Renehan v Leeuwin Ocean Adventure Foundation Ltd & Anor
[2006] NTSC 4

PARTIES:	TRACEY ANNE RENEHAN by her litigation guardian GERALDINE RENEHAN v LEEUWIN OCEAN ADVENTURE FOUNDATION LIMITED (ACN: 009 105 677) and COMMONWEALTH OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No 33 of 1998 (9803191)
DELIVERED:	13 January 2006
HEARING DATES:	21-24 & 29-31 March; 1, 4-8, 11-15, 18-22, 26-29 April; 3-6, 9-12 May; 2-31 August; and 1-2 September 2005
JUDGMENT OF:	MILDREN J

CATCHWORDS:

CONTRACT – alleged contract between parties when there was already existing a contract between one party and third party over same subject matter – whether contract existed between parties – whether there was consideration

CONTRACT – intention to create legal relations – factors relevant to be considered – objective circumstances

CONTRACT – repudiation by plaintiff – denial of existence of contract – pre-existing frustration of contract – whether plaintiff can sue on contract – whether approbating and reprobating

DAMAGES – assessment of damages for past gratuitous services – parents of injured plaintiff in receipt of carer's pension – whether plaintiff entitled to award

DAMAGES – assessment of damages for personal injuries – claim for lost earning capacity – odd lot – evidential burden on defendants to show extent of residual capacity to earn income

DAMAGES – assessment of damages for personal injuries – fund management – plaintiff's need due to pre-existing intellectual deficit and not caused by accident – whether recoverable

DAMAGES – assessment of damages for personal injuries – loss of Social Security benefits – whether claimable – whether benefits to be received after injury to be taken into account

DAMAGES – assessment of damages for personal injuries – scarring – presumption of loss – award for pain and suffering and loss of amenities

EVIDENCE – contract – evidence admissible to prove aim of the contract

EVIDENCE – evidence of plaintiff not directly contradicted – other rational inference open – whether evidence of admission – whether evidence must be accepted

EVIDENCE – standards published by Australian Standards Association – whether admissible

NEGLIGENCE – breach of duty of care – plaintiff fell whilst climbing mast on sailing ship – no instruction on how to climb mast – safety belt not correctly fastened

NEGLIGENCE – causation of loss – alleged breach of duty of care by Commonwealth – Commonwealth selected plaintiff to go on training voyage – whether alleged breach of duty caused loss – whether Commonwealth liable for negligence of third party

NEGLIGENCE – contributory negligence – failure to properly secure safety belt – claims in contract and in tort – whether any contributory negligence – extent of apportionment

NEGLIGENCE – damages – causation of loss – safety belt incorrectly fastened – whether plaintiff's injuries caused by the fall

NEGLIGENCE – duty of care – obvious risk – identification of relevant risk – plaintiff fell whilst climbing main mast on sailing ship – safety belt incorrectly fastened

NEGLIGENCE – plaintiff fell whilst climbing mast on sailing ship – safety belt incorrectly fastened – warning given that belt will unravel if incorrectly fastened – whether warning sufficient response to the risk

PRACTICE AND PROCEDURE – plaintiff suing in tort or alternatively contract – plaintiff denies existence of contract – whether approbating and reprobating – whether pleading permitted by Rules

TRADE PRACTICES – contract for supply of services – whether implied warranty services will be provided with due care and skill – whether implied warranty co-extensive with promise implied by common law – whether implied term breached

TRADE PRACTICES – contract for the supply of services – clauses limiting extent of liability – whether clauses void

Disability Services Act 1986 (Cth) s 23(2)(a)
Law Reform (Miscellaneous Provisions) Act (NT) (Act No. 12 of 2001), s 21A(3)
Social Security Act 1947 (Cth)
Social Security Act 1991 (Cth) s 17(1), s 17(2), s 17(3)(b), s 17(8), s 1170, s 1178, s 1179, s 1184K
Supreme Court Act (NT) s 84
Supreme Court Rules O.13.09(1)
Trade Practices Act 1974 (Cth) s 4(1)(a), s 4B, s 4B(2), s 4B(2)(d)(i), s 68, s 74(1)

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Batchelor v Burke (1981) 35 ALR 15

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Czatyrko v Edith Cowan University (2005) 79 ALJR 839

Ermogenous v Greek Orthodox Community of South Australia Incorporated (2001) 209 CLR 95

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Haines v Bendall (1991) 172 CLR 60

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Shorey v PT Ltd (As Trustee for McNamara Property Trust) (2003) 77 ALJR 1104

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Stoward v Joron Pty Ltd (In Liquidation) (21/12/1994, unreported, Crawford J, BC9400508)

REPRESENTATION:

Counsel:

Plaintiff:	M. Maurice QC with P. Barr QC
First Defendant:	J. Reeves QC with G. Macnish
Second Defendant:	L. Silvester with M. Grant

Solicitors:

Plaintiff:	Cridlands
First Defendant:	Ward Keller
Second Defendant:	Australian Government Solicitor

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

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BETWEEN:

TRACEY ANNE RENEHAN by her litigation guardian GERALDINE RENEHAN
Plaintiff

AND:

LEEUWIN OCEAN ADVENTURE FOUNDATION LIMITED (ACN: 009 105 677)
First Defendant

AND

COMMONWEALTH OF AUSTRALIA
Second Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 13 January 2006)

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1. Introduction

[1] This is an action for damages for personal injuries incurred by the plaintiff as the result of her falling some 16 metres from the futtock shrouds of the main mast of the sail training ship *Leeuwin* on 12 June 1996.

[2] The first defendant, Leeuwin Ocean Adventure Foundation Ltd (LOAF) is and was the owner and operator of the *Leeuwin*. The action against LOAF is brought in tort. Alternatively, the plaintiff's action against LOAF is for damages for breach of contract. The contract upon which the plaintiff relies is an agreement allegedly made between the plaintiff and LOAF and contained in a "Reservation Form" dated 13 May 1996 (the Reservation Form).

[3] The action in contract is brought in the alternative because the plaintiff denies the existence of any binding agreement between her and LOAF.

[4] The second defendant is sued in respect of the alleged negligence of the servants of its department, the Department of Employment, Education, Training and Youth Affairs (DEETYA), and its predecessor, the Department of Employment, Education and Training (DEET). It is alleged that DEETYA owed to the plaintiff a duty to take reasonable care to ensure that the plaintiff was not exposed to danger or risk of injury whilst on the *Leeuwin*. This duty is alleged to have arisen by virtue of the circumstance that DEETYA entered into a contract with LOAF for the latter to provide sail training aboard the vessel during a 10 day voyage departing Darwin on

10 June 1996 to those persons who were in receipt of benefits under the Social Security Act 1991 (Cth) and who were selected by the Department's case managers to embark upon the voyage. It is alleged that the plaintiff was one of the persons so chosen and that the second defendant knew or ought to have known, inter alia, that the plaintiff was not capable of climbing the mast of the vessel without unreasonable risk of falling and could not be relied upon to fasten her safety belt in the appropriate manner. The plaintiff alleges that the Commonwealth's servants or agents breached that duty which caused or contributed to the injuries she suffered.

[5] Alternatively, the plaintiff has sued the second defendant for damages for breach of contract. It is alleged that the plaintiff entered into an agreement on 30 May 1996 with the second defendant which contained an implied term that, whilst participating on the voyage, the second defendant would ensure that all appropriate steps were taken to ensure her safety, having regard to her physical and intellectual capabilities. It is alleged that the second defendant breached the implied term which caused or contributed to the injuries she sustained.

[6] In its defence, LOAF has denied that it was negligent, or that its negligence caused the injuries which the plaintiff suffered. Further, LOAF contends that the plaintiff has repudiated the Reservation agreement and is now unable to rely upon it as the repudiation has been accepted by LOAF. Notwithstanding the termination of that agreement, LOAF seeks to rely on certain clauses in the Reservation agreement which limit its liability for any damages which

the plaintiff has sustained. Alternatively, LOAF alleges that the plaintiff's injuries were due to her own contributory negligence. Further matters relied upon by way of defence to the plaintiff's claim is a claim for indemnity for breach of warranties contained in a Medical Information Form provided by the plaintiff to LOAF; and a claim that any damages to which the plaintiff is entitled should be reduced because the plaintiff has failed to mitigate her loss.

[7] The second defendant, in its defence, denies the existence of any binding agreement between it and the plaintiff; denies the existence of any implied term of the agreement; denies that it owed a duty of care to the plaintiff; and pleads contributory negligence on the part of the plaintiff.

[8] By way of Reply to LOAF's Defence, the plaintiff denies that she was on board the vessel pursuant to the Reservation agreement; says that any such agreement did not contain the alleged terms limiting LOAF's liability; says there was no consideration for the alleged agreement; says that there was no intention to create legal relations in contract between her and LOAF; claims that it would be unconscionable for LOAF to rely upon the terms limiting LOAF's liability; and claims that the alleged terms limiting LOAF's liability breached s 68 of the Trade Practices Act (Cth) and are void.

[9] So far as the defendants are concerned, a contribution notice has been issued by the Commonwealth against LOAF. It is unnecessary to dwell upon its terms or the terms of LOAF's Defence and Counterclaim thereto at this time.

2. Background facts

[10] Before turning to decide any of the issues relating to liability, it is necessary to make some factual findings relevant to questions of both liability and quantum which form the background to a number of the issues in this case.

[11] The plaintiff was born on 4 August 1966 at the Royal Northshore Hospital, Sydney. According to the plaintiff's mother, Geraldine Renehan, it was a difficult birth with a forceps delivery. A neuropsychologist, Mr Mark Reid, concluded in 2002 that the plaintiff had been "intellectually handicapped" since birth. The level of her handicap was described by Mr Reid as "below average intellectual ability, at the bottom of the 'borderline' range". Ms J Delahunty, a psychologist, reached a similar conclusion in March 2000.

[12] The plaintiff's father died when she was only two years of age. For a period, Mrs Renehan raised the plaintiff and her younger brother on her own. She eventually married again, but this marriage was short lived and resulted in divorce. At this time, Mrs Renehan and her second husband were living in Mandurah, Western Australia. After her divorce, Mrs Renehan met her present husband, Brian Renehan. After living together for a number of years, they became married in 1988. They lived in Western Australia at Mandurah until they moved to Alice Springs in December 1985. By this time, the plaintiff had met her future husband, Gordon Ronald Barndon. The plaintiff and Mr Barndon married in October 1987. By this time, the plaintiff and her husband had moved to Lockridge, Western Australia.

[13] On 12 April 1990, the plaintiff gave birth to her son, Gordon Jnr, at Swan District Hospital. On 19 April 1990, the plaintiff was transferred to Heathcote Hospital where she was admitted to the Psychiatric Unit. She was diagnosed as having a bi-polar affective disorder with psychotic features. She received anti-depressants, major tranquillisers and lithium, but did not respond well until she had a course of electro-convulsive therapy (ECT). She was discharged on 16 June 1990, but relapsed and was re-admitted on 26 June 1990. She received further ECT and was discharged on 15 August 1990. Shortly thereafter, the plaintiff told her husband that she wanted to go to Alice Springs for a holiday and stay with her parents. It was arranged that she would be collected by her mother. The baby remained with Gordon Barndon who had the support of his parents.

[14] The plaintiff did not return to live with her husband. In 1990 or 1991, proceedings were commenced between the plaintiff and her husband, which resulted in divorce in October 1991. Custody of the child was granted to Mr Barndon. There were no immediate arrangements made for access, although consent orders for access were made by the Family Court of Western Australia on 5 May 1994.

[15] According to Geraldine Renehan, when the plaintiff arrived in Alice Springs in August 1990, she was in a trance-like state where she needed constant direction and reminding in order to do things for herself and during the plaintiff's "recovery period" which lasted for about two years, it was necessary to re-teach the plaintiff many of her life-skills, such as how to use

money and how to cook and prepare a simple meal. During this period she was taking certain prescribed drugs under the care of her general practitioner, Dr Mark Young, to control her condition, but she kept getting relapses and was referred to a psychiatrist, Dr Kyaw, who changed her medication to Fluphenazine 3 milligrams at night. She saw Dr Kyaw on a number of occasions between 5 December 1990 and 5 May 1992. In May 1992, she returned to the care of Dr Young who thereafter maintained her condition on a low dose of Fluphenazine. She also saw Dr Kyaw again on three occasions between September and November 1992, who noted that she was stable. There were no further relapses in her condition prior to her accident on 12 June 1996.

[16] So far as the plaintiff's schooling is concerned, the plaintiff had learning difficulties which her mother noticed at the time she was attending primary school. After she left primary school, she attended a special class at Pinjarra High School because she had difficulty with learning. Subsequently her parents moved her to Mandurah High School.

[17] When she was about 14, the plaintiff became interested in horses and worked with a friend cleaning stables for a few weeks.

[18] The plaintiff left school about half way through Year 10 or towards the end of Year 10 when she was about 15 years old to go to Alice Springs with a friend, Leanne Miller, whose parents had a cleaning business in Alice Springs. She was employed by the Millers for a short period cleaning offices

and public buildings. After that, she returned to Mandurah to live with her parents. This I find was in about 1982. Thereafter she was in receipt of unemployment benefits and had irregular work as a kitchen hand at the Atrium Hotel in Mandurah and as a stable hand. It was whilst working as a stable hand for Pateman's at Mandurah that she met Gordon Barndon. After she started living with Gordon, she gave up her work as it was too far to travel each day, although she did do volunteer work at a centre for disabled children in Coolbinia, just north of Perth, for a day or so each week. This lasted for about three months. Apart from volunteer work, the plaintiff was not employed during the period of her relationship with and marriage to Mr Barndon. She did, however, do a 17 week course conducted by the Education Department of Western Australia resulting in a Childcare and Development Certificate which she obtained in November 1986. On 26 September 1994, after she returned to Alice Springs, she also obtained a Senior First Aid Certificate from St John Ambulance Australia.

[19] After returning to Alice Springs in 1990 to live with her parents, the plaintiff was in receipt of benefits under the Social Security Act 1991 (Cth). After she recovered from her psychiatric illness, she began casual employment, childminding and doing some ironing work. The plaintiff's evidence on this subject relating to the period during which she did this work is very confusing. It was over a period of some months, probably at least seven months: Ext P9, pp 31-33. She received between $5.00 and $10.00 an hour for childminding and she charged $20.00 to $30.00 a basket

for ironing. Apart from that, the plaintiff worked as a volunteer at the Gap Neighbourhood Centre doing childcare work for a couple of mornings a week.

[20] In late 1994, the plaintiff, and Mr and Mrs Renehan moved back to Mandurah. One of the reasons why the plaintiff wanted to return to Mandurah was to exercise her access rights to her son. Apart from assisting in some cleaning work at a caravan park in exchange for free rent, she was unemployed during this time. In 1995, she undertook some courses at the Metropolitan College of TAFE at Mandurah and obtained some certificates in a course "General Education for Adults (Foundation)" in Oral Communications Level 1, Reading and Writing Level 1, General Curriculum Options Level 1 and Numerical and Mathematical Concepts Level 1 in December 1995. Mr and Mrs Renehan returned to Alice Springs to live in mid 1995. The plaintiff lived with Brian Renehan's mother until the latter half of 1995 when she also returned to Alice Springs.

[21] In December 1995 the plaintiff secured some work with St Mary's Family Services. She was employed on a casual basis mainly working with disabled children following an interview with Ms June Clothier on 30 November 1995. Ms Clothier was the Programme Manager of Adult Services of St Mary's, now known as Anglicare. During the period thereafter until she went to Darwin in June 1996 to join the *Leeuwin*, the plaintiff continued to work on a casual basis for St Mary's. An analysis of St Mary's records indicates that, during the period between December 1995 and June 1996, the

plaintiff worked a total of 216.5 hours at an hourly rate of $14.33 plus extra allowances for occasional broken shifts and sleepovers.

[22] St Mary's Family Services had accommodation at three houses located in the community as well as houses for children located on campus and known as Blue House and Grey House. Most of the plaintiff's employment was at Blue House, which was a home for children with high-level needs. Most of these children were wheelchair bound and non-vocal with multiple physical and intellectual disabilities. There were five or six children at Blue House. Each morning the children had to be gotten out of bed, dressed, breakfasted and made ready for school. This involved helping them to brush their teeth, comb their hair, giving medication as directed and assisting them onto the school bus. Sometimes the plaintiff rode with them on the bus to help them off the bus when it arrived at school. The plaintiff would then clean the house and attend to cleaning, washing and food preparation duties. When the children returned in the afternoon she would assist the children off the bus, get afternoon tea, prepare and serve the evening meal and assist getting them ready for bed. The plaintiff usually worked from 6:30 to 9:00 am and from 3:30 to 8:00 pm. The plaintiff worked with another worker on each shift. There was a fair amount of heavy lifting involved.

[23] The plaintiff did not have a driver's licence and had never learned how to drive a motor vehicle. Her evidence was that she was told that she needed a licence to obtain permanent work at St Mary's and so she obtained her Learner's Permit and, through the Commonwealth Employment Service

(CES), undertook driving lessons. She had not finished the driving course by the time of her accident and still does not have a driver's licence.

[24] Because her work with St Mary's was casual, she was still receiving Social Security benefits, particularly during the weeks she was not earning any income. Shortly after arriving in Alice Springs, the plaintiff attended at the offices of the CES where she was interviewed by Ms Tracey Nuske, who was then the case management liaison officer for Alice Springs. The plaintiff filled out a "Questionnaire for Client Classification Level Seminar" as part of what was called a "case management referral interview". The plaintiff was then referred to a private company, Central Australian Group Training Company, for case management. However, that company ceased operations in Alice Springs and in March 1996, Ms Nuske became the plaintiff's case manager. By this time Ms Nuske had been transferred to Employment Assistance Australia (EAA) which was part of DEET.

[25] Case management was intended to provide intensive assistance to long term and specially disadvantaged unemployed job seekers to find employment. The plaintiff qualified for case management as she had been unemployed and in receipt of unemployment benefits for longer than 12 months.

[26] On 20 February 1996, LOAF entered into an agreement in writing with the Commonwealth acting through DEET to provide "assistance" to persons referred to LOAF by the CES (i.e. DEET) and who were eligible for assistance under a Special Intervention Program administered by DEET. The

agreement was varied by a further agreement in writing dated 18 April 1996. The Agreement as varied will be referred to as "the One Off Agreement". Under the terms of that agreement the Department agreed to, in effect, charter the *Leeuwin* for two voyages, for what is described as a "set fee". One of those voyages was to be a voyage departing Darwin on 10 June 1996 and arriving back in Darwin on 20 June 1996 (the voyage). It is not easy to find a clear statement in simple English of exactly what the parties contemplated, as the One Off Agreement does not appear to have been drawn up by a person with legal training, but rather has been cobbled together with various attachments all of which form part of the contract. However, it appears that the parties contemplated that persons referred to LOAF to join the voyage would act as volunteer trainee crew on the vessel and undergo sail training sufficient to enable them to sail the vessel themselves albeit under the supervision of the *Leeuwin's* officers and crew members. The purpose of this was to help the trainees "mature and develop in areas of self-esteem, discipline, teamwork and good citizenship". The Commonwealth saw this form of training as a means whereby long-term unemployed could gain self-esteem and self-confidence and experience team-building which it was hoped would better equip them to find employment. Information concerning the availability of the voyage was distributed to case managers, including Ms Nuske through her supervisor, Ms Tahnee Turner.

[27] On 26 March 1996, Ms Nuske sent to the plaintiff a letter and a brochure through the mail. Neither the original letter nor a copy of it can now be found. The substance of the letter was that it told the plaintiff that the voyage was coming up and that if she was interested, she should attend an information session to be presented in the Alice Springs DEET office. In late March 1996, the plaintiff had an appointment with Ms Nuske to attend a case management assessment interview. The plaintiff missed her appointment and a new appointment was arranged for 3 April 1996 which she did attend. The interview lasted about 50 minutes. An Assessment Form was completed and a "Case Management Activity Agreement" was signed by the plaintiff. These documents have not been located.

[28] The "information session" was held at DEET's office in Alice Springs on 13 May 1996. It was attended by the plaintiff as well as a number of job seekers, by Ms Tahnee Turner and, at the commencement, by Mr Anthony Yoffa, who gave a brief introduction but then left. Mr Yoffa was DEET's Alice Springs manager. He informed the job-seekers present that it was not compulsory for any of them to go on the voyage; it was being offered for those who were interested and anyone who was not interested was free to leave. He then introduced Mr Neil Burr, LOAF's business manager who made a presentation to those assembled, including the playing of a video "Lure of the *Leeuwin*", but with the volume down so that all could see the vision and listen to his explanation of it. At the end of the session the evidence of Mr Burr is that he conducted individual one-on-one meetings

with each of the potential participants to enable them to ask questions. According to the plaintiff, there were two information sessions with Mr Burr, but I consider that she is mistaken and find that there was only one. The plaintiff was given a Participant Manual which contained information about the ship, the voyage, what to bring, basic nautical terms and information concerning knots and rope work.

[29] The plaintiff also completed and signed two other documents which were provided by LOAF: (1) a Medical Information Form dated 13 May 1996; and (2) a Reservation Form also dated 13 May 1996. It will be necessary to discuss these forms and the circumstances under which they were filled out in more detail later. Both forms were sent to LOAF and ultimately both forms were sent to the vessel and read by the Chief Officer (First Mate), Nicolas Cole.

[30] On 30 May 1996, the plaintiff signed a further Case Management Activity Agreement prepared by Ms Nuske, which related to her participation on the voyage. This is the "agreement" which, it is alleged, formed the contract between the plaintiff and the Commonwealth and upon which the plaintiff has sued. The plaintiff undertook to "attend, fully participate and complete the Leeuwin Ocean Adventure Foundation Ltd" from 8 June to 21 June 1996.

[31] The plaintiff travelled from Alice Springs to Darwin by bus, arriving on the afternoon of Sunday 9 June 1996. She embarked on the Leeuwin that

evening. The cost of the bus fare and of the voyage was met by the Commonwealth.

[32] At the time of joining the Leeuwin the plaintiff was 29 years and 10 months old. She weighed 98 kilograms, more than about 35 kilograms above her ideal weight. She presented to most people as pleasant and easy-going. She had no previous experience on a sailing ship. She had never worked at heights. She had no experience of any kind with gymnastics or adventure activities. Ms Nuske described her as a "lovely person, overweight, easy to talk to". Nothing in the interviews with her gave her any indication that the plaintiff was abnormally below average intellectual capacity. The plaintiff's supervisor at St Mary's, Ms Broadbent, described her as a "mild mannered person on the quieter side, but that she was not shy or unfriendly… she seemed very willing to please… she was very gentle natured… [She was]… good, competent, hardworking and genuine…" She agreed that the plaintiff was not usually her first choice when she needed a casual because she needed more direction and supervision than other casuals although, not a lot more. Ms Clothier, also from St Mary's, noticed that the plaintiff did not have much education and required a lot of input from her supervisors "as she seemed to have some difficulty in learning new procedures". Her former husband, Mr Barndon, was unaware that the plaintiff had "any brain impairments" and was shocked when told about this by the plaintiff's mother. His evidence was: "I would not have known that Tracey had some intellectual impairment had Gerry (Mrs Renehan) not told me". In the short

time the plaintiff was on the vessel, her watch leader, Ms B said that the plaintiff did not appear to her to have an intellectual disability, although she was “quite heavy”, “a little unfit” and “did things slowly” and appeared to be “quite reserved and introverted” and “insecure” and lacking in confidence. The mate, Mr Cole, was told that the plaintiff was “not quite right” and “a bit slow”, as a result of which he spoke to the plaintiff. His impression of the plaintiff was that she appeared “quite immature, possibly a bit childlike… she came across as someone of about 13 or 14 years of age…” yet he thought her capable of coping with the program. Ms Ruth Sandow, an employee of DEET who went on board the vessel as a sail trainee as part of her duties with DEET, said that she had several conversations with the plaintiff on the voyage and that she did not think that the plaintiff was mentally slower than the other trainees – she appeared to be about average. She said that the plaintiff was “capable of holding a conversation at a reasonable level and she was quite talkative”. She was not cross examined on this part of her evidence. The second mate, Kristi McMullan, claims not to have spoken to the plaintiff before the accident, but remembers her as “standing back a bit” and “perhaps, shy or reserved and self-conscious”. Michael Baker, then an unemployed 16 year old from Tennant Creek, spoke to the plaintiff on a few occasions prior to the accident. He said that the plaintiff did not appear to be intellectually disabled or “slow” – she just seemed shy. On the basis of this evidence, I am unable to find that the plaintiff was obviously intellectually handicapped or

of low intelligence to an observer who did not get to speak to her on more than a few occasions (nor did she give me that impression when giving her evidence), although some persons might have reached that, or a similar conclusion, as in the case of Mr Cole.

[33] On the first day on board the Leeuwin, the plaintiff's evidence is that she went to see the nurse to give to her the plaintiff's Fluphenazine tablets. She did this because, on one of the forms, it said that any medication should be given to the nurse. The Participant's Manual States:

> "If you are required to take prescription medicines whilst on board, please inform your Watch Leader on joining."

[34] There is no other reference to medication in any of the documents which LOAF provided to the plaintiff. The plaintiff says that she told the nurse that the tablets were for depression, and that the nurse told her to keep them. At either this time, or some time later, the plaintiff says that she asked the nurse for sea sickness tablets, but the nurse refused to give her any because they should not be taken with Fluphenazine. The purpose of leading this evidence was to establish that LOAF knew that the plaintiff was not medically fit to climb the mast without close monitoring. There were in fact two trained nurses on the Leeuwin, viz., the second mate Kristi McMullan, and the purser, Donna Andrews. According to Ms McMullan's evidence, she never spoke to the plaintiff prior to her fall. Ms McMullan maintained in her oral evidence that she did not discuss medication with the plaintiff. Ms Andrews, in her statement, says she met the plaintiff on the first day of

the voyage and had quite a lot to do with her thereafter. She remembered her because she was a “very large girl” and there may have been only one other girl of her size on board. She claims that the plaintiff came to see her initially about sanitary napkins, but also that the plaintiff told her that she “had some medication which she did not declare on the forms… I was not entirely familiar with the name of the medication, but I thought it sounded like a drug from the anti-depressant family”. Ms Andrews says that she is certain that she did not tell the plaintiff to keep taking the medicine herself, that she was certain that she would have informed the first mate, Nick Cole of what she had been told and that she is certain that she would have instructed the plaintiff to see Mr Cole and give him the medication. In cross examination she agreed that she would not have wasted any time telling Mr Cole about it, but in my opinion Ms Andrews has no memory of informing Mr Cole or of telling the plaintiff to speak to Mr Cole and give him the medication and is relying on her practice. Mr Cole was not cross examined on whether or not Ms Andrews told him about the medication, and in his statement said that he could not recall whether he was told about this or not, but that if he was, he would have advised Captain Gebbie. According to Captain Gebbie, he was not informed by Nick Cole that the plaintiff was taking any medication. Exhibit L27 was tendered to support Captain Gebbie’s evidence as contemporaneous notes relating to which trainees had medical problems, but in cross examination by Mr Silvester, Captain Gebbie was forced to concede that the notes were made after the plaintiff’s accident.

As to the blue marks on the exhibit Captain Gebbie had no recollection of when they were placed there. Captain Gebbie's evidence concerning the provenance of Exhibit L27 and when and why he made markings on that document were not convincing.

[35] I find that the plaintiff did tell the purser, Ms Andrews, that she was taking Fluphenazine tablets, and that Ms Andrews thought these tablets were an anti-depressant. I am unable to find whether Ms Andrews told Mr Cole, or he told Captain Gebbie, or not. Clearly, on the evidence this information should have been passed on to Mr Cole and Captain Gebbie, and if it had been passed on, more information elucidated from the plaintiff or by radio with LOAF to ascertain for what condition the drug was prescribed. This should have triggered some response from the Master of the Leeuwin who ought to have made enquiries about it, and perhaps kept the plaintiff under stricter supervision until the matter was clarified. However, in the result, I do not consider that this oversight was causative of the plaintiff's injuries. There was no evidence to suggest that the plaintiff's fall was in any way connected with the fact that she was taking Fluphenazine. The causes of the accident are to be found in other factors: see below.

[36] When the trainees embarked they were divided into watches. The plaintiff joined the red watch. Her watch leader was Ms B. Ms B had been on numerous voyages on board the *Leeuwin*, but this was the first time she had been selected to be a watch leader. Amongst her duties, Ms B was responsible for demonstrating to the trainees on her watch how to carry out

the tasks allocated to the watch, including such things as setting sails, manning lines, and climbing aloft, and ensuring that these tasks were carried out safely. Ms B was a member of the crew as a volunteer, chosen because of her previous experience. Only the Master and four others on board were permanent members of the ship's company. Notwithstanding that Ms B was a volunteer, it was not suggested that LOAF was not responsible for any casual acts of negligence committed by her in the course of her duties. Clearly, Ms B was, when carrying out her duties as watch leader, LOAF's agent.

[37] It was the responsibility of the purser, Ms Andrews, to give to each trainee a safety belt shortly after embarkation. It is not in contention that the plaintiff was issued with such a belt. The belt was similar to a linesman's belt. I will describe the belt more fully later, but for the moment it is sufficient to note that the belt was worn around the waist, that it had what Captain O'Brien described as a three bar buckle, that the method of securing the belt to the waist was to pass the tail of the belt through the buckle and then double it back through the buckle, and that it had attached to it a lanyard at the end of which was a snap hook which could be used to fasten the belt to a secure part of the vessel. The evidence of Ms B was that on the Sunday night she told the members of her watch that they were required to wear their belts whenever they were on deck. On the Monday morning, at 8.00 am, all trainees were taken through an induction session by Kristi McMullan (neé Brooks) and she demonstrated to them how to double back the belt. After

that, Ms B's evidence was that she instructed her watch that if the belt was not doubled back, the belt would not hold if one were to fall. She then demonstrated again how the belt was to be done up and observed each member fasten his or her belt through the buckle, and she visually checked that each person had doubled back their belts correctly. After this, Ms McMullan came over to the red watch and went through the procedure again. She also visually checked that each belt was correctly done up. Ms B's evidence was that after this, each member of the watch was rotated through a series of exercises which included climbing up the rigging until about one metre above the deck, clipping the karabiner (the metal clip on the end of the lanyard) onto a ratline, letting go of the ratline and leaning back into the safety belt, and allowing the belt to take their weight. Some of the members of the watch, but not the plaintiff then went aloft. Ms B said that she physically checked the safety belts of all of the trainees in the watch about four or five times during the first two days of the voyage to make sure they were doubled back.

[38] There was also evidence from Nick Cole and from Kristi McMullan that Ms McMullan had dramatically demonstrated how easily the belt would come undone if not doubled back properly. Ms McMullan said that she also instructed all the trainees that the belt had to be worn outside of their clothing so that it could be easily seen, and that the trainees were instructed to check each other's belts from time to time to ensure they were done up properly. The plaintiff's evidence was largely consistent with these accounts

relating to the instructions concerning the belt. I find that the plaintiff was told how to fasten the belt properly, that the importance of doubling back was impressed upon her, and the she well knew these matters prior to her fall.

[39] The next matter of significance occurred on Wednesday, 12 June 1996. By this time the vessel was no longer in the safety of Darwin Harbour. The weather was fine, with little wind for sailing. The vessel had stopped her engines at 7.15 am and was thereafter under sail. According to the ship's log, at 0800 hours the vessel was located at a position 12°30' S, 129°39.4' E. The course of the vessel was 270 degrees i.e. westerly. The plaintiff's fall occurred at 8.45 am.

3. The fall and its cause

[40] It is not in contention that the plaintiff was not required to climb any of the masts to go aloft unless she was willing to do so. Nevertheless, it is obvious that unless most members of a watch were so willing, the work of furling or unfurling the sails could not have been done. There was considerable pressure applied to encourage all of the trainees to go aloft. On the night before her fall, the watch leader, Ms B, raised the matter with the red watch because on the Tuesday only two members of her watch had gone aloft, and the rest had shown no enthusiasm for this. She said to the group: "As a team, how do you feel with only half of our members going aloft?" Ms B said that it would be more of a team achievement if everyone in the watch went aloft.

The two who went aloft that day encouraged the others, saying things like, "It is great once you get up there". Up to this moment, the plaintiff's evidence was that she was afraid of heights, knew that she did not have to climb the mast and had decided not to climb the mast. At some time, when is not clear, she changed her mind because she believed she could do it and she decided she wanted to overcome her fears.

[41] The following morning, the red watch was given the task of unfurling and setting the top sail on the main mast. Ms B moved her watch to the bottom of the main mast and said: "Who wants to come up with me?" Baker and Bennett were the first to volunteer; then the plaintiff said that she would like to do so as well. Ms B asked Bennett to support the plaintiff during her climb. She said to Bennett: "Would you like to go aloft as Tracey's buddy?" She felt that the plaintiff needed a lot more support and "hand holding" than other trainees because she appeared to her to be insecure and lacking confidence.

[42] The main mast is, of course, the tallest of the three masts aboard the *Leeuwin,* and located roughly in the centre of the vessel. At a point 16.25 metres above the deck there are spreader crosstrees which support the top mast spreader shroud. There is also there a timber platform (the main mast platform) on which it is possible to stand, located between these crosstrees. There was no hole in the platform (called a "lubber hole" or "lubber's hole") enabling one to climb through the platform in order to climb on top of it. The lower shrouds on which one climbed the mast to reach the platform

were anchored on the main mast at a point immediately below the main mast platform. Anchored to the outer end of the platform and to the main mast are shrouds known as the futtock shrouds. These shrouds angle back to the end of the platform at an angle of about 45 degrees. In order to climb onto the platform, it is necessary to climb up the ratlines of the lower shrouds until one reaches the futtock shrouds, and then climb the futtock shrouds until one is able to climb onto the end of the main mast platform. Whilst performing this manoeuvre one will be leaning backwards at an angle of at least 45 degrees to the mast. The futtock shrouds have ratlines or cross members on which one is able to place one's hands and/or feet in order to perform the climb.

[43] According to the plaintiff, it was she and not Ms B who asked Bennett to climb with her, as she was afraid of going up. Bennett's account was that she, Bennett, had a conversation with the plaintiff where she said that she would go up with the plaintiff, and she told Ms B that she would go up with Tracey after Ms B and Baker. Bennett denied being asked to climb as Tracey's buddy, and that she had any responsibility for the plaintiff. Perhaps not much turns on this, but the fact is that there was no buddy system in place on the vessel at this time, although one has since been introduced. I think it is unlikely that Ms B would have used the expression "buddy", but if she did, that expression meant nothing of significance to either the plaintiff or Bennett.

[44] It is to be noted that at this stage the plaintiff had been given little instruction on how to climb. She knew she was always required to have at least three points of contact with the shrouds or rat-lines, and that she needed to clip on her lanyard at eye-level whilst ascending. However, this was the first time the plaintiff had climbed any of the masts. She had received no instructions on how to climb the futtock shrouds to ascend onto the main mast platform. Before commencing her climb, the plaintiff said that no one physically checked to ensure that the strap of her safety belt had been properly doubled back through the buckle. According to Baker's statement, he does not remember anyone checking the plaintiff's safety belt before she commenced the climb. According to Ms B's statement, she did not check this either. The plaintiff also says that no one checked her safety belt, except herself. Her evidence at trial was that the belt was on correctly, and that she checked it only minutes before she commenced the climb. I find that, apart from the plaintiff, no one else checked her safety belt either visually or physically before she commenced the climb.

[45] Ms B and Baker climbed up the mast first, followed by the plaintiff and Bennett. After Ms B reached the main top platform, she waited for Baker and instructed him to assist the plaintiff to climb the futtock shrouds. Ms B then went to locate the gasket knots on the main topsail and untied them, leaving Baker on the main top platform whilst the plaintiff and Bennett ascended the lower shrouds on the port side.

[46] To begin with, there was enough room on the lower shrouds for the plaintiff and Bennett to ascend together side by side, but as they got higher, the shrouds narrowed leaving insufficient room for them to continue and the plaintiff went ahead. According to the plaintiff she became very frightened as she got higher. Bennett's account supports this because she recalls that the plaintiff seemed to get more nervous the higher they got. She said also that progress was slow and the she assisted with clipping on the plaintiff's lanyard. At one stage the plaintiff stopped at a point below the futtock shrouds and said to Bennett that she wanted to go down, but Baker and others encouraged her to continue, saying things like "You can do it". Bennett conceded that the plaintiff may have said she wanted to go down. She told the plaintiff to have a rest and go further if she felt comfortable. The plaintiff recalls resting for a short time. The mast was swaying only a little; this became more noticeable the higher one climbed. Despite feeling very frightened the plaintiff decided to go on.

[47] When the plaintiff reached the futtock shrouds she attached the clip of her belt onto a metal bar called the Jill-go bar which is a safety rail located on the top side of the main mast platform. However, as she did not know how to climb the futtock shrouds, she attempted to climb in between the mast and the futtock shrouds. Realising she could not climb onto the main mast platform this way Baker told her she must climb from the front of the shrouds. The plaintiff then attempted to climb on the outer side of the futtock shrouds. By this time Ms B had returned to the main mast platform

next to Baker. According to Ms B, the plaintiff appeared to be confused and had taken about a minute from the moment she had attempted to climb in between the mast of the futtocks to the time she attempted to climb the outer side thereof, and had taken a lot of effort to get this far. The plaintiff was standing on the lowest ratline of the futtocks shroud with her hands on the first rung below the main mast platform. She said she was tired and could not hold on. Ms B said "Hold on Tracey, I'm coming to help you". Baker saw her hand coming up, looking for the top rail, and then a moment later, the plaintiff fell backwards. Initially her fall was broken by the belt, but after a short time, probably no more than a second or so, she fell out of the belt, rolled and hit the deck knees first, approximately some 16 metres below. I find that she lost her grip because she was too tired to hang on any longer.

[48] After the fall, the plaintiff's belt (Ext P23) was still left attached to the Jill-go bar from where it was later retrieved and tested by Crashlab, which is part of the Roads and Safety Transport Authority of New South Wales. According to the report of Crashlab dated September 1996 (see Ext P50), the safety belt was able to retain a body block weighing 136 kilograms through a drop height of 340 millimetres when the belt was correctly fastened by doubling back through the buckle, with only 5 millimetres of slippage measured in the webbing strap through the three bar buckle. If the belt was not doubled back, the safety belt came undone. The results of Crashlab's report were not in contention between the parties.

[49] Counsel for LOAF, Mr Reeves QC, submitted that there were competing inferences of equal degrees of probability as to why he safety belt unravelled, that the plaintiff bore the onus of proving that her injuries were caused by the defendants' negligence, that in all the circumstances the cause of the belt unravelling had not been established, and therefore no finding of negligence against the defendants was open on the evidence.

4. Why the belt unravelled

[50] Mr Reeves QC's starting point is that the plaintiff's unchallenged evidence is that, at commencement of the climb, the belt was correctly done up. Moreover the plaintiff said that she checked the belt only minutes before the climb to ensure that it was properly doubled back. The plaintiff was well aware of the consequences if she were to have fallen without the belt being doubled back. She had consistently maintained on a number of occasions since the fall that her belt was correctly done up. The belt was properly worn outside of her clothes so that anyone looking at the belt could see if it had been done up incorrectly. There was a system in place that each trainee was required to look out for others to see if their belts were done up incorrectly. Since no one noticed anything amiss, this lends support to the inference that the plaintiff's evidence cannot be dismissed as mistaken. The plaintiff had, on previous days, worn her belt correctly and no one had had occasion to correct her, although this had happened to other trainees. In the 12 months before her accident she had lived independently of her parents in Mandurah, and had demonstrated that she was capable of taking care of her

own safety and well-being. It was submitted that her evidence was credible, and as there was no evidence to the contrary, it should be accepted. Mr Reeves, in support of this submission, relied upon *Holman v Holman* (1964) 81 W.N. (Pt. 1) (NSW) 374 at 378 where Sugerman J, with whom Richardson and Macfarlan JJ agreed, said that where evidence is uncontradicted, it should in general be accepted, unless (1) it was improbable or unreasonable or (2) the judge disbelieved the witness based on the witness' demeanour or manner, in which case the judge should disclose that this is the reason for not accepting the evidence. These principles have been applied many times, and are not in doubt: see *Richards v Jager* [1909] VLR 140 at 147 per Madden CJ; *Hardy v Gillette* [1976] VR 392; *Repatriation Commission v Reid* (1984) 54 ALR 157.

[51] However, in this case there clearly is evidence to show that the plaintiff's evidence on this point does not have to be uncritically accepted without qualification. The Crashlab report shows that if the belt had been correctly fastened, it would not have become undone. The length of the lanyard, excluding the snap hook, was agreed to be 600 millimetres long (Transcript 292) and it was a further agreed fact that the belt was 132.5 centimetres long (Transcript 762). It is clear from the eye witness accounts, that when the plaintiff fell, the snap hook was attached to the Jill-go bar, which, at its lowest point, was level with the main mast platform. The plaintiff, when she fell was not even at eye level with the main mast platform and therefore could not have fallen more than 300 millimetres in those circumstances. The

Crashlab report also shows that if the belt had been done up, there was only five millimetres of slippage measured. Given that the eyewitnesses claim that the plaintiff was momentarily suspended in her belt before she fell to the deck, one inference to be drawn is that the plaintiff had doubled back the belt through the buckle, but only by five millimetres or less; another is that she had not doubled back the belt at all. In either case the belt was not properly secured.

[52] There is no compelling reason why one or other of these inferences should not be drawn. It is quite possible that the plaintiff's belief that she had done up the belt correctly was mistaken, and that due to her anxiety in approaching a climb about which she was clearly apprehensive, she failed to do it up properly. There is no evidence that anyone else checked the belt or even looked at the belt, so the fact that the belt was worn outside of her clothing does not assist. I am unable to draw the inference that anyone noticed that her belt was done up correctly. Plainly if that had been so, it is likely that evidence to that effect would have come to light in the investigations which followed shortly after the accident.

[53] Alternatively Mr Reeves QC submitted that the plaintiff's evidence that she had her belt done up correctly must be taken to be true as an admission against her own interests, i.e. in her success in the claim. Reference was made to *Slatterie v Pooley* (1840) 6 M&W 664 at 668-669, where Parke B said: "Whatever a party says in evidence against himself… what a party himself admits to be true, may reasonably be presumed to be so." (See also

Phipson on Evidence, 13th Edition, par 19.04.) However, as Parke B went on to say, at 619:

> "The weight and value of such testimony is quite another question. That will vary according to the circumstances, and it may be in some cases quite unsatisfactory to a jury."

[54] When this statement was first made by the plaintiff, it was not a statement made by the plaintiff knowing what the test results on her belt were likely to show. I have no doubt the plaintiff honestly believes that the belt was done up correctly, but in my opinion the correct inference to be drawn is to the contrary.

[55] For the sake of completeness, I also reject the possibility that the belt came undone accidentally, it having been properly fastened. The evidence on that subject is that it could not be undone except by using two hands. There is no evidence that the plaintiff deliberately undid or loosened the belt during the climb. If she had done so, she would have needed to use both hands and this would have been plainly visible to Bennett and possibly Baker as well. Given her fear during the climb I conclude that this is not a real possibility.

5. The plaintiff's claim against the first defendant in contract and tort

[56] The plaintiff originally sued the first defendant only in tort. In paragraphs 18 to 25G of its Defence LOAF pleaded first, that the plaintiff was on board the *Leeuwin* pursuant to a written agreement the terms of which limited LOAF's liability to a maximum of $50,000 for personal injury arising out of the negligence of LOAF, which sum is to be further reduced in proportion to

any contributory negligence by the plaintiff; second, that the plaintiff breached the written agreement by failing to disclose her pre-existing obesity, poor levels of physical fitness, coordination and strength, borderline intellectual capacity, poor comprehension and retention skills and the fact that she was a slow learner; and her lack of experience in and fear of climbing or working at heights.

[57] By her Reply, the plaintiff has denied the existence of any binding contract between the plaintiff and LOAF and has further pleaded that (1) the contractual terms upon which LOAF relies to limit its liability are unenforceable because of unconscionability, (2) the terms are unenforceable because of s 68 of the Trade Practices Act 1974 (Cth).

[58] Shortly before trial I permitted the plaintiff to further amend her statement of claim to plead that, if contrary to her denial, the plaintiff was on board the vessel pursuant to a contract, there was an implied warranty under s 74(1) of the Trade Practices Act 1974 (Cth) that the sail training services would be rendered by LOAF to the plaintiff with due care and skill, and that LOAF breached that warranty causing the plaintiff to suffer personal injury and consequential loss.

[59] LOAF claims that the plaintiff is unable to rely on the contract and any implied term in her favour because (1) she denied the existence of the contract (2) this amounted to a repudiation which was accepted by LOAF.

[60] The pleadings therefore raise a number of important legal issues as to whether or not there was a contract in existence between the plaintiff and LOAF, and if so, whether its terms have been breached, and whether the plaintiff or LOAF can now rely thereupon. The contractual issues are also important for another reason. If LOAF is liable to the plaintiff in contract, and if it is unable to claim the benefit of some of the terms thereof because they are unenforceable, the plaintiff's damages are unable to be reduced on account of her contributory negligence: see *Astley v Austrust Ltd* (1999) 197 CLR 1. Subsequent amendments to the Law Reform (Miscellaneous Provisions) Act effected by Act No. 12 of 2001 do not apply to this case as this action was commenced before the commencement of the amending legislation: see s 21A(3) of the Act. Because of the importance of these matters it is convenient that they be dealt with before considering the plaintiff's claim in tort.

6. Was there a binding agreement between the plaintiff and LOAF?

[61] LOAF asserts that there was a valid and binding agreement constituted by the fact that the plaintiff completed and signed the Medical Information Form and a Reservation Form dated 13 May 1996. It is necessary to now consider the circumstances under which these forms were filled out and the terms of these forms in some detail. The starting point is to consider the plaintiff's primary assertion that there was no intention to create legal relations between the parties. In *Ermogenous v Greek Orthodox Community*

of South Australia Incorporated (2001) 209 CLR 95, Gaudron, McHugh, Hayne and Callinan JJ said, at par [25]:

> "Because the inquiry about this last aspect may take account of the subject matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances, not only is there obvious difficulty in formulating rules intended to prescribe the kinds of cases in which an intention to create contractual relations should, or should not, be found to exist, it would be wrong to do so. Because the search for the "intention to create contractual relations" requires an objective assessment of the state of affairs between the parties (as distinct from the identification of any uncommunicated subjective reservation or intention that either may harbour) the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of any prescriptive rules. Although the word "intention" is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of the parties."

[62] One of the matters relied upon by the plaintiff is that certain of the terms of the contract between the plaintiff and LOAF relied upon by LOAF are said to be inconsistent with the terms of the One Off Agreement. There is no evidence that the plaintiff was aware of the terms of the One Off Agreement, and therefore the precise terms of that agreement are irrelevant. What the plaintiff and LOAF knew was that DEETYA had made arrangements with LOAF to pay for her voyage, that the plaintiff herself was not making any payment towards the voyage, that the plaintiff was undertaking the voyage as a trainee, and that the purpose of the training was to assist the plaintiff in

some ill-defined way to find permanent employment (but not necessarily as a sailor). The plaintiff's only source of information about the voyage and the purpose of it came from either Ms Nuske or Mr Burr and any brochures she was given, such as the brochure TR3 to the plaintiff's statement.

[63] It was also submitted that there was no consideration for the contract. Although this has sometimes been mentioned as a factor tending to show a lack of intention to create legal relations, it is now clear that it is a separate matter entirely going to the existence of an enforceable contract: see for example, Carter, J.W. and Harland, D.J., *Contract Law in Australia*, 3rd ed, pars [306] and [401]. Leaving consideration aside for one moment, I am unable to accept that, looked at objectively, the conclusion can be drawn that there was no intention to create legal relations between the plaintiff and LOAF.

[64] The plaintiff admits that she signed the Reservation Form (Ext L7). She also admits that someone read to her or helped her to read the conditions of contract on the reverse side of the Form. It is well established that signing a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document that the person who signed it has read and approved the contents of the document irrespective of whether or not he in fact read it: see *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 79 ALJR 129 at pars [45]-[48].

[65] Counsel for the plaintiff, Mr Maurice QC submitted that there was no consideration for the agreement. It is well established that, to be enforceable, there must be consideration moving from the promisee. The promises are the undertaking on the rear of the Reservation Form in the General Conditions to the extent that they move from the plaintiff to LOAF and include the promise to limit LOAF's liability in the way previously described (see clauses 9, 10, 11, and 12 of the General Conditions). Mr Reeves QC submitted that the consideration from LOAF moving to the plaintiff was that LOAF permitted the plaintiff to embark upon the vessel and participate as a trainee. I accept this submission, although I think LOAF undertook to do more than this (see par [73] below). There is no evidence that LOAF was obliged to accept every person nominated by DEETYA to go upon the voyage, but even if there were, the existence of such a contractual obligation by LOAF to the Commonwealth does not prevent the existence of contractual relations between LOAF and the plaintiff. I accept, however, that the plaintiff was not a party to the contract between LOAF and the Commonwealth and therefore could not sue upon it even if it could be argued that the contract existed for her benefit. To the extent that contracts which are made for the benefit of third parties are enforceable by the third party, the privity and consideration rules have been relaxed in the case of insurance contracts, but have not so far been further extended: see *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107. In any event, no one has brought an action relying upon the terms of that

contract. The question then is, was there any consideration moving from the plaintiff to LOAF to support the alleged contract between them based on the Reservation Form? In my opinion there was. First, there are the promises made by the plaintiff to LOAF as part of the written conditions on the Reservation Form which I have already mentioned. Secondly, if the plaintiff or any of the other trainees selected by the Commonwealth had not agreed to go on the voyage, LOAF could not have earned the consideration due to it under the contract with the Commonwealth. This was not a contract for the carriage of passengers; it was a contract under which the plaintiff undertook to undergo a sail-training program provided by LOAF. LOAF needed the plaintiff's cooperation and plainly got it. The plaintiff was put to considerable trouble to attend the voyage in that she was required to forego her casual employment with St Mary's and, as LOAF well knew, travel by bus from Alice Springs to Darwin to join the vessel. Moreover, once on board the vessel she was expected to perform tasks as a member of the ship's crew, even if this did not involve climbing the mast, and did so. It is true that the plaintiff was not bound by the terms of the agreement in the Reservation Form to go on the voyage but in my opinion, there is still valid consideration because the contract between the plaintiff and the defendant is a unilateral contract: see *Carlill v The Carbolic Smoke Ball Co* [1892] 2 QB 484; *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* (1975) 133 CLR 125 at 133 per Barwick CJ. I therefore find

that there was valid consideration given for the agreement between the plaintiff and LOAF enabling both parties to sue upon it.

[66] Mr Maurice QC submitted that the contract was not enforceable because the Reservation Form contained terms which, on the evidence, contradicted the actual arrangements made between the parties. First, the Reservation Form provided that "the contract is between the Trainee and the Foundation" "[i.e. LOAF]" and shall be formed on confirmation by or on behalf of the Foundation of the Trainee's application and payment of the prescribed deposit". In this case, there was no deposit, but I do not see how that matters. If there was no prescribed deposit, or any deposit, the contract was formed upon the plaintiff's embarkation on the vessel to participate in the training program. It is also the case that the booking and payment conditions were not in accordance with the understanding of the parties. That might give rise to a claim for rectification, but it does not otherwise deny the existence of a contract between the plaintiff and LOAF. The plaintiff's argument was also directed to show the use to which the Reservation Form was intended to be put, i.e. it was submitted that the form was not intended to evidence the terms of a contract between the parties, but was merely used as a convenient booking form because plainly LOAF needed to have certain basic particulars of who might be joining the *Leeuwin*, so the Reservation Form was used for that purpose as a matter of convenience. A consideration of the Reservation Form shows that in addition to the matters to which I have referred already some of the General Conditions would appear to be

inconsistent with an arrangement whereby the Commonwealth chartered the vessel – e.g. the provisions relating to retention of the deposit. On the other hand, if the parties merely intended that the form be used to convey basic information about the identity of the trainee, one would have expected the words "I have read and accept the Booking, Payment and General Conditions of Contract of the Leeuwin Ocean Adventure Foundation Ltd" appearing above the plaintiff's signature to have been deleted. Alternatively, if all that LOAF required was information of this kind, a simple form could have been drawn up by almost anybody in LOAF's office, which would have achieved that object. Looked at objectively I consider that the correct inference to be drawn is that there was an enforceable contract between the parties constituted by the terms, including the General Conditions 9 to 12, on the Reservation Form.

[67] Finally, I should mention that although it was pleaded that it was unconscionable for the first defendant to rely upon the General Conditions 9 to 12, (par 1(g) of the Amended Reply to the First Defendant's Further Amended Defence) that point was abandoned by Mr Maurice QC at trial (Transcript p2336).

7. The Trade Practices Act

[68] I turn now to consider whether clauses 9-12 of the General Conditions of Contract are affected by s 68 of the Trade Practices Act 1974 (Cth).

[69] Clauses 9 to 12 provide as follows:

9. The Foundation shall not be liable in respect of:

(a) the death, injury or sickness of any Trainee or in respect of the loss of or damage to any property of the Trainee (other than valuables deposited with the Master on board for safe keeping) unless the same is due to the negligence of the Foundation in which even the Foundation's liability shall be limited to the amount of $50,000 for death, injury or sickness and $300 for property accompanying the Trainee; or

(b) the loss or damage to any valuables howsoever caused and irrespective of negligence on the part of the Foundation unless the same has been deposited with the Master on board for safe keeping in which case the Foundation's liability shall be limited to an amount of $500.

10. Any damages payable by the Foundation up to the limits referred to in Clause 9 shall be reduced in proportion to any contributory negligence by the Trainee.

11. Notwithstanding anything hereinbefore expressed or implied the Foundation shall in any event be entitled to the maximum protection allowed by law in respect of the liability of or any limitation on damages recoverable from ship owners.

12. In applying for a berth reservation the Trainee shall be deemed to represent to the Foundation that he or she is medically and physically fit to undertake a sail training voyage and the Foundation accepts no responsibility for either making or monitoring any such assessment.

(For "Foundation" read "LOAF").

[70] The plaintiff submitted that, if there were an agreement between the plaintiff and LOAF, then by operation of s 74(1) of the Trade Practices Act there is an implied warranty that the services will rendered by LOAF to the plaintiff with due care and skill. Subsection 74(1) provides:

> In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied

warranty that the services will be rendered with due care and skill…

[71] Section 68 of the Trade Practices Act provides:

> 68. Application of provisions not to be excluded or modified
>
> (1) Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying:
>
> (a) the application of all or any of the provision of this Division;
>
> (b) the exercise of a right conferred by such a provision;
>
> (c) any liability of the corporation for breach of a condition or warranty implied by such a provision; or
>
> (d) the application of section 75A;
>
> is void.
>
> (2) A term of contract shall not be taken to exclude, restrict or modify the application of a provision of this Division or the application of section 75A unless the term does so expressly or is inconsistent with that provision or section.

[72] LOAF submitted that s 68 and s 74 of the Act did not apply so as to prevent reliance upon conditions 9 to 12 for two reasons. First, it was submitted that no services were supplied to the plaintiff under the contract between the plaintiff and LOAF. Second, that in any event, as the plaintiff had repudiated the contract, which repudiation had been accepted by LOAF, the plaintiff could not sue on it for damages for breach.

[73] As to LOAF's first argument, the Reservation Form provides that "These are the Booking, Payment and General Conditions of Contract applicable to participation by a Voyage crew member (the Trainee) on an STS "Leeuwin" sail training voyage conducted by Leeuwin Ocean Adventure Foundation Limited ("the Foundation")". It is clear from the Reservation Form that the plaintiff undertook the voyage, not as a passenger, but as a trainee crew member under the control of the Master of the ship (see especially cl 8). The voyage is elsewhere on the Reservation Form indicated as leaving from Darwin on 10 June and is identified as Voyage Number 12/96. Clearly, the Reservation Form does not contain all of the terms of the agreement because "the advertised route and timetable" referred to in cl 3 is not identified. Nevertheless, I think it is clear enough that LOAF undertook to accept the plaintiff as a member of the crew and to train her as a crew member in the sailing of the ship. That inference is clearly open from the Participant Manual given to the plaintiff at the information session conducted by Mr Burr. That manual is admissible to prove the aim of the contract: see *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 348-349, per Mason J. Even if LOAF under the One Off Agreement had undertaken with the Commonwealth to supply services to the plaintiff, that does not preclude the existence of a collateral agreement between the plaintiff and LOAF to provide the same services: see Cheshire and Fifoot, *Law of Contracts*, 7th Aust ed, par 4.34. I therefore reject Mr Reeves QC's first argument.

[74] I turn now to the question of whether the plaintiff is unable to rely on the contract because she repudiated it. LOAF's argument was based upon the fact that the Plaintiff's Reply to LOAF's Amended Defence filed on 20 November 2001 pleaded that conditions 9, 10 and 12 of the Reservation Form "were [not] intended to or formed part of any contract between herself and the first defendant (the existence of which is denied)". Similar pleas were contained in further amended pleadings filed on 21 March 2005. On 21 March 2005 and on 8 April 2005 LOAF's solicitors wrote to the plaintiff's solicitors purporting to accept the plaintiff's repudiation of the agreement.

[75] There is authority for the proposition that, when a party denies the very existence of a contract, that conduct amounts to a repudiation of the contract: *The Australian Coarse Grains Pool Pty Ltd v The Barley Marketing Board* (1989) 1 Qd R 499 at 504-505 per Connelly J; at 513 per Ryan J. That was a case where the contract had not been fully performed by either party. Ryan J said, at 513:

> The defendant, by asserting the existence of a contract which had been terminated and denying the existence of a contract by which it was bound, made clear that it refused to perform its obligations under that contract, and this amounted to repudiation of that contract which the plaintiff was entitled to accept.

[76] However, in this case the plaintiff had fully performed her side of the bargain in the sense that she embarked on the vessel and underwent the training until she was injured by her fall on the third day of the voyage.

From that point on, it was plain that neither side could perform the contract any further. The plaintiff was evacuated by air on the day of her fall and hospitalised where she remained for a considerable period of time, extending in all events past the time when the voyage ended. It is plain that the contract came to an end at that time, not because of any breach of its terms, but because further performance of the contract was not possible. Thus, the contract was frustrated: see *Robinson v Davison* (1871) LR 6 Ex 269.

[77] It is plain that where a contract is frustrated, whilst the parties are automatically discharged from their obligations to further perform their contractual duties, their obligations are only discharged *in futuro*. The contract is not rescinded *ab initio*. Accordingly, accrued rights and liabilities are not divested, and in particular, a cause of action in damages which accrued prior to the frustrating event is not divested: see generally *Carter and Harland* (op cit) at [2062] to [2065].

[78] I therefore reject the argument that the plaintiff's denial of the existence of the contract operates as a repudiation of the contract in this case. In my opinion the plaintiff is able to sue for damages for breach of any implied warranty of due care and skill, and to the extent that clauses 9-12 of the Reservation Form are not void, LOAF is entitled to rely upon those clauses. Although there is no express provision to this effect in the contract, I consider that I should draw the inference that the parties must have intended such clauses to continue to operate: *cf. Codelfa Construction Pty Ltd v State*

Railway Authority of New South Wales, supra, especially at 364-365; 391-392 where it was held that an arbitration clause continued to operate.

[79] Finally, counsel for LOAF submitted that the plaintiff could not rely on the contract to claim damages for breach and in the same proceedings deny its existence because she could not at the same time assert inconsistent rights. Reliance was placed upon what fell from Lord Atkin in *United Australia Ltd v Barclays Bank Ltd* (1941) AC 1 at 30, where his Lordship dealt with the situation of a person having two inconsistent rights which called upon him to make an election. However, that is not quite the same thing as a plaintiff saying, there is no contract between us, but if, as you claim there is, I seek to rely upon it according to its terms. Here there is no election required. It was asserted that the plaintiff cannot both approbate and reprobate. Mr Maurice QC submitted that that equitable doctrine is confined to deeds, wills and other instruments inter vivos: see the discussion by Viscount Maughan in *Lissenden v C.A.V. Bosch Ltd* (1940) AC 412 at 417-420; but to the extent that a similar rule may apply to claims in legal proceedings, the rule has been narrowly confined to circumstances where the party concerned is treated as having made an election from which he cannot resile because he has taken a benefit. Merely seeking a benefit is not enough: see *Banque Des Marchands De Moscou (Koupetschesky) v Kindersley and Another* [1951] 1 Ch 112 at 119-120; *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 421 per Brennan J. In this case there is no evidence that the plaintiff has taken a benefit by the course she and her legal advises have

adopted. The plaintiff is merely taking alternative positions, which is consistent with this Court's pleading rules: see Supreme Court Rules o 13.09(1). No election has yet arisen between the plaintiff's alternative claims in tort and contract. Counsel for the parties have all submitted that the plaintiff has a right to elect between the remedies available in contract or in tort but cannot be called upon to elect until the time when the Court is ready to enter judgment. Upon that basis I have agreed not to enter judgment until these reasons have been delivered to the parties, so that the plaintiff may elect to abandon her claim in either tort or contract. The only decision of which I am aware which discusses whether or not the plaintiff may be put to her election is the judgment of Thomas AJ in *Wylie v The ANI Corporation Limited* (2002) 1 Qd R 320 at 335-336, where his Honour held that, whilst the plaintiff has a right to elect to pursue one or other remedy, there is no obligation to do so and if no election is made, the Court will enter judgment which is the most favourable to the plaintiff. However, in view of the agreement reached between the parties, I will take the course they have agreed upon.

[80] The next question is whether the provisions of s 74(1) of the Trade Practices Act 1974 (Cth) imply a warranty that the services of LOAF will be rendered with due care and skill. The elements of s 74(1) are: (1) there must be a supply of services; (2) in the course of a business; (3) by a corporation; and (4) to a consumer. "Services" is defined by s 4(1)(a) of the Act very broadly, and "includes":

> any rights… benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:
>
> (a) a contract for or in relation to:
>
> (ii) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction, or...

I am satisfied that this was a supply of services because, under the terms of the contract between the plaintiff and LOAF, LOAF conferred benefits and facilities under a contract in relation to the provision, use and enjoyment of facilities, viz the *Leeuwin*, for instruction. Moreover, I consider that the provision of instruction in how to sail the sail training ship *Leeuwin* is, in ordinary language, the supply of a service. I am also satisfied that the supply of the service was in the course of a business. In this respect, s 4(1)(a) provides that "business includes a business not carried out for profit". Therefore, the fact that LOAF considered itself to be a charitable organisation does not exclude its operation from being that of a business. LOAF ran regular sail training voyages and charged for the services it provided. I think there is no doubt that this constitutes a business within the ordinary meaning of that word. LOAF admits in its Defence that it is a corporation. "Consumer" is not defined otherwise than by s 4B which places a monetary cap on consumers of services which does not apply here as the value of the services was less than the prescribed amount (see s 4B(2) and (d)(i)). Under the One Off Agreement, the Commonwealth agreed to pay

$1,250 per participant which is evidence that the plaintiff herself could have purchased the services at a sum well below the prescribed amount of $40,000). I take the ordinary meaning of "consumer" to mean the "user" of the service. I therefore find that there was a warranty implied into the contract between the plaintiff and LOAF by s 74(1) of the Trade Practices Act.

8. Were conditions 9-12 of the contract void?

[81] Mr Maurice QC submitted that clauses 9(a), 10 and 12 were void. No argument was put concerning cl 11. I am of the view that cl 9(a), which limits LOAF's liability to $50,000 for personal injuries, "limits the liability of the corporation" for a breach of the implied warranty, and is plainly void (in so far as it deals with personal injuries). Clause 10, which operates to reduce LOAF's liability proportionally to any contributory negligence by the trainee, I consider purports to modify the liability of LOAF for a breach of the warranty, given that contributory negligence is not a defence to a claim brought in contract and given that in this case the apportionment provisions of the Law Reform (Miscellaneous Provisions) Act do not apply. Consequently, in my opinion cl 10 is also void. However, I am unable to find that cl 12 is entirely void. Clause 12 deals with two matters. First, there is a deemed representation of fact by the plaintiff that she is medically fit to undertake a sail training voyage. So far as that goes, in my opinion it does not purport to exclude, restrict or modify the implied warranty, but rather it creates a deemed representation of fitness. Second, cl 12 provides that the

Foundation accepts no responsibility for either making or monitoring any assessment. This does not modify the implied warranty that the services must be rendered with due care and skill, unless it is inconsistent with s 74(1). The inconsistency would only arise if in the provision of the services, it was required by LOAF as part of the warranty it provided to so "make or monitor any such assessment". Obviously that will depend on the circumstances including the expert evidence led on this subject which is yet to be considered. It may not in any event be necessary to consider cl 12 if the plaintiff's lack of medical or physical fitness to undertake the voyage were not causative of her loss. I will therefore not make any finding about whether cl 12 is void at this stage.

9. Was the implied term breached?

[82] First, it should be pointed out that at common law contracts for services contain an implied promise to exercise reasonable care and skill in the performance of the services: see *Henderson v Merrett Syndicates* [1995] 2 AC 145 at 193-194 per Lord Goff of Chieveley; approved in *Astley v Austrust Ltd*, supra, at 22 per Gleeson CJ, McHugh, Gummow and Hayne JJ. The implied warranty is therefore no different from the promise implied by the common law and it is coextensive in content and concurrent in operation with the duty which arises by the law of tort to take reasonable care for the plaintiff's safety.

[83] The starting point is to identify the relevant risk. In this case the relevant risk was plain and obvious – the risk of falling from the shrouds or from somewhere else on the masts. It is not necessary in a case such as this, where the relevant risk is and was plain and obvious to everyone, to undertake a theoretical analysis of the formulation of the duty of care as is sometimes necessary: cf. *Modbury Triangle Shopping Centre Pty Limited v Anzil and Another* (2000) 205 CLR 254 at [103] per Hayne J. There can be no question that LOAF owed a duty to the plaintiff to take reasonable care to prevent her from falling from the mast and indeed, in oral submissions, Mr Reeves QC conceded this. However, in view of the submissions subsequently received by counsel for LOAF following the delivery of the judgment by the High Court in *Mulligan v Coffs Harbour City Council* [2005] HCA 63 and *Vairy v Wyong Shire Council* [2005] HCA 62 it is necessary that more be said on this topic, albeit that the point is, on the facts of this case, plainly unarguable. The nub of the argument put forward by LOAF is that the plaintiff does not fall within an established category of relationship, that the nearest analogy is that of the relationship between sporting administrator and participant and that the plaintiff's autonomous choice to participate in the "sail training course", to climb the mast and to keep climbing the mast are significant factors which weigh against imposing a duty of care on the respondent.

[84] The submission fails to take into account that:

(1) the plaintiff was subjected to pressure to climb the mast;

(2) LOAF knew that this was so and actively encouraged the pressure;

(3) the plaintiff was at all times under LOAF's instruction so that the relationship was that of teacher and pupil;

(4) LOAF, through its master, officers and crew exercised control over the plaintiff because the master was in overall control of the vessel and all aboard her;

(5) the plaintiff was not responsible for choosing her own safety equipment, but reliant entirely on what was provided to her by LOAF;

(6) whether or not the activity was "recreational" is irrelevant. Even in the case of recreational activities, those who teach or instruct others owe a duty to take reasonable case for their student's safety. The cases of *Mulligan* and *Vairy*, which relate to the duty owed by a public authority to an individual where there is no other definite relationship such as master and servant or teacher and pupil, are not to the point and do not expound any new principles applicable to this case;

(7) LOAF was far more than a sporting administrator and, in any event, the plaintiff's presence on the vessel was not as a participant in a sport. The plaintiff was there, as LOAF well knew, as the result of the agreement between LOAF and the Commonwealth, the purpose of which was to teach the plaintiff self-assurance or self-confidence through teaching sail-training, with the ultimate aim of assisting the

plaintiff to obtain permanent work. This is a far cry from the kind of situation which arises when a person undertakes a hazardous sport with obvious risks purely for the adrenalin rush, but even then a novice under instruction is entitled to assume that his instructor will take reasonable care for his safety.

[85] Having identified the relevant risk, the next question is whether there has been a breach of the duty of care. In *Wyong Shire Council v Shirt* (1979-1980) 146 CLR 40 at 47-8, Mason J, as he then was, said:

> "In deciding whether there has been a breach of the duty of care the tribunal must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved the risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alternative action and any other conflicting responsibilities which the defendant may have."

[86] It is relevant, in assessing the appropriate response to the risk, to bear in mind the following matters. This was an adventure training sailing course. The plaintiff was not compelled to climb the mast but there was considerable peer pressure upon her and encouragement for her to do so. That peer pressure was likely to be placed upon the plaintiff was known to and encouraged by LOAF. Unless enough of the trainees were willing to climb the masts, the sails could not be furled and unfurled. There was

installed on the main mast above the main mast platform a plaque with a poem inscribed on it, which was plainly intended to be an incentive to climb the mast. The plaintiff, as a trainee crew member, was under the control of the master of the ship, and through the master, the ship's officers, who not only controlled her activities, but were responsible for her training. They were her teachers.

[87] In the circumstances of this case, the plaintiff submitted that a reasonable man in response to the risk, would take steps to prevent a person from falling in the first place by ensuring that, on her first climb, the plaintiff was instructed on how to climb the futtock shrouds before she went aloft and by having her accompanied and supervised closely on her first climb. Further, having regard to the fact that such steps might not be effective and the severity of the likely consequences if they are ineffective, LOAF should have provided the plaintiff with an appropriate safety harness whilst climbing aloft, and, instructed the plaintiff in the proper use of the harness, in case, nevertheless, the plaintiff did fall. The plaintiff also submitted that the defendant ought to have had a system in place to ensure that the safety harness was checked before the plaintiff went aloft, and there was either no system or it was defective.

[88] I think that a person who has never climbed a mast before, and who has had no instruction in climbing, would need to be shown how to climb the futtock shrouds in order to climb upon the main mast platform. The evidence of Ms B is that in fact other trainees on the red watch were instructed how to

achieve this by Ms B on the day before the accident but the plaintiff was not present when this occurred, as the instruction was given by Ms B whilst aloft with the trainees Baker and Bennett. At this time, the plaintiff was on deck under the supervision of Cole, Stait or Brooks, according to Ms B. Plainly Ms B realised the importance of being shown how to climb the futtock shrouds, not only because she in fact did this, but also because it was, as she said, the hardest part of the climb. Further, according to Ms B, she instructed Baker to wait on the platform and to assist the plaintiff climb the futtock shrouds. As part of this operation Ms B had shown Bennett and Baker the Jill-go Bar and had instructed them to clip onto the bar when attempting the climb onto the main mast platform. None of this information was imparted to the plaintiff before she attempted the climb, and it is plain that she had no idea of what to do. I accept the opinion of Captain O'Brien that it was essential that proper instruction in how to climb the mast should have been given before the climb was attempted. Although Ms B had come to the main mast platform to give verbal encouragement and instructions, I agree with Captain O'Brien that this was far too late. Nor was it adequate that the plaintiff was effectively left to the supervision of the 16 year old Baker who was in effect given the task of assisting the plaintiff over the futtock shrouds. Although Bennett was also present, she, like Baker had no instruction in or experience in teaching others to climb the shrouds, and in any event it was not a responsibility which she had accepted. I note also that what occurred departed significantly from what had occurred during the time

Mr Tonnison, the current Chief Executive Officer of LOAF, served as First Mate on the *Leeuwin*. According to him the watch leader always watched and supervised trainees whilst they were aloft and all trainees were instructed on how to climb. He also stated that a crew member would climb aloft with the trainee up the shrouds, and there was a crew member stationed at the futtock shrouds to assist the trainee to climb over those shrouds. I agree with the opinion of Captain O'Brien that a competent and experienced watch leader witnessing the climb should have realised that the plaintiff was afraid of the climb and confused about what to do and aborted the climb. I find that there was a failure by LOAF through its agent Ms B to properly provide instruction for the plaintiff in the climbing of the futtock shrouds, and to properly supervise her climb, and these failures caused her to fall.

[89] I also accept the plaintiff's submission that a reasonable response to the risk required a system in place to ensure that the plaintiff's belt was properly fastened before she went on her first climb. I do not consider that LOAF was entitled to solely rely upon the other trainees' eyes in these circumstances. It is human nature that some people at least are likely to be quite fearful on their first climb, and if they are not properly and fully instructed on how to climb, the attention that might be expected to be given by the trainee to properly doing up one's belt is easily capable of being diverted by worrying about the climb itself. Not only is this reasonably foreseeable, but a simple buddy system requiring the buddy to physically, and not just visually, check the belt, would have been a reasonable response to that risk if the belt was

not to be physically checked by the watch leader. I accept the evidence of Captain O'Brien that, if a safety belt of the kind provided to the plaintiff is to be worn, there should be a buddy who is required to physically check the belt buckle. There are no countervailing factors which suggest to me that such a system was inappropriate. I note that Mr David Bell, an expert on climbing safety whose qualifications I accept enable him to comment generally on that topic, was of the same opinion, although he went further and suggested that, with trainees, there should also be direct supervision by the supervisor. In my opinion it is not necessary to consider whether Mr Bell's opinion on that aspect of supervision is correct, as no adequate system for physically checking the plaintiff's belt was in place. Had the belt been properly checked, the fall would have been arrested by the belt. There was evidence led about suspension trauma which might well have occurred in that event with the use of this type of belt. It is not necessary for me to make any findings on that issue.

[90] A great deal of evidence was directed to whether or not the belt supplied was adequate or inadequate for the purpose. This evidence was led to show that the belt did not comply with Australian Safety Standards in various respects, and that a full harness-style belt ought to have been supplied, or at least if a linesman's belt was appropriate a different style of buckle should have been employed or alternatively, the tongue of the belt should have been doubled over and cross-stitched to prevent it from sliding through the three bar buckle if it were not doubled back properly.

[91] Evidence was given by the Chief Executive Officer (CEO) of LOAF, Mr Johnson, as to the circumstances under which this particular type of belt was chosen. Prior to 1988 when Mr Johnson became the CEO of LOAF, a shoulder/chest harness was in use on the *Leeuwin*. Under the Terms of Regulation 2 of 1987 of the Sail Training Association of Western Australia, safety harnesses were required to be worn by trainees at all times whilst going aloft. However, the then master of the *Leeuwin* did not favour the compulsory use of harnesses for various reasons. In 1988, the *Young Endeavour* sailed into Fremantle harbour. This vessel was a bicentennial gift to Australia by the United Kingdom. Mr Johnson took the opportunity to ascertain what safety equipment was used on the *Young Endeavour* and met the master of that vessel, Captain Christopher Blake. The type of belt used on that vessel was inspected by Mr Johnson. It was a safety belt (or linesman's belt) rather than a harness. Mr Johnson was able to secure one such belt from that vessel.

[92] Mr Johnson, having made several unsuccessful enquiries to find a similar type of belt, approached a firm called Wilderness Equipment Pty Ltd, which manufactured safety belts, to manufacture a similar belt and to have it tested. The test results are not now important, but it is Mr Johnson's evidence that Wilderness Equipment Pty Ltd was the firm which manufactured the belts in use thereafter, including the belt supplied to the plaintiff.

[93] There was also some evidence from Mr Johnson that the *Young Endeavour* continued to use safety belts until 2001. Mr Tonnison, the present CEO of LOAF, gave evidence to the effect that at the time of the plaintiff's accident the *Young Endeavour* and another sail training ship located in Adelaide, the *One And All*, still used belts similar to the type of belt supplied to the plaintiff and the same kind of buckle. According to the evidence of the plaintiff's expert, Captain O'Brien, in 1997 about 30 per cent of sail training ships in the United States still used a linesman's belt.

[94] The plaintiff submitted that, at the time of the accident, the standard published by the Australian Standards Association in 1981 and 1983 required the use of a harness rather than a belt on the *Leeuwin*. As I said in *Giner v Public Trustee and Anor* (1991) 105 FLR 410 at 415:

> "… the publications of the Standards Association are neither public documents, nor works of science, so as to make them admissible per se. However, that does not mean that a particular standard may never become admissible… Whilst the standard has no legal force, in my opinion the correct rule is stated by King CJ in [*Chicco v Woodville City Corporation* [1990] Aust Torts Reports 69, 893] viz, that "it is permissible for an expert on safety to have recourse to such published standards, if he sees fit, as one of the sources from which he informs himself as to matters relating to the subject on which he is expert"."

Therefore, the fact that the standard may have required the use of a harness is, by itself, not admissible. Nevertheless Mr Bell, where expertise in relation to safety harnesses and belts used for climbing I accept, is entitled to, and did rely upon various Australian Standards to express his opinion

that safety harnesses should have been adopted in preference to a linesman's belt, for general safety reasons. Captain O'Brien also expressed the opinion that a harness should have been used rather than a belt. However, both of these opinions were based upon the premise that a harness was less likely than a belt to cause injury to the wearer in the event of a fall. Both experts referred to the possibility of significant injury caused by the initial arrest of the fall by the belt, as well as by the forces associated with prolonged suspension from a safety belt. Be that as it may, there is no evidence that enables me to find whether or not the plaintiff would have suffered injuries associated with either of these causes had the belt been properly fastened.

[95] On the other hand, I accept the criticism of both these experts directed at the style of the buckle used on the belt. Clause 2.1.3 of the Standard Association of Australia's Standard AS 1891-1983 relating to Industrial Safety Belts and Harnesses required:

> "All securing buckles shall be designed so they can be fastened only in the correct manner. If they are capable of being fastened in more than one way, each method of fastening shall comply with the requirements of cl 5.1."

I note also that LOAF's expert, Mr Gordon McCormack, also considered that the buckle did not meet this standard.

[96] Clause 5.1 deals with slippage of the webbing. It is clear that the buckle on the belt provided only complied with cl 2.1.3 and cl 5.1 when the belt was

correctly fastened and not when it was incorrectly fastened. In my opinion, if it was appropriate at the time of the accident to provide a belt rather than a harness, a safer buckle should have been provided. I accept the evidence of Captain O'Brien that the kind of three bar buckle provided was inadequate for this belt. Clearly there were many alternative styles of buckle available, e.g. a buckle with two tongues, which would have been safer. Mr Bell's evidence was to the same effect.

[97] Indeed, not only was the buckle inadequate, but it was inadequate to LOAF's knowledge, because the crew demonstrated to the trainees what would happen if the belt was not properly fastened. On the other hand, there is no doubt that the plaintiff saw the demonstration given by Ms McMullan and was well aware that the belt would not hold if she did not do up the belt properly. Did LOAF discharge its duty of care to the plaintiff by warning the plaintiff about the risk?

[98] There is no absolute rule that a person who owes another a duty to take reasonable care for the latter's safety will always have discharged his duty by an appropriate warning. The question must always be, once the risk has been evaluated, what is a reasonable response to the risk? This is not the same question as what is the minimum response which might be effective to eliminate the risk. Whilst knowledge on the part of the plaintiff of the relevant risk (whether as the result of a warning or otherwise) may in some cases result on a finding that the defendant is not liable in negligence, that is

not inevitably so. In *Bus v Sydney County Council* (1989) 167 CLR 78 Mason CJ, Deane, Dawson and Toohey JJ said, at 90-91:

> "Since the decision in Dell'Oro the law has progressed by placing an increased emphasis upon the relevance of the possibility of negligence or inadvertence on the part of the person to whom a duty of care is owed. That possibility is now recognized as being relevant to the standard of care owed by an employer to an employee and as well generally in situations in which a duty of care exists. As was observed by Mason, Wilson, Brennan and Dawson JJ, in McLean v. Tedman:
>
> > "[I]t is not an acceptable answer to assert that an employer has no control over an employee's negligence or inadvertence. The standard of care expected of the reasonable man requires him to take account of the possibility of inadvertent and negligent conduct on the part of others. This was acknowledged even in the days when contributory negligence was a common law defence … The employer is not exempt from the application of this standard vis-à-vis his employees … [T]he possibility that the employee will act inadvertently or without taking reasonable care may give rise to a foreseeable risk of injury. In accordance with well settled principle the employer is bound to take care to avoid such a risk."
>
> See also Bansktown Foundry Pty. Ltd. v. Braistina. The observation that a duty is owed to a person who may inadvertently or negligently injure himself if the duty is breached is not unique to employment situations. Cases of occupier's liability frequently concern injury involving the inadvertence of the person present on the land concerned: see, e.g., Cooper v. Southern Portland Cement Ltd. It is common ground that, under the applicable New South Wales legislative provisions, the fact that Mr. Bus' own negligence was obviously a contributing, and arguably the main, cause of his injury does not effect the existence or extent of the respondent's liability."

[99] Sometimes, these questions also raise questions of causation (see for example the discussion in Fleming, *The Law of Torts*, 9th ed at pp 134-136; 250-252), but in my opinion the proper resolution of this question lies not in causation but in an evaluation of what is a reasonable response to the risk in all of the circumstances.

[100] In evaluating what is a reasonable response to the risk of falling from the mast it is necessary to bear in mind that if a person were to fall from a mast, particularly near the futtock shrouds of the main mast, severe injury or death is the likely outcome. It is also the case that there had never been a previous case where a person had fallen through a failure to do up the belt properly. Although other accidents had occurred when a participant had fallen from the futtock shrouds to the deck, the causes of those accident were related to a failure to clip on the safety harness. These accidents all occurred before the Jill-go bar was installed and none involved serious injury. But it was inevitable that sooner or later an accident like the one which befell the plaintiff would occur. The possibility of a trainee failing to properly do up his or her belt on a first climb aloft was not one which could have properly been ignored. The risk was obvious, but it was nevertheless reasonable to expect that LOAF would take simple and inexpensive methods to obviate the risk. The steps which LOAF took were inadequate, for the reasons I have already discussed. LOAF ought to have instituted a proper buddy system to check that the belt was properly done up before a trainee went aloft. The plaintiff ought to have been instructed on how to climb the futtock shrouds

before climbing the mast. When it became obvious that she did not know what to do, she should have been taken down to the deck. LOAF also ought to have insisted on a buckle which could not slip if incorrectly fastened. Such buckles were available. There is no evidence as to their cost but even if they cost more than the type of buckle provided, the additional cost must have been minimal. Having considered all of these matters I find that the defendant, LOAF, was negligent.

[101] LOAF contended that, even if it were negligent, the injuries she sustained were not caused by LOAF's negligence. LOAF's submission was that, applying the "common sense" test postulated in *March v E & M H Stramare Pty Ltd and Anor* (1990-1991) 171 CLR 506 what caused the plaintiff to fall was her own failure to do up her belt properly. There are three answers to this submission. First, is that, in my opinion, LOAF had a responsibility to take reasonable steps to ensure that the belt was done up properly and failed to do so. Secondly, LOAF ought to have provided a belt which could not be incorrectly fastened. Thirdly, in any event the failure of the plaintiff to fasten the belt properly goes to the cause of the damage and not the cause of the accident: see *Froom & Ors v Butcher* (1976) 1 QB 286 at 292. The plaintiff did not fall from the mast because her safety belt was not done up properly. She fell from the mast because she was not properly instructed and supervised on how to climb the futtock shrouds, which led to her becoming disorientated and exhausted; and because she was encouraged to keep trying instead of being led down. The belt was designed to prevent serious injury if

she did fall. It did not do that, but its failure was not the cause of the fall, although it was the cause of the damage resulting from the fall. Mr Reeves QC referred me to *Wynbergen v Hoyts Corporation Pty Ltd* (1997) 72 ALJR 65 and the observations of Hayne J, with whom Gaudron, McHugh, Gummow and Kirby JJ agreed, especially at pp 68-69, where his Honour referred to apportionment legislation being predicated upon a finding that a person suffered damage partly as a result of his own fault and partly due to the fault of a tortfeasor. But, that discusses who is responsible for the cause of the damage, not the cause of the accident and is entirely consistent with *Froom v Butcher* and the many other cases which point out that, in order to be guilty of contributory negligence, it is not necessary to show that the plaintiff's conduct was a cause of the accident; all that is necessary if that the plaintiff failed to take reasonable care of his own safety which contributed to his injuries: see *Astley v Austrust Ltd*, supra, at [21].

[102] Questions of causation in contract and tort can be quite different. No submission was made that there was any difference in this case. The test in *March v E & M H Stramare Pty Ltd* (supra) applies to contract as well as tort cases: *Carter and Harland* (op cit) par [2120]. The principal difference lies in the rules relating to remoteness of damage. No submission was made that the damage sustained by the plaintiff was too remote. Nor could it be.

[103] I therefore conclude that LOAF breached the implied term of the contract between the plaintiff and LOAF which was the cause of the fall and a cause of the damage suffered as a result of the fall.

10. Contributory negligence of the plaintiff

[104] Because the plaintiff has succeeded in contract, contributory negligence does not reduce the plaintiff's damages. However, in case I am wrong that the plaintiff is entitled to succeed in contract, I should deal with the situation if the plaintiff is confined to a claim in tort.

[105] For the same reasons as I have found a breach of the implied warranty, the plaintiff is entitled to succeed in negligence. In that event, I am satisfied that the defendants have provided that the plaintiff was guilty of contributory negligence in climbing the mast of the vessel without ensuring that her safety belt was properly secured. The plaintiff well knew that unless she secured the buckle by doubling over the tongue of the belt, the belt would not hold her weight.

[106] Counsel for the plaintiff, Mr Maurice QC, submitted that I should treat her as if she were an employee of LOAF's for the purpose of determining the claim for contributory negligence. In oral submissions, Mr Maurice QC suggested that the plaintiff was in effect an employee *pro hac vice*. There is no evidence that the plaintiff and LOAF entered into a contract of service. Nor was the plaintiff a borrowed servant; she was nobody's servant. She was on the vessel under the instructions and commands of the master and other officers of the ship, but that did not make her a servant, borrowed or otherwise. So far as climbing the mast is concerned, she well understood this was not compulsory. The relationship was not like that of master and servant; it was that of pupil and teacher.

[107] Mr Maurice QC submitted that 'different considerations' arise when considering contributory negligence by employees, referring to *Thompson v Woolworths (Q'land) Pty Ltd* (2005) 79 ALJR 904 at 911 (par [40]). The cases referred to in that passage illustrate that this is so in cases where employees are involved in repetitive work in factories and in other cases where the employer has failed to provide a safe system of work: see *McLean v Tedman & Anor* (1984) 155 CLR 306 at 315; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 877 (par [60]), at 884-885 (pars [87]-[88]). But this is not the case here.

[108] LOAF also pleaded that the plaintiff was guilty of contributory negligence for deliberately letting go of the futtocks and allowing herself to fall. That pleading was not supported by any submission at trial by either defendant. My findings in relation to whether or not she 'deliberately let go' are at par [47] above. The burden of proving contributory negligence rests with the defendants: *Czatyrko v Edith Cowan University* (2005) 79 ALJR 839 at 843 par [18]. I am not satisfied that LOAF has established that the plaintiff was guilty of contributory negligence by failing to hang on to the futtock shrouds.

[109] LOAF also submitted that the plaintiff was negligent in failing to complete accurately LOAF's medical information form. It was also pleaded that she failed, as she was required to do by LOAF's Participant Manual, to inform her watch leader that she was taking prescription medication. Neither of these contentions are made out for the simple reason that neither caused nor

contributed to the plaintiff's fall or to her injuries. It was also pleaded that the plaintiff was negligent in failing to comply with LOAF's instructions and advice contained in its information brochure that all trainees should be in good health and reasonably fit. This matter was not pressed at trial, no doubt for the very good reason that it was not shown that any of these matters, even if proven, were causative of or contributed to, either the fall or the plaintiff's injuries.

[110] I consider that the greater proportion of the loss should be borne by LOAF. I accept that the plaintiff had been warned what could happen if the belt was not done up properly and had been taught how to do up the belt, but there are a number of findings I have made against LOAF which caused or contributed towards the fall and or the subsequent injury which LOAF could easily, and should have, prevented. This was the plaintiff's first climb. As one might expect, she was nervous and apprehensive. Her failure to properly do up her belt or to check that her belt was properly done up was due to momentary inattention when she was concentrating on performing an unfamiliar task under pressure. In those circumstances, the greater responsibility must rest with LOAF. I would apportion liability 80/20 in favour of the plaintiff.

11. The plaintiff's claim against the second defendant in contract and tort

[111] The plaintiff's case in contract as pleaded was based on an alleged breach of an alleged contract entered into between the plaintiff and the

Commonwealth on or about 30 May 1996. This was clearly a reference to the "case management agreement" referred to previously in par [30] above. The claim in contract against the second defendant was formally abandoned by counsel for the plaintiff. No claim based on the alleged contract was pursued as between the defendants (see Transcript pp 1845-1847).

[112] Nevertheless, the plaintiff relied upon the case management agreement as one piece of evidence going to establish the existence of a duty of care owed by the Commonwealth towards the plaintiff.

[113] Mr Maurice QC submitted that the Commonwealth owed to the plaintiff a duty to take reasonable care to ensure that the plaintiff would not be exposed to risk of injury by participating in the sail-training program to be provided by LOAF under the terms of the One Off Agreement. The duty arose, so it was submitted, because the voyage involved "adventure sail training" in which the plaintiff was to be encouraged to challenge "pre-conceptions about (her) physical and mental limitations by engaging in unfamiliar, risk-taking activities such as climbing the ship's rigging". In breach of that duty it was put that the Commonwealth knew or ought to have known that the plaintiff was not competent to climb the mast and, in particular, the futtock shrouds, because she was (a) grossly overweight; (b) not physically fit enough; (c) had been assessed as borderline intellectual functioning; (d) continued to take sedative anti-psychotic medication; (e) lacked confidence at heights; and (f) had no experience with climbing or adventure-type activities. Therefore, so it was submitted, the Commonwealth

ought to have either not sent the plaintiff on the voyage at all, or specified to LOAF that her participation was to be on the limited basis that she was not to engage in activities that involved climbing the rigging. It was not submitted that the Commonwealth's employees who were on the voyage could have intervened to prevent the plaintiff from climbing the mast on the day in question. Plainly these employees were not on board to supervise the plaintiff and had no role to play other than as trainees themselves.

[114] In my opinion the submission fails because the suggested breaches of duty did not cause the plaintiff's injuries. There is no evidence that the plaintiff's weight or level of fitness in fact precluded her from safely climbing the mast, or the futtock shrouds. It is true that her general practitioner, Dr Mark Young, stated in his report of 30 March 2005 that he "probably would have counselled Tracey Renehan about my concerns about her climbing the masts and rigging. These concerned relate to: her level of fitness; her general obesity; her confidence at heights; her mental state; and the requirement for sedative medication. These concerns would contribute a relative contraindication to climbing a mast". But the reason for the fall was not because she was overweight or unfit, but because of the factors I have previously indicated. There is no evidence that the plaintiff lacked sufficient strength to carry out the climb. There is no evidence that her mental state or the medication she was taking, caused or contributed to her injuries. It was not shown that her failure to do up the safety belt properly was connected to her borderline intellectual functioning, or to any drugs she had been taking,

or to her previous illness. As to the latter, she had not had an attack of mental illness for some years prior to the fall. There is no evidence she had an attack of mental illness on the day of the fall. There is evidence which I accept that the plaintiff had previously been able to follow the instructions on how to do up the belt and had successfully proven her ability to correctly engage the buckle. The reason she did not do up the belt properly was, as I have found, due to the pressure and anxiety over the climb, which could have happened to any person of average intelligence inexperienced in climbing and with a healthy respect for heights. As to her fear of heights, there is no evidence that her fear of heights was any worse than many people have who are not used to heights, or could not be characterised as phobic. Her fear of heights was not the reason she lost her grip. Even if the Commonwealth should not have sent her on the voyage, or restricted her participation, this was for reasons unconnected with the cause of her injuries, other than as a *causa sine qua non*.

[115] Furthermore, as Mr Silvester, for the Commonwealth, pointed out, the common law does not ordinarily impose a duty on a person to protect another from harm created by a third party: see *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (supra) at 266 (pars [26]-[28]) per Gleeson CJ. It may be otherwise where there is a special relationship between the parties such as master and servant, teacher and student, or bailor and bailee: ibid, at 265 (par [26]), or where the defendant exercises control over the third party: ibid at 270 (par [42]) and at 292-293 (pars [110]-[115]) per Gaudron and

Hayne JJ; at 299 (par [40]) per Callinan J, quoting Dixon J in *Smith v Leurs & Ors* (1945) 70 CLR 256 at 261-262; *Graham Barclay Oysters Pty Ltd & Anor v Ryan and Ors* (2002) 211 CLR 540 at 599 (par [152]) per Gummow and Hayne JJ. Here there was no special relationship between the plaintiff and the Commonwealth to give rise to such a duty; not did the Commonwealth exercise control over the first defendant's control of the ship or its crew, the training provided on the ship, or the safety equipment on board. It was not suggested that LOAF was the Commonwealth's agent.

[116] The action against the Commonwealth must fail. That being so, there can be no contribution between LOAF and the Commonwealth either.

12. Damages for pain and suffering and loss of amenities

12.1 Physical injuries

[117] The plaintiff's background and most of the relevant events in her life leading up to the accident have previously been canvassed and I will not repeat what I have already said.

[118] As a result of the fall, the plaintiff suffered a number of fractures and other injuries. She was evacuated by helicopter approximately 6 hours later and admitted to the Royal Darwin Hospital at approximately 1945 hours, some 11 hours after the fall. The plaintiff remembers landing on the deck in a kneeling position with her legs behind her. She was given some first aid treatment by "a nurse" on board but does not remember being in pain. According to Ms McMullan pain killers had been administered to the

plaintiff and she was assisted by Ms Andrews in trying to make the plaintiff comfortable until she was removed from the vessel. Ms Andrews said that the plaintiff was conscious, talking and that she had injected her with morphine. Other steps were also taken to immobilise the plaintiff's legs. It is unnecessary to go into details.

[119] On admission to the Royal Darwin Hospital, she was found to have suffered the following injuries:

(1) an open comminuted intercondylar fracture of the right femur;

(2) a mid shaft closed transverse fracture of the right femur;

(3) an oblique fracture of the right patella;

(4) a fracture of the shaft of the fifth metacarpal of the right hand;

(5) a fracture of the second proximal phalanx of the right index finger;

(6) a fracture of the third proximal phalanx of the right hand;

(7) bi-lateral peri-orbital haematomas;

(8) lung contusion; and

(9) bruising of the lower chest on the left side and the abdomen and arms.

[120] Following admission, she was taken to theatre the same evening. The fractured right femur was reduced and an intramedullary nail inserted. The left femur was reduced and atonal fixation was achieved by the insertion of

a condylar plate. She was returned to the Intensive Care Unit (ICU) at 0230 hours on 13 June 1996 and remained in that unit until 27 June 1996 when she was transferred to the ward.

[121] Whilst in the ICU, she received intubation probably due to a combination of lung contusion and fluid overload. On 22 June she required a percutaneous tracheostomy to expedite weaning from the ventilator. The tracheostomy was removed on 27 June when she was discharged from the ICU. She was then self-ventilating on 40 per cent oxygen with a venti-mask and was tolerating nasogastric feeding.

[122] The plaintiff has little memory of being in the ICU or the pain and trauma involved. She does recall being in the ward, visits by her father, having a plaster cast on her left leg, having her right leg exercised by a machine whilst she was in bed, which was very painful, exercising her arms using sandbags, being uncomfortable and having trouble sleeping because she could not roll onto her side. She also recalls getting an infection, being moved into a room of her own and feeling bored and frustrated that she could not go outside.

[123] Whilst in the Royal Darwin Hospital, the plaintiff was regularly seen by a number of other health professionals including physiotherapists, occupational therapists and nutritionists.

[124] On 23 July 1996, she was transferred to the Alice Springs Hospital where she remained an in-patient until her discharge on 4 August 1996. During this

period she was assessed and managed by the in-patient rehabilitation team there, principally by a physiotherapist, Ms Sue Wallace. When transferred the plaintiff was unable to walk and could not use a wheelchair. Ms Wallace's evidence (Ext P56) was tendered by consent. Her treatment plan was to get the plaintiff out of bed and walking on her right leg. At this stage the plaintiff still had a full leg plaster cast on her left leg which was non-weight bearing. She had a limited range of movement and strength in both legs, being unable to lift either leg from off the bed. Over the next 9-10 days the plaintiff was taught how to transfer to her wheelchair and from her wheelchair to a car. She underwent daily work-outs in the physiotherapy gymnasium, as well as bed exercises. By 1 August she was able to walk 10 metres in a high support frame, known as a gutter frame, and could stand and shower from the wheelchair and stand in the shower with rail support for 3-4 minutes. By the time of her discharge, her right leg strength had improved, but she suffered right knee pain and lack of strength in both upper and lower limbs. The plaintiff found this period of mobilisation very painful and tiring.

[125] Thereafter, Ms Wallace saw the plaintiff daily as an out-patient until 23 August when contact was reduced to 3 sessions per week of one hour's duration. During this period the plaintiff began to be able to walk on crutches for short distances. Her right knee was very painful and swollen and had to be iced directly after activity. By 6 September she was able to

walk up to 25 metres using crutches and could use a wheelchair for longer distances.

[126] On 26 September 1996, the cast was removed. She had a good range of movement in the left leg but the right knee was still painful. There was a small amount of swelling in the left leg and ankle. She reverted to walking using the gutter frame. On 11 October she began hydrotherapy with Ms Wallace at the Alice Springs public pool. On 26 October, the wires which held the right knee cap fracture in place were surgically removed. The plaintiff was unable to resume physiotherapy until 4 November 1996. Initially hydrotherapy sessions were not possible due to scar healing to the right knee but from 11 November there was one session a week (plus two gymnasium sessions). She was encouraged to ambulate using crutches and began using pedals as the first stage of working towards the use of an exercise bike. Over the next few months she continued with hydrotherapy, physiotherapy and gym work which improved her ability to walk using crutches and to transfer independently to and from her wheelchair. By 14 February 1997 the plaintiff was riding her exercise bike up to 15 minutes a day.

[127] However, whilst the pain in her right knee greatly improved following removal of the wires, she suffered increasing pain in her left knee. She had a persistent “quads lag” and could not straighten her left knee, which was between 10-20° short of full extension. This in turn led to a weak and unstable left leg. When seen by Dr Flavell in April 1997, he noted that she

had 2 centimetres of left leg shortening and was awaiting a shoe build up. In fact she had been referred to a visiting Prosthetic and Orthotist who prescribed both a left shoe raise as well as a knee brace to reduce her pain and increase her mobility. She also had a TENS machine for pain relief.

[128] On 26 March 1997, Ms Wallace left the Alice Springs Hospital on transfer to Community Health Services and did not see the plaintiff again until 1 May 1997. There was difficulty organising a heated pool for hydrotherapy during winter, but eventually, in August 1997, Ms Wallace obtained permission for the plaintiff to use a heated spa at the Alice Springs Memorial Club. At that time the plaintiff was walking using the built-up shoe indoors unaided and using a stick for longer distances outdoors. She was given a thermal knee brace to assist her on longer walks, spa exercises and encouraged to use her exercise bike at home. Ms Wallace decided that no further intervention was required by her and the plaintiff was left to follow this program on her own.

[129] Since then, the plaintiff has had surgery on two occasions relating to the left leg. On 16 December 1997, following an arthroscopy to the left knee, the internal fixation of the patella was removed. However, the result of the arthroscopy was that the right knee was “entirely normal”. She was in hospital only for a few hours on that occasion. On 21 September 1999 she was admitted again to the Alice Springs Hospital where the plate and screws from the left distal femur and wire from the right knee were removed. She was discharged on 1 October 1999.

[130] According to the evidence of Dr Alan Jones, the plaintiff's injuries had "stabilised" by July 1997. By "stabilised" I do not understand Dr Jones to be saying that there could be no further deterioration over time. His evidence was that there was no orthopaedic reason why the plaintiff could not have undertaken work of a sedentary nature in a few months' time. However, although he expected the plaintiff eventually to return to the workplace, he said "the left leg emerged as the main problem". Dr Jones was the senior orthopaedic staff specialist at Alice Springs Hospital and was responsible for the plaintiff's care between 23 June and 4 August 1996. It is not clear from the evidence when he last saw the plaintiff, if at all, after 1996-1997, except that I note he signed the discharge summary for the arthroscopy on the right knee on 16 December 1997 (see Ext P10; discharge summary, 4th Admission). The subsequent procedure in September 1999 was performed by Dr A Schmidt, who was not called to give evidence, nor was a report tendered from him. However, in March 1999 the plaintiff was also seen by another orthopaedic surgeon, Mr Ross Kennedy, whose report (Ext P51) was tendered by consent. Mr Kennedy summarised the plaintiff's complaints as:

(1) A painful left thigh and knee whenever she ambulates, getting worse the further she walks. She walked using two forearm crutches to travel any distance but could walk short distances without any walking aid. Sometimes she uses a walking stick for short distances.

(2) Stiffness in the right leg which affects her ability to bend or straighten the knee with ease.

(3) Stiffness of the right index finger resulting in soreness if she writes for too long and affects her ability to manipulate digits easily.

[131] He noted that when the crutches were removed the plaintiff walked with a ‘markedly waddling gait, swaying from side to side equally’. He noted also “early audible patellofemoral crepitus in both knees”, an obvious varus deformity of the left lower limb (difficult to estimate the extent due to her obesity), limitation of extension of the left knee, a stiffness in the right index finger at the PIP joint with limited range of movement, and varus deformity of the proximal phalanx. A CT scanogram revealed that the left femur was 23 millimetres shorter than the right. X-rays of the right index finger showed a varus malunion of a fracture of the head of the proximal phalanx with degeneration of the proximal inter-phalangeal joint. The varus deformity was approximately 12°. Dr Kennedy recommended removal of the internal fixation and an arthroscopy of the left knee (ultimately performed by Dr Schmidt). His opinion was that her injuries had stabilised to the extent that they were unlikely to improve unless there was surgical intervention, but on the other hand there was likely to be very slow progressive deterioration of the left knee over time due to osteoarthritic changes and there may be some deterioration of the function of the right finger as well. He was not surprised that the plaintiff has not returned to work since the accident and recommended vocational rehabilitation concentrate on obtaining suitable sedentary work. There is no reason not to accept this evidence.

[132] The plaintiff's physical symptoms have worsened since then. In 2001, she was seen by Dr T.D. Mills, a consultant orthopaedic surgeon, at the request of the second defendant. The essential findings of Dr Mills were that there was a progressive arthritic degeneration of both knees, more pronounced in the left knee. She also had troublesome back pain which he ascribed to an aggravation of mild degenerative change in the upper lumber region resulting from her left leg discrepancy. His opinion was that it is likely that she will continue to experience increasing low back pain. He considered that it was unlikely that there would be any improvement in the range of motion of her right index finger and she is likely to encounter persistent difficulties with power grip and pinch grip with her right hand. He did not consider that any specific treatment was needed at that time, although a patellectomy on both sides may become necessary in the future and "it is entirely possible that within her lifetime Ms Renehan will require a total knee-joint replacement on one or both sides". He considered that she will "in the long term be fit to carry out only the most selected sedentary work… However, even this type of work may be compromised by her persistent right hand symptoms".

[133] In evidence in chief, Dr Mills was asked to compare X-rays taken in 2001 with X-rays taken in 2005 of the plaintiff's knees. His evidence was that there had been a progression of the degenerative arthritis in both knees.

[134] In cross examination, Dr Mills said that he weighed the plaintiff when he saw her in 2001, at 80 kilograms. There is evidence before me that in 2005

the plaintiff weighed 124 kilograms. Dr Mills agreed that her weight increase would tend to accelerate degenerative changes in weight-bearing joints – in the hips, knees and ankles. The recording of the plaintiff's weight at 80 kilograms indicates a considerable weight loss between 2000 and 2001. At the time of admission to the Royal Darwin Hospital, the plaintiff weighed 98 kilograms (see Ext P65). Dr Home in his report (Ext L18) says there is no mechanism for weighing a person in a recumbent position and is usually obtained in circumstances such as obtained when the plaintiff was admitted by asking family members. It is doubtful that this was an estimate, as weights are usually estimated in multiples of 5 or 10. It is possible that the plaintiff was weighed using a weight bed. There is some evidence that such a bed existed at the hospital. I infer that that the plaintiff was accurately weighed. When transferred to Alice Springs Hospital there is no record of her weight in the Alice Springs file (Ext P10), but there is a note in the inpatient clinical notes that she was "obese". However, there are subsequent notes of her weight in Exhibit P10. On 29 October 1996, her weight is recorded on the anaesthetic day record at 84.2 kilograms. Possibly this loss can be attributed to the aftermath of her injuries and hospitalisation (see also Dr Home's report, Ext L18). On 16 December 1997, the anaesthetic day surgery record recorded her weight at 109 kilograms. On 22 September 1999 her weight is recorded at 107.2 kilograms. On 12 May 2000 her weight is recorded at 98.3 kilograms. According to Miss Freeman, when she interviewed the plaintiff in April 2001, the plaintiff acknowledged that she

had lost a considerable amount of weight, having reduced from size 16 clothing to a size 14. The reason she gave for this was that she had stopped eating because of depression. Miss Freeman apparently did not weigh the plaintiff. The plaintiff's mother also believed she had lost weight at that time, but had not put on weight since then. When seen by Dr Home on 14 December 2004, the plaintiff weighed 124 kilograms. I consider that the weight recorded by Dr Mills should be accepted as consistent with the evidence and clearly the plaintiff has gained considerable weight since then. All the witnesses confirmed that she was overweight. The Alice Springs Hospital File (Ext P10) records her as having a weight of 82.5 kilograms in June 1993. Plainly, the plaintiff has been significantly overweight for many years both before and after the accident and the records, such as they are, indicate considerable fluctuations in her weight from time to time.

[135] All of the medical experts were of the opinion that the plaintiff's condition would benefit by losing weight and maintaining the weight loss; and that the plaintiff's lack of mobility was a significant causal factor in her weight gain. Excessive exercise, such as walking, which may be helpful in her losing weight, is likely to be very painful and likely to exacerbate her osteoarthritis. Dr Home suggested she could do more hydrotherapy, which, combined with a suitable diet, would assist in weight loss. However, as Dr Home freely acknowledged, there were a number of problems involved, including the fact that she was taking neuroleptic medication which is an appetite stimulant (this is required for the mental problems which the

plaintiff had suffered), as well as genetic factors (the plaintiff's mother is also obese). I am unconvinced that the plaintiff is likely to lose weight and maintain weight loss for any significant period of time in the future using diet and exercise, but it would not be unreasonable for her to make an attempt at this. If the attempt fails, as I expect it will, the plaintiff will have to consider gastric banding. According to the evidence of Dr Home, the procedure has a very high success rate, with the average weight loss in the area of 55 to 60 per cent of excess body weight over a two year period. Morbidity rates are low and the risk of death from the procedure is almost nil. I accept also the opinion of Dr Home that unless other methods are successful within a short period of time, gastric banding is the best option. I prefer the evidence of Dr Home to that of Dr Fong on the question of surgical intervention. Dr Home's opinion is that this procedure could bring the plaintiff's weight back to about 85 to 90 kilograms. I also accept his opinion that the risks of undertaking this surgery are significantly less than the risks to the plaintiff's health if nothing is done to address her weight loss. Although the possibility of such a procedure was not put to the plaintiff in cross examination, my assessment of her is that if the procedure and the risks are properly explained to her, she would undertake such an operation.

[136] The evidence of Dr Home is that, if the plaintiff is able to reduce her weight to 85 to 90 kilograms, it would reduce the risk of diabetes, high blood pressure, heart disease, increase or improve her life expectancy, reduce the

risk osteoarthritis in all of her lower limb joints, improve her capacity to exercise and reduce the likelihood of a second knee replacement. However, in his opinion, it would not affect her working capacity, which would be restricted to sedentary work. Dr Home thought she could be retrained in a sheltered workshop environment to eventually, possibly, performing sedentary work in open employment. I think the chances of the plaintiff ever obtaining open employment are very slim. I will deal with that subject more fully later.

[137] So far as a future total left knee replacement is concerned, all the medical experts agree that a total knee replacement of the left knee is probable. There are some differences between them as to when this is likely to occur. Dr Fong's opinion was within 10 to 15 years. Dr Home agreed with the opinions of Dr Fong and Dr Flavell, but expressed the time frame as between 10 to 20 years, as it was difficult to predict that far ahead. I consider that I should find that this will probably occur in around 15 years' time. The chance that it may not occur at all is, on the evidence, very slim – unless some other unforeseen event occurs which make the procedure unnecessary or impractical, such as another accident.

[138] Dr Fong was of the opinion that the plaintiff may well require a second left knee replacement as well because the lifetime of replacement joints is only 15 to 20 years. Given that the plaintiff is now 39 years of age, a second replacement could be expected at around 65 to 75 years of age. Dr Home concurred that a second knee replacement might be inevitable and that the

first knee replacement would probably last only last 15 years. Allowance will have to be made for this possibility, although a larger discount for contingencies will be necessary having regard to the fact that if it occurs, it is still far into the future.

[139] There is also a possibility that the plaintiff may need a right knee replacement as well, according to Drs Fong and Mills. Dr Home's opinion was that the chances of the need for such a procedure on the right knee are small. Dr Flavell was of the same opinion, but qualified his opinion by acknowledging that this was probably outside of his expertise and better answered by an orthopaedic surgeon. Dr Home is not an orthopaedic surgeon, but he felt no qualms about expressing his opinion on that subject. The only orthopaedic surgeon to comment on the possibility of a right knee replacement was Dr Mills, whose evidence went no further than "it was entirely possible". There is evidence of further degenerative change in the right knee in the period between 2001 and 2005, but that evidence does not enable me to find with any degree of accuracy how probable a right knee replacement might be. Bearing in mind that I believe that the plaintiff will probably eventually have operative treatment to force her to lose weight and the onus which lies upon the plaintiff the prove the extent of her injuries, all I can find is that there is a small chance of a right knee replacement as well.

12.2 Mental injury

[140] The plaintiff claims that she suffered significant psychological symptoms as a result of her fall. This aspect of the plaintiff's claim is not easy, because the plaintiff suffered from mental illness prior to the fall and the defendants submitted that the evidence does not support a finding that all of the plaintiff's post accident mental problems are related to the fall, but rather there were some episodes which were re-occurrences of the plaintiff's pre-existing illness. The plaintiff's pre-accident mental problems began shortly after the birth of her child in April 1990: see par [13] above. No evidence was called from the Heathcote Hospital or from any of the doctors who treated the plaintiff at that time. Evidence was given by Dr Joseph Lee, consultant psychiatrist, who had access to the Heathcote Hospital medical records as to the plaintiff's history. He reported as follows:

> "Ms Renehan has a complex psychiatric history. Two days after she gave birth to her son on 12/04/90, her behaviour began to deteriorate and she was admitted to Heathcote Hospital on 19/04/90. She was described as appearing tearful, frightened, confused and disorientated (in time and place), child like and incontinent. She was avoiding the baby and refusing to eat. She was slow and unresponsive to questions and slow in body movements. She answered some questions with monosyllabic words and at times she was totally mute and uncommunicative. She described visual, auditory and somatic hallucinations and believed that she was being sexually interfered with. There were periods when she was described as restless, elevated and bouncing around.
>
> She improved promptly with a short course of electroconvulsive therapy (ECT) and was discharged on 15/06/1990 on Imipramine, an antidepressant, and lithium carbonate, a mood stabilizer. The initial diagnosis was "postpartum psychosis/depression". It was later revised to

"bipolar affective disorder – depressed phase" based on a very brief period of restless and elevated behaviour during the course of the treatment.

She quickly decompensated after discharge and was readmitted on 21/06/90. She was not sleeping and was feeling depressed. On admission she appeared very miserable, "psychomotorically" retarded and monosyllabic in her answers. She admitted to having auditory hallucinations. At times she was mute. She was then becoming confused and disorientated, euphoric and overactive. She showed repetitive hand movements (clicking fingers and then holding her hand up). Her speech became incoherent and preservative repeating the same answers to questions. She was incontinent and was not eating. She was giggling and hearing voices (hallucinations). She again responded promptly to ECT and was discharged on 15/08/1990 on Trifluperazine (sic), an antipsychotic, and Lithium Carbonate.

Psychological assessment was with Weschler (sic) Adult Intelligence Scale Revised (WAIS-R) was done during her admission and showed that she was functioning in the upper range of the mentally retarded category, only slightly below the borderline range. Shortly after discharge, she moved to Alice Springs to stay with her mother and step-father. Soon after her arrival in Alice Springs she had a further relapse. She became incoherent with little spontaneous speech. She was devoid of feelings. She was not sleeping well. Her behaviour was erratic at night; she did kitchen work in the middle of the night. She was hearing "voices". Her general practitioner in Alice Springs, Dr Mark Young, increased the dose of Trifluperazine and her condition improved. Two months later she had another mild relapse with similar symptoms, following her reducing the dose of the antipsychotic medication. She was subsequently referred to a psychiatrist in Alice Springs, Dr Kway, for follow up care.

She stopped seeing Dr Kway in early 1992 and reduced her antipsychotic medication on her own accord. Several months later, she had a relapse with a similar presentation to her previous ones. There was no spontaneous speech. She exhibited motor retardation. She showed no emotion. She did answer a few questions in monosyllables. With her antipsychotic reinstated she again improved promptly.

> She appeared to be well maintained on low dose of the antipsychotic Fluphenazine (1mg/day) in the coming years before the accident in 1996."

[141] There were no further episodes of psychotic disturbance from 1992 until the time of the accident. After the accident the plaintiff said that when she returned to Alice Springs she was troubled by "flash-backs of falling, laying on the deck and… people nursing me or someone talking to me while bandaging my legs". After speaking to her parents, she sought assistance from a counsellor. The person she consulted was a psychotherapist, Ms Cassandra McNaught. She consulted Ms McNaught on seven occasions between September 1996 and January 1997. Ms McNaught confirmed in her report the symptoms presented to her, which included recurrent distressing dreams of the accident.

[142] In March 1999 the plaintiff consulted Mr Mark Reid, a forensic and neuropsychologist, to whom at that time she complained of occasional intrusive thoughts, not nightmares, and occasional depression associated with frustration about her physical limitations. He noted that those intrusive thoughts related to the accident and were triggered by various stimuli, such as seeing doctors and sailing ships on television. He considered that, by March 1999, she was not suffering from post traumatic stress disorder. He considered her to be relatively well from an emotional perspective.

[143] She next saw Mr Reid in March 2000. By this time she reported suffering from very infrequent nightmares about the accident triggered by prompts or

reminders about the accident. Hr moods had improved since she had ceased taking Fluphenazine and both the plaintiff and her mother considered that she had improved. In 2000 she was place on Aldazine (Thioridazine) to stabilise her moods and was weaned off this until 6 September 2000 when she was admitted to the Alice Springs Hospital in a “depressive stupor” “with complaints of insomnia, depression and poor motivation in the context of stresses associated with an accident four years ago. Her parents seemed over-protective of her during in-patient stay”. During admission she suffered for “mutism” (although she did respond in monosyllables) and incontinence of urine and was reported as having not eaten over the last week. The plaintiff has little recollection of this episode. The plaintiff was placed under the care of the senior resident specialist in psychiatry, Dr Abusah, and psychiatric registrars working under his supervision, Drs Velan and Mantha. He said that the plaintiff also had muscle rigidity subsequent to admission. He believed there was some “hysterical overlay” or “compensations neurosis” which he explained as meaning, not a conscious effort to fabricate symptoms, but physical symptoms arising from psychological causes. Although he was of the opinion that the plaintiff was not suffering from post traumatic stress disorder, her symptoms included “features” of that disorder and were related to her accident. Dr Abusah gave evidence by video-link from Alice Springs. The link was poor. I have had to rely on my notes of his evidence in many instances where the transcription service was unable to record his evidence. According to Dr Abusah, the plaintiff’s parents said she

had refused food, had been screaming and "beating the walls". In fact, the information provided on admission came from the parents because the plaintiff was mute.

[144] The plaintiff's mother gave evidence that the admission on 6 September followed after the plaintiff saw an advertisement about the *Leeuwin* on television. The advertisement was "quite descriptive" and was on regularly until it stopped. I consider that Mrs Renehan's recollection was faulty. I accept the evidence of Mr Tonnison that LOAF did not have paid television advertising either in the Northern Territory or elsewhere. However, there is evidence, relating to the plaintiff's second admission, to which I will come, relating to advertising of another tall ship, the *Young Endeavour*, and I think that Mrs Renehan has confused the two incidents. According to Mrs Renehan, the plaintiff had not been sleeping, had been pounding on the wooden walls of the house saying "I don't want to fall", became confused and incontinent, could not dress herself and became too hard for she and her husband to manage. The plaintiff was discharged, having apparently recovered, on 18 September 2000.

[145] On 6 November 2000, the plaintiff was again admitted to the Alice Springs Hospital. According to Mrs Renehan the plaintiff became violent towards her parents. It began when she tried to hit her stepfather with a torch. She looked "really angry and didn't appear to understand what she was doing". They took her to the hospital immediately. Mrs Renehan denied that this episode was triggered by seeing advertisements or other reminders of tall

ships. However on admission, the plaintiff was seen by Dr Mantha who recorded in the hospital admission notes "? Above episode triggered by – watching commercial on 'TV' about Endeavour ship – calling for trainees…" The plaintiff has no recollection of this admission. Dr Abusah's evidence was that this admission was clearly related to something the plaintiff saw on television which reminded her of the accident.

[146] According to Dr Abusah, at the time of her admission in November, the plaintiff was confused, violent, hallucinating and suffering from insomnia. She was making angry sounds, was unstable and could not be examined physically. She denied hearing voices, but her parents said she was talking to objects. Her thoughts were incoherent and illogical. She was, during her admission, twitching, emotionally labile, gesturing, preaching and incontinent. Her mood swings went from laughing to crying. She behaved in a child-like manner. Because of her condition she was unable to communicate what it was that brought on her attack. During subsequent interviews, she did not mention flashbacks or reminders of seeing ships and the information about the *Young Endeavour* must have come from her parents. Dr Abusah agreed that she did not fulfil the requirements to diagnose post traumatic stress disorder and notwithstanding that his registrar concluded that that was the case, his own approach was "compensation neurosis".

[147] Dr Lee concluded that the psychotic episode in 1990 following the birth of her son was dominated by catatonic and psychotic symptoms, with transitory depressive and manic-like symptoms. In his report (Ext P29) he said:

> "Catatonia is a neuropsychiatric syndrome associated with various psychiatric (including bipolar mood disorder and schizophrenia), neurological and medical conditions, charaterized by predominantly motor symptoms including stupor (absence or diminution of movements), purposeless excitement, mutism, peculiar postures, repetitive speech, negativism and imitative movements. It is generally regarded as having two phases – stupor and excitement. The identification of catatonia is often missed, leading to the false notion that the syndrome is rare.
>
> It is often difficult to make a definitive psychiatric diagnosis of a postpartum psychosis, as is in Ms Renehan's case. The diagnosis very often has to be clarified with the subsequent clinical course of the illness. After her discharge from Heathcote Hospital, she continued to have minor relapses. These relapses were characterized predominantly by features of catatonia – absence or marked diminution of speech, immobility, psychomotor retardation, peculiar posture or repetitive movements – with associated confusion, lack of emotional reaction, and subsequent amnesia of the episodes. There were no significant depressive or manic symptoms noted in these relapses, suggesting that the recurrent disorder is not primarily a bipolar mood disorder. Her mother noted that she was more confused and not depressed during such relapses, which occurred often after she stopped or reduced her antipsychotic medications. The nature of her recurrent catatonic disorder, however, remains unclear.
>
> After the accident in 1996, she was disturbed by symptoms of posttraumatic stress disorder for several months. She had all the core symptoms of posttraumatic stress disorder – persistent re-experiencing of the traumatic event in the form of recurrent and intrusive distressing thoughts, dreams, and flashbacks of the accident, persistent avoidance of stimuli associated with the accident, and symptoms of increased arousal. Such symptoms were detailed in the report dated 07/03/2000 by Ms Cassandra McNaught, Psychotherapist, who

> provided counselling from September 1996 to January 1997 to Ms Renehan for her emotional trauma from the accident.
>
> Symptoms of her posttraumatic stress disorder gradually abated after a few months. Although she continued to have intrusive thoughts about the accident, invariably triggered by reminders of the accident, she appeared to have adjusted well for a few years. In late 2000 and 2001, some symptoms of her posttraumatic stress disorder but not a full syndrome recurred triggered by appointments with various doctors, interviews with lawyers, and other reminders of the accident. Such reactivation of symptoms is not uncommon in posttraumatic stress disorder. Moreover, she suffered two catatonic relapses in 2000, associated with reactivated symptoms of posttraumatic stress disorder and triggered by reminders of the accident, leading to her admissions in Alice Springs Hospital."

[148] I accept Dr Lee's opinions, subject to whether or not there is evidence that during 2000 and thereafter the plaintiff had reactivation of her symptoms associated with the accident.

[149] In his second report (Ext P30) Dr Lee said, of the admissions to the Alice Springs Hospital in 2000:

> "She was admitted to the Alice Springs Hospital on 11 September 2000. On admission, she showed catatonic symptoms though again not recognized as such. She was mostly mute and unresponsive, and was in a state of stupor (reduction or absence of speech and movements). She was diagnosed with "depressive stupor" in the absence, however, of prominent depressive symptoms… As discussed above, it is often difficult to elicit psychotic symptoms while she was in a catatonic and uncommunicative state…
>
> At her second admission to the Alice Springs Hospital, Ms Renehan presented with catatonic (withdrawal, purposeless excitement, posturing and combativeness) and clearly described psychotic symptoms… She described having auditory hallucinations and delusions of thought withdrawal

> and thought insertion (her own thoughts were being taken away and thoughts of others put into her head). Thought insertion and thought withdrawal are psychotic symptoms commonly seen in schizophrenia and related psychoses. Moreover, her thought process was described as very disorganized. The definition of psychotic symptoms varies. In its strictest sense, psychotic symptoms include only delusions and hallucinations. Disordered thought process and markedly disorganized behaviour are sometimes also regarded as psychotic symptoms…"

[150] Dr Lee said that although the nature of her recurrent catatonic disorder remains to be clarified, it is probably a manifestation of a poorly differentiated psychotic disorder. The closest diagnosis that best describes such a psychotic condition is "Psychotic disorder not otherwise specified…"

[151] He concluded:

> "Ms Renehan has been suffering from a recurrent catatonic/psychotic disorder and from posttraumatic stress disorder with repeated reactivation/recurrence of symptoms. Symptoms are currently under control with treatment. She has been free of active symptoms the last year [i.e. since March 2004]. Previous attempts to discontinue or reduce her antipsychotic medication led to relapses of her psychotic/catatonic disorder. She is in need of long term antipsychotic maintenance treatment. Moreover, she continues to be at risk of reactivations of her posttraumatic stress disorder on exposure to reminders of the trauma."

[152] In cross examination by Mr Reeves QC, Dr Lee agreed that if it was not established that either of the admission in 2000 was related to or triggered by reminders of the accident, he could only conclude that she had two relapses of her catatonic syndrome. Part of the difficulty associated with this argument is that according to Dr Lee, the plaintiff after coming out of a

catatonic episode would have no memory of what had happened. In those circumstances evidence of what triggered the episodes, of necessity, had to come from Tracey's mother unless there was a build-up of features before the episode occurred which the plaintiff could be expected to recall.

[153] Over the last two to three years, the plaintiff says she still has flashbacks from time to time related to occurrences when she is required to talk about the accident with lawyers or doctors, or if she sees a sailing ship on television. However, Dr Lee also referred to "taking a holiday" episodes which were entirely separate again. The source for this was the plaintiff's mother, Mrs Renehan, who, according to Dr Lee, gave an account to him of Tracey having these episodes, about six times a year, starting around Christmas 2002, triggered by reminders of the accident. There is a full description of the plaintiff's state on page 9 of Dr Lee's report (Ext P29). Mrs Renehan, in her witness statement (Ext P41), refers to something similar in paragraphs 537-544, but refers to it as "another depression". A more detailed description is given in cross examination at pp 1149-1150 of the transcript, which seems to accord with the "taking a holiday" episodes referred to be Dr Lee. Mrs Renehan's evidence was that there had been no further relapses of this type since January 2004. Dr Lee thought that these episodes were similar to the ones leading to her admissions in 2000.

[154] I am satisfied that there was an episode of post traumatic stress disorder which lasted for several months following from September 1996, which gradually abated. I am also satisfied that from time to time the plaintiff has

suffered from catatonic episodes which were probably related to the accident. In particular I find that the episodes in September and November 2000 were so related, as were the episodes from Christmas 2002 to January 2004. It may be that these episodes are the same as the episodes she experienced before the accident, but in my opinion Dr Lee and Dr Abusah are correct in relating them to the accident as well. It is well to remember that the plaintiff had had no re-occurrences of her previous illness for several years before the accident. Accordingly I also accept Dr Lee's opinions that the plaintiff is at risk of further reactivation of her disorder, but in my opinion that risk is now minimal. The plaintiff had no difficulties in giving her evidence in this case, which included being asked about the accident itself and being shown a video of the *Leeuwin*.

12.3 Disabilities consequential upon injury

[155] The present state of the plaintiff's injuries, particularly the left knee, prevents her from walking very far. She can manage short distances around the home without the use of aids. Otherwise she uses a stick, crutches, a wheelchair or an electric scooter if the distances to be traversed are long. There was criticism of her that she presented herself at medical examinations in a wheelchair when this was unnecessary. I do not agree with Dr Home that this reflects illness behaviour and I prefer the view of Dr Fong that walking aggravates her knee pain. I do not consider that the plaintiff consciously sought to deceive or to exaggerate her symptoms. I consider that the wheelchair was used because the distance to be travelled from the car

park to the doctor's rooms either warranted the use of the chair, or was unknown, it being the first time that the plaintiff visited that particular doctor. There is also a question of how level the terrain might be. There are probably also habitual behavioural patterns emerging; whenever the plaintiff is taken anywhere by car, the wheelchair is taken too, even if it may not be needed, "just in case".

[156] In her statement, the plaintiff complains of sore "hands" and pain in her "hands", which requires her to use a gel or gloves. There is no medical evidence to support these claims as arising from her accident. The plaintiff may suffer some discomfort and disability arising from arthritis, varus deformity and loss of movement in the right index finger but that injury is not significant and has no appreciable effect on the dexterity of that hand. There is no injury or problem with the left hand. I accept Mr Grant's submissions on this issue.

[157] A significant part of the plaintiff's claim relies upon evidence to the effect that the plaintiff has a reduced capacity for independent living, has needs for long-term rehabilitation involving a broad spectrum of specialists and requires significant alterations to her parents' home, where she lives at present. The defendants submit that these claims have been grossly exaggerated.

[158] The plaintiff called a number of witnesses in support of these claims including Dr Fong (rehabilitation specialist), Dr Flavell (rehabilitation

specialist), Ms Diane Mitchell (occupational therapist) and Raelene McNaughton (rehabilitation physiotherapist). The opinions of these witnesses depended in part upon the evidence of the plaintiff and that of her parents as well as the evidence of the orthopaedic surgeons, psychiatrists, psychologists, hospital records, etc. The defendants have relied principally on the evidence of Dr Home and by cross examining the plaintiff's witnesses, they have sought to undermine the premises upon which the plaintiff's case was based.

[159] The main differences of opinion are between Dr Home and Ms Mitchell and relate to the home assessments made by the latter. It will be necessary to discuss these differences later when I come to consider that aspect of the plaintiff's claim. On the other hand there was a great deal of common ground between Drs Fong, Flavell and Home on significant areas of the claim. I am satisfied that she does suffer some lower back pain from time to time due to the shortening of the left leg. If she suffers pain in the shoulder it is not a consequence of the accident. I agree with Dr Home's assessment as to the injury to the right hand and the very minor inconvenience this causes to the plaintiff. I also find that the plaintiff is largely capable of independent living, but would need assistance for tasks involving heavy lifting, bending and prolonged standing. Walking unaided for other than relatively short distances in the home is beyond her capacity but she is capable of improving her mobility using elbow crutches. She obviously cannot run, kneel, squat, skip, climb or crouch. She will still need a

wheelchair on occasions and the use of the electric scooter is important to enable her to go shopping or to attend other pursuits independently of her parents. In the future she will have at least one knee replacement and possibly three. Prior to this occurring the level of pain and disability is likely to increase and there will be a period of time post operatively when the plaintiff will need assistance whilst she recuperates. Allowance must be made for this. There will be a further period of rehabilitation involving exercises, especially hydrotherapy, which will be painful. I consider she will need surgical intervention to address her weight loss. The plaintiff is likely to have a slightly reduced life expectancy. I accept the opinion of Dr Fong that a 10 per cent reduction in life expectancy is a reasonable estimate, reducing her life expectancy to about age 75. A small conventional sum must be allowed for this. I accept also that the plaintiff experiences chronic pain, especially in the left knee, requiring daily medication.

[160] The plaintiff claims that because of the accident she has lost the opportunity to establish or re-establish a relationship with her son, Gordon Jnr. In my opinion that claim has not been proven. There are many reasons why the plaintiff may not have been able to establish this relationship, not the least of which appears to be the attitude of her son, her former husband and his family towards her. Whether she will ever be able to establish a relationship with him in the future, only time will tell. I note that although the plaintiff moved back to live in Mandurah in 2001 and now lives in Dawesville, the plaintiff has not seen her son who lives in Perth. The reasons for this seem

to be unrelated to her injuries, lack of money or inability to travel. The plaintiff's evidence is that she has had telephone access to her son for the last five years, but he declines to answer messages she leaves on his mobile telephone. According to the plaintiff, her son who is now aged 15 has told her that he does not want to see her. The reasons for this are not explained.

[161] The plaintiff claims an award for the loss of opportunity to form a relationship with a male partner. The plaintiff gave no evidence of having had a relationship with a male partner before the accident. It was suggested to her that she had a relationship with a person called Fraser but she maintained he was "just a friend" and denied any sexual relationship with him. There is no evidence that the plaintiff has wished for a relationship with a male partner since the accident. Although the opportunities available to her are somewhat slim, given her lifestyle after the accident, I cannot say that she has lost the ability to find a suitable male partner if she wanted to. Although she is obese and has the physical and mental limitations I have referred to, I cannot say that there is a significantly reduced risk of her forming such a relationship because of the accident. She has not given evidence that this is something she has any regrets about.

[162] She has for some time now been attending the SES (State Emergency Service) as a volunteer worker with her parents on Wednesday nights as part of the welfare team and helps with buttering bread, making sandwiches, doing the dishes and other tasks in the kitchen. Apart from shopping excursions and the occasional fishing trip with her parents this seems to be

the current level of her present social activities. Before the accident there was a period when she played netball, although she stopped playing before the accident because of her work commitments. Obviously sporting activities of this nature are not open to her following the accident.

[163] The plaintiff has suffered some scarring on her legs as a result of the accident. The scars are referred to in the report of Dr Home (Ext L17) and I also viewed them during the trial (Tr p 95). The plaintiff's evidence is that the scars are not irritable or itchy and that she is not embarrassed by them. She said in evidence she still used vitamin E cream for the scars, although why is not clear. She also has a tracheostomy scar which she says does get irritable and itchy. Mr Grant submitted that I should make no allowance for the scars. Mr Barr QC did not address the Court on the issue. Luntz, *Assessment of Damages for Personal Injury and Death*, 4th ed, Butterworths, 2002 par 3.5.1 supports the view that damages for disfigurement do not flow unless there is a "psychological impact" flowing from the plaintiff's awareness of his or her condition. I assume that all that this means is that the plaintiff must be embarrassed by the scarring, although, as the learned author points out, the plaintiff is still entitled to recover if the reaction of others causes embarrassment to the plaintiff or if the effect of the scarring precludes the plaintiff from enjoying an amenity of life such as swimming or from earning income, say, as a model.

[164] In *Turley v Saffin* (1975) 10 SASR 463, Bray CJ, with whom Walters and Wells JJ agreed, said at 473-474:

> "In my view, whenever there is some physical loss, be it of function or appearance, some damages are presumed as a result, and if there is no evidence one way or the other as to the effect of the injury or loss in question on the plaintiff's happiness, the Court will presume that he would suffer what an ordinary man in such circumstances would suffer - neither more nor less. It is for the plaintiff to show that the loss had on him more effect than it would have had on an ordinary man who had suffered the same loss and, in my view, on the defendant to show it had less effect than it would have had in the case of an ordinary man suffering the same loss."

[165] Applying those principles to this case, I consider that the plaintiff is entitled to a small award for the tracheostomy scar only. This is included in the total sum for general damages for pain and suffering and loss of amenities of life.

12.4 Award for pain and suffering and loss of amenities

[166] The plaintiff claims $200,000 for pain and suffering and loss of amenities. The defendants suggest a range of between $70,000 and $100,000. It is a long time since I have had to consider awards of general damages for personal injuries as cases of this kind are now relatively rare in this jurisdiction. Mr Grant submitted that I should note that in *Rosecrance v Rosecrance* (1995) 105 NTR 1, an award of $350,000 for pain and suffering and loss of amenities was reserved for "the worst type of injury". On the other hand I note that an award of $200,000 for pain and suffering and loss of amenities of life was not considered excessive by the Victorian Court of Appeal in a case involving ankle and knee injuries to a barrister aged 43. In that case the barrister's ability to walk was less affected than this plaintiff's: *Connell-McDowell v Bleechmore* [2000] VSCA 34 (unreported). Of course,

comparisons of this nature are not of assistance: see *Planet Fisheries Pty Ltd v La Rosa & Anor* (1968) 119 CLR 118. I think the top of the range for the worst kind of injury is now more likely to be closer to $400,000. I bear in mind that my task is to make a moderate assessment which is fair to both sides and that damages for negligence are compensatory and not punitive. Making due allowance for all of these matters and taking into account contingencies, favourable and unfavourable, I award the sum of $150,000 under this head. Having regard to the plaintiff's age and the future operations she will or may have to undergo and the gradual worsening of her pain I think a fair apportionment between past and future pain and suffering and loss of amenities is $75,000 in each case. Both parties submitted that this would be a fair apportionment.

13. Interest on post non-economic loss

[167] The plaintiff is entitled to interest on the amount of $75,000 from the date of the accident until judgment pursuant to s 84 of the Supreme Court Act. The Court of Appeal in *Rosecrance v Rosecrance* (1998) 8 NTLR 1 has held that the rate to be applied is four per cent over the whole period. Consequently the plaintiff is entitled to four per cent of $75,000 over a period of nine years and six months. I calculate this sum to be $28,500 and accordingly award that sum.

14. Loss of earning capacity to the date of trial

[168] In *Husher v Husher & Anor* (1999) 197 CLR 138, Gleeson CJ, Gummow, Kirby and Hayne JJ said at 143, par [7] and par [8]:

> "[7] Since at least *Graham v Baker* it has been recognised that it is convenient to assess an injured plaintiff's economic loss "by reference to the actual loss of wages which occurs up to the time of trial and which can be more or less precisely ascertained and then, having regard to the plaintiff's proved condition at the time of trial, to attempt some assessment of his future loss". But damages for both past loss and future loss are allowed to an injured plaintiff "because the diminution of his earning capacity is or may be productive of financial loss". Both elements are important. It is necessary to identify both what capacity has been lost and what economic consequences will probably flow from that loss. Only then will it be possible to assess what sum will put the plaintiff in the same position as he or she would have been in if injury had not been sustained.
>
> [8] No doubt the past may provide important evidence about the plaintiff's earning capacity and what economic consequences will probably flow from what has happened. What a worker earned in the past may provide very useful guidance about what would have been earned if that worker had not been injured. But the inquiry is an inquiry about the likely course of future events and evidence of past events does not always provide certain guidance about the future. There may be many reasons why an injured plaintiff's past work history provides no assistance in deciding what that plaintiff has lost through diminution of future earning capacity. The student who is yet to enter the workforce is an obvious case of that kind. That student may have no history of paid work. Important as evidence of past events may be, that evidence is not determinative of an issue about loss of future earning capacity."

[169] Nevertheless, a convenient starting point is to enquire into the plaintiff's past work history. The plaintiff's first job was in August 1981 when she was just turned 15. Up until then she had been attending Mandurah High School.

She and a friend, Leanne Miller, decided to go to Alice Springs where Leanne's family lived. The Millers owned a cleaning business. The plaintiff was offered employment as a cleaner, cleaning offices, a local high school and a youth centre. The work was Monday to Friday, usually in the mornings, with some evening work. The plaintiff could not recall how much she was paid.

[170] The plaintiff's recollection is that she stayed in Alice Springs for six months and then returned to her parent's home in Singleton because she was homesick. The plaintiff was on unemployment benefits, according to her evidence, from February 1982 until August 1984, with the exception of a period of a few weeks' work as a stable hand. In August 1984 she secured a position through the CES at a farming community called Yorke, a couple of hours drive from Mandurah. That work was a combination of stable hand, child carer and cleaner. It was "live-in". There is no evidence as to the amount the plaintiff earned. The plaintiff remained in this position for about six months after which she returned home because she was homesick. At this stage, February 1985, the plaintiff was aged about 18.

[171] The plaintiff returned to being on unemployment benefits for a couple of months until she obtained employment working as a stable hand for Patemans. Apparently this is a trotting stable in Mandurah. The plaintiff worked in this job cleaning out stables, feeding horses, cleaning horses, etc. The work was from 5:00 am to 11:00 am or 12:00 pm and from 3:00 to 5:00 pm. There is no evidence as to how many days a week the plaintiff

worked and for what remuneration. Whilst in this employment the plaintiff met her future husband, Gordon Barndon. He confirms that the plaintiff was then about aged 18 and was working at Pateman's. The plaintiff said that she did this work for about six months and gave it up after she moved in with Gordon. According to Gordon, this was about five months into the relationship and she gave up her work because it was too far to travel each day. Apart from working as a stable hand, the plaintiff worked as a volunteer at a nursing home in Mandurah a few hours each week for a few months.

[172] At the time the plaintiff went to live with Mr Barndon, he was living in a rented flat at Tuart Hill. The couple moved house twice after that. On each occasion the plaintiff did most of the packing whilst Mr Barndon went to work. The plaintiff did volunteer work for disabled children at a centre in Coolbinia, just north of Perth city. The work involved heavy lifting, feeding, bathing and dressing. The plaintiff did this work for 1 or 2 days a week. The plaintiff did not do any paid work, nor did she receive unemployment benefits. The plaintiff says that Gordon made her feel that she should not work. Apart from voluntary work, the plaintiff did courses in child care (see par [18] above) and work experience at child care centres for about 6 weeks.

[173] The plaintiff continued to manage the household, do all of the domestic chores including the cooking. She and Mr Barndon did the shopping together.

[174] The rest of the plaintiff's work history is set out in par [19]-[24] above.

[175] The plaintiff contends that the plaintiff only recently prior to her accident found physically based work with disabled children for which she was vocationally trained, which she found satisfying and rewarding, in which she was well-suited and which she did well and to the satisfaction of her employer. Mr Barr QC submitted that the evidence supports a claim for gradually increasing hours of work per week to say 20-30 hours per week or more from early to mid 1997 to the present time. Mr Grant submitted that the plaintiff's casual earnings from St Mary's do not provide a proper basis for assessment of the plaintiff's pre-accident earning capacity. He points to the fact that in the period from August 1981 to the date of the accident, the plaintiff was unemployed except for a period of 14 months and for most of that period she was on unemployment benefits.

[176] There are various factors which emerged from the evidence relating to the plaintiff's future prospects of employment with St Mary's. They do not all point in the same direction. On the positive side I accept that the plaintiff enjoyed the work, was capable of doing the work and had had some basic training in the work. Also, the evidence of Ms Clothier, the Programme Manager of Adult Services, Anglicare NT and, in effect, the business manager for St Mary's, is that the plaintiff was a valuable employee, but she needed support from her superiors because of her lack of formal education and difficulty in learning new procedures. The evidence of Ms Broadhurst, a former supervisor at St Mary's, and the person who actually chose which

casuals to call in, was that the plaintiff was a good, competent, hardworking and genuine employee, although she was not necessarily her first choice of casual because it was necessary to spend more time with her explaining what had to be done. Ms Broadhurst said that on the other hand, the plaintiff was always available and this was a factor in her favour.

[177] As against those positive factors, there are a few negatives. One important factor is that St Mary's policy was, even in 1996, that all employees had to hold a driver's licence and permanent employees had to have a first aid certificate. The evidence is that the plaintiff had obtained the first aid certificate and held a learner's permit, but had not sat for her 'P' plates at the time of the accident. I think it is unlikely that the plaintiff would have obtained her driver's licence. She had a learner's permit at the time of her marriage, but this never materialised into anything. She told Dr Home that she had failed to obtain a licence since the accident because of difficulty with 'concentration' and 'confusion' and that before the accident she felt it would have taken her a long time to learn how to drive, in particular, how to manage gear changes. I doubt if her pre-accident borderline mental deficiency is the reason why she did not obtain a licence. I think she was afraid and lacked self-confidence. Her evidence was that she had lost her nerve when her husband tried to teach her to drive. It may be that had she completed the sail training course on the *Leeuwin* successfully, this could have given her the self-confidence she needed to obtain a licence. That, after

all, is a large part of what sail training was supposed to achieve. There is a small chance only that she may have eventually got her driver's licence.

[178] Another negative is that, since 1996, St Mary's has changed its policy and now requires casuals to have a "light rigid licence" enabling them to drive buses. Ms Clothier's evidence was that without a driver's licence, the plaintiff would not have been kept on the list. As far as permanent employment is concerned it is plain that the plaintiff did not have the certificates required and there is no evidence which suggests that it is likely that she would have had the ability to obtain such certificates. Given her lack of secondary education and the fact that she left school because she unable to cope with her schoolwork, I think that her chances of obtaining permanent employment with St Mary's were virtually non-existent. However, Ms Clothier agreed in cross-examination that there are always staff shortages in Alice Springs, that care workers have a high attrition rate, especially amongst casuals, that the person who chose which casual to call was the supervisor, that the plaintiff's supervisor, Anne Harris (now Broadbent), was the person to make that choice and that the policy relating to driver's licences had not been consistently implemented. Ms Broadbent's evidence was that she considered the plaintiff to be reliable with good availability by the time of the accident.

[179] I have also heard evidence from Ms April Croser, a qualified relief worker at the Gap Community Centre, Alice Springs. Ms Croser had worked in the childcare industry for 12 years and in Alice Springs for four of those years.

She has acted as director of the Centre. Her evidence is that workers at the Centre are started at Level 2 and need have no qualifications other than a first aid certificate and demonstrate a suitable nature to work with young children. There is a high turnover factor of Level 2 workers.

[180] There is also evidence from an expert labour market research report (Ext C35, p 7) that there is little competition for entrants into the childcare industry with most applicants employed quite soon.

[181] As I have stated in par [21] above, the plaintiff worked a total of 216.5 hours between December 1995 and June 1996 at an average hourly rate of $14.33, with extra allowances for occasional broken shifts and sleepovers. This represents a total annual figure of only $6,200.00 approximately or $119 per week. Mr Barr submitted that the plaintiff averaged 13.8 hours or week or $14.33 per hour which over 12 months totals $10,283.00. The actual total amount the plaintiff earned from 12 December 1995 to 11 June 1996 was $3,153.5 (gross) less tax leaving a net figure of $2,653.00 (see Ext P57). The figures are a little misleading because during the period between December and mid March when the plaintiff first started the plaintiff worked relatively few hours. If that period is ignored the figures are from 5 March 1996 to 11 June 1996 (say three months) $2,823.95 (gross) and $2,379 (net). This averages out at $11,295.80 per annum gross/$9,516.00 per annum net. It is likely that the more the plaintiff worked, the more hours she would have worked in the short term, so that the latter figures are perhaps more representative of the value of her earning

capacity as at the date of the trial. This averages out at about 15 hours per week.

[182] As a Level 2 childcare worker, the award rate was a minimum of $496.70 per week on commencement for 38 hours per week or $13.07 per hour, for permanent employees. Casual rates allowed for a 20 per cent loading which increased the rate to $15.68 per hour.

[183] The rates suggest that the plaintiff had the capacity to earn at about $15 per hour as at the date of the accident. As at the date of trial, the rates paid for casual workers by St Mary's had risen to $19.11 per hour. It is not clear to me what the award rate was for Level 2 childcare workers was at the date of the accident. An average rate for casual workers employed by St Mary's is about $16.72 per hour over a period of nine and a half years. Assuming an average of 15 hours per week over that period, the result is $16.72 x 15 x 52 x 9.5 = $123,895.20.

[184] This raw figure is only a very rough guide and allowance must be made for a number of contingencies. On the positive side, the plaintiff may have through the adventure training course on the *Leeuwin* gained self confidence sufficiently to enable her to obtain a driver's licence. She may have obtained longer working hours. She may have changed jobs and worked full time or part time for the Gap Community Centre. On the negative side, she may have lost her job with St Mary's or had lengthy periods of unemployment. She may have had problems with her mental health, especially if she

changed her medication, which could have interrupted her employment. She may have chosen to have time away from employment or to have moved interstate which might have affected her job opportunities, especially if she moved to Mandurah to be near her parents (as she in fact did after the accident).

[185] The defendant's submission allows only for 15 months to September 1997 at $100 per week less contingencies at 50 per cent. I reject the suggestion that the plaintiff was fit to return to work by September 1997. In my opinion the plaintiff is still not fit to return to any kind of employment, except in a sheltered workshop environment and even then there are significant limitations upon her capacity to earn income. The defendant's submission rests upon the opinion of Dr Jones that he would have expected her to have been fit for sedentary work by September 1997. However, the plaintiff had no experience in sedentary work. She had never worked as a clerk or in a shop environment where such work might be available. The suggestion overlooks her work history, the pain she was suffering throughout that period, the intellectual and educational limitations and her mental and psychological problems. Such work as may be open to her is limited even now to a sheltered workshop environment. On the evidence before me, the first time it was suggested to the plaintiff that such employment was, or might be available to the plaintiff, was in Dr Home's report (Ext L17) dated 14 December 2004. The precise work in sheltered workshops which she might do was not identified except in a general way. As at the date of trial

the plaintiff has not sought such work, which is not surprising, given her health problems. It was not put to the plaintiff in cross examination that that she was capable of working in that or any other environment, or that she could have or should have obtained work before trial except for very minor sedentary work. In cross examination the plaintiff denied having the capacity to do any home-based childcare since the accident, because of the amount of standing, walking and lifting involved. I accept the plaintiff's evidence which is consistent with her injuries and the opinions of the medical experts. On the other hand, she felt that since about 1998 she could have earned some income ironing baskets of clothes, if the clothes were brought to her. There is evidence that she did this occasionally in Alice Springs before the accident. Some allowance should be made for the possibility that she may have been able to earn some income ironing had she made the effort to look for that kind of work and I will allow for it under the heading of contingencies. The plaintiff was also cross examined about meetings she had with officers of the CES and from the Commonwealth Rehabilitation Service after the accident. It was put to her that she did not want to work and that in effect, albeit not directly, she was a malingerer. The plaintiff denied these allegations. Although she was reminded of some suggestions made by those officers as to work opportunities for her, what those opportunities were and how realistic they were was not explored with the plaintiff.

[186] The plaintiff was examined at the request of the Commonwealth by a psychologist, Ms Freeman, in April 2001, to assess the effect of her injuries on her employment prospects. Ms Freeman's test results showed that the plaintiff's "… intellectual capacity falls in the borderline range and that her aptitudes in Mechanical Reasoning, Clerical Speed and Accuracy and Mathematics test fall far below average". Her findings continue:

> "Ms. Renehan's responses to the Coping Strategies Questionnaire indicate a good array of pain and discomfort coping strategies. She shows no tendency to helplessness and catastrophising and appears to have a healthy array of methods of helping herself divert attention as well as cope with pain and carrying on despite discomfort.
>
> Ms. Renehan's responses on the Depression, Anxiety and Stress Scales yielded a result suggesting that she was currently experiencing mild levels of anxiety and no indications on abnormally elevated levels of depression or stress.
>
> Ms. Renehan's results on the Illness Behaviour Questionnaire suggest the possibility of some abnormal illness behaviour which is most likely to be in the form of a conversion type tendency. It is not unusual for people who are suffering from chronic pain to believe that their life difficulties centre around the physical discomfort that they are experiencing and there is sufficient awareness of the fact that there may be psychological factors impacting on them as well. Examination of the individual sub-scales of the IBQ reveal that Ms. Renehan scored a maximum score on the Denial sub-scale suggesting that she in fact be channelling much of her psychological distress into awareness of and pre-occupation with pain and discomfort. There appears to be insufficient evidence to support a hypothesis of Hypochrondrasis.
>
> Ms. Renehan's responses indicate that she has tendency to somatise her concerns about her health focussing on the medical/physiological status of her health rather than admitting the psychological factors which would inevitably be

> associated with her condition. It must be emphasised that this response does not suggest a deliberately abnormal adjustment to her situation, but rather that there is a strong emphasis on the medical physical aspects of her condition.
>
> Ms. Renehan, with the assistance of her mother, completed a symptom checklist for post traumatic symptoms which is a self report questionnaire detailing the DSM – IV symptoms associated with Post Traumatic Stress Disorder. Ms. Renehan fulfilled the criteria for Post Traumatic Stress Disorder which was reinforced during the structured interview by comments she made about experiencing intrusive and distressing flashbacks of the event, as well as nightmares associated with her experience."

[187] The conclusion that the plaintiff suffered from Post Traumatic Stress Disorder, I consider I must reject, on the whole of the evidence. I have already discussed the reasons for this above. But the plaintiff, I have found was suffering from some symptoms of Post Traumatic Stress Disorder as part of her psychological illness and if this is borne in mind, I accept Ms Freeman's assessment, which I find is consistent with my own observations of the plaintiff whilst giving evidence.

[188] Ms Freeman concluded that the employment options for which the plaintiff's abilities, aptitudes and work experience suited her, were:

- teacher's aide – early childhood and reading skills
- secretarial/clerical assistant
- playroom attendant – preschool and special school children
- sewing machinist – light items

[189] This opinion, as I understand it, did not fully take into account the plaintiff's physical limitations, as that required a "Functional Capacity Evaluation".

[190] The plaintiff was also examined by an occupational therapist, Mr A Murati, at the request of the Commonwealth. Mr Murati's report was tendered by the plaintiff without objection (Ext P53). He concluded that the plaintiff has a work capacity at the sedentary level but it was difficult to predict whether she would be capable of sustaining that work for eight hours per day and "best attempted through a vocational rehabilitation program and in a graduated manner". This report really says very little. The author goes on to observe and list the plaintiff's major restrictions as follows:

> "From this assessment, it is suggested Ms Renehan's injuries are likely to have an impact on her ability to obtain and sustain work. Ms Renehan's major restrictions are:
>
> 1. she should not lift from the floor
> 2. she should not lift and carry weights over 8 kg at waist level
> 3. she should not lift weights over 6 kg at eye height
> 4. she should not perform lifting activities on more than a limited/occasional basis
> 5. she should avoid prolonged periods of static postures, particularly those which involve sitting, standing, working overhead, and work bent over-sitting.
> 6. she should avoid static postures, particularly those requiring crouching, kneeling, or work bent over-standing/stooping.
> 7. restricted walking, climbing stairs, and repetitive trunk rotation (sitting and standing)
> 8. avoid crawling, ladder climbing, squatting.
>
> Performance of these activities is likely to exacerbate symptoms and from the assessment results, appear directly related to an increase in symptoms. The restrictions listed above would mean

> Ms Renehan would be unable to sustain work that required more than these physical tasks to be performed.

[191] Plainly, two of the employment options identified by Ms Freeman, teacher's aide and playroom attendant, are not realistic on even a part-time basis given the plaintiff's physical limitations. The plaintiff has no experience in secretarial or clerical work and given her level of education, borderline intellectual functioning and inability to sit or stand for prolonged periods, that kind of work is not a realistic option. So far as a sewing machinist is concerned, the plaintiff sewed as a hobby and had no experience working in that capacity. It is not shown that she had any capacity to gain employment as a machinist, assuming such positions exist any more in this country – and assuming that an employer would be interested in her doing only light items. There is no evidence that such employment exists.

[192] Dr Flavell's opinion, as stated in Exhibit P11, is that "every attempt be made [to return her to the workforce] even in a voluntary capacity… I would anticipate that she would ultimately occupy a sedentary unskilled position doing mainly routine type tasks…" However, Dr Flavell's evidence was very guarded about this. No particular job or type of occupation was suggested as being within her capacity.

[193] Dr Fong's opinion is that "the plaintiff is capable of participating in a supported employment programme", by which he meant a sheltered workshop environment. Although initially he seemed to be saying that she might participate in the open workforce if she could find the right role, he

also said that he thinks there are various factors which would make this almost impossible to achieve. I agree with that assessment.

[194] Dr Home's opinion was the most optimistic but even he limited her capacity to light process work in a sheltered workshop and obviously had some future time in mind as he went on to say that a return to the workforce was problematic, would require close supervision and rehabilitation should be directed through a sheltered environment where close supervision is possible.

[195] All of these assessments assume that the plaintiff has successfully undergone the necessary physical rehabilitation to reduce her weight and improve her mobility, which has yet to be undertaken.

[196] Taking all of these factors into account I am not satisfied that the plaintiff has, as yet, any capacity to earn income other than on a very casual basis doing a little ironing at home. I reject the suggestion by Mr Grant that the plaintiff is lazy, or that her damages should be reduced through lack of motivation to take any steps towards the recuperation. Given her disabilities and constant pain, I consider that this is a most unfair assessment of her predicament. Also the plaintiff is very much reliant on the support which her parents are able to give her. Ms Freeman's report, which I have referred to in par [188] shows that the plaintiff's reaction to her predicament is not unusual for someone suffering from chronic pain.

[197] Taking all of the contingencies, favourable and unfavourable, into account and allowing for a small amount for income tax (bearing in mind that most of the plaintiff's income was below the tax threshold) and allowing for some casual ironing work, I consider that an amount of $90,000 for lost earning capacity to date of trial is reasonable and I award that sum.

15. Interest on past loss of earning capacity

[198] Both parties agree that the correct interest rate is 5.64 per cent. The plaintiff concedes that the total has to be halved if I find that the loss has been evenly incremental to date. As that is the case, I award the sum of $24,111.00 calculated as follows:

$$\frac{5.64\% \times \$90{,}000 \times 9.5}{2} = \$24{,}111.00$$

16. Compensation for loss of Social Security payments

[199] Included in the plaintiff's calculations and claim in respect of past lost earnings, was an allowance in the figures for unemployment benefits, the evidence being that for most if not the whole of the plaintiff's actual working life with St Mary's prior to the accident she never earned enough to entirely lose her entitlement to "unemployment benefits". The plaintiff's argument is that the damages should include damages analogous to *Fox v Wood* (*Fox v Wood* (1981) 148 CLR 438) damages to compensate her for the fact that she would, if not specially compensated, recover less by way of damages for past lost earning capacity than she would have received by way

of earnings plus unemployment benefits. The plaintiff's submission is novel and, not surprisingly, opposed by the defendants.

[200] Part of the plaintiff's argument rests upon the fact that since the accident, the plaintiff has been in receipt of disability support payments from the Department of Social Security which are repayable to the Commonwealth out of whatever sum is awarded for lost earning capacity to the date of the trial. Thus, it is submitted that if the plaintiff is not compensated for the loss of her "unemployment benefits", she will in the end result receive less by way of damages for past loss of earning capacity than what she would have received by way of income through employment and unemployment benefits.

[201] I will not set out the relevant provisions of the Social Security Act 1991 (Cth). They are long, convoluted and complex. The effect of the provisions, so far as they affect this case, may be summarised thus: Where a person has been in receipt of Social Security payments consequent upon an injury and the person successfully recovers damages against a tortfeasor which includes an award for lost earnings or loss of earning capacity, the person may become liable to repay those social security payments to the Department out of the award for lost earnings or loss of earning capacity: see s 1178 and s 1179; the definitions contained in s 17(1), s 17(2); and the provisions of s 17(3)(b) and s 17(8) of the Social Security Act 1991 (Cth). However, under s 1184K, the Secretary has a discretion to disregard the whole or part of a "compensation payment" in "special circumstances", but the fact that the circumstances under which the "compensation affected payments" (e.g. a

social security benefit: see s 17(1)) are different from the circumstances giving rise to the claim for "compensation" (i.e. damages: see s 17(2)) does not per se amount to "special circumstances". In this case there is no evidence one way or the other as to whether or not there are "special circumstances" which would enliven the Secretary's discretion under s 1184K. In my opinion it is incumbent upon the defendants to show that "special circumstances" might exist if they are to have the benefit of any argument resulting from the existence of that discretion. As this has not occurred, I consider that I should ignore the possibility that the Secretary may have a discretion under s 1184K to exercise in the plaintiff's favour: see also *Luntz* (op cit) par 8.5.5.

[202] However, there is a further complication. The plaintiff is only required to repay the lesser of the amount of damages recovered for lost earnings, etc or the sum of amounts received during the course of the "lump sum preclusionary period" (as to the meaning of this term see s 1170). There are very complex provisions in the legislation for calculating this period and therefore the relevant amount: see the discussion in *Luntz* (op cit) at par 8.5.4. However, it is common ground that the number of weeks in the lump sum preclusionary period is calculated by dividing that part of the damages awarded for lost earnings or loss of earning capacity or both by a factor of 656.63 (which has since been affected by inflation). Consequently, so the argument went, the amount of the repayment, or potential repayment cannot be calculated in advance of any award by the Court and it is therefore

possible that the plaintiff may only be required to repay benefits received during a relatively sort preclusion period following the accident and to compensate the plaintiff on the basis of a prospective loss of Social Security benefits would result in a windfall benefit to the plaintiff.

[203] I consider that the plaintiff is entitled to recover the value of the lost employment benefits for a number of reasons. There is authority for the proposition that where a plaintiff was, prior to the accident, in receipt of employment benefits which were likely to have continued after the accident, the plaintiff is entitled to recover the value of the benefits. In *Dabinett v Whittaker* (1989) 2 Qd.R. 228, the plaintiff was unemployed and in receipt of unemployment benefits at the time of his accident. After the accident, his unemployment benefits were altered by the Department to sickness benefits. Under the provisions of the Social Security Act 1947 (Cth), the plaintiff was "probably" required to repay the sickness benefit out of his award for damages. Therefore, unless the plaintiff could recover the value of his unemployment benefits, the plaintiff would be out of pocket. Applying *Redding v Lee* (1983) 151 CLR 117 at 146 where it was held that unemployment benefits were in the nature of income, the Full Court held that the loss was recoverable. Thomas J, with whom Andrews CJ agreed, said at 230:

> "The foreseeable loss of unemployment benefits will be productive of actual financial loss to a plaintiff if the benefits by which they are replaced are in due course refundable to the Department. If the plaintiff had been permitted to remain on unemployment benefits there would be no economic loss,

> because his economic capacity would have remained unaffected and, the court would therefore have made a nil assessment of economic loss. Presumably he would not have been called upon to refund money to the Department out of damages that he was not awarded."

[204] Admittedly there is dicta by Thomas J also that since amendments to the Act made on 9 February 1988 rationalised the legislation with the result that unemployment benefits were no longer to be treated in the nature of income, the problem would not arise and he would receive no award for the loss of benefit, because there was no change in his economic capacity and this was so whether he had to repay the benefits or not. The distinction seems to rest on the proposition that (1) unemployment benefits are no longer income; (2) there is no loss because they are no longer connected to social security benefits. I do not accept these distinctions because in my view the proper basis for the award in this case is not because the potential benefits were in the nature of income, but because this was a foreseeable loss directly flowing from the conduct of the defendant tortfeasor, or in terms of contract law (to the extent that the rules of remoteness of damage differ from tort cases where there are alternative claims: but see the discussion in Carter and Harland (op cit) par 2126), in accordance with the first limb of the rule in *Hadley v Baxendale* (1854) 9 Exch 341 at 354.

[205] The relevant principle in my opinion is that stated by Mason CJ, Dawson, Toohey and Gaudron JJ in *Haines v Bendall* (1991) 172 CLR 60 at 63:

> "The settled principle governing the assessment of compensatory damages, whether in actions of tort or contract,

> is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed: *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185 at 191; *Todorovic v Waller* (1981) 150 CLR 402 at 412; 37 ALR 481; *Redding v Lee* (1983) 151 CLR 117 at 133 ; 47 ALR 241; *Johnson v Perez* (1988) 166 CLR 351 at 355, 386 ; 82 ALR 587; *MBP (SA) Pty Ltd v Gogic* (1991) 65 ALJR 203 ; 98 ALR 193; *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39; *British Transport Commission v Gourley* [1956] AC 185 at 197, 212. Compensation is the cardinal concept. It is the "one principle that is absolutely firm, and which must control all else": *Skelton v Collins* (1966) 115 CLR 94, per Windeyer J at 128. Cognate with this concept is the rule, described by Lord Reid in *Parry v Cleaver* [1970] AC 1 at 13, as universal, that a plaintiff cannot recover more than he or she has lost."

[206] It follows therefore that if the plaintiff was in receipt of income by way of social security benefits prior to the accident which was likely to continue into the future and in receipt of a benefit after the accident recoverable from damages for lost earning capacity and the plaintiff will suffer a loss if the value of the social security benefit is not taken into account, damages, if they are truly restitutory, should take into account the value of that loss. In England that is apparently the principle upon which that head of damages has been allowed, not as lost earning capacity, but as an item of special damages: see *Neal v Bingle* [1998] QB 466 at 469-470, 473-474; see also the discussion in *Luntz* (op cit) at par 8.5.2-8.5.9.

[207] The question then arises whether the plaintiff can recover the whole amount lost, or only that amount which has to be repaid. In *Redding v Lee* (supra), the High Court by a narrow majority held that unemployment benefits received after the injury had to be brought into account, but at that time

unemployment benefits were not repayable to the Department as the equivalent benefit now is. Nevertheless, that authority usefully states the relevant principles, the test being (according to *Luntz*, op cit at par 8.5.6) whether it is the intention of the legislature that the plaintiff is to enjoy the benefits after the expiry of the preclusion period in addition to the damages, or whether it is that there should be no "double dipping" and administrative convenience alone has led to the repayment being limited to benefits paid during the preclusion period. In Tasmania there are a number of decisions which have held that it is proper to take such benefits into account, although the benefits there being considered related to future social security payments under Part 3.14 of the Social Security Act: see *Sorenson v Woolnough* [1989] Tas.R. 315 (NC 15); *Stoward v Joron Pty Ltd (In Liquidation)* (21/12/1994, unreported, Crawford J, BC9400508); *Pasminco Australia Ltd v Gasu* (Tas F.C., 5/7/1996, unreported). In Queensland, Ambrose J in *Muscat v Statewide Industries Pty Ltd* (1988) 1 Qd.R. 637 at 642-644 decided they should not be taken into account. This decision was approved by Thomas J (Campbell CJ concurring) in *Dabinett v Whittaker* (supra) at 232. I note that Crawford J in *Stoward v Joron Pty Ltd* preferred the Queensland authorities, but felt compelled to follow the decision of his own Court although they were only the decisions of single judges. In these circumstances, as the authorities are in conflict, I am entitled to express my own view. I prefer the opinion of Thomas J in *Dabinett v Whittaker*. This is consistent with the opinion of *Luntz* (supra) that no account should be taken

of the possibility of the Secretary exercising his discretion under s 1184K. In other words, I think the preferable view is that it is intended by the Act that, to the extent that the plaintiff may get an award which is more than he is obliged to repay, he can keep the excess. That being so, no deduction will be made for that possibility in the calculation of the loss.

[208] The evidence as to the amount of benefit the plaintiff received prior to the injury is set out in the schedules to the plaintiff's submission which were put before the Court without objection from Mr Grant. Because I have calculated a lesser sum for past lost earning capacity than the figures set out in Annexure 1 to the plaintiff's submission, the calculated amount of the loss of the weekly unemployment allowance in the Annexure is lower than it would otherwise have been. However, using the figures in the "Weekly Unemployment Allowance" column, the total net sum arrived at over the whole period is approximately $17,950.00, arrived at by multiplying the relevant weekly figure less tax (at 20 per cent to 1999/2000; 17 per cent for 2000/2001 to the present) by 52 weeks and adding the totals together. From this sum, I would normally deduct something for the contingency that the plaintiff may have earned more than I have allowed for in calculating lost earning capacity, but that exercise has already been reflected in the figures. I therefore allow the sum of $17,950.00 which is a rough estimate of the plaintiff's losses, given that the figures used are not very precise. I do not propose to award interest on this loss because the plaintiff received benefits under the Act and was therefore not kept out the use of the money and

because the plaintiff is not required to pay interest to the Department on the monies to be repaid to the Department: *c.f. Batchelor v Burke* (1981) 35 ALR 15; *Haines v Bendall* (supra).

17. Future loss of earning capacity

[209] I have previously found that the plaintiff should undergo a period of rehabilitation in order to reduce her weight and that if this is not successful, she should undergo operative treatment. Until this has occurred, a return to any form of work is out of the question. It is difficult to be precise about how long should be allowed for this to occur, but I consider that I should allow one year. Thereafter, I would expect the plaintiff to undergo a "supported employment programme", i.e. enter a sheltered workshop if there was one available to her. This could give rise to some capacity to earn income. Dr Home's evidence is that she could undertake pelmet assembly work or activities such as bagging small items into plastic bags through Active Industries at Rockingham near where she lives; and possibly may become suitable for open employment "down the track". In cross-examination, Dr Home agreed that the distance from where the plaintiff now lives to Rockingham is in fact 45 kilometres which would result in a 90 kilometre return trip each day. There is evidence that workers employed in sheltered workshops receive about 10 per cent of the appropriate award rates.

[210] Even if there became available work at a sheltered workshop the evidence does not enable me to find how many hours a day or per week the plaintiff would be capable of working in that environment. The plaintiff is at best an odd lot. The evidentiary burden of showing that there is someone capable of employing her and how much that employer would pay her is on the defendants: see *Cardiff Corporation v Hall* [1911] 1 KB 1009; *Ball v William Hunt & Sons Ltd* [1912] AC 496; *Wicks v Union Steamship Company of New Zealand Ltd* (1933) 50 CLR 328 at 338-339; *Arthur Robinson (Grafton) Pty Ltd & Anor v Carter* (1968) 122 CLR 649 at 657; *Luntz* (op cit) para 1.9.20 especially footnotes and cases therein cited. In those circumstances I think I should make an allowance for the possibility of such work in the future under the heading of "contingencies", but it cannot be a large allowance.

[211] In par [183] I referred to the fact that the rate per hour for casual workers at St Mary's as at the date of trial had risen to $19.11 per hour. Assuming on average that the plaintiff would have continued to work for 15 hours per week this amounts to $286.65 per week gross or $14,908.80 per annum. The tax on that sum is 17 per cent of $8,905.80, i.e. $1513.99. The resulting net loss is $13,391.81 per annum or $257.53 per week. The plaintiff has submitted that I should apply a discount rate of three per cent using Table 4A in *Luntz* (supra) which results in a multiplier of 804.5 assuming the person is female and will not earn past age 60. The table takes into

account mortality. Applying that multiplier, the total loss over the period, assuming a weekly income of $257.53, is $207,183.00.

[212] In relation to that figure there are contingencies, both positive and negative. The plaintiff may in fact have some small residual earning capacity which might enable her to earn a small amount of income, whether at ironing work or in a sheltered workshop. She might also have become unemployed, or ill, or chosen not to have worked as she has done in the past. But for the accident she may have had the opportunity to work longer hours, perhaps in better paying work. Mr Barr QC submitted that the award for future economic loss will generate a Department of Social Security "preclusion period" within which she will not be eligible to receive benefits for disability or unemployment. I am unable to find that this period will end after the date of trial. On my rough calculations, applying the relevant formula contained in s 1170(4) of the Act, the lump sum preclusion period is about six and a half years. If that is correct, the preclusion period will expire in the period prior to trial. If it might have ended at sometime after the trial date, I might have allowed for that contingency, but I am unable to find that this is a possibility and therefore I make no allowance for it. I think the negative contingencies, particularly the possibilities of her not working continuously through unemployment, ill health and lifestyle choices outweigh any possible positive contingencies by a significant margin. Accordingly, taking into account these contingencies, I award the sum of $165,000.00 for future loss of earning capacity.

18. Past Special Damages

18.1 Hospital, medical, hydrotherapy, orthotic and allied treatment

[213] There are set out in Exhibit P89 and Exhibit P90.

(1) The quantum and liability for the items set out in Ext P89 have been agreed at:	$867.65
(2) Of the items set out in Ext P90, the defendants have agreed the quantum and liability of most of those items which total a further:	$30,944.00
(3) I have found that the two admissions to the Alice Springs Hospital for the psychotic episodes in 1990 are causally related to the accident. Therefore I allow:	
a. For the hospitalisation in September 2000	$4,613.00
b. For the hospitalisation in November 2000	$9,226.00

(4)	There is a claim by CRS Rehabilitation Services for a rehabilitation program commenced from 16 May 2000. The amount claimed is $1,215.00. The defendant denies liability because the documents received from CRS Australia appear to create a legal liability in the defendants to pay this amount, but no corresponding liability in the plaintiff. Under the provisions of the Disability Service Act 1986 (Cth) s 23(2)(a) the plaintiff is liable to repay this amount to the Commonwealth. The amount is therefore recoverable by the plaintiff. If, however, LOAF pays the sum to be awarded to the Commonwealth as required by s 23 of the Act that will pro tanto discharge LOAF's liability to compensate the plaintiff: see s 23(8). In those circumstances the plaintiff is entitled to an award of the amount claimed, but recovery of this amount is subject to whether or not LOAF discharges the debt to the Commonwealth. Mr Grant submitted that the plaintiff did not comply with the plan and had no intention of complying with it. The plan referred to involved inter alia summarising briefs for newspapers and selling products over the phone. The plaintiff agreed that she refused to do that work. I am not surprised. She clearly has and never has had any capacity to engage in either of these activities. I reject Mr Grant's submission and allow the claim.	$1,215.00

(5)	**Janice Roberts, case management fees**. Quantum is agreed at $1,910.56. These fees were incurred in 2003-2004. However, as Mr Grant correctly points out, Ms Robert's evidence was that she was not involved as the plaintiff's case manager. Her reports, although useful, were prepared at the request of the plaintiff's solicitors for the purposes of giving evidence in this trial. If her fees are recoverable at all, they are recoverable as part of the plaintiffs' costs and disbursements, but not as special damages. I therefore disallow the amount claimed.	$0.00
(6)	There are claims for physiotherapy, hydrotherapy and an exercise bike (items 12-16 in Ext P90) which total $1550.00. The defendants claim that no allowance should be made for these items because they were either not needed or because the plaintiff attended on such an infrequent basis as to be of no benefit to her. Further it was submitted that no evidence was given as to whether the plaintiff even attended the hydrotherapy sessions, or was referred to them by a medical practitioner. The defendant's submission is in part based on the assumption that the principal benefit to be gained by the plaintiff by these sessions is to lose weight. There clearly is evidence that the plaintiff attended the sessions: see Ext P48 and Ext P54. There is evidence that they were of benefit to her: see Ext P54, principally because the sessions increased her mobility. I accept that these sessions did not improve her weight, but I am not of the view that that was their principal purpose. Dr Fong's evidence that attendance at hydrotherapy sessions once or twice a week was inadequate to achieve anything, because the level of intensity was too low. However, the physiotherapist, Judy Jefferies, in her report indicated that even though she had reduced her attendance (not at her	

recommendation), there was nevertheless improvement in her mobility. The plaintiff was not asked why she reduced her attendances. In these circumstances whilst I think the sessions have been of some benefit, they were not as beneficial as they might have been if the plaintiff had attended twice weekly or even more often than that. I see no reason why the defendants should pay for the full amount of those services if they were not being used efficiently. The only evidence from the plaintiff as to why she reduced this activity was hearsay accounts of the reasons given by the plaintiff to various doctors not supported by evidence from the plaintiff herself. I will therefore allow only for 50 per cent of these items, but nothing for the exercise bike which the plaintiff has not made much use of.	$655.50
TOTAL	**$47,521.15**

18.2 Equipment and building modifications

1. There is a claim for $18,990.00 for the purchase of a Mitsubishi Star Wagon with sliding door. There is no evidence before me as to the cost of this vehicle. Another vehicle was traded in on it. I know nothing about the amount of the trade-in. This claim is rejected as not proven. In any event, I have made generous allowance for the additional costs of vehicles and equipment under another head of damage and to allow this claim would involve duplication.	Nil
2. There is a claim for a Nissan Nomad Van to transport the plaintiff, her wheelchair and her gopher at a cost of $5,990.00. If the plaintiff had not been injured and had learned how to drive she would have needed a car anyway. Otherwise she would have been reliant either on her parents or on friends or public transport to attend to shopping, going to work, etc. There is no material before me to demonstrate that	Nil

	the purchase of the vehicle has resulted in a loss to the plaintiff. I disallow this sum.	
3.	The plaintiff purchased a scooter in mid 2004 for $2,000.00. This claim is reasonable and I allow the amount in full.	$2,000.00
4.	**Works carried out at Renehan's Dawesville residence**	
Mr Grant submitted that no allowance should be made because the alterations are to property not belonging to the plaintiff, referring to *Matheson v Union Assurance Society Ltd and Grosser* [1960] SASR 345 at 354. However, more recent authorities show, that in accordance with the principle established in *Griffiths v Kerkemeyer* (1977) 139 CLR 161, the fact that the property is not the plaintiff's is not a bar to recovery: see *Luntz* (op cit) par 4.1.8 and the cases cited in footnote 48.		
(i)	Changing the bath size: There is no evidence that this was necessary	Nil
(ii)	Widening the front door for the wheelchair: The evidence is that the plaintiff does not use the wheelchair inside the house accept on rare occasions. This item is unnecessary.	Nil
(iii)	Changing bathroom shower taps: There is no reason why the bathroom shower tap needed to be changed because of the plaintiff's injury.	Nil
(iv)	Changing the washing line: This variation resulted in a credit against the cost of constructing the house: see Ext P41 GR13.	Nil

(v)	Door modifications: These were done supposedly because the plaintiff needed wheelchair access. I find that the plaintiff did not need, and does not now need, wheelchair access within the home: see earlier findings.	Nil
(vi)	Outdoor retaining walls: The retaining wall was not necessitated by the plaintiff's condition, but, to quote Mrs Renehan, "to prevent the house from falling down the gully".	Nil
(vii)	Front end washing machine: The plaintiff's evidence was that she was capable of using a washing machine. At best the plaintiff could recover the additional expense of a front end loading machine if that is necessary and more expensive than the type of machine the family would otherwise require. There is no evidence to support this claim.	Nil
(viii)	Patio and driveway completed for wheelchair access: These items are not the result of the plaintiff's disability but are ordinary costs associated with the building of a new home which would have been required anyway and are therefore not claimable.	Nil
	TOTAL	Nil

[214] I therefore award the total sum of $49,521.15 for past special damages.

19. Interest on past special damages

[215] Only a few of the items allowed for have been paid for, the bulk of them in the last year or so. Of the claims for physiotherapy, hydrotherapy, etc for which I allowed $665.00, only three items totalling $115.00 and $128.00 for

the prescription medicines have been paid for. I allow interest on these three items at 50 per cent of the total sum (for the reasons given in par [213](6) above) viz $57.50 for one and a half years at 5.64 per cent which totals $4.86. I also allow interest on $128.00 for 4 years at 5.64 per cent which totals $28.88. The only other item which has been paid for is the scooter which was purchased on 14 April 2004 for $2,000.00. I allow interest on this sum for 20 months at 5.64 per cent which totals $188.00. I therefore allow a total of $221.74.

20. Future special damages

20.1 Knee replacement procedures

[216] The plaintiff's estimated costs of knee replacement surgery are $26,791.40. The defendants are prepared to allow $26,000.00. The difference in the figures is that the plaintiff has allowed for three months post operative physiotherapy relying on Dr Fong's opinion in Exhibit P32, whereas the defendants have relied on the opinion of Dr Flavell in Exhibit P11 which allows for fewer sessions although spread over the same time period of three months. The difference of opinion is because Dr Fong believes her excess weight and intrusion from multiple regional sites of pain will require a slower, more graduated approach. Given that the plaintiff will by then have lost weight through operative means I consider that the defendant's assessment is more accurate. Allowing for a knee replacement in 15 year's time, a suitable multiplier using three per cent tables (*Luntz* (supra) Appendix, Table 1) is 0.6419 with no allowance for mortality. This results

in a figure of $16,689.40. Discounting this figure for contingencies by around 10 per cent results in a figure of $15,000.00 and I allow that sum.

[217] I have previously found that there is a possibility of a second left knee replacement occurring at aged 65 to 75 years, i.e. somewhere between 26-36 years into the future. Using the same tables and allowing for a second knee replacement in 30 year's time results in a raw figure of $10,712.00. This figure should be discounted more heavily to take into account a higher degree of probability of the adverse consequences of the contingencies of life and the lower likelihood that the procedure will be necessary. I allow for this item $6,000.00.

[218] I have also previously found that there is a possibility the plaintiff may need a right knee replacement as well, which I assessed at a small chance. Allowing for another knee replacement in, say, 25 years using the same tables gives a raw figure of $7,971.00. I allow the sum of $2,000.00 for this possibility.

[219] This results in a total of $23,000.00 for knee replacement surgery and I allow that sum.

20.2 Future physiotherapy, hydrotherapy and gastric banding

[220] Mr Barr QC submitted that the challenge for those charged with the plaintiff's ongoing physical rehabilitation is to strike a compromise between exercise and activity, on the one hand, and preservation of knee joints on the other hand for as long as possible. There is a need to lose weight to, inter

alia, preserve the knees. I have already found that I consider that there should be a period of about 12 months of physiotherapy and hydrotherapy, followed by a gastric banding operation, if these measures are unsuccessful in helping to bring about weight loss with the help, inter alia, of a dietician. I therefore allow hydrotherapy costs of $620.00 ($155 per three month pass) plus physiotherapist attendances of $50 per session, three times per week, to supervise the hydrotherapy and gym exercises: see the report of Judy Jeffries (Ext P54). I have allowed for three "hands on" sessions per week because I accept the evidence of Ms Jeffries that the plaintiff lacks the discipline and motivation to consistently follow her programme and needs constant supervision. I have allowed for three sessions per week given that Dr Fong thought two sessions per week was not adequate. I therefore allow $7,800.00 for physiotherapy costs.

[221] Also, allowance needs to be made for the cost of the gastric banding operation, the overall cost of which, according to Dr Home's evidence, is about $3,000.00 and I allow that sum. After the operation I consider it reasonable that the plaintiff maintains two hydrotherapy/gym sessions per week to help maintain mobility and fitness under the supervision of a physiotherapist using a three monthly pass at $155.00. The value of this over the plaintiff's lifetime is approximately $14,765.00 using three per cent tables.

[222] The total sum under this head is therefore $26,185.00.

20.3 Orthotics/OT aids

[223] The claim by the plaintiff is set out in Annexure 2 to the plaintiff's written submissions and totals some $63,260.38. The defendants admit a total of $5,620.00. There is no doubt that the plaintiff's claim is inflated; the defendant's submission cannot be justified either.

[224] I have not allowed the following items:

Item	**Reason**
(1) Shopper walker	No evidence to support it; not required because has gopher
(2) Four wheelchairs	Estimate of Ms Mitchell is one every 10 years based on "heavy usage and Ms Renehan's weight"; allowed for two wheelchairs $2,780.44
(3) Poncho	This is an item of clothing which the plaintiff would have required in any event; or it is replacing a similar item
(4) Lounge chair	The plaintiff would have required a lounge chair in any event; it is not shown that the proposed chair is more expensive than a standard lounge chair
(5) Sports bras	The plaintiff would have required brassieres in any event; not shown that these are more expensive than standard brassieres
(6) Hills laundry trolley	Not shown to be a need resulting from the accident
(7) Double sided pegs	Not shown to be more expensive than ordinary pegs
(8) Utility knives (9) Jar opener (10) Electric can opener (11) Good Grips peelers (12) Braun food processor (13) Rocker knife (14) Kitchen trolley (15) Kitchen stool (16) Standing frame (17) Nuts and bolts (18) Soft touch scissors	Plaintiff's injured finger does not require these items. In any event, these items are normal household accessories or similar and it is not shown they are more expensive than would otherwise be required

(19) Mobile table (20) Toilet commode (21) Mobile hoist (22) Hoist sling	I am not satisfied that these are or will be required. The plaintiff's condition may require the commode and hoist from time to time for relatively short periods when her knees worsen near the time she needs knee replacements. I have therefore made an allowance of $750.00 to have these items on those occasions

[225] Making the above adjustments I allow the sum of $25,102.34 for these items.

20.4 Future pharmaceuticals

[226] I accept the claim for analgesic medication $4,000.50. The claims for Thioridazine is said to be based on Dr Flavell's report, but was in fact commented upon by a number of witnesses in evidence. It is the drug used in place of Fluphenazine to stabilise her mental problems the latter of which was prescribed for her before the accident. As it replaced a drug she needed anyway, I make no allowance for it.

20.5 Case management

[227] This is a very substantial part of the claim, totalling $286,506.33. Professor Luntz observes (*Luntz* (op cit), par 4.1.5):

> "In England, a case manager's fees for devising a proper program for the care of a plaintiff have been held recoverable. There is now at least one organisation in Australia that obtains reports from experts who will assess the full range of the plaintiff's needs."

[228] The case cited by *Luntz* is *Goldfinch v Scannell* [1993] PIQR Q143. However that was a case involving very severe injuries where the plaintiff could not lead an independent life style. The claim under this head is not

limited to the case manager's fees, but includes wide-ranging claims for fees for a range of other service providers including her general practitioner, occupational therapist, physiotherapist, hydrotherapist, dietician and psychologist.

[229] I consider that I should allow only for those items which are strictly necessary, the touchstone always being one of reasonableness. Where there is doubt about whether a service may become necessary in the future, I have allowed for the service, subject to a discount that the service may not prove necessary, or may not be required as frequently as the plaintiff has claimed: see *Marsland v Andjelic*(1993) 31 NSWLR 162 at 176, 178; *Malec v J.C. Hutton Pty Ltd* (1990) 169 CLR 638.

[230] The evidence relating to what future needs the plaintiff may have touching upon this segment of the claim principally comes from a report by Ms Janice Roberts, a consultant social worker and case manager (Ext P59). Ms Roberts agreed in cross examination by Mr Macnish that her report was prepared at the request of the plaintiff's solicitors "to set up an ideal life care program for submission to the underwriters for funding approval". The plaintiff is not entitled to an 'ideal' or 'perfect' life care program, only to what is necessary, adequate and reasonable: see *Lee Transport Co Ltd & Anor v Watson* (1940) 64 CLR 1 at 13-14; *Petroleum and Chemical Corporation (Aust) Ltd v Morris* (1973)1 ALR 269 at 271 per Menzies J. It was apparent, also, that Ms Roberts' opinions were based on information relating to the plaintiff's disabilities which were exaggerated. She understood, for example,

that the plaintiff could not live independently. On the evidence of the plaintiff, her mother and step-father, the plaintiff is perfectly capable of living independently. Ms Roberts was not aware that the plaintiff, during her former marriage, was capable of running the household. Nevertheless, there are some matters which I think it is reasonable to allow for.

[231] Hydrotherapy costs are claimed at $56,007.00. I have already allowed for this item: see par [223]. I do not accept that the plaintiff needs a professional case manager to liaise with her health professional. I prefer the opinion of Dr Home that this could be done by her GP. I do not consider that her ongoing care is likely to be so complex and regular as to require significant monitoring or liaison. Dr Home also was of the opinion that such an approach was likely to be counter-productive in the plaintiff's case because the plaintiff has a fairly dependent type of personality and if too many people are involved in making decisions for her, she will leave decisions to others. I agree with this assessment. I prefer the opinion of Dr Home to Dr Lee on this question.

[232] I also agree with Dr Home that the plaintiff is not as unintelligent as has sometimes been made out. She does know and understand her exercise regime, according to Dr Home. Her problem was getting to the pool, so she told him, because she was reliant on her mother. Dr Home was firmly of the opinion that she did not now need a rehabilitation team, but he accepted that she would nevertheless need some future ongoing care and assistance.

[233] In his report (Ext L17), Dr Home accepted that the plaintiff would need domestic support (three hours per week), the provision of two hours per month for gardening services and two hours per month for home maintenance services as recommended by Dr Fong. However, in cross-examination by Mr Barr QC, Dr Home accepted that she will need other ongoing assistance from a dietician, rehabilitation specialist, etc.

[234] The plaintiff, as I have noted earlier, has been prescribed psychotropic medication, viz, Mellinel or Thioridazine. There are two consequences of this. First, these types of drugs, which are necessary to stabilise her mental condition, contribute to her weight loss problem because they stimulate appetite. Secondly, this kind of medication can cause difficulties in concentration and sometimes confusion, such as might interfere with her ability to obtain a driver's licence or drive a motor vehicle. They may well be a continuing factor which may limit her ability to use an ATM machine from time to time. These are factors which were most likely to have been present anyway as the result of her pre-accident mental problems. However, to the extent that these factors complicate her future care as a result of the accident, the defendants must take the plaintiff as they find her, so to speak and allowance must be made for the extra difficulties placed in the way of her future care because of those factors: see *Shorey v PT Ltd (As Trustee for McNamara Property Trust)* (2003) 77 ALJR 1104; *Luntz* (op cit) par 2.2.1. The same applies of course to any additional problems the plaintiff suffers because of her limited intelligence.

[235] So far as case management is concerned, the defendants submitted that they can be catered for in allowances made for attendances on her GP, totalling $4,818.89. I do not entirely accept this submission. I consider that I must allow for the possibility of some extra visits if the GP is to be the case manager. There are also going to be periods of time in the future when her knee problems will become more painful leading up to her projected knee reconstructions. Doing the best I can, I think I should allow for double the rate allowed for in Mr Barr's schedule for the GP attendances to allow for case management as well as the other normal visits she will need. For those two items I will allow $9,600.00.

[236] I accept that there will also be travelling costs associated with these visits and with liaising with other health professionals and I allow $5,000.00 for this.

[237] There is a claim for liaison between the case manager and Public Trustee. I think it is likely that the plaintiff will need professional assistance to manage her money. However, even though I intend making an allowance for this, I do not see the need for liaison between the Public Trustee and her case manager.

[238] There is a claim for a yearly case conference between the plaintiff's GP, physiotherapist, occupational therapist, rehabilitation specialist, psychiatrist and case manager. This is supported by the evidence of Dr Fong and I accept

that it is reasonable to allow this claim, except for the case manager. I will allow, after contingencies $15,000.00.

[239] I accept the claim for review annually by a rehabilitation specialist and allow the amount of $4,700.00.

[240] There is a claim for an occupational therapist's review once annually. This is reasonable and supported by Dr Fong's evidence. I allow the sum of $2,190.00.

[241] There is a claim for three monthly reviews by a physiotherapist, to assess and adjust the plaintiff's future long-term rehabilitation programme. I accept that reviews will be needed, even if the plaintiff loses weight. However, the programme may not need review that often, if the plaintiff's weight loss is successful. Allowing for that contingency I allow the sum of $2,000.00.

[242] I accept that the plaintiff will need to consult a dietician and may need to do so on an ongoing basis. Although the plaintiff's weight problems pre-existed the accident and were probably made worse by the medication, the defendants are in my opinion liable for this cost because weight loss will improve her knee pain and they must take the plaintiff as they find her. I think the claim is overstated only in that I doubt that she will need as many consultations as have been allowed for, because I expect she will undergo gastric banding. Allowing for this contingency, I allow the sum of $1,500.00.

[243] There is a claim for visits to a psychologist twice a year. This is supported by Dr Fong on the basis that it will be important to her continuing wellbeing and maintenance of independence. Dr Home in evidence accepted this. I accept that this is so. There is a difficulty in that I expect that, to some extent, she may have needed to consult a psychologist anyway for her underlying mental condition. Allowing for that contingency, I allow the sum of $5,000.00.

[244] The total of these claims is $44,990.00, which I will round off to $45,000.00 and I therefore allow the total sum of $45,000.00 for the claim under this head.

20.6 Home modifications

[245] The defendants did not accept any of the proposed expenditure under this head of claim with the possible exception of the toilet rail. To the extent that the claims are based on the need to use a wheelchair inside the house, they are not maintainable. In the future the plaintiff may need a wheelchair for short periods related to knee replacement operations, but the cost of modifications is not warranted for short periods so far into the future. Claims for items based on problems with the plaintiff's hands are not warranted. Whilst I have not allowed for the cost of installing concrete patios, etc, I think it is reasonable to allow for the cost of extending the outdoor concreting to the remainder of the back area for the plaintiff's safety. The planned undercover garage is not required as a consequence of

the accident, but is a normal requirement in most homes which have a vehicle in order to protect the vehicle and persons using the vehicle from inclement weather. The proposed 24 hours personal safety monitoring system is, in my opinion, unnecessary. There is no evidence that the plaintiff has a condition resulting from the accident warranting this expense. I am prepared to allow for the slip grip in the bathroom/shower, for rearrangement of the railing beside the toilet, for the outdoor concreting (but not the gate), but not otherwise. I allow $1,500.00 under this head of damage.

20.7 Future transport and related costs

[246] I accept that the plaintiff is entitled to recover the future costs of attending hydrotherapy sessions twice per week. The claim is for $130,302.00, based on two trips per week at $28.50 per hour at two hours per trip, but this is for the cost of voluntary services by her parents in transporting her to and from Mandurah. I accept there is a need for the service, but a return trip by taxi twice a week is probably cheaper than allowing for the parent's services, the cost of petrol, etc. According to Ms Mitchell, four return trips from Mandurah would cost $60 per week by taxi. The trip from Mandurah is only half as far as the trip from Dawesville, so a figure of $120 per week is reasonable, less the 75 per cent discount for fares for which the plaintiff is eligible, resulting in a cost of $30 per week. This is about 25 per cent of the amount claimed for. However, taxi services from Dawesville might not always be available and I should therefore allow for some additional costs

should she need to access hydrotherapy by other means. I have also included an allowance for other travelling costs to attend on other health professionals where this has not previously been allowed for, including visits to her GP, psychologist, occupational therapist, etc. There is also a possibility that in the future the plaintiff might shift home closer to Mandurah, but this will involve further costs which are allowed for separately. Allowing for all of these contingencies I have allowed $60,000.00.

20.8 Transport costs – scooter and van

[247] The claim for replacement of the scooter is admitted and I allow $13,936.28 for this item. I also accept the claim for the scooter cover $1,189.23 and the backpack, $1,300.72. I also accept the claims for the shed, as I expect the scooter would not fit into a normal garage when there is a vehicle parked there and allow $600.00 for this item. The remainder of the costs claimed under this head of claim are reasonable and necessary and I accept that appropriate deductions have been made to allow for (a) the purchase of a car needed in any event; (b) contingencies, with the exception of the claim for petrol. I disallow this item because the plaintiff would have expended money on fuel for transport costs anyway and allowances have already been made elsewhere for additional transport costs for the hydrotherapy and visits to her GP, etc. I therefore allow the sum of $113,995.00.

21. Future care costs

[248] On the whole of the evidence I do not accept that the plaintiff needs a great deal of assistance in the home for personal care and domestic activities. The evidence of the plaintiff and her parents is that she is self-sufficient in matters of personal care and is able to and does manage her own medication regime without the assistance of her parents. She is also, on the evidence of the plaintiff and her step-father, able to prepare her own meals and work in the kitchen and do washing, ironing and some cleaning. I accept that there are some domestic tasks such as vacuuming and mopping floors and cleaning the bath or shower recess, which she would not be able to do because it would require excessive standing, squatting, bending or kneeling. Therefore if the plaintiff lived alone, I accept that she would require some domestic assistance on a regular basis. Dr Home and Dr Fong both suggest three hours per week, but I would regard this as the bare minimum.

[249] Dr Fong's evidence is that the plaintiff would need three hours a week carer support for community access, shopping, banking, etc. Dr Home did not necessarily disagree but said that it would depend on her ability to obtain a driver's licence and drive a modified vehicle. I have already found that this not open to her. Although the extent of this assistance is now lessened by the fact that she has a gopher which will enable her to access local shops, she will still need support to get to Mandurah when she needs to go shopping there. This could be provided by taxi, but there is no evidence this would be cheaper than allowing for the value of the parents' time. The

evidence is that the family shops once per fortnight and the defendants say I should make no allowance for this as it is a family concern. Nevertheless the plaintiff has a need to go shopping, not only for food, but for clothing, pharmaceuticals, banking and other normal activities as does everybody and I must allow for this irrespective of whether her mother does the family shopping with her or not. I might add that Mrs Renehan and her husband are not in good health so there may well come a time, perhaps sooner rather than later, when they will not be able to take her shopping. I think three hours a week is very reasonable and probably minimal.

[250] Both Dr Fong and Dr Home accept that two hours a month for gardening services and a similar allowance for home maintenance services would be reasonable. The defendants say that the plaintiff has never performed these activities. I accept that this is so, but in the future, when the plaintiff is no longer living with her parents she will have to employ someone to attend to some basic chores around whichever home she lives in. Even if the garden is minimal, there may be leaves to rake, weeds to pull out, etc. Unless she lives in rental accommodation she will need to attend to minor maintenance around the house. These are things she could have done but for the accident and some allowance for them should be made.

[251] In addition, Dr Fong's evidence is that after the plaintiff reaches the age of 55, she will need three hours per day of personal care and domestic support, as she experiences the effects of ageing and degenerative osteoarthritis. I discount Dr Fong's opinion to some extent because I do not accept his

premise that she presently needs one hour per day of carer assistance; nevertheless I will make allowance for the possibility that she will require two hours assistance from age 55. In accepting this figure I bear in mind that there will be fluctuations in her needs depending on how many knee replacements she may have and how effective the results of these operations may be.

[252] The plaintiff's figures, based on 14 hours a week for future care total $462,915.00. I would reduce this figure by half to cut out the seven hours per week for personal care and domestic activities. In addition, another two hours per day at $28.50 per hour ($399.00 per week) commencing at age 55 has a present net value of about $200,000.00 (using a multiplier of 500). The total of these prime figures is $431,500.00 roughly. From these figures there must be an allowance for contingencies. Bearing in mind that the prospect of future care of $200,000.00 is well into the future, there must be significant reduction for contingencies of life. I consider that $300,000.00 is a reasonable sum, doing the best I can and I allow this amount.

22. Loss of retirement benefits past and future

[253] I accept that in principle the plaintiff is entitled to the value of her putative employer's lost superannuation contributions. I have allowed $90,000.00 for lost earning capacity to date of trial and nearly all of this sum represents earnings from actual employment. The Disability Services Award required employer superannuation contributions ranging between six per cent and

nine per cent. A mid point of seven and a half per cent is reasonable. This comes to $6,750.00. Allowance must be made for interest. The plaintiff claims five per cent compound interest clear of taxes and administration expenses. There is no evidence before me as to what super fund earnings might be. The plaintiff's calculation must be reduced to reflect a smaller figure for economic loss and an allowance for contingencies on the rate of earnings and I allow $2,000.00. This results in a total of $8,750.00 for past superannuation losses.

[254] The plaintiff claims nine per cent of the future economic loss component attributable to salaries earned from an employer (a figure already discounted and subjected to contingencies) and I consider that this is a reasonable approach. I allow nine per cent of $165,000.00 which totals $14,850.00.

[255] Accordingly I allow a total of $23,600.00 under this head.

23. *Wilson v McLeay* Damages

[256] Damages under this head are allowable if the presence of a parent or parents are of some importance to the alleviation of the plaintiff's condition. According to Dr Flavell (Ext P12) the involvement of both parents was reasonable on each of the occasions the plaintiff was hospitalised principally because of Tracey's borderline intellectual functioning which made it difficult for her to understand the decisions which needed to be made for her treatment and care and difficult for her to give the hospital authority to treat her. The parents' presence was needed for logistical reasons as well, since

the plaintiff had to be transferred to Alice Springs. Dr Flavell expresses similar reasons for the admissions to Alice Springs Hospital, where he observes that the plaintiff, whilst cooperative, is forgetful and certain information necessarily needed to be obtained from her parents; and the fact that the parents needed to be informed of the rehabilitation plan as the plan depended upon their assistance.

[257] Notwithstanding that opinion, I consider that only one parent was really necessary and therefore the figures claimed must be discounted slightly (I note that often only one parent's time has been claimed). The usual basis of an award is the actual expenditure of the plaintiff's relatives on fares and accommodation and any wages lost due to time off work: see *Luntz* (op cit) par 4.7.4. The claim includes components for fuel and accommodation costs, but the parent's time has been claimed at hourly rates rather than calculating lost wages. There is some evidence that both parents were working from time to time but the evidence is not very clear as to what the work was or what earnings they made. For all I know, they might have been earning less than the rates which are being claimed. However, if the basis of the award is the plaintiff's need for the services, which it primarily is, the measure of damages should be the commercial or market cost of fulfilling that need: *Griffiths v Kerkemeyer* (1977) 139 CLR 161; *Van Gervan v Fenton* (1992) 175 CLR 327; *Kars v Kars* (1996) 187 CLR 354.

[258] However, I think the whole of the time claimed has not been proved to have been really necessary. A good many of the visits appear to be no more than

prompted by love and affection. Doing the best I can, I will allow roughly 50 per cent of the amount claimed, which I will round off to $5,000.00.

24. Past gratuitous services

[259] There is ample evidence to support the claim that the plaintiff needed the services of her parents which they have provided voluntarily to her, since the accident and up to the present time. The defendants deny that the plaintiff is entitled to recover anything under this head of damage because one or either of the parents was paid a non-refundable carer's pension by the Commonwealth. If, notwithstanding that fact, the plaintiff is still entitled to an award, the defendants submit it should be confined to care for household assistance and for transporting the plaintiff to and from doctors and other health professionals and that the claim is significantly inflated.

[260] So far as the non-refundable pension payable to the parents is concerned, the defendants' argument was that the parents' services were not voluntary because they were in receipt of a pension. It was submitted that, if the plaintiff recovered damages for the services provided for by the parents and paid for by the Commonwealth through the pension, the plaintiff would have been compensated for a service which has been paid for and therefore there was no loss to her: *Blundell v Musgrave* (1956) 96 CLR 73. However the opinion of Gibbs J in *Griffith v Kerkemeyer* (1977) 139 CLR 161 that damages for nursing services could be recovered only if the need was likely to be productive of financial loss, was expressly rejected by Mason CJ,

Toohey and McHugh JJ (with whom Brennan and Gaudron JJ were in general agreement) in *Van Gervan v Fenton* (1992) 175 CLR 327 at 322.

[261] An alternative submission was based upon the decision of the New South Wales Court of Appeal in *Diamond v Simpson (No 1)* (2003) Aust Torts Reports 81-695. In that case, a very severely injured plaintiff who, as a consequence of the appellant's negligence suffered cerebral palsy, was provided free medical and allied professional service by a charitable institution, the Spastic Centre. The plaintiff was under no obligation to pay for these services. The trial judge awarded $614,752.00 for the value of the services as voluntary services falling within the *Griffith v Kerkemeyer* principle. On appeal, the Court of Appeal (Stein JA, Ipp JA and Young CJ in Eq) held that the award was not recoverable because (1) the principle in *Griffith v Kerkemeyer* was anomalous, exceptional and should not be extended to new categories of claims; (2) whether or not claims for gratuitous services rendered by a charitable institution will be payable by the wrongdoer depends upon an application of the principles in *National Insurance Company of New Zealand Ltd v Espagne* (1961) 105 CLR 569; and (3) the Spastic Centre stands in a position in the community akin to that of a public hospital and (4) therefore the amount awarded was irrecoverable by the plaintiff.

[262] In my opinion *Diamond v Simpson (No 1)* is distinguishable because the services in this case were provided by the parents and therefore this case falls directly within the "anomalous" *Griffith v Kerkemeyer* principle.

[263] It was submitted by all parties that there were no authorities directly on point, but my researches have found that there are in fact decisions directly on point: *Wann v Fire and All Risks Insurance Company Limited* (1990) 2 Qd.R. 596 at 600 per Ryan J where the pension was ignored notwithstanding *Veselinovic v Thorley* [1988] 1 Qd.R. 191 which held that the measure of damages was the loss suffered by the provider of the services; *Harth v Schick* (1992) 2 Qd. R. 101, where Demack J, relying on *Veselinovic v Thorley*, took the pension into account; *Van Gervan v Fenton* (supra) which disapproved of *Veselinovic v Thorley* (at 331); and *Scarf v The State of Queensland and Anor* (White J, Supreme Court of Queensland, unreported 30/10/1998; BC9805715) at par [122] where her Honour declined to follow *Harth v Schick* and held that the parent's pension was to be disregarded. Despite some misgivings I think that on the present state of the authorities the parent's pensions are to be ignored and I proceed on that basis.

[264] The plaintiff claims under this head total $13,162.13 after deducting items which the plaintiff concedes cannot be substantiated, for transport; and $213,019.88 for home assistance. So far as the latter claim is concerned this works out to about three hours per day spread over the whole period of nine and a half years. The plaintiff's method of calculation is based on extrapolating from the evidence of Mr and Mrs Renehan their estimates of the hours they spent attending to the plaintiff over the period from 4 August 1996 to 1 November 2002; and from 2 November 2002 to the date of trial.

The figures are calculated based on the evidence of Ms Diane Mitchell. So far as the period 1996 to 2002 is concerned, the plaintiff's calculations are reminiscent of the kind of calculations prepared by quantity surveyors in building cases, but that does not mean they are not helpful. However, to a large extent the calculation relies upon the memories of the plaintiff's parents as to how much time was spent on individual items and were of necessity inaccurate bearing in mind that some of those tasks would have overlapped; e.g. bathing, toilet and dressing probably would have largely occurred at roughly the same time each day. Even so, it is only in the very early periods up to the end of 1997 that the claim is for five hours per day. From 1998 to 2001 the claim is for two and a half to three hours per day, except for short periods of increased care following treatment at the Alice Springs Hospital. After moving to Mandurah in 2001 the hours claimed vary from 2.5 hours to 1.75 hours per day up to November 2002. Over this whole period of six years three months, based on calculations made on the parents' evidence, the claim averages 3.2 hours per day for the period up to December 2001 and 2.2 hours per day from December 2001 to November 2002 (this may be contrasted with the evidence of Dr Fong and Dr Home whose estimates I have referred to earlier). The balance of the period from November 2002 to March 2005 is based on the evidence of Ms Mitchell. According to her evidence the plaintiff's needs totalled $80,772.38 or an average of $132.85 per day over a period of 20 months. Assuming an hourly

rate of $25, the result of her evidence averages 5.3 hours per day and is plainly inflated and unrealistic.

[265] The plaintiff's claims were subjected to very severe criticism by counsel for the defendant who pointed out that in many respects the claims for various assistance is not supported by the plaintiff's mother's evidence. For example, the plaintiff claims that in March 1997:

(a) The plaintiff needed 45 minutes per day assistance getting in and out of bed, yet Mrs Renehan's evidence (P41, par [373]) was that she could get out of bed on her own.

(b) The plaintiff needed 25 minutes per day assistance for "hygiene" yet Mrs Renehan's evidence was that the plaintiff could have a shower (including walking to the bathroom) unaided.

(c) The plaintiff needed 15 minutes per day to get dressed, yet Mrs Renehan's evidence was she could do this on her own.

[266] In general I accept the defendant's criticisms of this claim. The figures are plainly inflated and not supported by the evidence. Nevertheless, I accept that the parents have given the plaintiff a great deal of valuable assistance over this period. The difficulty is how to arrive at a reasonable figure. The defendants have submitted that I should allow only one hour per day for a period until her injuries "stabilised" in July 1997. I do not accept that submission. A reasonable starting point is the evidence of Dr Fong as to her

needs as at the date of his report, 20 May 2004. I have accepted about half that figure or seven hours per week, for her future care. Doing the best I can, I think it is reasonable to allow 2.5 hours per day for the period to July 1997, a period of 11 months. Thereafter I would apply an average of 1.5 hours per day to the date of trial. This comes to approximately $116,000.00. In arriving at these figures I have included allowance for the time involved in taking the plaintiff to visit doctors, hydrotherapy, etc to the extent that they are caused by the accident. I therefore allow the sum of $116,000.00.

25. Interest on past gratuitous services

[267] Interest is claimed at commercial rates calculated on the whole of the past period at one half of the commercial rate per annum (to allow for the fact that the claim is gradual). Applying that formula the result is: 116,000 x 5.64% x 9.25 x 0.5=30,258.60.

[268] A rate of half the commercial rate is appropriate where the loss is evenly spread over the period. In this case the loss was not evenly spread. More of the loss was incurred early in the plaintiff's post injury period than in the last four or so years. To allow for this factor I have adjusted the figure arrived at to $35,000.00 and I award that sum.

26. Fund management

[269] In this case there is no evidence that the plaintiff has suffered any intellectual impairment as a result of the injury. The decision of the High Court in *The Nominal Defendant v Gardikiotis* (1995-1996) 186 CLR 49 is

said to be binding authority for the propositions that: (1) in order to claim under this head, the plaintiff must show that as a result of her injuries, the plaintiff will incur additional expense in managing her financial affairs; (2) that the fact that the plaintiff has a fund which needs to be invested is not sufficient; (3) according to the headnote, the maxim that a defendant takes the plaintiff as found has no application in determining whether to award damages for fund management.

[270] There is no evidence upon which a claim for fund management can be awarded based on the plaintiff's injuries. The plaintiff's need for assistance in this area springs from her pre-accident intellectual deficit. However, in my opinion the headnote is inaccurate. The leading judgment was given by Gummow J, whose reasons were accepted by Brennan CJ, Dawson, Toohey and Gaudron JJ. His Honour accepted that it would be proper to make an award if the plaintiff's incapacity to manage his or her affairs did not result from the wrong but was antecedent to it: see, at 67-68. That is the case here.

[271] Fund management costs by Public Trustee in Western Australia include an establishment fee of the capital sum received of 1.1 per cent and 6.6 per cent on distributions of income from investments. The plaintiff seeks a finding that she will invest a portion of the judgment funds with Public Trustee at those rates and that she should recover those expenses. I so find. The final amount of the determination of this figure will be postponed until after I have published these reasons and I will hear the parties on the appropriate sum to be awarded. I draw the parties' attention to the High Court's decision

in *Willett v Futcher* (2005) 221 ALR 16 concerning the manner of assessing the sum payable in respect of allowable management fees.

27. Summary

[272] In conclusion I consider that judgment should be entered for the plaintiff against the first defendant, that the claim against the second defendant should be dismissed and that damages should be awarded against the first defendant as follows:

1.	Pain and suffering and loss of amenities of life:	$150,000.00
2.	Interest on past non-economic loss:	$28,500.00
3.	Loss of earning capacity to date of trial:	$90,000.00
4.	Interest on past loss of earning capacity:	$24,111.00
5.	Compensation for loss of Social Security payments:	$17,950.00
6.	Future loss of earning capacity:	$165,000.00
7.	Past special damages:	$47,521.15
8.	Interest on past special damages:	$221.74

9.	Future special damages:		
	(1) Knee replacement procedures:	$23,000.00	
	(2) Future physiotherapy, hydrotherapy and gastric banding:	$26,185.00	
	(3) Orthotics/OT aids:	$25,102.34	
	(4) Future pharmaceuticals:	$4,000.50	
	(5) Case management	$45,000.00	
	(6) Home modifications:	$1,500.00	
	(7) Future transport and related costs:	$60,000.00	
	(8) Transport costs – scooter and van:	$113,995.00	
	(9) Future care costs:	$300,000.00	$598,782.84
10.	Loss of retirement benefits:		$23,600.00
11.	Wilson v McLeay damages		$5,000.00
12.	Past gratuitous services		$116,000.00
13.	Interest on past gratuitous services:		$35,000.00
			$1,303,686.73
14.	Fund management:		to be calculated

[273] I will hear the parties as to the appropriate orders to be made in the light of these reasons and as to costs.