HEYWOOD v CAMUS

Court of Appeal of the Northern Territory of Australia

Kearney, Rice and Angel JJ

22, 23 August 1989 and 15 November 1990

APPEAL - Appellate Court - role of - review of award of damages by trial judge

DAMAGES - Appeal - personal injuries - approach of appellate court in reviewing award of damages by trial judge

DAMAGES - Personal Injuries - future economic loss - chance or risk of - real or substantial possibility - future unemployment or less remunerative employment

DAMAGES - Personal Injuries - loss of earning capacity - lack of evidence establishing loss of earning capacity

EVIDENCE - Damages - personal injury - loss of earning capacity - no evidence of loss of earning capacity

Cases followed:

Chaplin v Hicks (1911) 2 KB 786
Davies v Powell Duffryn Associated Collieries Ltd [1942] AC 601
Davies v Taylor [1974] AC 207
Government Insurance Office v Johnson (1981) 2 NSWLR 617
Mann v Ellbourn (1974) 8 SASR 298
Moran v McMahon (1985) 3 NSWLR 700
Planet Fisheries Pty Ltd v La Rosa (1968) 119 CLR 118
Thatcher v Charles (1961) 104 CLR 57
Thurston v Todd (1965) NSWR 1158
Victorian Stevedoring v Farlow [1963] VR 594

Cases referred to:

Kaiser v Carlswood Glassworks Ltd (1965) 109 Sol Jo 537
Lovel v Lovel (1950) 81 CLR 513
Todorovic v Waller (1981) 150 CLR 402
Volmer v NTEC (1984-85) 34 NTR 12

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

No. AP7 of 1989

ON APPEAL FROM THE SUPREME
COURT OF THE NORTHERN
TERRITORY OF AUSTRALIA

No. 48 of 1986

BETWEEN:

JOANNE HEYWOOD

Appellant

AND:

JOHN CAMUS

Respondent

CORAM: KEARNEY, RICE and ANGEL JJ

REASONS FOR JUDGMENT
(Delivered 15th day of November 1990)

KEARNEY J

The appeal

On 22 March 1985 the appellant was a passenger in a motor vehicle driven by the respondent on the Ross Highway. The vehicle rolled in a single-vehicle accident. The appellant was injured. The respondent ultimately admitted

liability for those injuries. The trial in November 1988 proceeded as an assessment of damages. The only oral evidence in the trial was from the plaintiff; a considerable number of medical reports were admitted by consent, as was documentary evidence relating to wages earned and awards. On 2 May 1989 the appellant was awarded $60,447 damages for her injuries; this comprised $51,320 general damages, $4320 interest thereon and special damages $4807. She appeals against that award on the basis that it is inadequate; she seeks increased general damages. The general thrust of the appeal is that there should have been an allowance for pre-trial economic loss, and for future economic loss.

I turn first to the judgment under appeal.

The judgment of 2 May 1989

The learned trial judge found that the appellant was not a resident of the Territory and hence her right to damages was not limited in any way by the Motor Accidents (Compensation) Act; in effect, she was entitled to sue for full common law damages. The appellant had not contributed in any way to the injuries she sustained. His Honour found:-

> "The plaintiff was born on ~~13 November~~ 1960. - - - there is nothing significant in her medical history prior to the accident. She matriculated on completion of her secondary school education, commenced an Arts/Humanities degree course at Griffiths University, but after one year took up a course for a degree of Bachelor of Communication majoring in journalism, which she obtained in April 1984, having studied 2 years full time and 2 years part time at the Queensland Institute of Technology. At that time she had been working as a B grade journalist at Proserpine [on a regional weekly newspaper, 'The Proserpine Guardian'] for about 3 months [from 9 January 1984] and had ambitions to progress to the top grade of that

profession. She was in that employment at the time of the accident [that is, she had been so employed for some 14½ months for the period 9 January 1984 - 22 March 1985].

Prior to the accident the plaintiff was actively involved in sport and recreational pursuits - - - She enjoyed reading daily and sewed occasionally.

The plaintiff was rendered unconscious for a short while when thrown from the vehicle. Upon regaining consciousness she was in pain and unable to move her left shoulder, neck or head. The upper part of her left arm was numb and she had what she described as muscle spasms in the left shoulder. She was transported by ambulance to the Alice Springs Hospital, admitted and X-rayed, after which she was given an injection and other medication to relieve the pain. She was largely confined to bed for a week, during which the pain continued, though alleviated to some extent by medication. She wore a neck brace when out of bed. After discharge from hospital [where she had spent 7 days from 22-28 March 1985] the plaintiff went to Mt. Isa where she stayed with her sister, a nursing sister, where she continued bed rest, and then returned to Proserpine where she consulted general medical practitioners, and attended for physiotherapy [She resumed her job there on 21 April 1985, some 31 days after the accident]. She was still in pain in her neck and shoulder, the numbness in the left arm continued and she wore the neck brace for about two months. Physiotherapy at Proserpine continued until the end of 1985 [She attended on 42 occasions for physiotherapy between 9 April 1985 and 12 November 1985, and "treatment is continuing" (Exhibit P6)]. She was also referred to an orthopaedic specialist and a neurologist.

After a few months the plaintiff found that the physiotherapy had alleviated a lot of the pain and she stopped taking drugs regularly, but she still suffered from pain periodically especially when typing and reading. She says that most things associated with her normal work activities as a journalist cause pain in her neck, the back of her head and shoulders and she sometimes resorts to pain-killing tablets. Lack of strength in her left arm was such that she had difficulty changing gear in her car and now has a vehicle with an automatic gear box. The weakness in her left arm sometimes causes difficulty in steering a car.

> The migraine attacks, which the plaintiff related to neck pain, increased in frequency after the accident to 2 or 3 a month, but in the intervening period the frequency of those attacks has diminished to that prevailing prior to the accident [about once a year, for about one day on each occasion].
>
> I have no reason to doubt the plaintiff's evidence as to the nature or extent of her disabilities nor that they arose as a consequence of injury suffered in the accident. There has been some improvement in her condition, in the period from the date of the accident to trial, but she still suffers from pain and discomfort which arises particularly from any activities which involve strain to her neck, shoulders and left arm." (emphasis mine)

Mr Hiley of senior counsel for the appellant stressed the words emphasized above, saying that they indicated that his Honour accepted the appellant as a credible witness and that accordingly he later erred when he found against the appellant on some matters where she was not corroborated; see, for example, on the question of loss of her earning capacity, the words emphasized at the foot of p.12 and Mr Hiley's submissions thereon. Put another way, the submission was that as the appellant had been found to be credible on "the nature or extent of her disabilities", her testimony alone was sufficient to provide a basis for assessing the quantum of her alleged lost earning capacity. In my opinion, to construe those words in this way is to give them a weight which they cannot bear; they express his Honour's assessment of the credibility of the appellant in relation to her disabilities, and must be read in the context of the preceding account which formed the basis of that assessment. They do not connote that her views must be accepted, without more, on the question of her loss of earning capacity through reduced job opportunities.

His Honour then discussed the medical evidence "which confirm the plaintiff's evidence as to her disabilities."

Dr White, an orthopaedic surgeon, had seen the appellant on 2 May 1985 (6 weeks after the accident); his long-term prognosis was that "the development of cervical spondylosis may occur in time." This is the only reference in the medical reports to this possibility. In his report of 16 October 1985 Mr Cameron, a neurologist who saw the appellant on 10 September 1985, (9 months after the accident) noted that "her neck still caused her problems at times", that "I suspected in the following 2 or 3 years most of the problem [stemming from her neck injury] will have abated," but "it is quite likely she will experience [neck pain] from time to time in the foreseeable future" and "obviously certain work, such as typing or sitting still for any period of time, will aggravate this problem." No later medical report dealt with these matters, apart from that of Mr Douglas, an orthopaedic surgeon, of 18 November 1986. He stated that in his opinion the appellant had suffered a serious injury to her cervical spine; there was progressive degeneration of the C3-4 disc from the injury, likely to cause increasing neck pain, which was, however, usually controllable by simple physical methods such as heat, massage or traction. There were no up-to-date medical reports in evidence at the trial in November 1988; the last was dated 27 May 1987, 18 months before the trial, and did not, for example, deal with the matters noted by Mr Cameron in September 1985. The lack of up-to-date medical reports is very surprising; they are the keystone of any personal injuries case. The Court is entitled to have up-to-date reports, to reduce the difficulties in assessing developments; see Kaiser v Carlswood Glassworks Ltd. (1965) 109 Sol. Jo. 537, per Sellers LJ.

His Honour continued:-

> "The plaintiff resumed her prior employment as a [B Grade] journalist [on a regional weekly newspaper] at Proserpine [on 21 April 1985, some 31 days]

> after the accident [at the same pay]. She was at first unable to perform her duties to her full capacity, but gradually became able to reasonably do so notwithstanding the pain and discomfort which arose as a consequence. The discomfort and need to rest at the end of a day's work curtailed much of her recreational activities. She continued in that employment for about 18 months [until 5 September 1986]. Her then employer [Mr Lewis], in a statement received by consent [Exhibit P10], said that the plaintiff:-
>
> > " - - was a good member of the staff of the newspaper. I found her a willing and enthusiastic worker who was prepared to take an interest in local events. It was my view that given some further time and experience she would have progressed to an A Grade journalist ranking .... I noticed on Joanne's return to work [on 21 April 1985] that she was rather less active for some time. She appeared less mobile and less able to perform physical parts of her assignments."
>
> I take that last sentence to refer to the unspecified time that he observed the plaintiff to be less mobile and less able to perform physical parts of her assignments. It does not appear to me to amount to a qualification of her then employer's opinion as to the prospects of advancement in her profession. Another letter from that employer, dated 8 June 1988 [Exhibit P11], is ambiguous and not helpful."

Mr Hiley submitted that his Honour had misinterpreted Mr Lewis' statement (Exhibit P10), treating it as meaning that even with her injury the appellant "would have progressed to an A Grade journalist ranking." I reject that submission; it is clear that that is exactly what Mr Lewis meant, and this is confirmed by his letter of 8 June 1988, Exhibit P11.

His Honour continued:-

> "[On 5] September 1986 she voluntarily left her employment as a journalist [at Proserpine, where she had earned $252.80 nett per week] and went to Lindeman Island to work as a waitress and housemaid

[for about 5½ months, at $220 nett per week]. That move was not related in any way to her disabilities or their consequences. [She went for 'romantic reasons'. As already noted she experienced pain in her left arm resulting from lifting. Her neck pain continued but not to the same extent as she was not then engaged in much typing. The frequency of headaches diminished.

[On 23] February 1987 the plaintiff took up employment as a D grade journalist in Mackay [at $281.80 nett per week, with the Daily Mercury, a regional daily newspaper]. She was told by her employer that that was the only option then open to her, but that she would soon be promoted to C Grade. As soon as she started typing with a computerised word processor the frequency and degree of her disabilities increased. She sought further medical advice and was prescribed pain killing tablets. She underwent further physiotherapy treatment [She ceased this employment on 3 July 1987, after some 4½ months].

After about 4 months [on 10 August 1987] the plaintiff took up employment [at $245.90 nett per week with Syme Community Newspapers] as a D grade journalist at Frankston, Victoria, again, she says, on a promise of promotion. She had more responsibilities there and much the same pattern of aches and pain continued, migraines about once a month for a day and constant neck and shoulder pains. There was no evidence that she had not carried out her work [as editor of the "Frankston News"] to the satisfaction of those latter employers [for the 8 months she was in their employment during which she had 3 sick days off].

Her condition improved somewhat upon her again changing employment in [5] April 1988 to work as a research officer to a Commonwealth parliamentarian in Victoria [at an increased salary]. She was selected from 60 applicants. At the time of the hearing [in November 1988, some 7½ months later] she was still so employed, [earning $347.75 nett per week]. There is a lot less typing involved and she is not obliged to drive her car a great deal. As the plaintiff put it:-

> "it's a lot easier on one physically. I can cope a lot better, but I still have the neck and shoulder problems and the headaches, not so frequently."

> However, although typing is reduced, she must read a lot more and that causes her neck problems.
>
> At the time of trial [in November 1988] the plaintiff said she had a stiff neck all the time but chiropractic treatment helps to alleviate her problems. Her headaches are not as severe and medication gives relief. The frequency of migraine attacks had dropped remarkably, none having occurred during the previous year, coinciding roughly to the time she commenced her latest job.
>
> Apart from the physical problems which are associated with typing and reading the plaintiff says that her productivity as a journalist has been adversely affected. The plaintiff's demeanour and physical movements whilst in Court appeared to me to be genuine and to show that she does suffer from stiffness, pain and discomfort around her neck and shoulders.
>
> Although she is not now completely disabled from work, nor likely to be so, by reason of the persisting symptoms of her injuries, it is clear that those symptoms cause her distress and affect her ability to carry out some of the duties of a journalist, to some degree. She has continued in the line of work for which she is qualified, notwithstanding that it causes her pain and discomfort." (emphasis mine)

Mr Hiley appeared to submit that this was a finding by his Honour that the appellant could cope with the work of an A Grade journalist, though with increased pain and discomfort. As can be seen from the words used, and from later observations, his Honour did not make such a finding; he did not advert to the appellant working as an A Grade journalist. The finding that the "symptoms - - affect her ability to carry out some of the duties of a journalist, to some degree" appears to point to a diminished work capacity on the part of the appellant; but as will be seen (p.19), his Honour did not treat this as giving rise to damages because he found that her pain did not adversely affect her work capacity - see pp.9 and 16. Further, his Honour made it clear that by these words he meant she was still able to

perform the tasks of a journalist, but with pain - see words emphasized at p.16.

His Honour continued:-

> "It was not suggested that any of the changes in employment were caused by her ongoing problems [from her injuries]."

This statement is challenged by Mr Hiley insofar as it is a finding that the appellant changed her employment, from Proserpine to Lindeman Island to Mackay to Frankston to working for the parliamentarian, for reasons other than those attributable to her injuries. I consider it is clear that that is in fact what his Honour found, and the evidence warranted his finding. His Honour continued:-

> "The plaintiff married in September 1988 [2 months before the trial]. She and her husband are thinking about having children but have made no definite plans in that regard."

His Honour then stated his approach to the basis on which damages for future economic loss should be awarded:-

> "The plaintiff claims damage for future economic loss arising from diminution of her earning capacity. It must be shown on the material before me, on the balance of probabilities, that she will suffer such a loss [that is, a diminution of earning capacity] by reason of the disabilities arising from the injuries suffered in the accident. She is entitled to an award of damage for pain and suffering and loss of amenities of life, including loss of enjoyment in her work by reason of pain occasioned in the doing of it. <u>But, if notwithstanding that pain, she is, and will remain as capable of exploiting her earning capacity as she might otherwise have done, then I do not consider that she is entitled to claim damages for loss or partial loss of earning capacity</u>. Changes in employment, which are not shown to be occasioned by her disabilities, but which cause less pain and discomfort, do not show that the plaintiff has

> suffered any loss of earning capacity. Because this aspect of the matter causes me some concern it is necessary that I review the evidence with particular care." (emphasis mine)

The words emphasized are vital to his Honour's approach to the question of damages for economic loss: he is saying that the fact that pain has become a concomitant of her work as a journalist does not sound in damages for economic loss unless it is shown to have reduced her earning capacity. On p.8 his Honour found that the symptoms of her injuries affected "her ability to carry out some of the duties of a journalist, to some degree"; while this appears to be a finding of partial incapacity to work, in fact it was not - see p.8. In any event what must also be shown is that a diminution in her earning capacity results. His Honour dealt with this at p.19.

I note that Mr Hiley submitted that in what is quoted on p.9 his Honour "started to apply wrong principle," in that he ignored the fact that the pain and discomfort the appellant would suffer in working as an A Grade journalist could ultimately impede her earning capacity. As to that I consider first that his Honour did not accept that some increased pain and discomfort would flow from the appellant working as an A Grade journalist, as opposed to one of a lower grade. Second, his Honour did not fail to take account of the ultimate results of pain on earning capacity; see pp.21 and 23.

His Honour then turned to the appellant's evidence as to the effects of her injuries upon her work capacity, viz:-

> "When asked in examination in chief as to whether the problems she experienced at work affected her ability to carry out the duties of her employment, the plaintiff answered:

> "Yes - I would say so. As a journalist you're fairly busy. It's a non-stop sort of day from the time you walk in the door to the time you walk out you're continually typing and I would say my output has decreased - I'm not physically as capable of my duties as what I would have been because of the accident. .."."
> (emphasis mine)

Mr Hiley submitted that since his Honour had indicated (at p.4) that he accepted the appellant's evidence, he should have found on the evidence that her work output had decreased, as she said, and her physical capacity to carry out that work was less, as a result of the accident. In turn, he submitted, this pointed to a pre-trial loss of earnings, as she could have earned more had her capacity not been reduced by the accident; and that reduced capacity would also mean a reduced productivity in the future, and hence a loss in her earning capacity. I do not accept this submission. His Honour considered her evidence in the context of the case and came to the conclusions underlined on p.12.

I return to the narrative. His Honour noted the plans which the appellant had had pre-injury for her future career as a journalist, and considered the effect of her injuries on those plans, as follows:-

> "The plaintiff had plans for her future. The journalistic profession is highly structured. Starting as a cadet, a journalist might progress through D, C, B, A and higher grades. The higher the grading the higher the rewards. There are differences in the rates of pay for the different grades depending upon the type of newspaper published, both as to its location and frequency of publication. The plaintiff said that a suburban weekly publication [such as the "Frankston News"] was "on the bottom rung", that progressing up the ladder came provincial weekly [such as the Proserpine Guardian], regional daily [such as the Mackay 'Daily Mercury'] and metropolitan daily. The distinctions were not precisely explained, but

> the plaintiff said that at Proserpine the newspaper was categorised as a regional weekly, that in Mackay a regional daily and that in Victoria [at Frankston] a suburban weekly. Her ambition was to become an A grade journalist on a metropolitan daily such as the 'Daily Sun' or 'Courier Mail' published in Brisbane. Prior to the accident [on 22 March 1985] she intended to remain in Proserpine [where she had been a B Grade journalist on a regional weekly] until about the end of 1985 [she in fact left in September 1986], and progress to the regional daily newspapers published in Mackay [where she went in February 1987 as a D Grade journalist on a regional daily, staying 4½ months] or Townsville at C grade, improving to B grade within a further 2 years. After that she intended to apply for a job on a metropolitan daily commencing at B grade and advancing to A grade in about a further 2 years. Had that all come about the plaintiff expected to be an A grade journalist working on a metropolitan daily newspaper by the end of 1988, about the time of the trial. Her plans did not materialize but there is nothing to show that that failure is attributable to the injuries sustained in the accident or their consequences, except in so far as her progress may have been temporarily delayed. She did obtain a position in Mackay [in February 1987], at a lower level [D Grade] than she had planned, that is, C grade [and about a year later than she had planned]. For unexplained reasons she then moved to Victoria [about 6 months later] effectively putting an end to her planned career path in Queensland.
>
> There is no evidence as to why the plaintiff did not follow her intended career path, other than the suggestion from her that she believed her capacity to be impaired. No employer, or prospective employer, came forward to say that she had been refused employment or advancement because of the disabilities she suffered. Indeed, there was no evidence from any person experienced in the profession to the effect that a person suffering from such disabilities would be inhibited in their job opportunities." (emphasis mine)

At this point I note that Mr Riley conceded that the appellant bore the onus of satisfying the Court that her "intended career path" had been adversely affected by her injuries, but submitted that the lack of evidence as to

whether her disabilities had an inhibiting effect on job opportunities as a journalist was irrelevant. Such evidence would only have been corroborative of her own evidence; since his Honour had already accepted her evidence, Mr Hiley submitted that he should not have been influenced by the lack of corroborative evidence. See the earlier discussion at p.4. In my view, his Honour was right to stress the lack of evidence, other than evidence from the plaintiff, on these vital matters. There was nothing in the evidence placed before the Court to suggest that any employer (other than Mr Lewis at p.6) considered that her disabilities had impaired her journalistic work capacity, or that she had been employed at a lower journalistic grading because her disabilities prevented her working at a higher grade. Mr Lewis had said her injuries affected her working capacity, but only "for some time". There are glaring evidentiary omissions in her case.

His Honour continued:

> "When the plaintiff left the Victorian newspaper position [as a Grade D journalist] she says she was replaced by an A grade regional journalist who transferred from another position in the same organisation. That does not show the level at which that person was then employed, nor that the plaintiff would not have advanced had she continued in that employment [beyond the 8 months she remained in it]."

His Honour noted that the appellant had applied unsuccessfully at the end of 1985 and in 1987 for two jobs as a journalist, the first with the 'Daily Sun', a metropolitan daily in Brisbane, the other as a B Grade journalist with the 'Australasian Post' magazine. He commented:-

> "She volunteered that journalism is a fairly competitive field. Clearly the plaintiff must have

> considered that she was capable of doing the jobs for which she applied even though she anticipated ongoing pain and discomfort." (emphasis mine)

Rightly, as it appears to me, the learned trial Judge put considerable weight on this factor when considering the question of the appellant's continuing capacity to carry out journalistic work despite the associated pain. Mr Hiley submitted that, even if this finding were accepted, his Honour had not taken into account that the appellant would nevertheless have been at a disadvantage on the open labour market because of her discomfort when working, and might later by reason thereof not have been able to perform her work effectively; but see pp.21 and 23.

His Honour stated:-

> "The [appellant] regards her present employment [with the parliamentarian] as being a stepping stone towards promotion in journalism - - - a very good preparation for becoming a political reporter on a metropolitan daily."

Mr Hiley submitted that this statement was incorrect. His Honour was quite correct; see transcript p.62.

As to the appellant's present capacity to reach the status of an A Grade journalist with a daily metropolitan newspaper his Honour noted that in her evidence:-

> "- - the plaintiff gave a qualified denial to the proposition that she could never [now] reach the status of an A Grade journalist. - - - "I believe that I have the intellectual capability, but not the physical capability to cope with 8 to 10 hours a day of typing on a computer". - - - In other parts of her cross-examination, the plaintiff explained "I don't think that I could perform the duties of an A Grade journalist now because of my physical disabilities.""

As to this evidence his Honour observed:-

> "There is no evidence that such demands [that is, typing 8-10 hours a day on a computer] would be made of her [if she were an A Grade journalist]. At the same time she acknowledged being able to manage her previous journalistic positions [at Proserpine, Mackay and Frankston] - - - The plaintiff replied "Yes", when asked in cross-examination whether she thought she could have reached A grade status with a [regional weekly] newspaper such as that published at Proserpine. She did not seek to qualify her answer by reference to her physical disabilities."

As to the latter point - of attaining A Grade status with a regional weekly - Mr Hiley submitted that his Honour had misinterpreted the evidence; I think not - the relevant evidence is as follows (transcript p.92):-

> "I am not sure whether I asked you about this yesterday, but do you think that you could've reached A grade status for a journal of the type that you worked for, when you were working with the Proserpine newspaper; that's if you had carried on with them?---Yes, yes, that's true."

His Honour noted:-

> "Although inhibited in sewing and tapestry work and she finds aerobics and scuba diving uncomfortable, the plaintiff is able to play competition netball. The plaintiff has gained about 12kg in weight since the accident which she attributed to diminished physical activity because of her disabilities."

His Honour then set out his conclusions from the evidence, as follows:-

> "The plaintiff's intellectual capacity to continue her career as a journalist or research officer has not been impaired. Her problems arise from activities necessarily associated with such employment which place strain on her neck and shoulders, such as bending to read, typing and

> driving a car. She is able to perform those tasks, albeit with some difficulty and consequential pain and discomfort." (emphasis mine)

Mr Hiley submits that this finding causally links her injuries with her ability to carry out the work of a journalist, which gives rise to "her problems". That is correct, but the sentence underlined is a finding that nevertheless "she is able to perform those [journalistic] tasks", putting up with the consequential pain. In other words, she is a stoic. Mr Hiley submits that there should have been a finding that the pain and discomfort occasioned by such work would eventually lead to a loss of earning capacity; see, however, his Honour at pp.21 and 23.

His Honour continued:

> "She feels that those stresses [from the work of a journalist] are harmful and that she could not cope with what she perceives as being the higher demands of employment at the highest grade of the profession. There is no certainty, or even probability that she would have made it to the top, as much as that might have been her goal, and to try and assess just how far she might have progressed, if at all, would be sheer speculation." (emphasis mine)

As to the first sentence, Mr Hiley submits that his Honour has ignored the fact that the additional stress on the appellant of the work of an A Grade journalist, because of her injuries, would sooner or later mean that her productivity, and thus her earning capacity, would decline. However I do not consider that his Honour was satisfied that there were additional stresses arising from the work of an A Grade journalist to which her injuries made her more susceptible.

Mr Hiley also submits that the conclusion underlined takes no account of the appellant's intellectual ability, education, ambition, stoicism and Mr Lewis' assessment of her in Exhibit P10. I note that it can never be certain whether the appellant "would have made it to the top", if she had not been injured. To apply a requirement of "certainty" in deciding that would be wrong. In general, the Court must consider the possibility, not simply the probability, of loss occurring after trial, and seek to evaluate it. If there is a chance of loss, the appellant is entitled to be compensated for that risk. As Asprey J put it in Thurston v Todd (1965) NSWR 1158 at p.1166, the Court:-

> "- - proceeds to its verdict in the dark, forced to speculate as best it can into the far, unknown future. - - ."

By its nature, what will happen in a future career is uncertain; less uncertain, usually, is an assessment of what would have happened to her career, had she not been injured, between accident and trial. But in both cases the Court must estimate, as best it can, what may have happened had the appellant not been injured; her prospects of achieving higher grades as a journalist must be assessed. In doing so, the question to be answered is: was there a real or substantial chance that she "would have made it to the top", or to some lesser grade, as opposed to a speculative or fanciful possibility? Where there is a real chance of promotion, how it will sound in damages depends on the facts of the case, after the effects of the injuries on those career prospects have been assessed. When the Court is satisfied that damage has been sustained, difficulty of assessment per se is no excuse for not making an award; see Chaplin v Hicks (1911) 2 KB 786 at p.792, per Vaughan Williams L.J.

Since assessment of future economic loss involves the valuation of a chance of which the plaintiff has been deprived, the test of "certainty, or even probability" is inapposite. On the other hand a possibility which is assessed as "sheer speculation", in his Honour's words, is to be ignored. It is the real or substantial possibility of promotion which must be evaluated. The dividing line may be difficult to draw. In the closely related context of damages for loss of dependency under Fatal Accidents legislation Lord Reid put it this way in Davies v Taylor (1974) AC 207 at p.212-213:-

> "To my mind the issue and the sole issue is whether that chance or probability was substantial. If it was it must be evaluated. If it was a mere possibility it must be ignored. Many different words could be and have been used to indicate the dividing line. I can think of none better than "substantial," on the one hand, or "speculative" on the other. It must be left to the good sense of the tribunal to decide on broad lines, without regard to legal niceties, but on a consideration of all the facts in proper perspective.
>
> I am well aware of the fact that in real life chances rarely are or can be estimated on mathematical terms. But for simplicity of argument let me suppose two cases of a widow who had separated from her husband before he was killed. In one case it is estimated that the chance that she would have returned to him is a 60 per cent. probability (more likely than not) but in the other the estimate of that chance is a 40 per cent. probability (quite likely but less than an even chance). In each case the tribunal would determine what its award would have been if the spouses had been living together when the husband was killed, and then discount it or scale it down to take account of the probability of her not returning to him.
>
> But in the present case the trial judge applied a different test. He held that there was an onus on the appellant to prove that on a balance of probabilities she had an expectation of continued dependency - that it was more probable than not that there would have been a reconciliation.

> - - - You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All that you can do is to evaluate the chance. Sometimes it is virtually 100 per cent.: sometimes virtually nil. But often it is somewhere in between."

In similar vein in Mann v Ellbourn (1974) 8 SASR 298 Bright J said at p.308:-

> " - - compensation is paid for the value to the plaintiff of whatever it is that he has lost. If what he has lost is replaceable then he gets - - a sum of money which restores him to the position he was in before the loss. If he loses an attribute and that attribute cannot be restored to him, such as capacity to work, - - then one has to look at what he is doing with that attribute before the accident, and what he was likely to have done with it but for the accident, and what he might possibly have done with it but for the accident, and one assesses the user, the probable user, and the chance as best one can. One does not however assess as if possibilities were probabilities or probabilities certainties." (emphasis mine)

I return to the narrative. His Honour continued:

> "Journalism is a competitive field, she would need luck as well as experience [to make it "to the top"]. Her recent marriage [2 months before the trial] and planned family give rise to further doubts as to the probabilities in relation to future employment." (emphasis mine)

Mr Hiley submits that the factors stressed should be taken into account as adverse contingencies tending to reduce an award for future economic loss, rather than as matters going to her reaching A Grade level. That appears to me to be a distinction without a difference. I consider his Honour was correct to take them into account in the way he did; the term "probabilities" is used presumably in the same sense as by Lord Reid in Davies v Taylor (supra).

His Honour concluded:-

> "I do not consider that, on the evidence, the plaintiff has shown that her earning capacity has been materially affected. Undoubtedly, she will continue to suffer pain and discomfort arising from the performance of her duties, but as already noted conservative treatment, exercise and medication all assist in alleviating the symptoms. There is no evidence as to effect which the possible future cervical spondylosis may have upon her earning capacity." (emphasis mine)

His Honour had earlier (p.16) expressed the difficulty he found in assessing the appellant's career prospects, had she not been injured. Here he has turned to the other factor in determining loss of future earning capacity - the effect which the injuries have had on those (pre-injury) prospects and work capacity, whatever they may have been. If the injuries have no effect then (subject to the qualification his Honour discussed at p.21) ex hypothesi they are not productive of economic loss by way of diminished earning capacity and the assessment of pre-injury prospects and capacity is seen to be irrelevant (because they are unaffected by the injuries). The words emphasized express his Honour's vital conclusion that diminution of earning capacity has not been shown; that is, the appellant had failed to prove the fact of damage.

Mr Hiley rhetorically asked, with reference to his Honour's reference to "on the evidence", what admissible evidence there could be which would establish a reduction of her earning capacity. The short answer is that evidence relevant to that issue would include up-to-date medical evidence, evidence from persons knowledgeable as to the work required of different grades of journalists in different types of publications, the evidence from the appellant, and independent evidence of her capacities and employment record

since the accident. This case is remarkable for the paucity of evidence relevant to this issue. The medical evidence constituted an inadequate basis from which to draw such an inference, bearing in mind the evidence of the appellant's work history from March 1985 until November 1988. As Rice J pointed out during the hearing of the appeal, the onus was on the appellant to establish the loss of earning capacity she claimed. In so far as a conclusion on loss of future earning capacity may involve a comparison of the assessment of what the appellant's career prospects would have been had she not suffered the injuries, with the assessment of her post-injury career prospects, a good deal of prophesying is necessarily involved; but in this case the state of the evidence was such that his Honour was unable to conclude that the injuries affected her pre-injury prospects. The appellant never reached first base; she failed to prove the fact of damage in relation to her earning capacity. Clearly, she presented as a stoical person, continuing in her journalistic career despite the pain and discomfort which his Honour found her work caused her. The common law tort system with its built-in disincentives to rehabilitation does not, unfortunately, deal very meaningfully with the stoic, though persistence in working despite pain sounds in a somewhat higher award for non-pecuniary loss for pain and suffering. His Honour made allowance for this; see p.9 and 24.

His Honour continued:-

> "It is not open to me to make a speculative assessment for future economic loss, but it has been recognised that a plaintiff may be compensated "to the extent of a reasonable and moderate evaluation in money of the mere chance or risk of future unemployment or loss of remunerative employment (sic)" (per Sholl J. in Victorian Stevedoring v Farlow (1963) VR 594 at p.599, Herring C.J. at p.595 and Hudson J at p.600)."

Mr Hiley submitted that the appellant had never contended that she would be totally unemployed, yet in the light of this statement the later award of $10,000 "for the chance or risk of future economic loss" appeared to be for the chance or risk of total unemployment. That is not so. There is a typographical error in the citation from Victorian Stevedoring Pty. Ltd. v Farlow (supra), in that "loss of remunerative employment" should read "less remunerative employment." It is clear that the award of $10,000 was intended to compensate the appellant for the chance or risk of economic loss arising from both causes.

In Farlow's case (supra), Sholl J was concerned with a similar question to that in issue in this case: "what actual probability did the plaintiff here establish of future economic loss?" (p.598). His Honour concluded that there :-

> "- - was nothing in the evidence to warrant the inference that his tenure of [his post-accident] employment would probably be brief, or that he was likely, sooner or later, to find himself off the wharves looking for work." (p598)

Sholl J considered that nevertheless there should be some allowance for the possibility of the plaintiff leaving his work, since "the defendant wrongdoer has damaged the plaintiff by putting him into a class of workers potentially more vulnerable to the risk of unemployment." His Honour considered that the plaintiff had not proved a probable loss of wages to the amount awarded by the jury, being in mind that :-

> "He called no witness from the Authority; nor the classifying doctor referred to in the evidence, nor any other witness acquainted with the work he was doing; no union official; no fellow wharf worker. In short, there was no evidence to suggest any real probability of loss of employment in the

> foreseeable future. - - - And unless there is evidence upon which [the jury] can find it likely that he will earn less money, the most they can lawfully do is to compensate him to the extent of a reasonable and moderate evaluation in money of the mere chance or risk of future unemployment or less remunerative employment. Even if the jury in the present case was entitled - as I think it was - to take the view that the plaintiff, if he had to find work off the wharves, might earn reduced wages and have periods of unemployment, there was simply no evidence that that was likely to be his situation at any foreseeable time. The jury was entitled to award something moderate by way of insurance against the chance of such a situation arising, - -"

Returning to the present case, I note that his Honour proceeded to consider whether allowance should be made for what may be called the Farlow element:-

> "The plaintiff is 28 years of age and subject to the vicissitudes of life could seek to exploit her earning capacity for another 30 years or thereabouts. There is no certainty that her condition will stabilize or improve and, at least so far as the cervical injury is concerned, the predominant medical opinion is that it is likely to deteriorate, although the resultant pain can be simply controlled. She runs the risk of the underlying causes of her symptoms being aggravated." (emphasis mine)

Mr Hiley submits that this is another important finding. And so it is. His Honour extrapolated on this risk, as follows:-

> "Returning to work with a visual display terminal may lead to increase in the frequency of migraine. There is a chance or risk of future economic loss." (emphasis mine)

It is clear that his Honour is here expressing his conclusion on the Farlow element, which led to his later award of $10,000 for the risk of future unemployment or less

remunerative employment. This amounts to an award of damages for the risk of handicap in the labour market at some future date, though no loss of future earning capacity has been otherwise shown.

His Honour continued:-

> "I will include in the award for loss of amenities of life a moderate allowance for the plaintiff's loss of job satisfaction. Not because she is unable to perform the work for which she is qualified, but because the pain and discomfort it engenders renders her performance less enjoyable. Care will be taken to avoid overlapping." (emphasis mine)

His Honour then proceeded to assess damages as follows:-

> "For the reasons already given there will be no award for past loss of earnings."

As to this aspect, Mr Hiley conceded that the appellant, as a stoic person, had promptly returned to the work force; and that there was no unequivocal evidence that she had suffered a loss of income pre-trial. He submitted, nevertheless, that his Honour should have found that, uninjured, she would have earned more, prior to trial, than she actually had. I reject that submission; there is nothing to support any such finding, and the evidence supports his Honour's conclusion above in that respect.

His Honour continued:-

> "The only evidence going to future medical expenses is that the plaintiff incurs an expense of $20 per fortnight for chiropractic treatment. Using the tables in Luntz the plaintiff calculates an allowance of $13,320 to death. [This discounts $10 per week at 3% per annum, in accordance with the statement in Todorovic v Waller (1981) 150 CLR 402

at p.409]. It is, I think, likely that the plaintiff will continue to need to seek relief from her symptoms, whether at the hands of a chiropractor or otherwise, and by way of medication. That relief reduced the allowance which must be made for pain and suffering in the future. $10 per week does not seem to me to be an unreasonable amount to take into account.

| | |
|---|---|
| For pain and suffering and loss of amenities of life post and future I award [subsequently apportioned as to $18,000 for pre-trial loss and $10,000 for post-trial loss] | $28,000 |
| For the chance or risk of future economic loss [the Farlow element] | $10,000 |
| For future medical expenses | $13,320 |
| Special damages are agreed at | $ 4,807.35 |

Looking at the total of $51,320 for general damages I consider it to be a fair and just award.

Interest is claimed. Since the most severe pain and suffering occurred over the period prior to trial, I apportion $18,000 of the award under that heading to the past. Taking what appears to be a standard but broad brush approach, interest at 6% will be allowed from the date of accident to trial, a period of about 4 years. That amounts to approximately $4,320.

Judgment for the plaintiff for $60,447." (emphasis mine)

I note that the interest rate of 6% over the whole period (effectively 12% on the accruing non-pecuniary loss) is the rate currently applied in the Territory though it is certainly not the commercial rate; see the discussion in Volmer v NTEC (1984-85) 34 NTR 12 at pp.28-32. No objection is taken to the rate.

The appellant's case

In the course of setting out the judgment I have already dealt with several of Mr Hiley's submissions on various points. I now deal with them formally. In general, his submissions fell into four categories though there was overlapping; I deal with them in that way.

First, he submitted that his Honour had misinterpreted the evidence in finding that the appellant had not established that her earning capacity (both pre-trial and future), had not been materially adversely affected by her injuries. In this connection, he submitted that some of his Honour's findings relevant to this question were inconsistent with other findings he made, while some findings were wholly unsupported by the evidence.

He referred to some 10 findings in respect of which, he submitted, there are other contradictory or qualifying findings. I have examined the alleged 16 conflicting findings which bear on the adverse effect of the appellant's disabilities on her work. It is clear that the appellant suffers some pain and discomfort, as detailed by his Honour, in carrying out the work of a journalist. His Honour found that the symptoms of her injuries "affect her ability to carry out some of the duties of a journalist, to some degree"; he also later found "she is able to perform those [specified] tasks, albeit with some difficulty and consequential pain and discomfort." I do not consider that these findings conflict with his Honour's conclusion that there was a lack of evidence to show that the earning capacity of the appellant, a stoical person, had been materially adversely affected. Nor do the findings on the appellant's reliability as a witness, the medical evidence, the appellant's pre-injury career plans, her reasons for leaving journalism to take up research work with a parliamentarian, on the competitive nature of journalism, the fact that her cervical injury is likely to deteriorate,

the pain and discomfort which she has suffered, and the fact that her present employment depends upon the re-election of the parliamentarian, conflict with the findings his Honour made to the effect that her earning capacity had not been materially adversely affected.

Mr Hiley submitted that but for her injuries in this accident, the likelihood is that the appellant would by trial have reached the top of the journalistic profession, as an A Grade journalist on a metropolitan daily newspaper, earning $439.20 nett per week, instead of her present $347.75 nett, a difference of $91.45 per week. He submitted that while the appellant can cope with the work of a B Grade journalist, she cannot now cope with the work of an A Grade journalist. I note that the evidence was that at trial a B Grade metropolitan daily journalist earned $389.25 nett per week and an A Grade provincial journalist $378.40 nett. He submitted that while there was no evidence that had the appellant not been injured she would have become an A Grade journalist, that is an inference of fact which the learned trial judge should have drawn, taking into account her background, employment pattern and stated intentions, and it is an inference which it is open to this court now to draw. His Honour did not do so. In view of his conclusion that her injuries did not affect her work capacity, a decision on her pre-injury prospects becomes irrelevant, as far as concerns future loss of earning capacity. The same conclusion led to the finding that she had suffered no economic loss pre-trial. Whether this Court should review those conclusions is a matter to be determined by applying the legal principles applicable to a review of a trial judge's award of damages; I deal with this later.

The second submission was that his Honour had misinterpreted other parts of the evidence: Mr Lewis'

statement; the evidence of the appellant as to her ability to reach A Grade level at Proserpine as a journalist; her evidence as to the limited assistance in coping with her work as a journalist which regular breaks had given her; and what was said to be the thrust of the medical evidence as to the effect her deteriorating cervical spine would have on her physical condition. Clearly enough, the appellant's view was that she lacked the physical capability "to cope with 8-10 hours a day of typing on a computer." However, his Honour's conclusion was that there was no evidence that such a work regime would be required of her. I do not consider that his Honour misinterpreted any of the evidence in question.

The third submission was that his Honour had disregarded the detailed calculations of the appellant's loss presented to him, without giving reasons for doing so. These were calculations of her estimated nett yearly earnings to 1988 in the absence of injury, on certain assumptions; they also showed her actual earnings and thus a claimed loss of earnings to trial of $12,394.58. The calculations also involved estimates of future loss of earnings on certain assumptions as to the journalistic grades which she would have attained, and as to time she would have spent in the workforce. I consider that his Honour had no need to pay attention to these calculations unless they proved to be material to the facts as he found them to be. In the light of his finding that her earning capacity had not been materially and adversely affected by her injuries, the calculations were not material.

The fourth submission was in three parts.

First, Mr Hiley submitted that his Honour had erred in making no award for loss of earnings to trial. Mr Hiley made it clear that the basis of this submission was that the

appellant had suffered loss of earnings through the loss of her expected acceleration in her journalistic career. The submission was that on the evidence and his Honour's findings, the appellant had suffered a loss of earnings. That is not so. His Honour found that the appellant had not suffered any loss of earnings or earning capacity during the pre-trial period and had chosen to change to a job with less pain and discomfort with the parliamentarian, as a stepping towards towards promotion in journalism. Whether that finding should be reviewed depends on the legal principles to be applied when reviewing his Honour's decision; see later.

Second, the submission was that the appellant's stoicism meant that in persisting with her journalistic career in the pre-trial period, despite the pain and discomfort which that caused her - and thus minimising her loss of earnings - the sum of $18,000 allowed for pain suffering and loss of amenities pre-trial was inadequate. I observe that with non-pecuniary loss a Court must do the best it can; such damages really involve fairly conventional amounts, though taking into account the particular facts of the particular case. Nevertheless, the somewhat unsatisfactory law in Australia is that there is no norm or standard derived from amounts awarded in other cases by which it is to be assessed; see Planet Fisheries Pty Ltd v La Rosa (1968) 119 CLR 118 at pp.124-5 and Moran v McMahon (1985) 3 NSWLR 700 at pp.702-712 (Kirby P), 724 (Priestley JA) and 726 (McHugh JA). Current general ideas of fairness and moderation are to be given weight. The objective is fair compensation; see Thatcher v Charles (1961) 104 CLR 57 at p.63, per Kitto J. Applying those ideas, I do not consider it could be said that the award of $18,000, or the overall award of $28,000 for non-pecuniary loss, was inadequate. Indeed, it appears to me, with respect, to be a very fair award. His Honour was careful to avoid overlap with future

medical expenses; see p.25. But in any event a review depends upon the application of legal principles; see later.

Third, Mr Hiley submitted that the award for future loss of earning capacity ($10,000), and the allocation for future pain suffering and loss of amenities ($10,000) were inadequate, when measured against the appellant's age, (28 years old at trial), the extent of her ongoing pain and discomfort, and the likelihood of a deterioration in her physical condition. It is not a matter of words to observe the first award of $10,000 above was "for the chance or risk of future economic loss" in the Farlow sense, and not for future loss of earning capacity as that expression is commonly used. As such, it is very speculative, a contingency incapable of direct evidence, and involves a "guesstimate". Again, whether these amounts should be reviewed depends upon the principle applicable to the review of a discretionary judgment to which I now turn.

The legal principles applicable

The proper approach of an appellate court to reviewing an award of damages by a trial Judge is set out in classical form in Davies v Powell Duffryn Associated Collieries Ltd (1942) AC 601 at pp.616-7, per Lord Wright:-

> "An appellate court is always reluctant to interfere with a finding of the trial judge on any question of fact, but it is particularly reluctant to interfere with a finding on damages which differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate. - - - These latter cases [that is, where the damages were for pain and suffering] are almost entirely matter of impression and common sense, and are only subject to review in very special cases. - - - Where, however, the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an

> exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer L.J. in Flint v Lovell [1935] 1 K.B. 354, 360. In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency." (emphasis mine)

See also Lovell v Lovell (1950) 81 CLR 513 at p.532-4, per Kitto J.

Conclusions

Mr Hiley submitted that the learned trial Judge was required to make a reasonable estimate of the appellant's loss of wages and earning capacity where it was clear that she had suffered some economic loss. I accept the legal proposition; but I consider there is no room for its application in this case, on his Honour's finding that the appellant had not suffered such a loss, a finding which was warranted by the evidence.

I adopt the explanation of "loss of earning capacity" by Hutley JA in Government Insurance Office v Johnson (1981) 2 NSWLR 617 at p.627:-

> "Loss of earning capacity is the capital asset consisting of the personal capacity to earn money from the use of personal skills."

The major thrust of the appeal was the lack of an award for damages for loss of earnings to trial, and for the loss

of future earning capacity. As to the former it is clear from the evidence, including the appellant's employment history over the 3½ years between accident and trial, that his Honour's conclusion that she had suffered no loss of earnings was warranted. Basic to that conclusion was his finding that her injuries had not caused a diminution in her earning capacity, and that her various changes in employment were not attributable in any way to her injuries. As to the latter, for the same reason - that on the facts as he found them it had not been shown that there had been a diminution in the appellant's earning capacity - it was unnecessary for his Honour to measure the appellant's hypothetical capacity (measured by what she could have earned uninjured) against her present capacity (measured by what she can now reasonably earn), or her former prospects of advancement to a higher grade of journalist, and the effect of her injuries on those prospects. In simple terms, the appellant failed to prove the fact of damage in relation to pre-trial earnings and post-trial earning capacity; hence no question of a lucrum cessans, her lost gain, arose.

I accept that the fact that an injured plaintiff has been re-employed at the same salary as her pre-injury salary, does not mean that she has not ~~sustained~~ a loss of earning capacity. I also accept that damages must compensate for the chance that the plaintiff may suffer loss of income in the future, when her injuries may place her at a disadvantage in the open labour market with reduced employment options. The learned trial Judge recognised this aspect in allowing $10,000 for the Farlow chance or risk of future economic loss. I consider that that sum represents a reasonable and moderate evaluation in money of the mere chance of that risk occurring. Similarly, I consider the award for non-pecuniary loss was fair and reasonable, bearing in mind the award for future medical expenses.

In the light of these observations, and adopting the approach to reviewing the award set out by Lord Wright in Davies (supra), I do not consider that the learned trial Judge in this case acted on a wrong principle of law, misapprehended the facts in a way relevant to his award of damages, or for any other reason has made a wholly erroneous estimate of the damages the appellant has sustained. I consider the award as a whole and the items of which it is composed are well within the limits of what a sound discretionary judgment could reasonably adopt. For these reasons I would dismiss the appeal, with costs.

RICE J

I concur with Kearney J.

ANGEL J

I, too, concur with Kearney J.