SUPREME COURT OF QUEENSLAND

CITATION:	*Platts v Kelly* [2003] QSC 196
PARTIES:	**JAMES MICHAEL PLATTS** (plaintiff) **v** **TIMOTHY DENNIS KELLY** (defendant)
FILE NO:	S 9711 of 2001
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	27 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	2 August, 24 October 2002
JUDGE:	B W Ambrose J
ORDER:	**I answer the questions in the following way:** **1. The amounts of benefits received by the plaintiff since 29 November 1985 pursuant to the provisions of the *Veterans Entitlement Act* 1986 and the *Defence Forces Retirement and Death Benefits Act* 1973 are not required to be deducted from the gross amount of any damages awarded to the plaintiff in this proceeding.** **2. The amount of benefits for economic loss (pecuniary loss) received by the plaintiff since 29 November 1985 is required to be deducted from the gross amount of damages awarded to the plaintiff in respect of past economic (pecuniary) loss and future economic (pecuniary) loss.** **3. Benefits received by the plaintiff since 29 November 1985 to date of trial are not to be deducted from or otherwise taken into account in any assessment of damages made with respect to past non economic (non-pecuniary) loss or future non economic (non-pecuniary) loss.** **4. I order that the costs of this application be each party's costs in the cause to be assessed on a standard basis.**
CATCHWORDS:	PRACTICE – Preliminary points of law – application for determination of the question whether the amount of certain benefits received by the plaintiff since 29 November 1985 are required to be deducted from the gross amount of any damages awarded to the plaintiff in this proceeding – where plaintiff injured while serving in army – where claim filed for

breach of contract and negligence against solicitors for not pursuing action against the Commonwealth – where quantum recoverable in question – whether amounts paid under Commonwealth arrangements should be deducted from any assessment of damages

Compensation (Commonwealth Government Employees) Act 1971 (Cth), s 99, s 99(3)
Defence Forces Retirement and Death Benefits Act 1973 (Cth)
Safety Rehabilitation and Compensation Act 1988 (Cth), s 5(9), s 14, s 19, s 24, s 27, s 28, s 48, s 124
Uniform Civil Procedure Rules 1999 (Qld), r 483(1), r 666
Veterans Entitlements Act 1986 (Cth)

Kitchen v Royal Air Force Association (1958) 1 WLR 563, considered
National Insurance Company of New Zealand Ltd v Espagne (1961) 105 CLR 569, considered
Nikolaou v Papasavas Phillips & Co (1988 – 1989) 166 CLR 394, considered
Redding v Lee; Evans v Muller (1982) 151 CLR 117, considered
Tipper v Williams (No 2) [1994] NSWCA 40030/1991 (6 May 1994), considered

COUNSEL: F G Forde for the plaintiff
S T Farrell for the defendant

SOLICITORS: Quinn & Scattini for the plaintiff
Brian Bartley & Associates for the defendant

[1] **AMBROSE J:** This is an application pursuant to an order made on 13 June 2002 under UCPR 483(1) for determination of the question as to whether the amount of certain benefits received by the plaintiff since 29 November 1985 pursuant to the provisions of the *Veterans Entitlements Act* 1986 (Cth) ("the 1986 Act") and the *Safety Rehabilitation and Compensation Act* 1988 (Cth) (the "1988 Act") is required to be deducted from the gross amount of any damages awarded to the plaintiff in this proceedings.

[2] The order was made by consent pursuant to UCPR 666.

[3] I will state briefly the circumstances of the order being made. On 30 October 2001 the plaintiff instituted proceeding claiming against the defendant (his former legal representative) damages for professional negligence and/or breach of contract.

[4] Stated shortly it is the plaintiff's claim that on 29 November 1985 he was a soldier in an army truck being driven by another soldier on a road near Townsville when the truck ran over a pot hole or rut in the roadway causing the plaintiff to suffer spinal injury.

[5] As a consequence of his injury the plaintiff received hospital and medical treatment, he performed his duties with some difficulty and eventually on 20 May 1987 was discharged from the Defence Forces as medically unfit and received a pension of 38.25% of his salary initially and later one of 76.5% of his retirement salary under the *Defence Force Retirement and Death Benefits Act* 1973 (the 1973 Act). This pension is to be disregarded in the assessment of damages because it falls within the class of benefits described by Dixon CJ in *Espagne's Case* (*vide* para 40 herein). From 21 May 1987 he has been a former employer – vide s 5(9) of the 1988 Act.

[6] In about August 1988 the plaintiff retained the defendant as his solicitor to take proceedings against the Commonwealth of Australia (and the soldier driving the truck at the time of his injury).

[7] Pursuant to those instructions on 28 November 1988 the defendant caused to be issued and 11 months later to be served on the Commonwealth of Australia a writ of summons.

[8] Eventually a statement of claim was delivered to which a defence was entered.

[9] Ten years after the issue of the writ of summons and about 6½ years after the delivery of the defence the plaintiff sought leave to proceed with his claim against the Commonwealth. Evidence was called, but on 25 June 1998 leave to proceed with that action was refused.

[10] In this action the plaintiff claims *inter alia* –

> "1. $700,000 for damages, plus refunds (details to be ascertained) plus interest as caused by negligence or breach of contract together with interest on such damages together with the costs incurred in connection with the prosecution of the personal injuries claim."

[11] The cause of action which the plaintiff pursues against his former solicitor is one for damages for the loss of the chance he had to recover damages against the Commonwealth of Australia for the spinal injuries he suffered resulting from of the negligent driving of the military vehicle in which he was a passenger in November 1985.

[12] Essentially one of the facts the plaintiff must prove is the quantum of damages that he would have recovered against the Commonwealth of Australia had the defendant pursued the action commenced on his behalf in a timely way.

[13] Applying then the test in *Kitchen v Royal Air Force Association* (1958) 1 WLR 563 he may recover the value of the chance that he had of recovering a judgment against the Commonwealth of Australia for that sum.

[14] The starting point therefore is the assessment of the quantum of damage which the plaintiff would probably have proved, recovered, and retained had his action for personal injuries against the Commonwealth of Australia been successfully prosecuted. Upon determination of that issue, the amount he might recover for the loss of his chance to recover that sum would depend upon the prospect he had of succeeding on the question of both liability and quantum.

[15] Upon this application it is unnecessary for me to give any consideration to the prospects the plaintiff had on the issue of liability.

[16] Both parties however seek a determination of the question to which I have referred to assist in the determination of the quantum of damage recoverable in this action – particularly with respect to the loss of past or pre-trial earnings and of post trial loss of earning capacity recoverable in the 1988 action.

[17] It is on this issue that both plaintiff and defendant seek to have a determination of the question to which I have referred in para 1.

[18] I was informed upon the hearing of the application that there are good prospects for settlement of the action. There is no contest on the part of the defendant as to his liability to the plaintiff. The only contest is on the issue of quantum of damages.

[19] Broadly speaking the issue of quantum in the present case depends upon the likely award of damages that would have been recovered by the plaintiff against the Commonwealth of Australia had his action commenced on 28 November 1988 by the defendant proceeded to judgment.

[20] It is clear on the material that no issue of contributory negligence was raised in the action commenced in 1988. I proceed on the basis therefore that had the plaintiff succeeded on the issue of liability he would have recovered an award of damages comprising the following heads of damage –

(i) General damages for past and future pain, suffering and loss of amenities of life.
(ii) Special damages for medical treatment.
(iii) Damages for future medical treatment and needs.
(iv) Loss of income from date of injury to date of trial.
(v) Damages for loss or impairment of future earning capacity.
(vi) Interest on special damages which had not been met by way of compensation by the Commonwealth of Australia.
(vii) Monies, if any, refundable by the plaintiff to the Commonwealth of Australia by reason of benefits received under the legislation referred to in para 1 and 28 hereof should he recover such damages.

[21] Upon the hearing of this application evidence was led from three Commonwealth public servants connected with the payment of a number of Commonwealth benefits to which the plaintiff became entitled subsequent to his injury as to the source of those funds under various Commonwealth legislative provisions.

[22] Initially the plaintiff's entitlement for compensation for injuries he suffered in the course of his employment was based on the *Compensation Government Employees Act* 1971 ("the 1971 Act").

[23] However this Act was repealed in 1988 and replaced by the 1988 Act. The new Act however had transitional provisions which distinguished between employees injured prior to its commencement and those injured subsequent to its commencement.

[24] Three persons were called to assist in the determination of the matters debated upon this application.

[25] The first witness was Wayne John Lynch who was a delegate appointed under the 1988 Act in the Department of Veterans Affairs.

[26] The second witness was Margaret Ann Jenyns the assistant director of the compensation section of the Department of Veterans Affairs. Her prime area of concern as assistant director of the compensation section of that department was the entitlement of former soldiers under the *Veterans Entitlement Act*.

[27] The third witness called upon this application was William Ernest Fischer who was the Queensland manager for the Disability Compensation Department of Veterans Affairs.

[28] There was some divergence of opinion expressed in the evidence of those three witnesses. To the extent that their opinions are of assistance in construing the legislation, where there was inconsistency in some of the opinions expressed I prefer the opinions of Mr Fischer to the conflicting opinions expressed by the other two witnesses.

[29] In the course of the evidence and argument reference was made to the following Commonwealth legislation:

1. *Compensation (Commonwealth Government Employees) Act* 1971. ("the 1971 Act")
2. *Defence Forces Retirement and Death Benefits Act* 1973. ("the 1973 Act")
3. *Veterans Entitlements Act* 1986. ("The 1986 Act")
4. *Safety Rehabilitation and Compensation Act* 1988. ("The 1988 Act")

[30] Stated very briefly in 1985 the plaintiff suffered spinal injury which was assessed initially under the 1971 Act as a 20% impairment of back function and/or an impairment of 10% of whole bodily function.

[31] Apparently the plaintiff's back disability was eventually reassessed under relevant legislation as a 50% impairment of bodily function.

[32] Subsequent to that reassessment however, in March 1999, he was again reassessed as a consequence of the development of depression resulting presumably from the injury to his back assessed first at 10% and then at 50%, as being disabled to the extent of 100%. Upon this assessment however the contribution of his spinal injury to his impairment was reduced from 50% to 30% of that total disability and the contribution of his depression was assessed at 70%.

[33] At the time of this application therefore he had been assessed as being 100% disabled from working or supporting himself apportioned as to 30% resulting from his spinal injury suffered in 1985 and 70% resulting from the psychiatric component which existed in 1999. There was no suggestion in the material that this psychiatric condition existed at any relevant time prior to that assessment – much less in June 1993 the agreed notional trial date of his action against the Commonwealth of Australia had it been pursued in a timely way.

[34] I proceed therefore on the basis that the damage that might have been recoverable had the plaintiff's action proceeded to judgment in mid 1993 would not have been assessed on the basis of the psychiatric injury which resulted in 1999, which could not in any way have contributed to a total disability resulting from both the spinal injury he received in 1985 and the ultimate psychiatric disability resulting from that injury assessed in 1999.

[35] Although upon the application some time was spent addressing the effect, if any, of that 1999 assessment I do not propose to give further consideration to that matter having regard to the content of the pleading as it presently stands. In making this decision I am comforted by the evidence of Ms Jenyns that it would only be in the event that judgment was obtained by the plaintiff against the defendant for damages in respect of the depressive disorder between 11 March 1999 and the present time in respect of which he has received a pension partly attributable to it that any question would arise as to refunding compensation paid since 1999 in respect of it. Reference to the plaintiff's claim in this case does not indicate that he seeks to recover against the defendant any damages in respect of the development of this depressive condition – I assume because it had not manifested itself by the notional date for trial of his action against the Commonwealth which it is agreed was in about June 1993.

[36] As interesting then as the discussion has been I do not propose to consider what the provisions of the relevant legislation and the consequences of its implementation by the Department of Veterans Affairs in respect of compensation for depression may have been since March 1999 or may be in the future were damages recovered either in his notional action determined in June 1993 or in this action in which no claim was or is made for damages for that depressive condition.

[37] In *Nikolaou v Papasavas Phillips & Co* (1988 – 1989) 166 CLR 394, 399 Mason CJ considering quantification of a plaintiff's claim against his solicitor for negligence said –

> "In such a situation a court's goal is to determine what amount of money would put the plaintiff in the position he would have been in had the solicitor not been negligent."

[38] In my view in the present case to achieve this goal it is necessary to determine upon the relevant legislation what loss the plaintiff suffered as a result of the negligence of the Commonwealth of Australia up until the notional trial date.

[39] One must determine whether to the extent that the plaintiff had suffered any loss of income or incurred any expense up to June 1993 that loss or expense had been reduced by the amount of any compensation he had been paid under relevant legislation. If the compensation paid equalled or was greater than the loss which he would otherwise have suffered then he would have suffered no recoverable loss. Any recoverable loss would then be limited to the difference between what he would otherwise have received or not expended had he not been injured and the amount of compensation which he did in fact recover under the relevant legislation.

[40] This general principle in my view will be applied in most cases with the exceptions considered by Gibbs CJ in *Redding v Lee; Evans v Muller* (1982) 151 CLR 117, 122

– where loss has been ameliorated by a contractual indemnity or by gifts made by a benevolent third party.

[41] In this case to the extent that there is a statutory requirement that the plaintiff refund any compensation or other benefits paid to him under the legislation in my view those payments clearly fall outside benefits described by Dixon CJ in *National Insurance Company of New Zealand Ltd v Espagne* (1961) 105 CLR 569, 573 as benefits conferred on him "not only independently of the existence in him of a right of redress against others but also that they may be enjoyed by him although he may enforce that right".

[42] In my judgment compensation for pre-trial losses quite apart from any statutory right of The Commonwealth to reimburse itself from the proceeds of any judgment for such compensation paid to the plaintiff, must upon the notional trial be deducted from any damages assessed for lost income or medical expenditure which would be otherwise recoverable.

[43] Similarly at the date of the notional trial, damages for future loss would have to be calculated taking into account the statutory entitlement of the plaintiff to compensation in the future.

[44] In my view there is no principle of law which would permit an assessment of the plaintiff's future economic loss at the notional trial date on the basis that he had lost in essence his future earning capacity and other entitlements of employment which disregarded completely his entitlement to compensation under appropriate legislation because of the very injury in respect of which he brings his notional action. There are many cases in which courts have firmly refused to permit a plaintiff to "double dip" by recovering damages for future loss of earning capacity disregarding his entitlement to compensation under a legislative scheme of a kind which does not come within the exceptions considered in *Espagne's case*.

[45] In my view the same approach must be adopted with respect to all items of future loss whether of earning capacity or liability for medical expenses etc.

[46] In s 99 of the 1971 Act it is provided *inter alia* –

> "(1) If
>
> (a) an employee recovers damages from the Commonwealth … in respect of an injury to the employee … or
>
> (b) …
>
> the succeeding provisions of this section have effect.
>
> (2) Subject to this section, the compensation that is payable under this Act to the employee in respect of the injury, … is so much (if any) of the compensation under this Act that, but for this section, would be so payable as exceeds the amount of the damages recovered by the employee ...

(3) Subject to this section, if, before the recovery of the damages by or for the benefit of the employee … any compensation under this Act was paid to the employee in respect of the injury … the employee … is liable to pay to the Commonwealth the amount of the compensation so paid to him for his benefit or, if the amount of the damages recovered by him or for his benefit is less than the amount of that compensation, the amount of those damages.

(4) …

(5) …

(6) …

(7) …

(8) Where

(a) a person is liable to pay an amount to the Commonwealth under this section; and

(b) the Commissioner or any other person holds on behalf of the first-mentioned person –

(i) moneys being compensation payable for the benefit of, or damages awarded to, the first-mentioned person; or

(ii) investments acquired out of moneys of a kind referred to in the last preceding sub-paragraph , the Commissioner or other person shall deduct from the moneys held by him or shall realize the investments held by him and deduct from the proceeds of the realization, an amount not exceeding the amount that the first-mentioned person is liable to pay to the Commonwealth under this section and shall pay the amount so deducted to the Commonwealth, and the payment of that amount is, to the extent of the amount paid, a discharge of the liability of the first-mentioned person to the Commonwealth and of the Commissioner or other persons to the first mentioned person."

[47] What is a little unclear to me on the material is whether the plaintiff ever received compensation for non-economic loss under either the 1971 Act or the 1988 Act or whether such compensation was payable to him under either of those Acts. The 1971 Act ceased to have effect on 30 November 1988 (subject to the transitional provisions of s 124 of the 1988 Act – *vide* para 56 herein) and 1988 Act came into operation on 1 December 1988.

[48] Section 14 of the 1988 Act provides *inter alia* –

> "(1) Subject to this Part, Comcare, is liable to pay compensation in accordance with this act in respect of an injury suffered by an employee if the injury results in … incapacity for work, or impairment."

[49] Under s 48 of the 1988 Act it is provided *inter alia* –

> "(1) This section applies where:
>
> (a) an employee recover damages in respect of an injury to the employee … being *an injury loss or damage in respect of which compensation is payable under this act* or
>
> (b) …
>
> (2) The employee … shall not later than 28 days after the day on which damages were recovered, notify Comcare in writing of the recovery of the damages and the amount of the damages.
>
> (3) If before the recovery of damages by, or for the benefit of … the employee … any compensation under this Act was paid to the *employee in respect of the injury, loss or damage,* … the employee … is liable to pay to Comcare an amount equal to:
>
> (a) the amount of that compensation; or
>
> (b) the amount of the damages;
>
> whichever is less.
>
> (4) Compensation is not payable under this Act to the employee in respect of the injury, loss or damage … after the date on which the damages were recovered by the employee …"

In 2001 ss (4A) was amended to read:

> "(4A) *Subsection 3 does not apply if the damages were recovered in an action for non-economic loss* or by way of a settlement of such proceedings.
>
> (7) Where an employee, … establishes to the satisfaction of Comcare that a part of the damages referred to in subsection (1) did not relate to an injury, loss or damage in respect of which compensation is payable under this Act, subsection (3) applies in relation to that employee .. as if the amount of the damages were an amount equal to so much of the amount of the damages as did relate to an injury, loss or damage in respect of which compensation is payable under this Act."

[50] Under s 27 of the 1988 Act, it is provided, *inter alia* –

"(1) Where an injury to an employee results in a permanent impairment and compensation is payable in respect of the injury under section 24, *Comcare is liable to pay additional compensation in accordance with this section to the employee in respect of that injury for any non-economic loss suffered by the employee as a result of that injury or impairment*.

(2) The amount of compensation is an amount assessed by Comcare under the formula:

($15,000 x A) + ($15,000 x B)

where:

A is the percentage finally determined by Comcare under section 24 to be the degree of permanent impairment of the employee; and

B is the percentage determined by Comcare under the approved Guide to be the degree of non-economic loss suffered by the employee."

In 2001 ss(3) was inserted to read:

"(3) *This section does not apply in relation to a permanent impairment commencing before 1 December 1988 unless an application for compensation for non-economic loss* in relation to that impairment *has been made before the date of introduction of the Bill for the Act that inserted this subsection*."

[51] Under s 28 of the 1988 Act Comcare may from time to time prepare a "Guide to the Assessment of the Degree of Permanent Impairment" setting out *inter alia* –

"(b) criteria by reference to which the degree of non-economic loss suffered by an employee as a result of an injury or impairment shall be determined; and

(c) methods by which the degree of permanent impairment and the degree of non-economic loss, as determined under those criteria, shall be expressed as a percentage."

[52] Under s 19 of the 1988 Act it is provided in effect that Comcare is liable to pay to an employee in respect of injury for each week of incapacity a maximum rate of compensation to be worked out deducting from the amount of the employees normal weekly earnings the greater of either the amount that the employee is able to earn "in suitable employment" or the amount per week that the employee earns during the week.

[53] Section 24 of the 1988 Act provides *inter alia* –

"(1) Where an injury to an employee results in a permanent impairment, Comcare is liable to pay compensation to the employee in respect of the injury."

[54] The entitlement to compensation under s 24 of the 1988 Act is not discretionary. The amount of compensation to which an employee is entitled under that Act is to be calculated according to other provisions in the Act.

[55] Under s 124 of the 1988 Act it is provided *inter alia* -

> "…
>
> (1A) Subject to this Part, a person is entitled to compensation under this Act in respect of an injury, loss or damage suffered before the commencing day if compensation was, or would have been, payable to the person in respect of that injury, loss or damage under the … 1971 Act.
>
> (2) A person is not entitled to compensation under this Act in respect of an injury, loss or damage suffered before the commencing day if compensation was not payable in respect of that injury loss or damage:
>
> (a) …
>
> (b) …
>
> (c) in any other case under the 1971 Act as in force when the injury, loss or damage was suffered."

[56] I can find no provision under the 1971 Act and none was drawn to my attention in the detailed submissions advanced to suggest that there was any provision in the 1971 Act for payment of compensation to be assessed for non-economic loss of the sort contemplated by s 27 of the 1988 Act in respect an award of general damages for pain, suffering and loss of amenities of life.

[57] On my construction of the legislation should the plaintiff have recovered general damage for pain, suffering and loss of amenities in life upon his notional trial in June 1993 the provisions of s 27 of the 1988 Act making payments of compensation "payable" in respect of non-economic loss could have played no part in the consideration of one of the principal questions argued upon this application which was whether an award of damages received for both non-economic loss and economic loss in the plaintiff's notional action heard in June 1993 might have been available to the Commonwealth for reimbursement of compensation paid to that time in respect of economic loss only. If it was then for practical purposes it would be necessary to balance all the compensation paid for economic loss against the judgment recovered in June 1993 for both economic and non-economic loss to determine what might be the ultimate benefit to the plaintiff in the pursuit of this action. Presumably items of special damage for medical treatment etc should they form part of the benefits to be recovered under s 99(3) of the 1971 Act would be proved in much the same way as they have been proved in master and servant cases where reimbursement of such benefits is required under Workers Compensation legislation.

[58] On my view it is clear from the material and from the provisions of the 1988 Act to which I have referred that no compensation was payable for non-economic loss of

the sort described in para 20 (ii) herein under the legislative scheme prior to the coming into effect the 1988 Act and because the plaintiff's initial eligibility for compensation arose under the 1971 Act which did not make any provision for compensation for non-economic loss it seems quite unlikely that the plaintiff ever applied for or received under the 1971 Act compensation for non-economic loss of the sort to which he would have been entitled to claim had his entitlement accrued subsequent to the 1988 Act.

[59] The Plaintiff finds himself in a position where unless he can demonstrate that reimbursement of compensation paid for economic loss under the 1971 Act out of an award of damages including an award for pain, suffering and loss of amenities of life is confined to reimbursement from only that part of the award assessed in respect of economic loss, the inevitable conclusion must be that the Commonwealth may reimburse itself for compensation paid in respect of economic loss only, from any award of damages recovered based upon both economic and non-economic loss sustained by the plaintiff as a result of his 1985 accident which might be recovered in his notional trial in 1993. In my view even though s 99(3) of the 1971 Act would seem to require reimbursement of "the amount of compensation" in fact paid to the plaintiff for his benefit from "the amount of those damages" recovered by action, as a matter of policy the evidence indicates that the Commonwealth Departments would not seek to do so. *Vide* para 77 herein.

[60] The questions to be determined were formulated in such a way as to make them difficult to answer in the absence of more precise knowledge as to the likely facts to be considered by –

(a) the trial judge at the notional trial date in June 1993 and

(b) the trial judge entertaining the plaintiff's action perhaps within the next 12 months or so.

[61] In fact of course it will be the same trial judge who must essentially determine what damages he or she would have awarded in June 1993 as one step in the determination of the quantum of damage that should be assessed in the trial over which he or she presides.

[62] At trial it will be necessary to consider three periods in determining quantum of loss:

1. from the time of accident in November 1985 to the notional trial date in June 1993.

2. from June 1993 to the date of trial of the current action and

3. from that date of trial until the date of death of the plaintiff.

With respect to the second period Clarke JA in *Tipper v Williams* (No 2) (New South Wales Court of Appeal decision in action 40030 of 1991 delivered 6 May 1994) observed –

> "Upon the findings of his Honour the respondent would, in the absence of the appellant's negligence, have received full compensation at common law for his employer's breach of duty in 1979 subject only to a deduction in respect of payments made under

> the Workers' Compensation Act 1926 prior to the date of trial … In addition, upon the entry of judgment his rights under the Workers' Compensation Act 1926 would have come to an end ...
>
> Accordingly, his Honour was obliged, in order to put the respondent in the position he would have been if he would have proceeded to trial on the notional date, that is 31 May 1987, to assess the damages he would probably have received and deduct from that amount of benefits received and the value of the workers' compensation rights which were not brought to an end by the judgment against the appellant. This is what his Honour in fact did subject only to the fact that he deducted some workers' compensation payments after the notional date of trial and failed to make any allowance for the respondent's continuing workers compensation rights."

[63] In my view it will be quite unnecessary for the trial judge in this case to speculate upon what award of damages he may have made in June 1993 had the evidence then available been only facts, wage rates, compensation payments etc at that time. In fact it will be unnecessary for the trial judge to make estimates of a speculative kind when considering facts relevant to the determination in June 1993 of the loss as at the notional date of trial in June 1993 between June 1993 and when this action comes to trial in the next 12 months or so

[64] Both the plaintiff's loss of income and the total benefits received which are repayable and do not come within the principle of *Espagne's case* can clearly be established by precise evidence for periods 1 and 2 specified in para 63 herein. There should be no difficulty in establishing precisely what income the plaintiff would have received from the date of his accident in 1985 until the date of trial of this action in 12 months or so. Similarly there should be no difficulty whatever in establishing all the benefits the plaintiff has recovered under the legislation which have been canvassed at length upon this application.

[65] In my view it is unnecessary upon this application to do more than analyse the benefits paid under each of the four pieces of legislation to which I have referred to determine whether or not they come within *Espagne's case*.

[66] With some difficulty I have come to the conclusion that payments made pursuant to the 1986 Act were discretionary albeit that the plaintiff's entitlement to this discretionary pension involved payment to him of a benefit coming within the protection of *Espagne's case*.

[67] In my view in assessing damages for loss of income – both past and future – this pension entitlement should be ignored applying the principle in the *Espagne's case*.

[68] Similarly with respect to the 1973 Act the pension paid to the plaintiff comes within the *Espagne case* exception – albeit that the quantum of the pension is discretionary.

[69] The overall philosophy behind the legislation which has been considered in this case seems to be that while benefits received under the 1971 Act and 1988 Act can be precisely calculated according to the formulae contained in those Acts, the

Commonwealth desires to impose an upper limit on the total benefits received under all four Acts (viz para 29 hereof) and achieves this by adopting a policy which involves exercising a discretion as to the quantum of total benefit that will be received by the plaintiff under all Acts by reducing the benefits to which the plaintiff is entitled under the 1973 Act and the 1986 Act, having regard to the quantum of his specified entitlements under the 1971 and 1988 Acts.

[70] In my view it is unnecessary to give further consideration to the rather intricate policy considerations which involve the exercise of the discretion as to quantum of the benefit or pension which the plaintiff has received and will receive under the 1973 Act and 1986 Act.

[71] In my view however it is clear that in the assessment of damages either at the notional trial date in June 1993 or upon the actual trial date of this action within the next 12 months or so, the benefits which the plaintiff receives under the 1973 Act and the 1986 Act should be disregarded.

[72] On the other hand the benefits which the plaintiff has received and will receive under the 1971 Act and 1988 Act must be taken into account in the assessment of damages suffered by the plaintiff in both the first and second periods to which I have referred and also in the third period which will encompass the period from the trial date of this action for professional negligence to the date of the plaintiff's death.

[73] It is unnecessary to consider what impact the development of the plaintiff's psychiatric condition in 1999 had upon his entitlements under either the 1973 Act or 1986 Act. However, it may be that in this action damages may be recoverable against the defendant which would not have been recoverable against the Commonwealth in June 1993.

[74] The effect of the assessment of the plaintiffs total impairment in March 1999 as being 70% attributable to his psychiatric condition was not explored upon this application. I infer, however, that the result is that the benefits he receives under the 1971 Act and 1988 Act are not founded in any part upon that condition.

[75] In my view it is unnecessary to embark upon consideration of what effect an award of damages to the plaintiff will have upon the exercise of discretion by the department with respect to the quantum of benefit the plaintiff recovers under either the 1973 Act or 1986 Act.

[76] To the extent that any discretion may be exercised against the plaintiff in respect of the quantum of future pensions or benefits payable under the 1973 Act or 1986 Act, that simply provides another reason why any entitlement under those two Acts should be ignored in the assessment of damages.

[77] Under clause 9 of the *Military Compensation & Rehabilitation Instruction* No 15 (part of exhibit 1) it is stated –

> "9. Certain damages payments which cannot be recovered or offset – Sub-section 99(11) of the 1971 Act and sub-section 48(7) of the *SRC Act* (*the 1988 Act*)

> 9.1 Delegates should note that if the MCRS (Comcare) is satisfied that a part of a damages award can be identified as having been awarded for a loss for which there was, or is, no equivalent provision for payment under the 1971 Act or under the *SRC Act,* (*the 1988 Act*) that part of the damages award is not recoverable by the Commonwealth nor can it be offset against future compensation entitlements.
>
> 9.2 For example, if in a 1971 Act damages case, a court awarded an employee an amount of damages which included a payment for pain and suffering, it would not be appropriate for the Commonwealth to seek to recover that amount. Nor would it be appropriate to seek to offset that amount against the claimant's possible future compensation entitlements. This is because the 1971 Act made no provision for payment of compensation for non-economic losses such as for pain and suffering, loss of enjoyment of life etc."

[78] In my view this is a clear policy statement and the various statutory provisions in the 1971 Act and 1988 Act which have been analysed must be viewed in the light of the way in which the Commonwealth would exercise its discretion when considering whether to have recourse to that part of damages assessed for pain, suffering and amenities of life in the event that special damages recovered by the plaintiff were insufficient to repay the benefits for economic loss paid to the plaintiff under either the 1971 Act or the 1988 Act.

[79] In my view therefore when considering the effect of the 1971 Act and the 1988 Act in the assessment of damages at the trial of this action that part of the assessment of damages made for non-pecuniary loss, pain, suffering and loss of amenities of life suffered by the plaintiff as a consequence of injury in November 1985 should be disregarded altogether.

[80] This policy obviously applies also with respect to damages assessed for non-pecuniary loss during the second and third periods – ie from mid June 1993 (the notional trial date of his claim against the Commonwealth) to the date of his death. It is unclear from the terms of the plaintiff's claim whether he will seek to show by calling the appropriate medical evidence that indeed the psychiatric condition which developed in 1999 was caused or contributed to by the failure of his solicitor to prosecute his action in a timely way. This was not a matter canvassed at any length upon this application. However if such matter were to be canvassed there would be no question of the of the Commonwealth seeking to offset any amounts recoverable in respect of an assessment for non-pecuniary loss (pain, suffering and loss of amenities of life) resulting from his psychiatric condition appearing in 1995 against possible future compensation entitlements. It was not suggested that the plaintiff would have been entitled to the costs of medical treatment etc for that condition in his notional action against the Commonwealth. It is unclear however why damages might not be claimed against the defendant in this action if the plaintiff's depression resulted from his failure to prosecute his action in a timely way.

[81] It is unclear to me on the evidence and argument what effect the reassessment of the plaintiff's disability resulting from his back injury from 50% to 30% had on the quantum of the benefit under his 1971 Act entitlement.

[82] Compensation benefits paid since 1999 have been attributed in part to that psychiatric condition. The fact of the matter is that he was assessed as being only 50% incapacitated by reason of his back injury years prior to the assessment of the part played by his psychiatric condition which first emerged in 1999.

[83] It seems the principal object of this application is to facilitate a proposed mediation and/or settlement negotiations between the parties. I have indicated the only issue will be the quantum of the plaintiff's damages.

[84] The questions are expressed in a rather elliptic form. However, I will attempt to answer them having regard to the issues debated upon the application, keeping in mind the object of this application is to facilitate negotiations for settlement and/or a mediation.

[85] I answer the questions in the following way:

1. The amounts of benefits received by the plaintiff since 29 November 1985 pursuant to the provisions of the *Veterans Entitlement Act* 1986 and the *Defence Forces Retirement and Death Benefits Act* 1973 are not required to be deducted from the gross amount of any damages awarded to the plaintiff in this proceeding.
2. The amount of benefits for economic loss (pecuniary loss) received by the plaintiff since 29 November 1985 is required to be deducted from the gross amount of damages awarded to the plaintiff in respect of past economic (pecuniary) loss and future economic (pecuniary) loss.
3. Benefits received by the plaintiff since 29 November 1985 to date of trial are not to be deducted from or otherwise taken into account in any assessment of damages made with respect to past non economic (non-pecuniary) loss or future non economic (non-pecuniary) loss.
4. I order that the costs of this application be each party's costs in the cause to be assessed on a standard basis.