*Gaffy v Tennant Creek Town Council* [2001] NTCA 11

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| PARTIES: | LISA MICHELLE GAFFY |
| | v |
| | TENNANT CREEK TOWN COUNCIL |
| TITLE OF COURT: | COURT OF APPEAL OF THE NORTHERN TERRITORY |
| JURISDICTION: | APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION |
| FILE NO: | AP17 of 2000 (9608483) |
| DELIVERED: | 15 October 2001 |
| HEARING DATES: | 19 and 20 March 2001 |
| JUDGMENT OF: | MARTIN CJ, THOMAS & BAILEY JJ |

**REPRESENTATION:**

*Counsel:*

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| Appellant: | J Reeves QC and S M Gearin |
| Respondent: | P Day |

*Solicitors:*

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| Appellant: | Povey Stirk |
| Respondent: | Collier and Deane |

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bai0105

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Gaffy v Tennant Creek Town Council* [2001] NTCA 11
No. AP17 of 2000 (9608483)

BETWEEN:

**LISA MICHELLE GAFFY**
Appellant

AND:

**TENNANT CREEK TOWN COUNCIL**
Respondent

CORAM: MARTIN CJ, THOMAS & BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 15 October 2001)

**THE COURT:**

[1] The subject-matter of this appeal is limited to the quantum of damages recoverable by the appellant for personal injuries which she sustained as a result of a domestic accident on 17 April 1993 caused by the negligence of the respondent.

[2] In brief, the appellant rented a property at Peko Road, Tennant Creek, from the respondent. On 17 April 1993, the appellant, having showered in the bathroom of the property, stepped from the shower and slipped on the slippery floor. The floor in the bathroom was slippery because of water

sprayed by the defective shower fitting. As a consequence the appellant suffered a severe left knee injury.

[3] Liability was admitted by the respondent. The learned trial judge, Angel J held that the respondent had not shown that the appellant failed to take reasonable care for her own personal safety and rejected the respondent's allegations of contributory negligence.

[4] The appellant, who was 26 years old at the time of the accident, suffered considerable pain from the injury to her knee. The injury resulted in a permanent disability which would reduce her future earning capacity. She also suffered psychological problems and weight gain as a result of the accident.

[5] The learned trial judge made an award of damages, totalling $229,464.89 made up of:

| | | |
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| (1) | Past pain, suffering and loss of amenities | $ 30,000.00 |
| (2) | Interest thereon | $ 8,500.00 |
| (3) | Future pain, suffering and loss of amenities | $ 30,000.00 |
| (4) | Agreed special damages | $ 4,612.70 |
| (5) | Past loss of earnings | $ 28,000.00 |
| (6) | Interest thereon | $ 1,200.00 |
| (7) | Future loss of earning capacity | $120,000.00 |
| (8) | Future medical and medication expenses | $ 7,152.19 |

[6] No complaint is made as to the first four of the above items. The focus of the voluminous and detailed appeal grounds were directed at the amounts awarded for past loss of earnings and future loss of earning capacity. Before turning to these matters, it is convenient to dispose of the appeal grounds concerned with the amounts awarded for interest on past loss of earnings (appeal ground no. 9) and future medical and medication expenses (appeal ground no 1.5).

**Interest on past loss of earnings**

[7] After awarding $28,000 for past loss of earning capacity, the learned trial judge held (par [39]): "in addition there will be interest on that sum at the rate of 4%, ie $1,120".

[8] Mr Reeves QC for the appellant submitted – and Mr Day for the respondent readily conceded – that His Honour has made an obvious arithmetical error in allowing interest ($1,120) for one year rather than the seven years which elapsed between the accident and the date of judgment. On the approach adopted by the learned trial judge a sum of $7,840 should have been awarded under this head of damage. We agree that figure is correct (assuming the amount awarded for past loss of earning capacity remains unchanged).

[9] Mr Reeves further complained that the learned trial judge gave no reasons for adopting an interest rate of 4%. It had been submitted to Angel J that a rate of 5% had been applied in previous Territory cases and that similarly

5% had been the percentage used in an expert's report dealing with superannuation which was before His Honour.

[10] The rate of interest to be applied in the present context is, of course, a matter of discretion. No evidence was led before Angel J to justify a figure of 5% – the expert's report dealing with superannuation having merely adopted the figure as an unsubstantiated assumption. Having regard to the downward trend in interest rates generally in recent years, we are not persuaded that Angel J was in error in adopting a figure of 4%, rather than the figure of 5% applied in previous cases when interest rates were considerably higher than the present level.

**Future medical and medication expenses**

[11] Within the total of $7,152.19 awarded for future medical and medication expenses, His Honour included $2,500 for the future use of Naprosyn tablets (an anti-inflamatory medication). The appellant had submitted that an appropriate figure for this item was $6,515, while the respondent had suggested $850.

[12] Mr Reeves submitted that the learned trial judge gave no indication as to how he had arrived at the figure of $2,500 after rejecting the appellant's suggested method of calculation as "rather too scientific". His Honour observed (at par [43]):

> "The adopted base figure of ten Naprosyn tablets per week is a rate of consumption the plaintiff might be expected to reduce over time.

> Notwithstanding that according to the agreed Schedule of 'Special Damages', exhibit P36, the plaintiff has been using this quantity of tablets for some five years, I do not consider there is any justification for relying on an assumption that the plaintiff will continue to use Naprosyn at the same level at present until death. I allow $2,500 under this head".

[13] Having regard to the appellant's evidence (AB p 38 and 57) that at the date of proceedings before Angel J she was taking Naprosyn "occasionally", we do not consider that His Honour erred in awarding $2,500 for future use of this medication. The appellant's evidence did not support calculations based on an assumed future use of 10 tablets per week. In the light of the appellant's evidence, the sum of $2,500 might well be considered generous.

**Past and future loss of earning capacity**

[14] Mr Reeves relied upon the extensive appeal grounds to make detailed submissions that the learned trial judge had erred in assessing the appellant's pre-accident earning capacity, her post-accident loss of earnings and her future loss of earning capacity. The appeal grounds may be summarised as complaints that the learned judge erred by:

1. Failing to give adequate reasons for his decision;

2. Failing to apply established legal principles;

3. Assessing the appellant's loss of earning capacity by reference to the number of hours she said she might be physically fit to work with a sympathetic employer;

4. Failing to take properly into account certain (specified) evidence in relation to the appellant's earning capacity;

5. Making a substantial deduction to the appellant's post-accident loss of earnings and her future earning capacity because of the fact that the appellant had three children;

6. Making (specified) findings of fact for which there was no, or insufficient, evidence;

7. Failing to make any allowance for certain (specified) matters in his assessment of the appellant's loss of earnings and loss of earning capacity; and

8. Failing to properly use and/or further discounting the dollar multiplier obtained from the 3% discount tables when calculating the appellant's future loss of earning capacity.

[15] There is a good deal of overlap in the detailed appeal grounds. It is not proposed, nor is it necessary, to address the appeal grounds in the level of particularity adopted by Mr Reeves and Mr Day in their careful and well-presented submissions. As will become apparent, many of the appellant's complaints are, in substance, an attack on the learned trial judge's findings of fact – findings which have not been challenged directly and which in our view were open to the learned judge on the available evidence.

[16] At the outset, it is also appropriate to recall the words of Lord Diplock in *Paul v Rendell* (1981) 55 ALJR 371 at 372 - 373:

> "The assessment of damages in actions for personal injuries is not a science. A judgment as to what constitutes proper compensation in money terms for pain, suffering or deprivation of amenities of life, can only be intuitive, and the assessment of future economic loss involves a double exercise in the art of prophesying not only what the future holds for the injured plaintiff but also what the future would have held for him if he had not been injured. What matters to the parties, however, to the plaintiff and to the insurer of the defendant alike, is the total sum awarded. Neither party is concerned

how the assessor of the compensation has rationalized his intuitive assessment of the total amount that the plaintiff ought to recover by apportioning it between the various components, past and future, economic and non-economic loss, and interest on each class of loss, which he has taken into consideration before arriving at his final award."

[17] His Lordship also observed at p 376:

> "A judicial guess gains nothing in reliability by being used as a factor in a mathematical formula; the answer reached by working out the formula is still nor more than a judicial guess."
>
> And later at the same page:
>
> "To undertake detailed mathematical calculations in which nearly every factor is so speculative or unreliable in order to assess the capital sum to represent what is only one of several components in a total award of compensation for personal injuries, is, in their Lordships' view, not only not worth while but, worse than this, it has a tendency to mislead. To have one's attention focussed on the detailed differences between the rival calculations, as that of counsel and their Lordships' has been in the instant appeal, makes it only too easy to forget how far removed from all reality are most of the assumptions on which the calculations are based. One is in danger of becoming unable to see the wood for the trees."

[18] Similar observations as to the difficulties of assessing damages for loss of earning capacity have been made by the High Court. In *Todorovic v Waller* (1981) 150 CLR 402 at 412, Gibbs CJ and Wilson J noted:

> "Although the aim of the court in awarding damages is to make good to the plaintiff, so far as money can do, the loss which he has suffered, it is obvious that it is impossible to assess damages for pain and suffering and loss of amenities of life by any process of arithmetical calculation. It may be less obvious, but is no less certain, that the assessment of damages for future pecuniary loss resulting from personal injuries can never be a mere matter of mathematics. It is true that as the assessment of damages has become more sophisticated, calculations are made in an attempt to

> achieve greater precision. Such calculations may sometimes give a false appearance of accuracy. Some of the figures on which they are based are the result of estimate or speculation. In the case of loss of earning capacity it is necessary to compare what the plaintiff might have earned if he had not suffered the injury with what he is likely to earn in his injured condition. In many cases this means that the court has to engage in 'a double exercise in the art of prophesying': *Paul v Rendell* (1981) 55 ALJR at p 372. Of course in some cases of serious injury it will be possible to say that the plaintiff is probably capable of earning nothing in the future. However, in no case can there be any solid basis on which to determine what the plaintiff would have earned if he had not received the injuries in respect of which he sues. Actuarial tables will show the average number of years which will be lived after a certain age by those alive at that age, but will not show that it is probable that the plaintiff, even if in good health, would have conformed to the average. No evidence can possibly indicate whether the plaintiff, had he not been injured, would have remained in good health, and continued to be employed at any particular rate of earnings. For these reasons, damages for financial loss likely to result from personal injury 'can only be an estimate, often a very rough estimate, of the present value of his prospective loss': *British Transport Commission v Gourley* [1956] AC 185 at p 212 per Lord Reid. Ultimately the process must always be one of judgment rather than calculation."

**Grounds 1 to 3**

[19] These three grounds of appeal complain that the learned trial judge:

1. failed to give adequate reasons for his decision;

2. failed to apply established legal principles; and

3. erred in assessing the appellant's loss of earning capacity by reference to the number of hours she said she might be physically fit to work with a sympathetic employer.

[20] In relation to the appellant's past and future loss of earning capacity, the approach adopted by the learned trial judge may be summarised briefly as follows. His Honour:

a) reviewed the appellant's pre-accident and post-accident employment history;

b) rejected expert accounting evidence tendered by the appellant as to her loss of earnings and earning capacity on the basis that the reports were based on assumptions without substance and had ignored the fact that the appellant gave birth to three children after the accident;

c) rejected any causal link between the birth of the appellant's children and the accident;

d) found that the appellant would have not worked in full-time and part-time employment concurrently past the date when she first became pregnant (October 1994);

e) considered the appellant's post-accident earnings for the five financial years immediately following the accident;

f) found that the appellant's earning capacity was, in broad terms, halved in terms of hours worked after the accident and that the starting point for calculating loss of past earnings should be based on the appellant's average weekly salary immediately before the accident;

g) found that despite the absence of evidence from the appellant, on the basis of a concession by the respondent, some allowance should be made for inflation with respect to past loss of earnings;

h) accepted that the possibility of the appellant's promotion and the possibility of disruption to the appellant's employment by reason of moves to follow her partner's places of work should be treated as contingencies;

i) assumed the appellant would take six months maternity leave following the birth of each of her three children;

j) found that the appellant's earnings in the financial year immediately following the accident were more reflective than

later years (ie after the birth of the three children) of the appellant's actual post-accident loss due to the accident;

k) rejected a submission that judicial notice should be taken that the 'normal' retiring age for women in Australia is 65 years;

l) recognised that psychological injury as a result of the accident had impacted on the appellant's earning capacity;

m) made allowance for the vicissitudes of life and other contingencies;

n) allowed $3,500 per annum, plus interest, for lost earnings between the date of accident and judgment;

o) assessed the appellant's loss of future earning capacity by reference to a net weekly loss in the order of $100 per week and, having regard to a discount rate of 3% and the relevant multiplier to age 60, awarded $120,000 on account of future lost earning capacity.

[21] The learned trial judge emphasised on a number of occasions that he was compelled to adopt a "broad brush" approach in view of his rejection of the appellant's expert accounting evidence.

[22] For the appellant, Mr Reeves attacked the learned trial judge's judgment in detailed submissions that sought to portray the reasons given by His Honour as inadequate. We do not agree. We agree with the submission of Mr Day that the reasons were adequate, coherent, intelligible and comprehensive. The real gravamen of Mr Reeves' complaint was not the alleged inadequacy of the reasons given by His Honour but rather findings of fact against the appellant's position and the rejection of the appellant's expert reports. Many of the points of detail advanced by Mr Reeves are the subject of

consideration in relation to appeal grounds nos. 4 to 8. In relation to appeal ground no. 1, it is sufficient at this point to indicate that we do not accept that there is any merit in the general appeal ground that the learned judge's reasons were inadequate.

[23] Similarly, we do not accept that there is any validity in the second ground of appeal, ie that the learned trial judge failed to follow established legal principles. The thrust of Mr Reeves' submissions in this respect were that His Honour had lost sight of the fact that in an action in negligence "… an injured plaintiff recovers damages for loss or impairment of earning capacity as distinct from the direct recovery of past or future lost earnings" (per Deane, Dawson, Toohey and Gauldron JJ in *Medlin v SGIC* (1995) 69 ALJR 118 at 120 referring to *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649 at 658.

[24] Mr Reeves submitted that Angel J appeared to have adopted an approach of requiring the appellant to prove precisely what she had lost in past earnings and what she would lose in the future. However, a perusal of His Honour's reasons demonstrates this not to be the case. For example, in relation to past loss of earnings, the learned trial judge rejected the appellant's submission that she was entitled to an award based on working full-time and part-time jobs concurrently. He also declined to average her post-accident annual earnings and compare these with her pre-accident earnings. In relation to loss of future earning capacity, he had regard to her post-accident earnings, particularly before the birth of the appellant's children, her own

assessment of her capacity for paid employment and the possibility of promotion. We are not persuaded that the learned trial judge erred in either applying established principles or applying something other than a strictly arithmetical approach in the absence of relevant expert accounting evidence.

[25] The issue raised by appeal ground no. 3 is addressed in considering appeal grounds 4.5 and 4.6 below.

**Ground 4**

[26] This ground alleges that Angel J failed to take into account at all, or properly, certain evidence in relation to the appellant's earning capacity.

[27] The first two matters under this heading may be dealt with together, that is:

> "4.1 The appellant's evidence about her intention to obtain employment in the public service;
>
> 4.2 The appellant's evidence about her intention to pursue a career rather than to have a family"

[28] The appellant's evidence was that she had an ambition to be a senior executive in the Northern Territory government. Mr Day, for the respondent, submitted that the learned trial judge appears to have treated the appellant's career aspirations as "little more than a pipe dream". We agree with that assessment and consider that Angel J was correct not to have given weight to this part of the appellant's evidence. The appellant had left school at age 16, having completed year 11. In the 10 years before the accident, the appellant had made no attempt to complete year 12. She had completed

minimal further education and had an unimpressive history of employment, principally as a waitress and supermarket employee.

[29] The appellant's evidence was that, before the accident, her intention was not to have children. This intention, contrary to appeal ground no. 4.2, was not because of an intention to pursue a career, but rather (AB p 30):

> "Because I just don't have faith in the world. I think it's a pretty shitty place and I just didn't have any intention of having children."

[30] It is hardly a matter of surprise that Angel J did not consider it necessary to deal with this evidence at any length in light of the appellant's decision to have three children after the accident. Mr Reeves did not go so far as to suggest that the respondent's negligence was in some way responsible for the birth of the appellant's three children. He did submit that the appellant's decision to have children was related to her inability to pursue her executive career aspirations (and accordingly should be treated as causally connected to the appellant's injuries). In the light of the appellant's evidence, we consider the learned trial judge was correct in rejecting any connection between the appellant's decision to become a mother and the accident resulting in injury to her knee.

[31] The next matter which the learned trial judge is alleged to have failed to take into account properly is:

> "4.3 Mr Harvey's evidence in relation to the quantum of the appellant's likely post-accident earnings and her prospects of promotion if she had been able to remain at the Food Barn."

[32] The appellant, immediately before the accident, was employed at the Tennant Creek Food Barn where Mr Harvey was the manager. Mr Harvey gave evidence that there was a strong possibility that the appellant could have been promoted to the position of Office Manager if she had been able to continue her employment at the Food Barn and some possibility that she might eventually raise to the position of Assistant Manager.

[33] Mr Reeves' complaint appears to be that Angel J did not treat the appellant's promotion prospects as a certainty rather than a possibility. His Honour (par [31] and par [41]) accepted that "allowance must also be made for the contingencies of promotion …". We are not persuaded that there is any error in the approach adopted by the learned trial judge.

[34] The next matter under this ground of appeal is:

> "4.4 Mrs Smylie's evidence in relation to the appellant's prospects of obtaining a second job with her if she had not been injured and the earnings she could have expected to earn from that job."

[35] Mrs Smylie operated the Memorial Club in Tennant Creek and had employed the appellant on a part-time basis for some three or four months as a general kitchen hand and waitress. The appellant had ceased working at the Memorial Club some six or seven months before the accident. Mrs Smylie's evidence was she had approached the appellant to work for her again on a part-time basis at some time after the accident, but the appellant had been unable to accept the offer.

[36] The thrust of Mr Reeves' complaint on behalf of the appellant was that the learned trial judge ignored the appellant's history of working concurrently at full-time and part-time jobs in assessing her earning capacity both before and after the accident. However, no challenge is made to the finding of the learned trial judge that the appellant had worked two jobs together for only some eight to ten months (including the period at the Memorial Club) during the course of her working life to the date of the accident, that is an average of about one month per year. His Honour also found (AB 612):

> "The plaintiff (appellant) worked two jobs at a time when she was aged 16, 18 and 25 respectively, that is at times when she had no children or family responsibilities. For the purpose of calculating past loss of earnings and loss of earning capacity, in my opinion, the plaintiff would not have worked two jobs together (if at all) past the time she became pregnant with her first son in about October 1994. Her family would certainly have precluded her from the level of work required in maintaining two jobs."

[37] We consider that such findings are consistent with the evidence before His Honour, subject only to the contingency (as Mr Day for the respondent conceded) that some allowance for loss of earning capacity would be appropriate to allow for the possibility that the appellant may have worked at two jobs concurrently between the date of the accident (17 April 1993) and the time when she became pregnant with her first child (around October 1994). On the basis of her employment history, we consider that the appellant should have been awarded something equivalent to one or two months part-time earnings as a contingency in her favour.

[38] Next the appellant complains that the learned trial judge failed properly to take into account:

> "4.5 The appellant's evidence that her employment at the Bluestone Motor Inn in 1994 was employment by a sympathetic employer which did not reflect the appellant's actual post-accident earning capacity;
>
> 4.6 The appellant's evidence that she could not continue her employment at the Tennant Creek Memorial Club in 1998 because of pain and disability despite her desperate financial straits at the time."

[39] After the accident, the appellant recommenced work (on light duties) with her former employer, the Tennant Creek Food Barn. On 28 August 1993, she commenced work as a part-time receptionist at the Bluestone Motor Inn. This continued until 23 November 1994. In the period 1995-1998, the appellant was employed (again) at the Memorial Club, initially as a part-time receptionist and later as a secretary. She also undertook some bar work at the Club.

[40] The learned trial judge found, on the basis of the appellant's own evidence, that she was capable of working 20 to 30 hours per week post-accident. Mr Day readily conceded the sympathetic nature of the appellant's employers at the Bluestone Motor Inn and the Memorial Club – but in his submission, the appellant's own evidence was that she left these two positions because of the increasing demands placed on her to work more hours than she was comfortable with and which resulted in aggravation of her left knee condition.

[41] The appellant's evidence was that she wanted the position at the Bluestone Motor Inn because it was advertised for 20 - 25 hours per week. However, (AB p 32) she "…ended up doing more hours – a lot more hours" and "… the pain was getting too much for me to cope with for the hours that I was doing, and I couldn't cope with it". She decided to leave when she learnt that she was pregnant with her first son. Similarly, in relation to the Memorial Club, the appellant gave evidence (AB p 35) that she left the position due to the "long hours".

[42] We are not persuaded that the learned trial judge was in error in finding that the appellant was capable of working 20 - 30 hours per week in appropriate employment. Support for the appellant's assessment of her capacity lay in the medical evidence. Her decision to leave the positions at the Bluestone Motor Inn and the Memorial Club because of the longer hours that she was in fact required to work is not inconsistent with the findings of His Honour.

[43] While we do not accept that there is any merit in appeal ground no. 4.5 as drafted, the appellant's evidence as to why she left her employment at the Bluestone Motor Inn in 1994 is relevant in a different context.

[44] In assessing the appellant's loss of past and future earning capacity, Angel J placed a good deal of emphasis on the appellant's actual net income for the financial year ending 30 June 1994 (the first full financial year after the accident). In relation to past loss of earnings, His Honour stated:

> "The plaintiff's accident occurred on 17 April 1993. For the balance of 1992-93 financial year, that is from the 18 April 1993 to the 30 June 1993 the plaintiff had a capacity net income of $3,931.43 and an actual net income of $796.69 incurring a net loss of $3,136.74. In the following financial year 1993-94 the plaintiff had a capacity net income of $19,777.75 and an actual net income of $16,746.05 incurring a loss of $3,031.70 that is slightly short of $60 per week. The more substantial "losses" attributed (Exh P39) to subsequent financial years was, I find due to her change in family circumstances rather than as a consequence of her accident. As I note later when discussing loss of future earning capacity, time wise the plaintiff's loss is of the order of 50%. This and the comparatively small loss during the 1993-94 financial years are, I find, more accurately reflective of the plaintiff's actual post accident loss due to the accident."

[45] The learned trial judge laid a similar emphasis on the appellant's actual net loss in income when he dealt with future loss of earning capacity (see par [41]).

[46] His Honour also found (at par [41]):

> "On the plaintiff's own evidence and consistent with the medical evidence, the plaintiff's loss of earning capacity (time wise) is something in the region of 50%."

[47] We have already referred to the finding that the appellant was capable of performing paid clerical work for some 20 to 30 hours per week.

[48] While a 50% reduction in the appellant's earning capacity may be consistent with her ability to work 20 (rather than 30 hours per week), it appears to us that His Honour may have had insufficient regard to the appellant's reasons for leaving her employment at the Bluestone Motor Inn in assessing her past and future earning capacity. The learned judge's starting points of $60 per week for past losses and $100 for future losses is consistent with an actual

loss of around $60 per week in the 1993/94 financial year, but does not appear consistent with loss of earning capacity, time wise, in the order of 50%. The starting points adopted by His Honour also do not appear to acknowledge that the appellant's reason for leaving her employment at Bluestone Motor Inn was because she ended up working "a lot more hours" than the advertised 20 – 25 hours per week. We consider that the learned trial judge has placed an undue emphasis on the appellant's actual net earnings at Bluestone Motor Inn and that her earning capacity should be assessed having regard to a figure somewhat less than her actual earnings to take account of the fact that she was working more hours than were appropriate to her medical and psychological condition.

**Ground 5**

[49] This ground alleges that the learned trial judge erred by:

> "Making a substantial deduction to the appellant's post-injury earnings and her future earning capacity because of the fact that the appellant had three children, rather than assessing the likelihood that the appellant would not have had children but for her injuries and making a deduction accordingly."

[50] In addressing appeal ground no. 4 we concluded that the learned trial judge was correct to reject any causal link between the appellant's decision to have children and the accident. Accordingly, we do not consider that there is any merit in this ground of appeal.

**Ground 6**

[51] Under this ground of appeal, it is submitted that the learned trial judge erred in making findings of fact for which there was no evidence, or insufficient evidence.

[52] The first matter complained of in this context is:

> "6.1 That the appellant would have taken six months maternity leave with the birth of each of her three children."

[53] The learned trial judge (par [39]) stated that he:

> "… would allow $3,500 per annum over the eight years since the accident … In reaching that conclusion I have taken account of the matters previously referred to including the plaintiff's 'time out' for having her children."

[54] Earlier in his reasons (par [33]) His Honour held that it was "… appropriate that the plaintiff should be deemed to have taken six months maternity leave from the Food Barn for the birth of each of her children".

[55] Mr Reeves submits that there was no evidence to support the approach of the learned judge. However, we agree with Angel J's observation that (par [30]) the "assessment of the plaintiff's past loss of earnings and future loss of earning capacity has been far from easy". The appellant had tendered various reports of expert accountants as to her loss of earnings. Angel J rejected the reports as based on assumptions "without substance" and accordingly of "little assistance" (par [30]). The appellant has not appealed against the rejection of the accountants' reports. In the circumstances, we

do not consider that it was unreasonable for the learned judge to assume that the appellant would take six months maternity leave following the birth of each of her three children. The various reports rejected by His Honour had, at different times, assumed the appellant would take 12 months maternity leave upon the birth of each child or that the birth of the children was to be ignored entirely.

[56] We consider that the reduction made by the learned judge with respect to the birth of the children was entirely appropriate. Indeed, Mr Day submitted that His Honour may have been unduly generous in allowing **eight** years at $3,500 per annum. Only seven years had elapsed between the date of the accident and the date of judgment.

[57] This discrepancy, however, may well be explicable on the basis that His Honour intended to count the balance of the financial year 1992/1993 immediately following the accident (18 April 1993 to 30 June 1993) as a full year for the purposes of awarding the appellant compensation for past losses. At par [39] of his reasons, His Honour noted that the appellant incurred a "net loss of $3,136.74" for the financial year ending 30 June 1993. We think it likely that the learned judge intended to compensate the appellant for this in addition to awarding compensation for the seven full financial years which had (almost) elapsed to the date of judgment. This would explain His Honour's decision to allow $3,500 per annum over eight years rather than seven years.

[58] The next finding of fact which was said to have been made without evidence is:

> "6.2 That the appellant's work life would have been disrupted by her moving to places of her partner's work."

[59] We do not consider that there is any merit in this ground of appeal. There was evidence that the appellant had moved in the past as a consequence of her partner's employment and that a future move was imminent as a consequence of his impending retrenchment.

[60] Similarly, we do not consider there is any substance in the complaint:

> "6.3 That it was notorious that few women work until they are 65 years of age."

[61] The learned trial judge had rejected any likelihood that, but for the accident, the appellant would have pursued her aspirations to become an executive in the public service where it was said to be "common knowledge" that the usual retiring age is 65 years. There was no evidence from the appellant as to the age at which she might have intended to retire. The appellant would have been content for the learned trial judge to adopt a retiring age of 65 upon the basis of judicial notice. In the circumstances, His Honour was required to form a view on the basis of the material before him as to when the appellant would have retired but for the accident. We consider that it was not inappropriate or unreasonable for him to conclude that the appellant would have retired at some age less than 65 years old.

[62] The final matter under appeal ground no. 6 is:

> "6.4 That the appellant's psychological inability to fully exercise her earning capacity was limited to the past."

[63] Mr Reeves submitted – and Mr Day agreed – that the medical evidence as to the psychological damage caused to the appellant as a result of the accident was not limited to the past. Mr Reeves submitted that such psychological damage would impact upon the appellant's future earning capacity.

[64] At par [41] of his judgment, Angel J observed:

> "Some allowance must be made for her **past** psychological inability fully to exercise her earning capacity." (Emphasis added).

[65] This observation appears in that part of His Honour's judgment dealing with the appellant's **future** loss of earning capacity. Immediately before Angel J referred to the appellant's **past** psychological injury, he had found the appellant's "actual" loss of income in the 1993-94 financial year was $3,031.70 (or just under $60 per week). His Honour continued:

> "The loss in subsequent years was greater but attributable to family concerns rather than actual physical inability to do paid clerical work from some 20 to 30 hours per week."

[66] This was the context in which His Honour referred to making some allowance for the appellant's "past psychological injury". We do not understand His Honour as intending to find that the appellant's psychological inability to fully exercise her earning capacity was limited to the past. On the contrary, we consider that His Honour was seeking to

explain, in part, why the appellant's past (and continuing) psychological condition was a reason to assess the appellant's future loss of earning capacity in excess of $60 per week (ie the approximate net loss in income suffered by the appellant in the financial year immediately following the accident. We do not consider that there is any merit in this ground of appeal.

**Ground 7**

[67] This ground of appeal asserts that the learned trial judge failed to make any allowance for certain specified matters in his assessment of the appellant's loss of earnings and loss of earning capacity. The first such matter is:

> "7.1 Employer funded superannuation contributions."

[68] The only reference to superannuation in His Honour's reasons is (par [30]) made in connection with the tender of various expert's reports by the appellant concerning loss of earnings and superannuation. We have noted earlier in these reasons that Angel J rejected the appellant's reports. He found that the reports were based on assumptions without substance. In arriving at the award of $120,000 for future loss of earning capacity, His Honour (at par [40] and par [41]) refers to the various factors which have led him to arrive at this figure. In broad terms, he assessed the appellant's future net loss of earning capacity at approximately $100 per week and adjusted this figure upwards to allow for favourable contingencies to arrive at a capital sum of $120,000. No reference is made to superannuation

contributions and it is not clear whether His Honour intended to make some allowance for this in what he termed the "broad brush" approach he felt that he was forced to adopt after rejecting the reports of the appellant's experts.

[69] We consider, having regard to the reasons expressed by His Honour for arriving at the figure of $120,000, that no allowance was made for future loss of superannuation contributions. We return to this issue later in these reasons.

[70] The next matter under this ground of appeal is:

> "7.2 The lower taxation scales introduced on 1 July 2000."

[71] Mr Day for the respondent concedes that the learned trial judge made no express reference to the lower income tax rates applied from 1 July 2000 (consequent upon the introduction of the GST). Mr Day accepts that, having regard to the material before His Honour, the new tax rates should have been taken into account.

[72] The next matter under appeal ground no. 7 (the effects of inflation on the wages the appellant was likely to receive) was not pressed by the appellant.

[73] The appellant also complained that the learned trial judge had failed to make any allowance for:

> "7.4 The appellant's psychological inability to fully exercise her earning capacity."

[74] We have noted previously in dealing with appeal ground no. 6.4 that we do not accept that the learned trial judge ignored the appellant's continuing psychological condition in assessing her future earning capacity.

[75] The final sub-ground of appeal no. 7 is that His Honour made no allowance for:

> "7.5 The likely development of osteoarthritic changes in the appellant's left knee joint."

[76] We consider that the reference to "*likely* development of osteoarthritis changes" suggests a probability. The evidence of Dr Bruce Caldwell, a specialist orthopaedic surgeon called on behalf of the appellant, was (at AB 107):

> "I don't think her chances of developing osteoarthritis requiring significant intervention are high, so I'd say perhaps 30% chance that she'll develop enough arthritis to require intervention within about 10 to 15 years".

[77] We consider that the possibility of the appellant's left knee deteriorating over time, set against the evidence of the possibility of improvement, was such that His Honour was not required to make specific allowance for this matter.

**Ground 8**

[78] This ground of appeal contends that the learned trial judge erred in:

> "Failing to properly use and/or further discounting the dollar multiplier obtained from the 3% discount tables when calculating the plaintiff's future loss of earning capacity".

[79] The learned trial judge assessed the appellant's net weekly loss in the order of $100 per week. His Honour noted that for a discount rate of 3% the relevant multiplier to age 60 would be $946 for a woman of the appellant's age. His Honour also observed (par [41]):

> "That multiplier should be discounted however because of the unlikelihood of the plaintiff working to 60 years of age let alone 65."

[80] On this approach, His Honour would have arrived at a figure of something less than $94,600 for the appellant's future loss of earning capacity. In fact, he awarded $120,000 after applying a "broad brush" approach in the appellant's favour. The respondent filed a cross appeal on the basis that the award of $120,000 was manifestly excessive in the light of His Honour's finding that the appellant's loss of earning capacity was to be assessed by reference to a net weekly loss in the order of $100. The respondent has not pressed the cross appeal. We do not consider that the appellant has any case for complaint by reason of the approach adopted by His Honour – a strict application of the 3% discount rate and the relevant multiplier would be to the appellant's considerable disadvantage.

**Ground 10**

[81] In awarding costs in favour of the appellant, the learned trial judge refused an application that he certify the matter as one appropriate for senior counsel. His Honour observed that in his view the matter could have been "adequately dealt with by a senior junior" (AB p 630).

[82] Appeal ground no. 10 complains that the learned trial judge erred:

> "In observing that this was not a case requiring senior counsel".

[83] The Supreme Court Rules make no express provisions for certification that a matter is appropriate for senior counsel. Order 63.72 of the Rules provides:

> "(9) No fee shall be allowed –
>
> (a) …
>
> (b) for more than one counsel, unless the court certifies that the retainer of more than one counsel was warranted."

[84] Mr Reeves submitted that His Honour's order for costs should be set aside and that costs in favour of the plaintiff should be awarded with a certification that two counsel (one senior counsel and one junior counsel) was warranted in the circumstances. In Mr Reeves' submission the case was complex, particularly in relation to the issue of quantum and the case was one that warranted the engagement of senior counsel.

[85] Mr Day submitted that any complexity in the case arose only from the appellant's accounting and actuarial evidence which was rejected by the learned trial judge.

[86] The question of whether to certify the case as one warranting more than one counsel was, of course, a matter of judicial discretion. We consider that His Honour was in the best position to exercise that discretion. We are not persuaded that there is any sufficient basis for this Court to intervene.

However, we would agree with the submission of Mr Reeves that an application for certification pursuant to Order 63.72 is confined to the question of whether more than one counsel is warranted in the circumstances of the case. The learned trial judge made it clear that he did not consider two counsel were warranted in the present case. The question of whether costs for a single counsel should be awarded at senior counsel rates or junior counsel rates is a matter for the taxing master.

**Conclusions**

[87] In considering appeal ground no. 4, we concluded that the learned trial judge placed an undue emphasis on the appellant's actual net earnings at Bluestone Motor Inn in assessing both the appellant's past and future loss of earning capacity. We have also concluded that allowance should have been made for the possibility of the appellant working full-time and part-time jobs concurrently for one or two months prior to the birth of her first child. Further, we have concluded that in assessing future loss of earning capacity, the learned trial judge did not take into account the lower income tax rates introduced in conjunction with the GST and did not make an award with respect to the appellant's future loss of superannuation

[88] In the event of the appellant succeeding in the appeal, Mr Reeves urged the Court to make its own assessment of damages rather than remit the matter to the learned trial judge. We agree that is an appropriate course in the light of the time which has elapsed since the appellant's accident.

[89] Justice Angel was obliged to adopt a broad brush approach to assessment of damages in view of his rejection of the appellant's accounting evidence. The learned trial judge's approach was the subject of a good deal of criticism by the appellant, but the reality is that His Honour had little choice in the absence of practical assistance from the appellant's reports from accountants.

[90] It is apparent from these reasons that, in the circumstances, we agree that His Honour's approach was essentially correct, subject to the matters to which we have referred. There is nothing to be gained by providing detailed breakdown of the sums we propose to substitute for the appellant's past and future loss of earning capacity. As we have noted at par [16] above, in Lord Diplock's words: "What matters to the parties … is the total sum awarded".

[91] Having regard to the learned trial judge's over-estimate of the appellant's actual net earnings in the period following the accident, the failure to make allowance for the possibility of the appellant working two jobs concurrently for a short period and taking into account provision for lost superannuation and the new tax rates, we consider that the damages awarded for past and future loss of earning capacity should be increased by some fifty per cent, resulting in an award of $42,000 for past loss of earnings and $180,000 for future loss of earning capacity. We would allow interest on the past loss of earnings for 8 years at 4% ($13,440).

**Orders**

[92] The appeal is allowed to the extent that the judgment and orders made by the learned trial judge with respect to past loss of earnings, interest thereon and future loss of earning capacity are set aside. In lieu thereof damages are awarded to the appellant as follows:

| | |
|---|---|
| Past loss of earnings | $ 42,000 |
| Interest thereon | $ 13,440 |
| Future loss of earning capacity | $180,000 |

[93] In consequence of the above order, the total judgment for the appellant awarded by His Honour in the sum of $229,464.89 is set aside and in lieu thereof there will be judgment for the appellant in the sum of $315,664.89.

[94] The respondent is to pay the costs of the appeal. The appeal is certified as warranting two counsel pursuant to Order 63.72 of the Supreme Court Rules.

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