is produced remains a little uncertain.

66 In my opinion, once it is accepted that superannuation contributions by employers are virtually compulsory, the Court can hardly avoid the conclusion that loss of earning capacity will, as a general rule, involve an additional loss in the form of loss of superannuation benefits. The Court

is then bound to do the best it can, I would have thought, to evaluate that loss in arriving at a just overall award. As has been noted, the learned trial Judge did make an allowance for loss of past superannuation benefits. I would hold that there should have been an allowance for loss of future superannuation benefits, notwithstanding that no actuarial evidence was produced in support of the claim.

67 As to the measure of that loss, notwithstanding the criticisms that no doubt can be fairly levelled at it, the ***Jongen*** approach has been widely accepted by practitioners who regularly practice in this field as providing at least a *prima facie* measure of this detriment. I see no reason not to apply it in this case.

68 Using the version of the ***Jongen*** formula set out above, the figure for lost superannuation benefits works out at $3,430 if a minimum contribution rate of 7 per cent of salary is used with respect to a notional salary of $150 per week over 15 years. The rate of 7 per cent was the rate prescribed under the Act at the date of trial. It is the rate which counsel for the appellant contends for in the appeal. He did not claim, as he might have, that there should be an allowance for the fact that the rate is now 8 per cent and will rise to 9 per cent on 1 July 2002, as to which see ***Kember v Thackrah*** [2000] WASCA 198 par 34.

69 I would increase the award for future loss of earnings, or lost earning capacity, to $73,430.

70 It should be remembered that we are here dealing with a case in which no actuarial evidence was presented. It is a case in which the Court must do the best it can in those circumstances. I am still of the view which I expressed in ***Jongen*** that it would be undesirable to have in every personal injury action elaborate and expensive actuarial investigations to determine the loss of superannuation benefits. I would not wish to say anything that might encourage insurance companies to adopt such a practice as a general practice. However, it must be said that the ***Jongen*** formula is not a rule of law and is no bar to the production of actuarial evidence on either side. It is nothing more than a convenient rule of thumb of which there are, of course, quite a few in this field. But opinion evidence of actuaries remains admissible and the assessment tribunal cannot refuse to receive such evidence or ignore it if it is tendered: ***Nolan v Hamersley Iron Pty Ltd*** [2000] WASCA 304 at par 42.

Special Damages - Past Loss of Earnings

71 In accordance with established practice, the loss of earnings to the date of trial was separately assessed - assessed separately from the other heads of pecuniary loss and treated as special damages. It was not contended that this head of claim should have been included in the assessment of general damages for loss of earning capacity: *cf* ***Arthur Robinson (Grafton) Pty Ltd v Carter*** (1968) ALR 257 per Barwick CJ at 264 - 265; ***Forsberg v Maslin*** [1968] SASR 432 per Bray CJ at 435.

72 The calculation made by his Honour was as follows:

> "For the purpose of calculating the plaintiff's past economic loss I adopt the minimum adult wage which is $346.70 gross per week. The income tax payable by a single adult person living in the metropolitan area of Perth on that amount is $55.80 which gives a net weekly rate of $290.90. The plaintiff claims past economic loss from 1 July 1996 being the date by which the plaintiff might reasonably have obtained employment following completion of the computer course. That is a period of three years eight months (188 weeks) times $290.90 equals $54,708. Reduced by 75 per cent leaves a net allowance of $13,677.
>
> The plaintiff also claims loss of superannuation benefits for that period together with interest. In the circumstances taking into account those matters a total appropriate allowance inclusive of those additional items for past economic loss is $17,500."

73 If the appellant's earning capacity is held to be $150 per week from 1 July 1996, being the date from which she could reasonably be expected to have commenced to use her earning capacity to earn income after her retraining course was completed, the calculation of the value of her lost earning capacity prior to trial would be 188 weeks x $150 = $28,200. That is the amount which, *prima facie*, ought to be awarded.

74 The appellant claims interest on this amount. I would not increase the award by allowing interest. That would be going too far, especially as there is no deduction for contingencies. However convenient it may be in an overall assessment to treat compensation for loss of earning capacity prior to trial as a calculation of special damages, the fact is the appellant in this case was not working when she was injured and had no job to go to; and there is a degree of uncertainty as to what work she would have taken up and as to when she would have taken it up and as to what she would have earned had she not been injured. These are matters for

evaluation not calculation and I am of the opinion that an award of $28,200 payable now without any deduction for contingencies is sufficient to compensate the appellant for the loss of her earning capacity during the period between the accident and trial. To this must be added $1,380 for lost superannuation benefits calculated according to the ***Jongen*** formula, making, in all, $29,580.

Future Medical Expenses

75 The learned trial Judge adverted to the evidence concerning the possible need in future for medical treatment and, after carefully considering it, he held that:

> "Without defining a breakdown of costs I conclude that a reasonable allowance for future medical treatment, medication, medical reviews and travelling expenses is $10,000."

76 I am not persuaded that there was any error in this assessment.

Gratuitous Services

77 The last part of the award challenged by the appellant was that part of the award which assessed the compensation payable to the appellant in respect of gratuitous services. This is the head of compensation which compensates the victim in a personal injuries case for incapacity to look after herself arising out of the injuries sustained as a result of the wrong. The compensable loss is measured by reference to the need for the services.

78 On behalf of the appellant, it was contended that the award in respect to the gratuitous services for which the appellant had need prior to trial was inadequate. The learned trial Judge made no award with respect to gratuitous services for the future. He concluded on the evidence that as at the date of trial the appellant had no need for domestic or nursing care and no such need would arise in the future referable to her injuries.

79 As his Honour pointed out, an award of damages for gratuitous services where the cause of action arose on or after 1 July 1993 (which is this case) is subject to the provisions of s 3D of the *Motor Vehicle (Third Party Insurance) Amendment Act 1994*. The relevant subsections provide as follows:

> "3D. Restrictions on damages for provision of home care services
>
> (1) This section limits the damages that may be awarded for the value of gratuitous services of a domestic nature or gratuitous services relating to nursing and attendance that have been or are to be provided to the person in whose favour the award is made by a member of the same household or family as the person.
>
> (2) No damages are to be awarded for the value of the services if the services would have been or would be provided to the person even if the person had not suffered the bodily injury."

80 The appellant's two children had continued to live at home and were still living at home at the date of trial. The appellant's daughter was then aged 20 and her son was aged 24. After her discharge from hospital the appellant required assistance with her showering and toileting and general physical needs and this need for assistance was met by the two children and by the appellant's elderly parents who came to the house and stayed with the appellant during the day while the children were at work. An allowance of $12 per hour for three hours per day was made with respect to the first 60 days following the accident. An additional allowance at the rate of $12 per hour for three hours per week was made for a further three years. These two sums totalled $7,776. To this the learned trial Judge added 4 per cent per annum interest for a period of three years, bringing the total allowance under this head of damages to $8,709.12.

81 Essentially, the appellant claims that her need for domestic and nursing care was much greater than that after the initial period of intensive care.

82 On the evidence as a whole, I think there may have been times when the appellant did need greater assistance than allowed for. For example, there was a period immediately following her visit to hospital for the removal of the tibial nail when her need probably was greater than three hours per week. However, I am not persuaded that, overall, the allowance made by his Honour was inadequate.

83 No allowance was made for the future and, in my opinion, his Honour was correct to conclude there was insufficient evidence of a need for future domestic or nursing care to warrant any such allowance.

The main piece of evidence relied on by the appellant is the evidence of the appellant's general medical practitioner, Dr Milligan, which, it was submitted, shows that there is a continuing need for not less than three hours per week of domestic assistance. I am not persuaded the Dr Milligan's evidence is to that effect. In her report of 17 December 1998, Dr Milligan said:

> "In my opinion Mrs Villasevil is unfit for heavy household duties. She has difficulty making her bed because of back pain. Vacuuming, ironing, cooking have to be done with very frequent breaks due to painful slow movements. She is unable to do any heavy gardening and if she sits to weed she has difficulty getting up and it is reasonable to require assistance of up to three hours weekly."

84 In her report of 18 February 1999, Dr Milligan confirmed that "Mrs Villasevil's condition is unchanged since" the earlier report.

85 I would accept the submissions made on behalf of the respondent that the evidence falls short of establishing a continuing need. The time of "up to three hours weekly" referred to by Dr Milligan seems to be a reference to the amount of assistance which it would be reasonable to allow for the whole range of domestic duties hitherto performed by the appellant, including those which she performed for her children. It was not proved that the appellant is unable to perform the necessary tasks with respect to her personal hygiene and sustenance. As to housekeeping and the like, it seems to me that the evidence as a whole goes no further than that certain housekeeping activities are now done much more slowly and induce some degree of pain and discomfort. About the only thing she cannot do at all is "heavy gardening". It must be remembered that the appellant has received an award which compensates her for the pain and suffering which she must endure. Furthermore, it is very difficult to distinguish between, on the one hand, evidence of the appellant's incapacity to provide domestic services to her adult children such as making their beds, vacuuming their rooms, doing their washing and ironing, and so on, which they now do much more of than before and, on the other hand, evidence of the appellant's inability to look after herself. It is only evidence of the latter which can support a claim under this head. There is very little evidence which is clearly in the latter category. I would not uphold the appeal against this part of his Honour's judgment.

Conclusion

86 I would uphold the appeal to the extent that I would increase the award of damages of $118,575.12 to $187,587.12.

87 **GROVE AJ**: I have had the benefit of reading the judgment of Anderson J in draft form. I agree with that judgment and wish to add only a few words in relation to one aspect of the damages.

88 The award for non-pecuniary loss was governed by s 3C of the *Motor Vehicle (Third Party Insurance) Act 1943* as a consequence of which the amount to be awarded needed to be assessed as a proportion of a prescribed maximum amount, that maximum amount being capable of being awarded "only in *a* most extreme case" (s 3C(3)).

89 In his application of that provision the learned trial Judge said:

> "When the plaintiff's injuries and associated symptoms are compared with what may be regarded as *a* most extreme case it seems clear that the plaintiff's initial injuries and symptoms, their progression and treatment, the prognosis for their improvement and the effect that they have had on her enjoyment of life places her case at no more than 15 per cent of *the* most extreme case."

90 It is important to bear in mind the legislative intention in its selection of the indefinite article in the phrase "a most extreme case" in contradistinction to the definite article which appears on the second occasion that his Honour referred to the phrase. Having regard to his correct citation earlier, I would tend to the conclusion that it is more likely a slip in expression than a manifestation of error and, noting that I share the view that intervention is called for in any event, it might be considered of little moment. It is, however, appropriate to emphasise that the ceiling figure is available not to one but to a range of situations which could qualify within the description.

91 Section 3C is in terms not dissimilar from s 79 of the *Motor Accidents Act 1988 (NSW)* where the phrase also appears. About that provision it has been written:

> "No doubt Parliament recognized that comparisons of the extent of bodily injury must be odious, hence the choice of language '*a* most extreme case' … which avoids any requirement to apply the superlative by imagining *the* most extreme case and putting

that at the top of some grisly table of catastrophes." *Matthews v Dean* [1990] Aust Tort Reports 81-037; see also *Southgate v Waterford* (1990) 21 NSWLR 427.

92 The fixing of damages for non-economic loss must be done in harmony with the circumstance that Parliament has determined to lay down a maximum which is to be reserved for "*a* most extreme case" against which a case falling short of the range of tragedies implicit in that expression is to be proportional. Such proportioning is not to be undertaken against any notion of "*the* most extreme case".

93 The various emphases in the foregoing have been added.

94 I agree with the orders proposed by Anderson J.