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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

SC No. 611 of 1986

BETWEEN:

KIM MAREE SHAW
Plaintiff

AND:

THE COMMONWEALTH OF AUSTRALIA
Defendant

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 9 November 1992)

In this action the plaintiff sues the defendant for damages for injuries she received in a accident when as a schoolgirl she was using a school trampoline. The accident occurred in 1974 when the plaintiff was 12 years of age. She contends that the defendant's negligence caused her injuries. In addition to denying that it was negligent the defendant contended that if it had been, the plaintiff had contributed to her injuries by her own negligence in using the trampoline without at least 4 persons positioned around it to prevent her falling to the ground.

The long delay in instituting this action stemmed from the ignorance of the plaintiff's parents who believed what they had been told - that the defendant was not liable for the plaintiff's injuries of 1974, because as parents they had signed a consent form. In 1985, when the plaintiff met her future husband, Howard, and they realised

the cost of her future medical expenses, he raised the possibility of instituting an action. She consulted solicitors in March 1986; the action was instituted in August, some 12 years after the accident.

I turn first to the evidence of the accident.

The accident of August 1974

I accept the plaintiff's account of the accident, and generally; she was a truthful witness and did not seek to exaggerate matters. I now set out her account which was the sole evidence as to what took place in 1974. The plaintiff was born on 6 November 1961; today she is 31 years of age. She resided at the time of trial at Rankin Park, a suburb of Newcastle. In 1970 she came as a child to Darwin with her family. She attended Jingili Primary School between 1972 and 1974. I am satisfied that in August 1974, aged 12 years, she was one of about twenty students attending an eight day school camp at Oenpelli school. She admitted that she did not have a complete recollection of this school excursion; that is to be expected in view of the lapse of time. The object of the camp was to expose the students to Aboriginal culture; it was the first trip of its kind organised by the Jingili Primary School. The defendant admits that it operated that School during 1974 (Exhibit P7, Answer 1), and that the school camp was organized and operated by teachers who were its servants or employees (Exhibit P7, Answer 2).

In the grounds of the Oenpelli school there was at the time a full size trampoline, which the plaintiff roughly estimated to be "10.5 ft long, 8 ft wide and 3 ft high". As it was exposed to the sun the mat was faded and looked worn although all of the springs appeared intact. On the first day of the camp Mr Cameron, the plaintiff's teacher, gave instructions to the effect that four students, "spotters", should be present and stand at the corners when someone was

on the trampoline, in order to catch that person should he or she fall. That was the full extent of his instructions; he did not say how they were to catch a falling student or how many people were allowed on the trampoline at the same time. Compare, for example, the evidence of the trampolining expert as to the role of "spotters", in *Bills v South Australia* [1982] 32 SASR 312 at 315. The plaintiff was aware of Mr Cameron's instructions, but gave no thought to whether using the trampoline, unsupervised, was right or wrong or unsafe. It will be recalled she was then 12 years old, a Year 7 primary school student. The trampoline was in fact used on several occasions by the children without any "spotters" being present.

For the first seven days of the eight-day camp the plaintiff used the trampoline two or three times each day. Prior to the camp she had used a trampoline twice, a year before. She does not recall having seen any of her fellow students complying with Mr Cameron's instructions; she stated that he supervised the use of the trampoline only "occasionally". She was not supervised at all in her use of the trampoline by either of the other two teachers present at the camp. As will later be apparent Mr Cameron's instructions and the lack of supervision of the use of the trampoline by the accompanying teachers were an inadequate discharge of their duty to take proper care of the children.

The accident happened on the seventh day, about 1 pm. That afternoon the plaintiff was on the trampoline, unsupervised, with a friend, Nicola McKellar. Their activity pattern was that as one of them came down on the mat, landing on her knees, the other would jump up and then come down on her bottom. At some time while this was going on the plaintiff came down on the trampoline on her knees; immediately she did so Nicola descended and her impact on the trampoline catapulted the plaintiff off the trampoline on to the adjacent "baked earth". She landed on this hard

ground on her left knee with her right leg out in front of her. She says she felt a "jarring pain in her [left] knee up to her hip and her knee was grazed." Despite the pain, the plaintiff got up. She went on a hike that same afternoon and although she limped the whole way she managed to complete the round trip. The following day she was sore and continued to limp. Although she had told Mr Cameron about her fall from the trampoline he did not do anything about it or record any of the details.

After the accident - school days

On returning to Darwin the pain slightly abated; however, it flared up again after a few days. The pain was primarily in the left knee and not the left hip so the plaintiff concluded that it was her knee which was the problem. Her mother took her to a general medical practitioner at Casuarina; he referred her to a Darwin specialist, Mr Selby. He immediately diagnosed that the problem lay in the left hip and referred her to a specialist at the Queen Elizabeth Hospital in Adelaide.

By the time the plaintiff went to Adelaide, in October 1974, she had already suffered a lot of pain; she was taking pain killers and her left knee was swollen. In Adelaide, Mr White, an orthopaedic surgeon, performed exploratory surgery around the plaintiff's left hip in an attempt to determine her true medical condition. Following this biopsy operation, the plaintiff was in traction for two weeks; she then underwent physiotherapy for a further two weeks. She was in bed in the hospital from 24 October until 7 December 1974. During the surgery, an incision was made diagonally across her left buttock, about "6-7 inches long and 1-1.5 inches wide." The scar this incision caused remains, although the discoloration and raised effect are slowly subsiding. She says it has been a great source of embarrassment to her over the years as it is visible under a swimsuit.

When the plaintiff returned to Darwin from Adelaide, in early December 1974, her limp had improved. She was not then aware that her hip joint was in the process of fusing, spontaneously. That is to say, the head of the femur and the articular cartilage of the hip joint had both been damaged and as the surfaces deteriorated they fused or ankylosed.

Soon after her return, Cyclone Tracy struck Darwin and the plaintiff and her family were evacuated to Newcastle. In Newcastle the plaintiff, then 13 years of age, had a lot of difficulty walking; she sought therapeutic treatment from an orthopaedic specialist, Mr Sage. It was not possible, however, for the plaintiff to have physiotherapy because the pain it caused was too great. She also saw Mr Cummings, a Macquarie Street specialist; he explained that her hip was undergoing natural fusion and considering the amount of pain she was suffering, it should be left alone. He suggested a hip replacement some time in the future. In fact she has not yet had any medical intervention; it is clear that the hip had unfortunately fused in an unfavourable position. Her family remained in Newcastle for a year; her father, a Federal policeman, was then transferred back to Darwin. Upon the family's return to Darwin in January 1976, the plaintiff attended school at Casuarina High School from 1976-1978.

I accept that prior to her accident the plaintiff had sustained no physical injuries. She was, from a young age, keen at sports; she played netball and basketball and participated in "little athletics" and swimming. In early 1974 she had been selected in the junior NT netball squad; she also excelled at swimming. She has always been tall and athletic; her present height is 5 ft 8in. At Casuarina High School she tried to participate in various sports but the pain, after the activity, was always too severe to cope

with. In the result she had to give up nearly all sports; she could manage a minimal amount, for example a "chin up", and ball catch. She could also swim a short distance but the pain following a lap of the pool was so great that it was not worth the effort. Considering her prior level of participation in sports, this was hard for her to accept; her lack of sporting activity, and the way she walked, also made it difficult for her to make friends at school.

From an early age, the plaintiff had an interest in pursuing a career in radiography or in running her own hairdressing business. In light of her good school grades and advice from professionals in both of these areas she felt she was capable of achieving either goal. However, the specialist Mr Cummings in 1975 dissuaded her from pursuing either of these career paths, because she was no longer physically suited to either of them. That is clearly correct, as she lacks the necessary agility; see later. Consequently, the plaintiff steered away from the science-based subjects in which she was proficient - she was in the Matriculation 'stream' - and chose to do a stenographer's course when it was offered in Year 11 at school. She had been interested in Earth Sciences and had envisaged herself working for a company such as B.H.P.; however her restricted mobility and agility meant that she would not have been able to do the required field work. She felt that secretarial work would be better suited to her now-limited mobility; her parents had also suggested it as work she could manage. She left school at the end of Year 11, aged 17 years. The plaintiff fairly conceded that her academic progress at school had been impeded to some extent by the change of schools occasioned by Cyclone Tracy, and not just by the accident.

<u>After the accident - after school</u>

On 28 November 1978 the plaintiff started work as a typist/clerk with the Commercial Banking Company of Sydney

(now the National Australia Bank) in Darwin. She remained there until August 1980 when she transferred to the C.B.C. in Newcastle to be near her family who had moved there. She has been employed by the Bank ever since, because she found it was work that, in general, she could do well.

After a short period as a typist/clerk, the plaintiff worked in "ledgers"; she became a "ledger supervisor". This position involved the oversight of accounts and the referral of reports to the Bank Manager. The plaintiff could cope with these tasks because she was able to stand or sit as she required. Freedom to do so is essential for the plaintiff, as she can stand for only about five minutes before she feels pain in her back and left hip. After 3-4 years as a ledger supervisor, the plaintiff was promoted to "Number 1" teller, a most responsible position in the Bank. This job proved difficult for her because it involved a lot of standing; however, she held it only for a few months. Following a three-month overseas holiday, the plaintiff was promoted to "relief staff"; this entailed her travelling around Eastern NSW to relieve, when Bank staff were absent. She was in this position for 18 months; in it she travelled for up to 4 hours daily.

Shortly before her marriage on 12 October 1985, the plaintiff was promoted to "operations supervisor". In this position she was in charge of 7 staff, working in the "back office" of a "module one" Branch with 20 staff. She also had a great degree of mobility in this position (in that she could stand or sit freely), and therefore it well suited her physical needs.

She enjoyed the 3-4 years she spent in this work. While she was on maternity leave in 1988 the plaintiff learned of a potential promotion to the position of "customer services supervisor". This prompted her to return to work full-time in January 1989 after only 9 months on

maternity leave, rather than the 12 months to which she was entitled; she was then still suffering pain from the birth (see later). She considered that an earlier return to work would allow her to ascertain her physical capabilities for work in the future. On her return, she worked for six months in her old position of "operations supervisor" before being promoted to "customer services supervisor", the position formerly known as "Branch accountant". This new position proved fairly stressful; it carried a lot of responsibility and involved long hours of work as well as a restriction on her mobility in the sense of freedom to stand or sit. For example, she could be called upon to do any job required to ensure the smooth running of the Branch; this did not allow her the freedom to choose when to stand or sit. She had to fill the automatic teller machines with heavy cash cartridges and basically remain at the Bank until the work was completed. This was often 6 pm and meant that she often did not get home until 7 pm. Because of the pain she was by then suffering from her day's work she had to take a hot bath immediately and retire to bed. After enduring six months of this regime, she elected to work part time. Her decision to do so was ultimately based on two factors: the body pain mentioned above, and the need to spend more time with Haydn, her son, whom she says was then "bonding" to his father because of the limits on her ability to attend to him, stemming from her disabilities and her work.

In fact 14 months elapsed before a part time position in the Bank became available. The plaintiff finished working full time in June 1990; her salary for the financial year ending 30 June 1990 was $29,617.42 (gross), $22,165.47 (nett). She then commenced working part time in July 1990 3 days, 19.5 hours per week; these are the hours she presently works. Her salary for the year ending 30 June 1991 was $17,038.63 (gross), $13,876.53 (nett). See Exhibit P1. Her hourly rate is $10.95, gross. As a "part

time", the plaintiff regards herself as now having the lowest position in the Bank: she has no responsibility and she is regularly required to attend at the counter. This means that she has to stand for long hours, as the Manager of her particular Branch does not allow the tellers to use stools. She copes with this difficulty and attempts to relieve the resulting pain by moving around on-the-spot, and bending to alter her balance. At each 3-month work appraisal she has requested a "sit down" job; each time she has been told that there is nothing available. The "special duties" provision within Bank policy is rarely implemented; in her 13 years in banking the plaintiff does not know of anyone who has been granted it. When she gets home from work she feels tired and sore and needs her days off to recover. As she gets older she finds it more difficult to "bounce back"; her tolerance for pain is diminishing.

Present life and plans

The Shaws plan to have a second child. The plaintiff stated that she would resign from the Bank early in her next pregnancy to help alleviate the strain caused by carrying a baby - a strain which she experienced in her first pregnancy. This decision is prompted by the fact that her present job involves standing for most of the time and the fact that it is unlikely she would be able to get a "sit down" job. If she resigns, she considers she is unlikely to get another part time job with the Bank, because such jobs are very rare. She explained that the banks now seek to recruit young graduates who can climb the corporate ladder; there are a large number of women waiting for part time work. Nevertheless, the plaintiff considers that she will still have to work, for financial reasons; accordingly, she would consider work as a receptionist in either the real estate or hospitality industries, although she understands she may have to do some retraining to gain any such employment.

As noted earlier, to relieve her pain the plaintiff takes hot baths. She resists taking pain killers unless she finds the pain insufferable, when she may take "Panadol Forte" or "Solcode". If the pain is severe when she is trying to sleep she places a pillow under her knee. The Shaws recently purchased a waterbed for $700 for their new home; it appears to ease the pain. Pain is brought on by walking, standing, sitting, housework and lying in certain positions. For example, to have sex the plaintiff has to lie on her left side to support her leg; this is both painful and embarrassing. Because of the pain which is caused by sporting activities she is limited to reading and sewing as her leisure activities. Although she enjoys shopping she is limited in the amount of time she can wander around shops. Her shopping expeditions have to be broken by long lunch breaks and followed by a rest when she returns home. When she first met her husband Howard he was heavily involved in a range of sports including water skiing. They bought a boat together but as she could not participate in the sport she got bored and frustrated. The boat was sold and Howard was forced to give up many of his sports, to be with her.

Her left leg is now 3.5cms shorter than her right leg. Recently, she resorted to building up her left shoe by some 1.5cm; this has slightly alleviated some of the pain. These special shoes cost between $8 and $30, depending on whether the heel has to be replaced or only built up. She has gone through 3 pairs of these shoes in 6 months and therefore estimates she will need 6 pairs per year; they wear out rapidly because of the way she stands. She initially resisted wearing a built-up shoe because of vanity; she felt self-conscious wearing shoes of a different height. Likewise, she is self-conscious when buying clothes, in particular jeans and swimwear. It takes her some time to find clothes that do not "hug" her hip or

reveal the scar on her left buttock. This means she has had her clothes tailormade, or has had to buy more expensive brands which suit her body shape. I should say that when she stood still in the body of the Court her appearance was initially deceptive; there was no obvious deformity of the body. However, when she raised her jacket, the curvature of her spine was quite obvious as was the protrusion of her hip bone. She walked about with a pronounced limp and when she stood with legs apart she "tottered", because of the difference in leg length.

When the plaintiff became pregnant in late 1987 the gynaecologist expected there to be problems and anticipated delivery by Caesarean section. During her pregnancy she suffered a lot of lower back pain, her pelvis expanded and she felt that her left leg became shorter. She took some time off work. Contrary to her doctor's expectations, however, the plaintiff gave birth to her son Haydn normally on 14 June 1988, although she suffered third degree tears to her uterus. Because of this complication she thinks that a second child would have to be delivered by Caesarean section. When Haydn was first born she could sit with him but she could not lift him or take him for walks. It was this lack of physical contact which she feels caused Haydn to "bond" with Howard rather than herself. As a new mother this was distressing. It took her 12 months before she felt that the pain had subsided. She feels her tolerance for pain has now lessened. She continued to have difficulties carrying Haydn; she needed to use a stroller for even the shortest of walks with him.

Housework causes a lot of problems for the plaintiff. To pick up toys etc. she has to get down on her hands and knees and crawl along the floor. She is unable to carry out the full range of normal house duties; she has great difficultly vacuuming, mopping and cleaning the bathroom and windows. Howard attends to most tasks at any

height; for example, hanging out the washing, and cleaning windows. He also irons on demand because it is too painful for the plaintiff to stand for long periods of time at an ironing board. She considers that as she works part time and Howard works full time she should carry the greater load of housework but she is physically unable to do so because of her lack of mobility.

As the plaintiff has no movement in her left leg or sufficient flexibility in her hip to enable her to operate the clutch of a manual vehicle she is forced to drive an automatic car. The additional cost of an automatic car above a manual car is $600-1000 per car. The Shaws change cars about every three years. The plaintiff would not have chosen to buy an automatic car had it not been necessary for her now to do so, as her family had always used manual cars.

While it might be thought that her employer Bank has displayed some apparent lack of consideration for her special needs, the plaintiff has not considered looking for another job. This is because of the current tight employment situation and the fact, she says, that other Banks are also recruiting only young male graduates. She rejected the suggestion in cross-examination that even if she was not disabled she would now choose to remain at home with Haydn. She stated that most women with children work because of economic necessity; and so does she, as had her mother when she was growing up. While she is at work Haydn is cared for by his grandmothers for 1 day per week and a Family Day Care mother for the other two days. Family Day Care costs $14 per day; that is, it costs her $56 per fortnight.

As a Bank employee for more than 5 years she is entitled to a home loan of up to $24,000 at a concessional interest rate of 9%. Howard is also entitled through his

employment to a concessional home loan but the terms of his loan would require a large cash repayment from his salary; this renders the taking up of any such loan a non-viable option, in practice.

The plaintiff's husband's evidence

It is useful to throw a somewhat different search light on the plaintiff's life in more recent times, as indicated by the evidence of her husband Howard Shaw. I found him a reliable witness, not prone to exaggeration. His evidence was as follows.

When he first met the plaintiff they attempted to participate together in several sports: water skiing, golf and walking. The plaintiff could not manage to water ski and found it boring sitting on the banks of the rivers; accordingly, they sold their boat. She could not walk the necessary distances entailed in playing golf. She cannot accompany him when he takes Haydn or the dog for a walk. For example, on a recent trip to the Blue Mountains they had to drive (not walk) to each scenic spot; they were restricted to the very short walks, though he would have liked to have done some of the longer walks. On their trips to Queensland they have had to carefully plan the travel distances because the plaintiff cannot sit in the car for long periods. Her physical condition thus affects the quality of their holidays, in that they have to drive short distances at a stretch, they cannot take long walks along the beach and they must sit close to the sea.

He found that the plaintiff was embarrassed by the physical appearance of her leg, where the muscles have wasted, and by the scar on her left buttock. This scar is noticeable when she wears swimwear. He finds her very self conscious about the clothes she wears. Whenever she buys a new outfit she seeks his reassurance that it conceals her hip.

At the time of trial the Shaws were building a house they had planned 2 or 3 years before; they hoped to move into it, shortly. Prior thereto, they were living with the plaintiff's parents, with the plaintiff's mother doing most of the housework. Howard Shaw said that the plaintiff finds it difficult to vacuum, garden, iron, hang out the washing and reach heights. Their new house is 28 squares in area; it has 4 bedrooms upstairs, 3 bathrooms and a lounge, dining and rumpus rooms. They gave some consideration to the plaintiff's special needs, when designing the house; for example, there is a small bath downstairs which is accessible to a child and a much larger one upstairs which will accommodate the plaintiff. He will clean the bathrooms and the windows and do most of the gardening.

He confirmed that when the plaintiff returned to work after Haydn's birth, the level of pain she suffered increased; this manifested itself by the greater number of pain relieving baths she took, and her retiring to bed early and taking more pain relievers. He was left to cook dinner and care for Haydn. Consequently, Haydn would generally go to him and not let the plaintiff change or feed him. This trend was compounded by the fact that when Haydn woke at night Howard Shaw had to attend to him because he could only be calmed by walking around carrying him and the plaintiff was unable to do this. He said that the plaintiff was greatly distressed by the way in which Haydn thereby "bonded" to Howard and not to her. It was therefore a matter of mutual agreement between them, because of her physical pain from her work and the bonding issue, that she would thereafter work part time.

At trial, the plaintiff had been working part time for some 15 months. During this time her level of pain had increased and occurred more regularly. She expressed the pain more often and took more pain-relief tablets. It was

hard for her to get in and out of a car because her hip locked. Howard often had to hold her hand. Sometimes she could not move at all because of the pain; it was then simply a matter of waiting until the pain subsided. These events were generally followed by a hot bath, bed and occasionally a massage in the hip and knee area.

He hoped that if they had another child the plaintiff could give up work altogether. He admitted that there were financial factors to consider after a second baby was born and it might not be possible for the plaintiff to give up work altogether; he expected that she would only be able to manage part time work, in any event.

Howard Shaw is a Claims Manager with the MMI Insurance Group. He earns $48,000 per annum and has reached the peak of his prospects in Newcastle, where he was born. He considers it would not be financially beneficial to take a promotion, which would involve their relocating in Sydney.

Like the plaintiff, he prefers to drive a manual car but as the plaintiff is now unable to drive such a vehicle they have been forced to buy an automatic car. They only have one car. An automatic car is an added expense of about $1000 or more. He had 5 cars from time to time prior to meeting the plaintiff; 4 of them were manual. To date they have changed cars every 3 years. The preference for manual cars is said to be due to the way they drive and the greater control the driver has in driving.

The plaintiff cannot do much gardening. If she were not so disabled he would normally have expected her at least to help out in the garden, even if she did not do the heavy work.

I turn next to consider the question whether the defendant is liable in damages for the injuries sustained by

the plaintiff in 1974, and their sequelae.

The standard of care required in the use of the trampoline

Expert evidence in relation to the use of a trampoline in schools was received from Mr Petitt, a trained teacher who holds the degrees of B.Ed., and MA (PE), and is currently completing a Ph.D in Physical Education. He is a "PE" specialist who has trained student teachers to teach PE. He has spent 15 years in the classroom; at present he is a Senior Lecturer at the Northern Territory University. I accept his evidence without qualification.

Mr Petitt came to Australia from New Zealand in 1970 and spent the early 1970's in Queensland and Western Australia. He came to the Northern Territory in 1988. With that experience and background he did not have any direct knowledge of the instructions generally given in relation to trampolining in the Northern Territory in 1974, or of the numbers of trampolines then in Territory schools. However, from his experience in Queensland during this time he was able to say that there were stringent conditions in force for the use of trampolines in schools. In 1974, he said, it was recommended that schools with trampolines not allow them to be used as play objects. He agreed that as parents were unaware of the regulations they probably allowed their children to use the trampolines unsupervised. These regulations included the guidelines of the U.S. Gymnastic Association which were adopted by many Australian schools, although in 1974 they did not have the status of Department of Education regulations.

Mr Petitt stated that the curriculum for primary school physical education teachers had not changed a great deal between the 1970's and the 1990's. The emphasis was on movement exploration, the development of basic ball and aquatic skills and, most importantly, safety. This approach discouraged the use of basic gymnastic movements on

apparatus because it was felt that young children do not have the requisite physiological capacity.

During the 1960's and 1970's teachers were trained in the use of the trampoline. In the past 10 years, however, trampolines have been banned from most schools because teachers lack the requisite teaching expertise and class sizes are too big to ensure that safety standards are adhered to.

Mr Petitt described the trampoline as an "inherently skilled apparatus". He referred to a New Zealand study which reported that in one year 21 people were admitted to hospital with trampoline-related injuries; one-third involved injuries to limbs. He said that children need to have acquired certain skills if they are to use the trampoline properly; for example, while they should land on the mat with their knees locked, they would naturally land with flexed knees. It is also a "fatiguing" sport and children should be limited to 45 seconds at a session. Furthermore, "double bouncing" (that is, the use of the trampoline by 2 children at the same time) is and always has been "strictly taboo" because it requires "incredible physiological skill". I might note at this point the expert evidence to the same effect in *Bills v South Australia* (supra) at 315.

The minimum standard of supervision of trampolining, in Mr Petitt's opinion, involved the following:-

(1) a child should learn different moves in small stages eg. how to bounce;

(2) strict safety procedures should be in force; for example, trainers now use "spotting belts" which allow greater control over a child;

(3) as an absolute minimum, there should be 4

"spotters" and children should never be used in that capacity as they are not strong enough to catch those who fall; and

(4) there should be matting on the trampoline frame. "Spotters" should be instructed how to stand and catch. It is quite common for sports clubs to train its "spotters".

Applying these minimum standards, Mr Petitt was of opinion that the instructions given by Mr Cameron, for four children to stand by as "spotters", were not sufficient. He also considered that a teacher should always have been present during the use of the trampoline to ensure there was compliance with the rules, because while 12 year olds may be responsible the inherently dangerous nature of the apparatus meant that risks should not have been taken. Mr Petitt further considered that it was inadequate to entrust the care to children, especially if the trampoline was being used as a play thing. If there were only children available as "spotters", he would have insisted on at least 8 of them being present. If the children ignored the safety instructions they should have been banned from using the trampoline.

Mr Petitt described the trampoline as an "autocratic" piece of apparatus, in the sense that children are required to do as they are told. It is accordingly not used in PE classes, because it does not fit in with the philosophy that sport for young people should be "fun and free". When it is to be used, teachers should be trained in its use by a gymnastics club and thereby acquire the skills and knowledge to ensure the highest level of safety. Mr Petitt said that a reasonable teacher would not have allowed 12 year olds the unlimited and unsupervised access to a trampoline which I find took place at the Oenpelli school at the time the plaintiff sustained her injuries; he said that this would have been the prevalent view of

teachers in 1974. This was the gist of his evidence.

I referred earlier to *Bills v South Australia* (supra), a case involving an accident on a school trampoline in South Australia in 1976. I respectfully agree with the observation of the trial judge, Millhouse J, at p317 that:-

> "Apart from that expert opinion, it is, to me as a layman, a matter of common sense that there should be supervision [of school trampolining] all the time."

The decision in *Bills* was reversed on appeal (see [1984-85] 38 SASR 80) for lack of evidence to support a finding of fact, but the force of his Honour's observation was not affected.

At this point I indicate that I am satisfied on the balance of probabilities that the plaintiff sustained the injuries of the nature already described when she fell from the trampoline at Oenpelli school in August 1974. Further, as I indicated during the course of submissions, I am satisfied that she sustained these injuries through the negligence of the defendant whose teacher-employees failed properly to supervise the use of the trampoline by the plaintiff, then one of the students at the Jingili Primary School operated by the defendant. The defendant was negligent in two ways. First, it is vicariously liable for the negligence of its teacher-employees, who failed in their duty to their pupil, the plaintiff, to take reasonable care of her in that they did not maintain that reasonable supervision of the children on the trampoline at Oenpelli which the law required of them; see *Geyer v Downs* (1977) 138 CLR 91, *Ramsay v Larsen* (1964) 111 CLR 16. The risk of injury to the 12-year old plaintiff in the absence of supervision of trampolining, and proper instruction, was

reasonably foreseeable, not far-fetched or fanciful. Second, the defendant was also in breach of the non-delegable and personal duty of care it owed to the plaintiff as one of the pupils of the school it had established, to ensure that there was adequate supervision of her at the time; see *Commonwealth v Introvigne* (1982) 150 CLR 258 at 269-271 per Mason J, *Watson v Haines* (1987) Aust. Torts Reports 80-094, and *Robertson v The Hobart Police and Citizens Youth Club Inc.* (1984) Aust. Torts Reports 80-629.

For the general test to be applied in relation to the standard of care applicable to a child when the issue is contributory negligence, see *McHale v Watson* (1965-66) 115 CLR 199 at 205, 214-5, 223-4, and 229-230. I do not consider that in the circumstances the defendant has proved that the plaintiff, 12 years old at the time, was guilty of contributory negligence. I consider that she exercised in the circumstances the care for her own safety reasonably to be expected of a child of her age, intelligence and experience with trampolines.

On this aspect of the case I conclude that the defendant must bear all the responsibility for the accident and is therefore liable in damages to the plaintiff. I turn next to consider other evidence relevant to the question of damages.

Economic loss - loss of career opportunity

I noted earlier the interest of the plaintiff pre-accident in pursuing a future career as a radiographer. On this aspect expert evidence was received from Mr Genga Theralingum. I accept his evidence, which may be summarized as follows.

He has a Diploma in Radiography and has worked as a radiographer in Australia for the past 14 years. He had earlier worked as a radiographer in the United Kingdom. The

academic requirements for radiographers include a diploma or degree in Applied Health Sciences, with a major in

radiography. To seek to attain this level a student needs to have passed Year 12 Maths and English.

Following 3 years of salaried study as a radiographer-in-training a base grade radiographer commences work on a salary of $24,515 per annum. There are 9 increments to move through before being promoted to professional Grade 2, on $34,200 per annum. See the relevant N.T. Award, Exhibit P2; and Exhibit P6 which shows the Award rates for radiographers in NSW from 1977 to 1990.

In most States there is a high demand for radiographers. Mr Theralingum stated that there were 2 vacant positions at the Royal Darwin Hospital and he was having trouble in filling them. In addition to these base rates of pay a radiographer could increase his/her salary by some 20-30%, by working shift and overtime hours.

A radiographer spends most of the time on his/her feet. They are expected to lift and move heavy machinery. It is not possible to operate these machines sitting down or to modify them so as to allow operation from a sitting position. Mr Theralingum considered that it was probably due to this practical matter that he had never seen anyone with a physical disability, such as the plaintiff's, working as a radiographer. He was not aware of any procedures elsewhere in the world other than those he had described; he stated that there was a universal standard and practice.

It is clear from Mr Theralingum's evidence that the nature of the plaintiff's disabilities precluded her from pursuing any career in radiography.

However, I do not consider that the question of the plaintiff's taking up a career as a radiographer is, on the evidence, one which merits consideration as a contingency proper to be taken into account; it lies in the realm of speculation.

Economic loss - domestic expenses

Evidence was adduced from Ms Doris Thiele directed to establish the costs of having what may be called domestic chores carried out on a commercial basis, by way of home help. Ms Thiele had been a cleaner in Darwin for 11 years and did not have any knowledge of pay rates for cleaners outside Darwin.

Ms Thiele works as a domestic cleaner. Her work includes basic housecleaning tasks such as vacuuming and ironing. At trial she had 3 regular clients per week; she cleaned for 10-11 hours per week at a rate of $12.50 per hour.

The house the Shaws were building is, in Ms Thiele's terms, "large". She considered that it would take 1 hour per week to clean the 3 bathrooms, and 35 minutes per week to vacuum the house. It would take 65 minutes per day to iron, considering that the Shaws are "professional" people who need fresh shirts etc. each day. The washing would also be time consuming. In total, Ms Thiele considered:

> "I would say if you consider the fortnightly, weekly and monthly cleaning things you have to do it is reasonable to say 3 hours a day - 7 days a week."

That is, 21 hours per week would be involved in terms of the amount of work in cleaning such a house. Ms Thiele referred to shelves, windows and curtains but said the amount of work required might depend on where the house was situated. For example, if it was on a busy highway the windows might need to be cleaned regularly.

Economic loss - the plaintiff's general capacity for work

Ms Saunders is an occupational therapist. She testified as to the plaintiff's general capacity to work. She compiled a report on the plaintiff after hearing from her and examining her capacities and abilities; see Exhibit P3. She observed the plaintiff walking over a distance of some 340 metres, and up and down stairs. She concluded that the plaintiff's physical condition was consistent with the medical reports and examinations. From an occupational viewpoint, Ms Saunders recommended that the plaintiff should only work in sedentary jobs; she should work shorter days, for example, 4 hours a day over 5 days rather than 8 hours over 3 days. This would allow her time in the afternoons to rest so she could spend the evenings with her family. Ms Saunders considered that the plaintiff was having difficulties because her present job involved standing for 90% of the time. At most, she considered the plaintiff should work 20 hours per week in a job which allowed her free choice of movements when her pain was being aggravated. She considered that even if the plaintiff had a considerate employer she could not work 40 hours per week because of her low tolerance for sitting and standing, and her limited capacity to walk.

She considered that the plaintiff's physical disabilities had affected her in her daily living activities, and her choice of leisure pursuits and work; she did not consider that the plaintiff, with her limitations, could have pursued a career either as a hairdresser or a radiographer.

Apart from this opinion, Ms Saunders could not offer other solutions to relieve the pain although she considered that an ergonomic chair might increase the time during which the plaintiff could sit, and an "easy reach" might make it easier for her to pick up objects from the floor.

Economic loss - capacities and future medical expenses

Expert evidence was given by Mr George Johnstone, a recently-retired specialist surgeon; see also his report of 27 October 1991, Exhibit P4. Mr Johnstone considered that the fact that the fusion of the plaintiff's left hip had taken place in a position of flexion and adduction did not imply a criticism of her medical treatment although it "probably could have been placed in a more satisfactory position, for example, abduction and external rotation". He considered that if the plaintiff's left hip was not internally rotated and adducted then her feet would stand differently and she would have better balance.

Mr Johnstone expressed his personal opinion that if he were in the plaintiff's position he would have a hip replacement operation "tomorrow" in order to enjoy his youth; however he also added "I don't think there would be many people who would support my attitude - conventional wisdom prevails". I accept the conventional medical view: that the hip replacement operation should not be performed until the patient is from 40 to 50 years of age. This view is based on the assumption (in turn based on the present state of technology) that the prosthesis will wear out after some 10-12 years and can only be replaced once; thereafter the hip has to be fused, causing a reduction in mobility. Assuming the hip-replacement operation is successful, the hip joint should then be painless and mobile, though there would not be a full range of movement. The present pain would not totally subside because of the changes which have already occurred in the lower back region, but it should be easier for the plaintiff to walk, and she should then have an increased working capacity, and ability to carry out household duties. She might still need heel uplifts. I add that the plaintiff would not choose to have a hip replacement at her present age; she presently contemplates

undergoing that operation at age 45-50 years.

Following 2 hip replacements and a later fusion, the plaintiff would face the risk of an increased shortening of her left leg, skin grafting with extensive surgery, and a greater likelihood of fracturing fragile limbs and contracting arthritis and osteoarthritis.

Mr Johnstone's evidence was that it costs some $6000--$10,000 for each hip replacement; the patient is hospitalized for 2-3 weeks, and 3 months of physiotherapy follows. A fusion would cost some $20,000; it involves the patient spending 3 months in hospital, so hence the increased expense. The plaintiff's response to the hip replacement would determine whether she should later undergo a fusion. These costs of course vary depending on the surgeon and the hospital; they were not specific Darwin costs.

Mr Johnstone referred in some detail to the condition of the plaintiff's back. He said that her lower back pain was caused by lumbar lordosis and thoraco-lumbar scoliosis. This pain is indicative of the stress and strain that is caused by the position of her hip and the fact she has a shorter left leg and walks on her toes. Although Mr Johnstone was shown X-rays taken in 1975 and 1987, which did not reveal any major changes, he considered that her condition appears to have deteriorated over that time. This assessment of her condition was, however, clinical rather than radiological. He was of opinion that without surgery the plaintiff could anticipate osteoarthritic and degenerative changes and increasing changes in her back, the long term effect being chronic back ache.

Although he is not an obstetrician, Mr Johnstone said from an anatomical view point he would anticipate difficulties with the birth of another child.

I consider that Mr Johnstone's report (Exhibit P4) accurately describes the plaintiff's injuries, her present physical condition and its consequences for her life, viz:-

> "The injury to the left knee [in August 1974] was direct with force being transmitted along the rigid shaft of the femur to the hip joint producing damage to the femoral head and the articular cartilage of the left hip joint. Despite treatment and investigation the joint surfaces deteriorated and fusion or ankylosis took place. Unfortunately this took place in a position of flexion and adduction. The radiographs of 1/7/87 show a firm fusion. She has little, if any, mobility of the left hip joint, the left leg is one inch shorter than the right and the leg is wasted. A firm arthrodesis should be painless. Unfortunately Mrs. Shaw experiences pain when using the hip. She also has low backache due to her secondary lumbar lordosis and thoraco-lumbar scoliosis which are compensatory to the fixed hip and shortened left limb. Degenerative changes are likely to take place in the spine. She also as a 40° loss of range of flexion and extension at the left knee joint.
>
> From the foregoing report it will be noted that she has a considerable range of disablement ranging through her employment, now only part-time, household duties, social and sporting activities. The latter do not exist. She can only drive an automatic car and cannot sit or stand for prolonged periods. She is wakened at night due to pain in her back. She has unnecessary and unimaginable difficulties whilst participating in sexual intercourse to the extent that this has become an infrequent event. It also raises the question whether she could become pregnant and if she did become pregnant what difficulties would arise at parturition. Her very experienced obstetrician found it difficult to perform a cervical smear due to pain and difficulty of access.
>
> There is no hope of spontaneous improvement for Mrs. Shaw but deterioration is a probability. Corrective osteotomy has been suggested in the past but never proceeded with. Her remaining hope is total hip replacement. Conservative views are

held about what age this should be undertaken.

> The percentage disablement attributable to Mrs. Shaw's let hip is 85% of the lower extremity because of the unsuitable position in which the joint is ankylosed, and for the left knee it is 14% of the lower extremity. This gives a combined disablement of 87% for the lower extremity and 35% of the whole person. I estimate that, in addition there is a disablement of he back which is probably equivalent to 20% of the whole person, thus making the total disablement of the whole person 55%."

The conclusion, with which I agree, that the plaintiff is suffering from a "total disablement of the whole person" of 55% means she can only do about 45% of the range of things a "whole" person can do.

Mr Johnstone did not make a full assessment of the plaintiff's employment capacities because he considered this involved personal matters related to the particular individual's tolerance of pain. He considered, however, that even if the plaintiff had a considerate employer so that she had unlimited mobility as regards sitting or standing, "40 hours [of work per week] would be a bit much." He considered she was "probably working to her capacity" by working 19.5 hours per week. I agree.

Economic loss - loss of benefit of a loan at a concessional rate of interest

Mr Gillsley is an "operations service" manager at the National Australia Bank in Mitchell Street, Darwin. He gave evidence concerning the eligibility of bank employees to receive home loans at concessional interest rates. Generally speaking, the amount of the loan permitted depends on an employee's status in the bank and in particular whether they are full time or part time. The interest rate on the loan remains constant.

Calculations relevant to the plaintiff's home-loan entitlements are set out in Exhibit P5. As a full time "J class" customer service supervisor she would have been entitled to a 25-year loan of $67,000 at 9% per annum. In her part time "N class" position the plaintiff is only permitted to borrow $27,000 at 10% per annum. A bank customer would be charged a loan rate of 12.5%. These rates were current at the time he testified.

If the plaintiff were to resign from the Bank she could either repay the loan in full or convert the loan to one at the usual Bank rates of interest for a customer (ie. to 12.5%).

As customer rates of interest decrease so too do the concessional rates, although not at the same rate. The amount is linked to the Fringe Benefits tax which is paid by the Bank.

Against this outline of the evidence I turn to the award of damages. I approach it by way of a consideration in turn of the conventional heads of damage, for the purpose of making allocations to each head, in a tentative and preliminary way.

Pecuniary loss - motor vehicle

It is clearly necessary that the plaintiff purchase an automatic car as opposed to the manual vehicle which the Shaws otherwise would have bought, at least until she has a hip replacement operation in some 15 years time. I accept that the difference in price between a manual and automatic car is about $1000. I allow a tentative amount of $3000 for past loss in this respect. For future loss I allow $6.40 x 632 = $4045.

Pecuniary loss - special adjustment to shoes

Tentatively, I allow for 4 pairs per year at a

total average cost of $60 per annum, until age 78; using the multiplier 1325 the tentative award if $1529.

Pecuniary loss - medical expenses

Mr Johnstone's estimate for the present day cost of the 2 future hip replacements and the fusion operation was $40,000. I would tentatively award that sum. Mr Coulehan of counsel for the defendant submits that this amount should be discounted for present payment, but I do not consider that that would be appropriate. To do so would make a grossly inadequate provision for the actual cost of these operations when they come to be later performed. The position differs in that respect from the allowance for the automatic car and the adjustment of the shoes.

Pecuniary loss - loss of earning capacity to date of assessment

Mr Waters of counsel for the plaintiff usefully supplied some written submissions and calculations. Insofar as his submission founds on the plaintiff's capacity to have earned a higher income as a radiographer - yielding higher earnings to trial of the order of $43,000 to $63,000 - I reject it, as I do not consider that the evidence carries that contingency beyond mere speculation.

For purposes of calculation of this loss I consider it appropriate to treat the plaintiff's career in the Bank as indicative of her true earning capacity. She worked full time in the Bank until July 1990 and suffered no loss of earning capacity until that time. The question arises as to whether in July 1990 she would in any event, irrespective of the pain she was suffering from her disabilities and the birth of Haydn, have moved to part time employment with the Bank. On consideration, I do not think that she would have done so. I consider that she moved to part time work with the Bank because that was in fact the

most work which she could then do, in her state of health. I do not consider that the birth of Haydn as such should be treated as a significant factor in her decision.

As a full time customer services supervisor her nett income including superannuation was $23,053.99 per annum. As a part time Bank officer, working 19.5 hours per week at $10.95 per hour, her nett income including superannuation was $10,194.77 per annum. The nett difference is $12,859.22. Accordingly, for loss of earning capacity to date of assessment I tentatively allow 2 1/3 years at $12,859.02; that is approximately $30,004. I would allow interest on that sum at 6% for that period, amounting to about $4200.

Pecuniary loss - future loss of earning capacity

I think it likely that the plaintiff would be able to maintain her current part time employment with the Bank, of the order of 19.5 hours per week. In her mid-40's, following a hip replacement, I consider the likelihood is that she would return to full time work and would remain in full time work thereafter. Accordingly, the period for which she would suffer a future loss of earning capacity, of the order of $12,859.02 per year or $247.3 per week, is limited to some 15 years. Applying Table 2 in Luntz yields 632 x 247.3 = $156,293. There must be a substantial discount of this amount to provide for the contingencies of life, particularly as the Shaws propose to have another child; that is a factor which would necessarily entail some time off work.

Pecuniary loss - home help

Mr Waters put in a useful revised written submission dealing with this head of damages. He submitted that not less than one half of the household work, estimated to take 21 hours per week, should be performed by the plaintiff's husband or by hired help. In either event, an

award should be made to compensate for that assistance. Mr Waters relied in particular on *Hodges v Frost* (1989) 53 ALR 373. He conceded that allowance should be made in

favour of the defendant for the fact one half of this work should be treated as enuring for the husband's benefit.

I am not satisfied that it would be necessary to obtain hired domestic help. It is clear that the plaintiff's husband does a considerable amount of the household work. However, this is not a case where the wife's condition changed after marriage due to injury, requiring significant domestic rearrangements. I consider that this is a case where the couple made ordinary sensible domestic arrangements after marriage and it is not one where it can fairly be said that it would otherwise be reasonably necessary to provide the services carried out by Mr Shaw, at a cost. What he does, does not "go beyond the mere rearrangement of domestic chores or the tender attention to comfort that can be expected in an affectionate environment": *Hodges v Frost* (supra) at p380.

Accordingly, I would not make any award under this head.

Pecuniary loss - benefit of concessional Bank loan

Mr Waters handed up a useful written submission dealing with this head. I consider it likely that the plaintiff will return to full time work with the Bank after her hip operation. Accordingly, I consider that the amount suggested by Mr Waters should be substantially discounted. I would allow the sum of $5000 under this head.

Non-pecuniary loss - pain and suffering and loss of the amenities of life

This head of loss is not readily measurable in money; imponderables are involved. The general standards prevailing in this community provide a touchstone.

It is clear that the plaintiff, a promising person at sports, was in effect largely deprived from the age of 12

of any further meaningful sporting activity. Her capacity for the enjoyment of life in that respect has been sharply curtailed. In addition, from the age of 12 she has suffered pain of varying severity. Her work history shows that she has a Trojan spirit; she is a resilient person prepared to suffer considerable pain and discomfort in order that she could hold down a quite responsible position in the Bank. While that stoical attitude means that she has thereby reduced the amount of her pecuniary loss below that which a less stalwart person may have been awarded, she must be compensated for the increased pain which she suffered for the purpose of earning that income. It is clear that she suffers a degree of constant pain in any event, in carrying out the ordinary mundane tasks of life.

I consider that the probabilities are that she will continue to work part time in the Bank on a basis which should not cause her any substantial additional pain. In some 15 years or so, when she is likely to have the first hip replacement, the pain should be considerably reduced and her mobility increased. That position should obtain thereafter. As against that, I bear in mind the pain and discomfort associated with the various operations, as an aggravating factor.

I also make allowance under this head for damages for the psychological impact on the plaintiff of the disfiguring scar on her left buttock; this is part of her loss of capacity for enjoying life. Also compensable under this head are the difficulty and pain which she encounters in having sexual intercourse and the frustration which she has encountered in not being able properly to look after her son Haydn.

Mr Waters referred me to *McCarthy v Newcastle* (Asche CJ, 15 March 1991), but that is a very different case. I must do the best I can, in all the circumstances.

For non-pecuniary loss I would tentatively award the sum of $40,000. Of this sum I would allocate $30,000 as pre-trial non-pecuniary loss, and $10,000 for future non-pecuniary loss.

Since *MBP (SA) Pty Ltd v Gogic* (1990-91) 171 CLR 657, interest on damages for non-pecuniary loss sustained before trial should be calculated at 4%, because of the built-in inflationary factor arising from the fact that the damages are assessed on the basis of the value of today's money. Accordingly, the preliminary amount I would award for interest from August 1974 to trial is $21,900. I should say that I accept Mr Coulehan's submission that this cause of action arose before the commencement of the Supreme Court Act on 1 October 1979, and the provision in s84 of that Act permitting the award of interest does not apply. However, I consider that the award of interest is authorised by s29 of the Civil Procedure Act 1833 (UK), in force in the Territory at the relevant time; see *Jones v South British Insurance Co. Ltd* (1984) 53 ALR 408 at 413.

Award of damages

In the result, the tentative amounts I have allocated to each of the conventional heads of damage which have been put forward, are as follows:-

Pecuniary loss

1A	Motor vehicle (past)	$3000
1B	Motor vehicle (future)	4045
2	Shoes	1529
3	Future medical expenses	40000
4A	Loss of earning capacity, to trial	30004
4B	Interest on this component	4200
5	Future loss of earning capacity	156293
6	Home help	nil
7	Loss of benefit of concessional Bank loan	5000

Non-pecuniary loss

8A	Pain suffering and loss of amenities of life	40000
8B	Interest on pre-trial component of this head	21900
	Total	$305971

Taking into account in particular the need to discount substantially item 5 above, and to provide for the contingencies of life and the overlapping between the various conventional heads of damage, I reduce the tentative total figure by 30%. The defendant must pay the plaintiff $214,180 and her costs of the action less $500. The sum of $500 is to take account of the fact that several hours were lost on one day when the plaintiff had no witness ready to continue.