Gaffy v Tennant Creek Town Council [2000] NTSC 45

PARTIES:	GAFFY, LISA MICHELLE
	v
	TENNANT CREEK TOWN COUNCIL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	ALICE SPRINGS No. 26 of 1996 (9608483)
DELIVERED:	21 June 2000
HEARING DATES:	8 - 12 March 1999 & 23 February 2000
JUDGMENT OF:	ANGEL J

REPRESENTATION:

Counsel:

Plaintiff:	Mr J Reeves QC & Ms S Gearin
Defendant:	Mr P Day

Solicitors:

Plaintiff:	Povey Stirk
Defendant:	Bowden Turner & Deane

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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Gaffy v Tennant Creek Town Council [2000] NTSC 45
No. 26 of 1996 (9608483)

BETWEEN:

LISA MICHELLE GAFFY
Plaintiff

AND:

TENNANT CREEK TOWN COUNCIL
Defendant

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 21 June 2000)

Preliminary

[1] This is an action for damages for personal injuries suffered as a consequence, inter alia, of the alleged negligence of the defendant.

[2] On 7 April 1993 the plaintiff entered into an agreement with the defendant as owner to rent the property known as "The Pool House" at Peko Road, Tennant Creek at a weekly rental of $130 for a period of 12 months. On 17 April 1993 the plaintiff, having showered in the bathroom of the property, stepped from the shower and slipped and fell on the slippery floor. The floor in the bathroom was slippery because of water sprayed by the

defective shower fitting. As a consequence the plaintiff sustained a severe left knee injury.

[3] The defendant initially denied liability but after it became apparent that between 8 April 1993 and 17 April 1993 the plaintiff had advised the defendant that the shower fitting was defective and in need of repair and constituted a danger to the plaintiff as the tenant of the property, and, further, had fruitlessly requested the defendant to fix it, liability was admitted.

[4] There now remains for consideration the defendant's allegations of contributory negligence and the assessment of damages.

[5] The initial hearing finished last year. A six month period of my long leave intervened. In February this year, as a consequence of announced changes in new income tax rates, and by consent of the parties, I heard further evidence in relation to damages. The hearing finally concluded on 23 February 2000.

The Plaintiff's Accident

[6] The shower fitting in the premises let by the defendant to the plaintiff was defective. When the shower was turned on water sprayed over the top of the shower curtain on to the floor of the bathroom. Prior to the accident the

plaintiff had advised the defendant of this defect and requested that it be repaired on at least two separate occasions. The defendant did nothing.

[7] On 17 April 1993 the plaintiff was sharing the house with her partner Beau Marks with whom she had been living as husband and wife since 1991. He had a shower before the plaintiff and the bathroom floor was wet as a consequence. Before commencing her shower the plaintiff placed a fresh towel on the floor both to mop up water and for something to step on to when stepping out of the shower. Having completed her shower, she stepped on to the mat and slipped, falling violently against the bathroom wall. As a consequence of the fall she sliced her left knee on the skirting board suffering personal injury.

Contributory Negligence

[8] The defendant pleaded five allegations of contributory negligence. It said that the plaintiff:

1. Failed to keep a proper lookout at the floor which the plaintiff new or ought to have known was slippery when wet.

2. Failed to place a rubberized or other non-slippery mat or similar cover on to the floor before using the bathroom for a shower.

3. Failed to take a firm grip with her hands on some secure surface prior to stepping out of the shower on to the slippery floor.

4. Failed to advise the defendant that the shower fitting was in need of repair, and

5. Failed to effect the plaintiff's own repairs to the shower fitting following the alleged failure of the defendant to respond to her complaints (which failure to respond the defendant denied).

During the course of the trial (t 268) the defendant abandoned the first and fourth allegations.

The plaintiff gave evidence (which I accept) that she did not use a rubberized or other non-slip mat because she did not think of it at the time. I find this quite understandable. It was common ground that the plaintiff did put to one side a wet towel that had been used by Beau Marks as a mat and replaced it with a fresh dry towel prior to entering the shower. I do not think it can be said that there was a failure on the plaintiff's part to take care for her own safety in not acquiring and using a non-slip mat.

[9] In respect of the third ground of the alleged contributory negligence the plaintiff gave evidence (t 140) that the reason she did not exit the shower area on the hand basin side of the bathroom where she might have supported herself with her hands was that there was an accumulation of water there on the floor and a towel that was there was wet. In my opinion the plaintiff can not be criticized for leaving the shower on the less wet side of the bathroom albeit in an area where she did not have something to grip with her hands.

There was no contributory negligence in the plaintiff choosing to use the side of the shower she did to leave the shower.

[10] The remaining allegation of contributory negligence is that the plaintiff failed to effect her own repairs. There is nothing in this allegation. The plaintiff had been told she would need the defendant's authorization to do work on the premises herself. The fact of the matter is it was the responsibility of the defendant to repair the premises. The defendant had been put on notice by the plaintiff as to the need for repairs by her two complaints made on 12 and 14 April 1993 and the plaintiff in any event did not have the money to affect the repairs at the time.

[11] The defendant has failed to show that the plaintiff failed to take reasonable care for her own personal safety. The allegations of contributory negligence are not made out.

General Damages – Pain, Suffering and Loss of Amenities

[12] I come to an award of damages for pain, suffering and loss of amenities.

Pain & Suffering

With respect to pain and suffering, I take into account the following.

As a result of the accident, the plaintiff sustained a 20cm laceration to the left knee, including the medial retinacula tissue. Her joint capsule was opened medially, and her patella tendon was partially torn. The next day, the plaintiff had to undergo an operation under general anaesthetic to clean the wound and repair the knee. Following the operation, the plaintiff's leg had to be set in plaster from her toes to the top of her leg for about 6 weeks. She had to use crutches to move around during that time. As a result of having her leg immobile in plaster for so long, the plaintiff's quadriceps wasted away to some extent. Once her leg was taken out of plaster, the plaintiff had to undergo 3 months of physiotherapy. The plaintiff suffered from pain and swelling in her leg. These problems became particularly acute following the plaintiff's return to work at the Food Barn in Tennant Creek. The plaintiff had to undergo an arthroscopy operation in which a chondroplasty procedure was performed. The plaintiff was in a great deal of pain for three to four weeks following the accident, and had to use Panadeine Forte constantly. The plaintiff especially suffered knee pain during her three pregnancies from about the fourth month onwards.

The Plaintiff suffers residual problems:

She continues to experience pain, albeit no longer constant, in her left leg. This pain is associated particularly with changes in the weather and the

carrying out of certain activities. The plaintiff's knee feels weak on occasion and 'gives way'. The plaintiff suffers from occasional but not significant swelling of the knee. The plaintiff's quadriceps remain mildly wasted. The plaintiff suffers from stiffness in the knee joint. The plaintiff suffers discomfort with prolonged sitting or prolonged standing.

The plaintiff has gained weight since the accident. Her evidence (t 51) was that she had gained somewhere in the vicinity of 10 kilos, and that her dress size had changed from a size 8/9 to a size 14. Her evidence was also that the reason she thought she had gained the weight was that she had a slow metabolism, and that to keep fit and skinny she had to do lots of exercise – which she was unable to do after the accident. She stated that she felt 'horrible' about her weight gain because she had always maintained a pretty slender build and looked after her body, but could not do that any more. I accept this evidence as genuine and truthful.

[13] The plaintiff has a 20cm circular scar convex laterally extending from the midline above the knee to the midline below the knee.

[14] Psychological: According to Dr Ian Jackson's first report, dated 13 July 1998, the plaintiff is suffering from moderately severe 'Reactive Depression', which was directly caused by the accident. The plaintiff's deteriorated mental condition was evidenced by an incident at the Tennant Creek Hotel where she quite uncharacteristically became very drunk, danced

around, dropped glasses, was abusive to others, head-butted her mother, who had to be called, and clashed with security guards and police. As a result she was eventually arrested and charged. Further evidence of her condition was demonstrated from testimony of the plaintiff's partner, Mr Marks, who said amongst other things (t 159-160) that the plaintiff is not as positive about the future as she was before the accident, that she gets depressed, that her sense of humour had 'gone down a couple of notches', that her temperament was not as high as it used to be, and that she was now moody and negative. I accept this evidence. There is also evidence of the plaintiff's condition in Dr Jackson's second report, dated 18 December 1998, where at p 4 he refers to the plaintiff's alcohol abuse as a means of coping with her pain and interpersonal problems, which are in turn a direct consequence of her original injury. I accept Dr Ian Jackson's report of 13 July 1998, at p 5:

> "Her current psychiatric condition, along with her physical symptoms and disabilities, is a significant contributor to, and has a significant impact on, her lifestyle and relationships with others."

Loss of Amenities

With respect to loss of amenities, I find:

(i) The plaintiff is unable to run.

(ii) The plaintiff has difficulty kneeling, crouching, or squatting down.

(iii) The plaintiff can walk without impediment if she does so slowly. However, her knee becomes sore if she walks for any distance.

(iv) The plaintiff has difficulty with prolonged sitting or standing.

(v) The plaintiff has been precluded by her knee problem from participating in the sporting activities she enjoyed prior to the accident, such as basketball, netball, squash, water-skiing, aerobics, and tennis etc.

(vi) The plaintiff's capacity to work is significantly impaired.

(vii) The knee injury has introduced some degree of difficulty for the plaintiff in carrying out housework and household activities. One area where she encounters specific difficulties is activities involving the mothering of her children, eg bathing the children, and running after them.

(viii) The plaintiff experiences difficulty negotiating steps and stairs, uneven ground, and sloping surfaces.

(ix) The pain in her leg at times interferes with her sleep.

(x) The plaintiff has difficulty walking on her toes or wearing high-heel shoes.

(xi) The plaintiff has difficulty flexing her knee past 90° under load, eg when operating the clutch of her car.

(xii) The plaintiff has difficulty with heavy lifting.

[15] So far as percentage figures of the loss of function of the plaintiff's left leg go, the medical experts who did give a percentage figure expressed themselves differently.

Dr Caldwell said that the plaintiff suffered a 20% 'impairment in the function of the left knee'.

Dr Schmidt said that the plaintiff suffered a 10% 'impairment of the lower extremity function as a whole'.

Dr Robin Jackson said that the damage the plaintiff suffered could be expressed as either a 15 % 'loss of function of lower limb' or a 6 % 'total impairment'

[16] Whilst the plaintiff's knee injury is a very significant one, and not something that ought to be trivialised - I must say I agree with the

submission of counsel for the defendant, Mr Day, who in his submission (t 282) said:

> "With regard to the plaintiff's injuries, Your Honour, she gave evidence that they consist of an inability to run, to squat and to kneel and there's no doubt that's all consistent with the nature of the injury that she's suffered. Furthermore, I don't think that there's any doubt that the plaintiff cannot return to any of her pre-accident sporting activities. Obviously, the plaintiff suffered a very significant soft tissue injury. There is some scarring on the plaintiff's left knee …
>
> However, … [i]n my submission, Your Honour, neither the medical evidence nor the plaintiff's own evidence paints a picture of profound disability. The plaintiff has intermittent pain and certainly it interferes to a significant extent with her life. We acknowledge that. But her knee has not been destroyed … by this accident.".

[17] What Mr Day said, I think, is true. The plaintiff has suffered a serious knee injury. However, what should not be lost sight of here is that she still has a working knee. The evidence before me suggests that it is a sometimes-painful knee. It is a sometimes-'swelled up' knee. It is a sometimes-'weak feeling' knee. It is a sometimes-'uncomfortable feeling' knee. It is a knee that makes going about many of her everyday activities, difficult for the plaintiff. It is a knee that even rules the plaintiff out of engaging in certain activities. However, it is still a moving, working knee. The plaintiff can still walk. She can still swim. She can still drive a manual car. There are many things she *can* do.

Possibility of Improvement in Condition of Plaintiff's Knee

[18] There was disagreement among the medical experts as to the plaintiff's prospects of recovering from her present disabilities. Mr Day, via reference to the medical reports and through his examination and cross-examination of the medical experts – made the point that many of the plaintiff's symptoms stem from weakness of the plaintiff's wasted quadriceps. He submitted that the reason the plaintiff's left quadriceps muscle is still so weak, is that the plaintiff did not engage in enough rehabilitative exercise, or engage in it for a long enough periods, after the removal of the plaster cast. Whilst it is best to engage in rehabilitation as soon as possible after an injury occurs, as Dr Robin Jackson stated (t 242):

> "It is never too late."

[19] Dr Jackson said in cross-examination (t 245) that while further rehabilitative exercise at this stage would not cure the plaintiff of her present disability, the maintenance of good muscle control that it would promote would serve to keep the symptoms to a minimum. Dr Cornish said at p 6 of his report and in evidence (t 254-255), that efficient quadriceps function, which can be achieved through certain rehabilitative exercises, would largely offset the plaintiff's symptoms - particularly the 'giving way' and possibly the 'catching'. Dr Caldwell said (t 154) that through certain quadriceps exercises, the sense of instability in the leg of the plaintiff, as well as the function of the knee, could be improved.

[20] On the basis of this medical evidence, the possibility of some further improvement in the plaintiff's condition, if she applies herself to her exercises, should be taken into account as a contingency. I do accept this as a contingency. However, I do not accept it as a contingency of great weight. It is far from clear that the plaintiff will in fact apply herself to her exercises or that if she does that her condition will improve. For the type of rehabilitative exercise involved here, a lot of hard work is involved – and not only that, it is very painful work. The plaintiff gave evidence (t 123-124), which I accept, that she neglected her exercise regime in the past because it was too painful for her to continue.

She gave up these exercises altogether when she became pregnant with her first son.

[21] Whilst the medical experts agree that the plaintiff's symptoms would likely improve to some extent if she were to engage in the quadriceps exercises, they do not go so far as to say that the plaintiff would be cured or that her symptoms would disappear altogether. There is no evidence before me as to what extent the plaintiff's condition would likely improve assuming the exercises were a success - that is, to what extent specific symptoms would improve.

[22] There is the further consideration that the constitution of the plaintiff's quadriceps muscle is such that it just can not rehabilitate from this sort of injury, no matter how much effort is put in. Although he did not suggest

that he had any evidence that the plaintiff was such a person, Dr Caldwell (t 153-154) gave evidence (which I accept) that:

> " [I]t's not always possible to rehabilitate the knee as much as one would like, it is by – in valiant attempts by the patient. You find in major injury sometimes, particularly if you've had a tourniquet on the knee for the surgery, and you've got significant pain, and sometimes you just can't build your quads up again well enough. I've got many highly noted athletes, tri-athletes and people who have got excellent quadriceps function on one side and try very hard and just cannot rebuild their muscles to a satisfactory level following a significant knee injury.".

[23] Thus, in the light of all the evidence, this contingency consists of the possibility that if the plaintiff adequately engages in her exercise regime, that certain symptoms of the plaintiff *may or may not* improve to an extent that is indeterminable. As I have said, I do not take this contingency to be one of overwhelmingly great weight.

Psychological Problems

[24] I accept the evidence tended by counsel for the plaintiff through Dr Ian Jackson, that the plaintiff is suffering from a psychological condition, or 'mental injury' as he called it. It constituted a moderately severe 'Reactive Depression'. In cross-examination Dr Jackson rejected many of the matters put to him by Mr Day. However, many of the matters put in cross-examination with respect to the plaintiff's psychological condition made a lot of sense. Thus, I accept the following factors as contingencies:

(i) The plaintiff's psychological condition is almost certain to improve if she can find work that she can cope with, even part-time work.

(ii) Financial concerns stemming from this litigation have played a significant part in bringing on and feeding the plaintiff's condition. As such, the plaintiff's psychological condition is likely to improve once she has been duly compensated and these financial worries have ceased to exist.

(iii) Being involved in this litigation has inevitably caused the plaintiff to focus on her injuries, disabilities, and losses. Once the litigation comes to an end, the plaintiff's outlook will probably improve.

(iv) If the plaintiff undergoes successful surgery on her knee, her psychological condition is almost certain to improve. On this point, I note the plaintiff's comments in cross-examination (t 137):

> "With the compensation you receive in relation to this matter, would you be able to retrain and improve your skills and thereby have a look at that option of entering the Public Service? --- Yes. First I'd have to find out what exactly my leg – if I have a knee reconstruction, it really is a matter of what happens after I find out with my knee what I've got to do. Which I don't intend on doing until September, when Beau's finished work, because I know I'll be out of work for a couple of months – or be out – not looking after the kids.".

There is the further evidence of the plaintiff (t 61):

> "Now, have you received some advice from the doctors you've seen, particularly Doctor Caldwell, about the future treatment on your knee? --- Yes. He told me that there's a possibility that I could have a total knee reconstruction, but he'd like to look into it a bit further. But he said that it could turn out worse. That, if I have it, he said you'd have to weigh it up. He said it could be good and it could be bad. I could just be better off putting up with the problems that I have now.
>
> Have you made any decision about what you might do about it? --- For sure. I was always going to, but I got pregnant again and again and again. But now I know that I can't any more and what we're waiting for is when we could get some time off, because I'll probably be out of action for about 2 months at least. So we had to wait until a time that we could afford for Beau to take time off. We were planning that September when he gets retrenched, that we'll probably have to do it then.
>
> Do what? --- Get my knee operated on. See what I can do to make my knee better for me.".

Dr Jackson gave evidence that assuming surgery is not the answer, the plaintiff being reassured by someone she saw as an expert that surgery was not the answer because it would be of no benefit to her – would have an antidepressant effect because it would remove an unfounded and unfulfilled expectation. Additionally, Dr Jackson said (t 171-172 and 173-175) the plaintiff's psychological condition would likely benefit from general encouragement and education based on medical knowledge, by the plaintiff's general practitioner allied with an orthopaedic surgeon. The possibility that the plaintiff's psychological condition may benefit from the

type of education and reassurance prescribed here, is something I also take into account as a small contingency.

Weight Gain

[25] As I have said, I accept that the plaintiff has gained weight as a result of the accident, in that she gained weight because the state of her leg was such that she could not move around as much or exercise. There is the consideration, however, that the plaintiff would likely have gained weight, anyway, as she advanced in years, and especially after having three children.

Award for Pain, Suffering and Loss of Amenities

[26] Having taken into account the matters outlined above, for pain, suffering and loss of amenities I make an award of $60,000. I break that up into $30,000 for past pain, suffering and loss of amenities; and $30,000 for future pain, suffering and loss of amenities.

[27] Counsel for the parties agreed that the interest on pre-trial non-economic loss, in accordance with the settled practice in this Court as set out in *Rosecrance v Rosecrance* (1995) 129 FLR 310 at 328, should be 4% per annum. I allow interest on past pain, suffering and loss of amenities in the sum of $8,500.

Past Loss of Earnings

[28] The plaintiff was born in Carlton, Victoria, on 2 January 1967. At the time of her accident she lived with her partner Beau Marks who worked in the mine at Tennant Creek. The plaintiff left school at the age of 16 in 1983, having been educated at Nathalia Primary School and Nathalia Secondary School to Year 11 near Shepparton in Victoria. It is unnecessary to set out a full history of her pre-accident employment. From 1984 to 1986 she had been employed as a checkout operator at Echuca working some 38 to 40 hours per week. In addition she did some part time evening waitressing at a Chinese restaurant at Echuca. Thereafter she had a variety of jobs. In 1991 for a few months she was employed at the Dolly Pot Restaurant in Tennant Creek as a waitress. She also did some work at the Tennant Creek Hospital as an Administrative Assistant. Late in that year she went with Mr Marks to Streaky Bay in South Australia looking for work and did six weeks bar maid work in Perth. From 1 July 1992, having returned to Tennant Creek, she was employed at the Tennant Creek Food Barn and from April 1992 did waitressing work at Memories Bistro at the Memorial Club on a permanent/part time basis.

[29] Her first post-accident employment was for a couple of months from May 1993 at the Food Barn on light duties. She ceased employment there on 29 July 1993. From August 1993 to November 1994 she worked as a receptionist at Bluestone Motor Inn working from 7.00 am to 1.00 pm. In 1995 and 1996 she worked part time as a receptionist at the Memorial Club.

In the financial year 1996-97 she continued with work. In 1998 for a period she was employed as a secretary working a 36 hour week at the Memorial Club.

[30] The assessment of the plaintiff's past loss of earnings and future loss of earning capacity has been far from easy. The plaintiff tendered various reports of loss of earnings and superannuation – see Exhibits P 8, P 33 and P39. The accountants who prepared those reports were requested to make a number of assumptions. I have reached the conclusion that those assumptions are without substance and that as a consequence the reports are of little assistance.

[31] It was assumed, for example, that the plaintiff would be promoted in her employment. I agree with counsel for the defendant's submission that at its highest, promotion is a favourable contingency to be taken into account by way of adjustment of the discount rate: see *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485, and that it is not a fact proven in the evidence. Exhibits P8 and P33 adopt the plaintiff's income for the financial year ending 30 June 1998 ($3,065) as the measure of the plaintiff's residual earning capacity. The figure of $3,065 represents the lowest point of the plaintiff's post-accident earnings. The accountants who prepared the report assumed that the plaintiff's residual earning capacity was the average of the wages earned by her over the past five financial years. This assumption is not only inconsistent with the figure of $3,065 but inconsistent with the evidence of the plaintiff (which I accept) that post

accident she was able to work 20 to 25 hours per week in a clerical position. The plaintiff said in Answers to Interrogatories sworn in January 1999 that she was fit for 20 to 30 hours clerical work provided she could move around as required.

[32] The accountant's reports relied on by counsel for the plaintiff also failed to take account of the fact that the plaintiff had three children after the accident. Her first child, Jack, was born on 19 March 1995, her second child, Max, was born on 22 September 1996 and her third child, Liam, was born on 10 October 1997. These events necessarily affected her ability to exploit her residual earning capacity.

[33] The plaintiff gave evidence(t 48, t 109) that she had no plans to have children prior to the accident. When the plaintiff's accountant, Mr Nourse wrote up his original report it was assumed that at the time of the plaintiff's accident the plaintiff was working both at the Food Barn and the Memorial Club. Mr Nourse was asked to assume that the plaintiff would take maternity leave from the Food Barn for each of her three children but would have continued employment with the Memorial Club. It later transpired that the plaintiff had in fact finished working at the Memorial Club some six or seven months before the accident. In subsequent reworked calculations Mr Nourse was asked to assume that the plaintiff did not have any children post-injury, and that no maternity leave was taken, but these false assumptions, it seems to me, render the calculations useless. I reject counsel for the plaintiff's submissions that an assessment of damages should

be made on the basis that as the plaintiff did not intend to have children her having the three children should be ignored. The fact of the matter is that she has three children and damages should be assessed on that footing. As Lord Macnaghten said of an arbitrator's duty to determine compensation payable under a statute in *The Bwllfa and Merthyr Dare Steam Collieries (1891), Limited v The Pontypridd Waterworks Company* [1903] AC 426 at 431:

> "Why should he listen to conjecture on a matter that has become an accomplished fact? Why should he guess when he can calculate? With the light before him why should he shut his eyes and grope in the dark?".

I reject counsel for the plaintiff's submissions that the birth of the plaintiff's three children should be ignored for the purposes of calculating loss of earnings. For the purposes of calculating past loss of earnings I consider it is 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. I accept that the plaintiff, if physically able, may well have placed her children in child care and returned to work.

[34] The plaintiff gave evidence that on occasions she worked two jobs together. This evidence was sought to be elevated by counsel for the plaintiff into an assessment of damages based on her holding down two jobs. I think, upon analysis of the evidence, this is far fetched and would be a wrong basis to

assess damages. For a period at Echuca in Victoria the plaintiff worked as a checkout operator whilst maintaining a second job as a waitress at a Chinese restaurant. There was no evidence how long the plaintiff worked the second job. For another period at Echuca she worked in merchandising at Coles whilst working a second job for five to six months at an antique shop at Echuca Port on the Murray River wharf. There was no evidence as to how many hours per week she worked her second job.

[35] The third occasion the plaintiff worked two jobs (t 25), she worked as a waitress at Memories Bistro at the Memorial Club in Tennant Creek whilst working at the Food Barn. The period she worked the two jobs is not clear but appears to be some three to four months. In all it would appear the plaintiff worked two jobs together for some eight to ten months during the course of her working life to the date of the accident, that is an average of about one month per year. On the basis that the plaintiff worked two jobs for four months for the financial year prior to the accident, Mr Nourse was asked by counsel for the plaintiff to assume for the purpose of his calculations of the plaintiff's loss of earnings that the plaintiff would have worked two jobs for four months of each year for the entirety of her working life. Given her work history there is no foundation for that assumption. The plaintiff 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 purposes 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.

[36] The plaintiff's post-accident earnings were as follows:

(i)	for the financial year ending			30 June 1994	net earnings		$18,439
(ii)	"	"	"	30 June 1995	"	"	$8,543
(iii)	"	"	"	30 June 1996	"	"	$4,699
(iv)	"	"	"	30 June 1997	"	"	$9,630
(v)	"	"	"	30 June 1998	"	"	$3,065.

It is significant that in the first full post-accident financial year the plaintiff earned $18,439 notwithstanding her injuries. The plaintiff's residual earning capacity is thus far in excess of the figure relied on in the plaintiff's accountant's calculations. I have already referred to the plaintiff's evidence that she was capable of working 20 to 30 hours per week post-accident. It seems to me therefore, doing the best I can faced with the misleading evidence and assumptions led by the plaintiff, that the plaintiff's earning capacity, in terms of hours worked, was, in broad terms, halved after the accident. Subject to contingencies, I am of the view that the calculations should be based on the plaintiff's average weekly salary whilst employed at the Food Barn prior to the accident.

[37] There were submissions before me as to the use of the Consumer Price Index. Counsel for the defendant argued that the plaintiff's accountants should not have inflated the plaintiff's wages during the period following the end of the 1993 financial year by reference to the CPI. Counsel argued that if increases in wages between 1993 and 1998 were to be established they should have been established through evidence of wage rates at the Food Barn over the period. Mr Nourse in cross-examination (t 189) agreed that wage rates may or may not keep pace with the CPI. He also agreed that the only way of knowing what rates would have been paid to the plaintiff for the financial years 1994 through to 1998 would have been to have gone to the plaintiff's employer and ascertained how wages had been effected over the period. No evidence was led during the course of the trial as to how wage rates had changed at the Food Barn since the time of the plaintiff's accident. Thus I am left to calculate past loss of earnings from the wages the plaintiff earned in the 1993 financial year. Counsel for the defendant conceded that some inflation of the figures would be reasonable to take account of the passage of time. In the unsatisfactory state of the evidence I shall necessarily have to take a broad approach. I will, in accordance with the concession of counsel for the defendant, make some allowance for inflation.

[38] I have already referred to the fact that any question of the plaintiff's promotion should be treated as a contingency. A significant contingency that must be taken into account is disruption of the plaintiff's work life on

account of moves to places of Mr Marks' work. He, of necessity, moves in the course of his work and the plaintiff would follow with the family. The plaintiff is motivated and hard working but her earning capacity is limited.

[39] 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. So far as her post accident loss of earnings resulting from the accident is concerned, doing the best I can and necessarily with a broad brush, I would allow $3,500 per annum over the eight years since the accident, that is $28,000 and in addition there will be interest on that sum at the rate of 4%, ie $1,120. In reaching that conclusion I have taken account of the matters previously referred to including the plaintiff's "time out" for having her children.

Future Loss Of Earning Capacity

(i) Work Life

[40] Counsel for the plaintiff argued that the calculations for future loss of earnings should be made on the basis that the plaintiff would have worked to a retirement age of 65. Counsel submitted (t 319):

> "[I]n our submission, Your Honour can make a clear inference that if she pursued a career that she described to you, she would have certainly worked to 65, because that is the normal work span of people in the Australian work force and a career person … [I]t is we would submit it is common knowledge that the normal work span is 65 - that's the retiring age in the public service.".

I am unable to accept this argument or draw the inference I was invited to draw.

As to the 'normal work span of people in the Australian work force', it is notorious that few women work until they are 65 years of age.

As to the reference made to the fact that it is common knowledge that 65 is the 'retiring age in the public service', or the end of the 'normal work span' in the public service, the age of 65 is, in fact, the maximum, outermost, mandatory retirement age in the public service. In any event, this whole line of argument about when the plaintiff would have retired from the public service rests on the assumption that the plaintiff would have entered the public service. This is an assumption which I do not make.

Counsel for the defendant argued that as there was no evidence before me as to whether the plaintiff would have worked to 60 or 65, what I should do is

follow the approach of Lander J in *Murray v Dawson* (1996) 24 MVR 244 at 251-253. In that case, Lander J adopted a figure between the two.

I accept the plaintiff's evidence that the plaintiff is a 'doer', as Counsel for the plaintiff submitted (t 318) and that the plaintiff is a person motivated with respect to work and likely to work to a later stage in her life than many other women.

[41] As at the time of judgment the plaintiff could have, but for the accident, worked at the Food Barn earning some $24,000 to $25,000 per annum nett. 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%. Her actual loss in the 1993-94 financial year was $3,031-70 or that is just under $60 per week. 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. Some allowance must be made for her past psychological inability fully to exercise her earning capacity. Allowance must also be made for the contingencies of possible promotion, disruption to and change of employment due to moving residence and the bringing up of her three young children. Allowances must also be made for the vicissitudes of life and other contingencies. For a discount rate of 3% the relevant multiplier to age 60 would be $946 for a woman of the plaintiff's age. See Exhibit P38. That multiplier should be discounted however because of the unlikelihood of the plaintiff working to 60 years of age let alone 65. I think the plaintiff's lost earning capacity can

be assessed by reference to net weekly loss of the order of $100 per week. Taking all these matters into account and again, of necessity approaching the matter with a broad brush, I award $120,000 on account of future lost earning capacity.

Special Damages

[42] Past special damages are agreed, in the sum of $4,612.70.

Future Medical & Medication Expenses

[43] Counsel for the parties are essentially in agreement with respect to the area of future medical and medication expenses. Mr Reeves QC (t 324) stated that he agreed with all of the calculations set out in the 'Schedule of Future Special Damages' prepared by the defendant, save for the allowance for medication and ice wraps.

With respect to the allowance to be made for medication and ice-wraps, Mr Day for the defendant said (t 299):

> "For the simplicity of calculation sir, I included $850 for that …".

Mr Reeves QC, on the other hand, came up with the figure of $6,515 for the same allowance. Mr Reeves stated that his figure was based on the following calculations:

(a) He took the figure of 10 Naprosyn tablets per week from the agreed schedule of 'Special Damages' (exhibit P36).

(b) He multiplied that by 52 weeks to get a total of 520 tablets per year.

(c) He divided that by 30 tablets per bottle to get 17.33 bottles per year.

(d) He multiplied that by $15 per bottle to get a figure of $260 for 1 years' supply of the medication.

(e) He divided that by 52 to arrive at a figure of $5 per week for the medication.

(f) He multiplied that by $1,303, which is the value set out at p 549 of the third edition of *Luntz* of a regular loss of $1 per week to a female aged 32 ceasing at death.

The final figure arrived at was $6,515.

Mr Reeves' method of calculation, I must say, is a rather too scientific approach to calculating the allowance for future medication. 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.

Therefore, for future medical and medication expenses, I would allow $1,500 for the 30% chance that the plaintiff may require an osteotomy or partial knee replacement within 15 years; and $3,152.19 for the 30% chance that the plaintiff may require a total knee replacement within 25 years – these figures being agreed. I would also allow $2,500 to cover future usage of Naprosyn medication. The total figure, therefore, for future medical and medication expenses comes to $7,152.19.

Conclusion

For the reasons given above I award damages to the plaintiff as follows:

(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
		$229,464.89

There will be judgment for the plaintiff in the sum of $229,464.89. I will hear the parties as to costs and any ancillary matters.