SUPREME COURT OF QUEENSLAND

CITATION:	*Andrews v Traynor & Suncorp Metway Insurance Ltd* [2003] QSC 292
PARTIES:	**GARY MARK ANDREWS** (plaintiff) **v** **MARGARET ROSE TRAYNOR** **and** **SUNCORP METWAY INSURANCE LIMITED** ACN 075 695 966 (defendants)
FILE NO/S:	SC No 6111 of 1999
DIVISION:	Trial Division
PROCEEDING:	Personal Injury – Quantum Only
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	6,7,10 & 13 February 2003
JUDGE:	White J
ORDER:	**Refer to order of 4 September 2003**
CATCHWORDS:	DAMAGES – PARTICULAR AWARDS OF GENERAL DAMAGES – NEW SOUTH WALES – AWARDS IN RESPECT OF MOTOR ACCIDENTS OCCURRING AFTER 30 JUNE 1987 – where plaintiff injured in car accident in NSW – where *Motor Accidents Act* 1988 (NSW) applies – where plaintiff previously employed in manual labour – where plaintiff had history of absenteeism and intermittent unemployment – where evidence of pre-existing degenerative condition – where plaintiff no longer able to undertake manual labour – whether plaintiff should recover for loss of income until age of 65 *Motor Accidents Act* 1988 (NSW), s 68, s 70A, s 72, s 79A *Geaghan v D'Aubert* [2002] NSWCA 260; (2002) 36 MVR 542, referred to *John Pfeiffer P/L v Rogerson* (2000) 203 CLR 503, referred to *Marsland v Andjelic* (1993) 31 NSWLR 162, referred to

Southgate v Waterford (1990) 21 NSWLR 427, considered

COUNSEL: J R Webb for the plaintiff
R D Green for the second defendant

SOLICITORS: Gall Sandfield & Smith for the plaintiff
Dibbs Barker Gosling for the second defendant

[1] **WHITE J:** The plaintiff was injured when the motor vehicle driven by the first named defendant collided with the rear of the motor vehicle which he was driving and which was stationery on the Pacific Highway at Benora Point, NSW, waiting to turn right into the Benora Point caravan park on 8 July 1996.

[2] Liability is not in issue but the defendant insurer contests the nature, extent and consequences of the injuries which the plaintiff says he sustained as a consequence of the collision.

[3] The assessment of the plaintiff's damages is governed by the provisions of the *Motor Accidents Act* 1988 (NSW) ("the Act"), *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

The issues

[4] The defendant contends that

- the disability from which the plaintiff now says he suffers which precludes him from earning more than pocket money was not caused by the motor vehicle collision and, in any event, is exaggerated;

- since the defendant was not in employment at the date he sustained his injury, had not been employed for nearly a year and showed no real intention to work at anything like the level at which his claim for economic loss is made he should have that claim assessed very conservatively.

The plaintiff's background

[5] The plaintiff was born on 8 June 1963. He was educated to Form 3 in Victoria and left school in 1977 at age 14 to take up a panel-beating apprenticeship. Although manually skilled he struggled with the theoretical side of his course and his employment was terminated after about nine months for that reason. He then worked as a factory hand for two years manufacturing refrigerators.

[6] Over the next 10 years to 1989 his principle occupation was that of a deck hand on various boats operating out of Lake's Entrance, Port Welshpool and at Phillip Island in Victoria. This involved fishing for scallops and crayfish and sharks in Bass Strait. It was arduous work but well paid. The plaintiff worked briefly as a security guard in Dandenong for about 6-8 months and was then in receipt of unemployment benefits for approximately two months before being employed in the Nissan factory pouring manifolds. The plaintiff returned to Phillip Island to live with his parents and worked on fishing boats. He had hoped to obtain his skipper's ticket but the boat on which he was working was sold. He was then again in receipt of unemployment benefits for about 7 months until he commenced work with BHP on

the paint line at Westernport in 1989. He held an in-house BHP gantry crane ticket and was part way through his boiler attendant's ticket when he resigned in 1995.

[7] In about 1993 or 1994 the plaintiff had been approached by management to move with other workers to Acacia Ridge in Brisbane where BHP was setting up a paint line with the object of training workers. He was not then interested in moving.

[8] It was suggested that the plaintiff had significant absenteeism whilst he was at BHP and was at a real risk of having his employment terminated. The plaintiff agreed that he did take time off but no more than he was entitled to under the award. In the event the defendant did not produce any witness to support the allegations made in cross-examination although a warning notice (exhibit 44) confirmed his absenteeism. It also suggested that he was a well-regarded employee so far as his work was concerned. The plaintiff contended that his domestic situation as well as the nature of shift work and overtime contributed to him having days off. In the later years of his employment at BHP the personal problems involved the need to coordinate with his wife who also worked shift work as a station assistant and railway conductor, the care of their two young daughters. The plaintiff also suffered from recurring severe tonsillitis.

[9] The plaintiff resigned from BHP on 8 July 1995 to go to northern NSW so that he and his family could spend time with his father and mother who lived at Kingscliff. His father had undergone heart by-pass surgery in 1991 and was about to undergo further surgery in 1995.

[10] The plaintiff received termination pay on his resignation from BHP and did not initially apply for social security benefits, he thought for a period of about 6 months. In fact he was in receipt of benefits from 5 September 1995. When he and his family moved they lived at a caravan park where his parents also moved to reside. He performed various tasks for his father, driving him to medical appointments and assisted him to move from one caravan site to the other. He did some work building and repairing fishing rods, an activity at which he is particularly skilled and which he enjoys. He said that he had been actively seeking employment since starting unemployment benefits although without success.

The collision

[11] At about 3 pm on 8 July 1996 the plaintiff was driving his father's Ford Laser hatchback along the Pacific Highway and had indicated his intention to turn right into the caravan park where he was residing when the first named defendant's motor vehicle collided with the rear of his vehicle. The plaintiff was wearing a seatbelt and accompanied by his wife and two children. At the time of the collision he suffered a sudden onset of pain in his neck and back and was aware of a burning sensation through his whole spine. Police were called to the accident scene. Subsequently he drove his car into the caravan park and his mother drove him to the emergency department of the Tweed Hospital about an hour after the collision. His wife and children sustained no injuries.

The consequences

[12] It is not doubted that the plaintiff suffered musculo-ligamentous injury to his cervical and thoracic spines in the motor-vehicle collision which was very painful

for a time. Those symptoms have largely resolved. What is in dispute is whether the pain which the plaintiff says he experienced and continues to experience with increasing severity in his lumbar spine was as a consequence of injuries sustained in the collision.

[13] X-rays taken at the Tweed Hospital on 8 July revealed, the plaintiff was informed, a possible fracture of the sixth thoracic vertebra. He was given a soft collar, analgesics and referred to physiotherapy. The next day he consulted a general practitioner complaining of a tender neck and weakness in his left arm and hand as well as tingling in his left foot. He received physiotherapy from 9 July to 5 September for 13 treatments ceasing when the pain from traction proved intolerable. A bone scan undertaken on 17 July revealed no abnormality. The plaintiff continued to take analgesics and valium for muscle spasm. Standing, sitting, moving and walking caused pain in his buttocks and stiffness in his lower spine.

[14] During the period of physiotherapy his thoracic and neck pain settled but his lumbar pain worsened. At the end of August 1996 he underwent a CT scan. On 6 September the plaintiff was referred to the emergency department of the Tweed Hospital by his general practitioner for bed rest, analgesia and review. The plaintiff had an appointment to see Dr Parkington, an orthopaedic surgeon, about his lumbar pain and discharged himself from the hospital. The plaintiff continued to experience severe pain in his middle and lower back and down the back of his left leg.

[15] When the plaintiff saw Dr Parkington the focus was on a lump of fat located under the skin in his left lower back which was thought to be the cause of his discomfort. Dr Parkington proposed to excise it. That did not eventuate, it seems, both because the plaintiff was reliant upon the insurer to agree to pay for the operation and because he and his family moved to the Sunshine Coast hoping to find work and where the cost of living was lower.

[16] When the plaintiff moved to the Sunshine Coast in 1997 he came under the care of Dr Dearnaley (deceased at the time of trial). Dr Dearnaley recommended the plaintiff for a rehabilitation course at Belmont Private Hospital in part because of the plaintiff's dependency on methadone and other analgesics.

[17] The plaintiff discharged himself from Belmont for family reasons prior to a final assessment however the hospital records have been tendered (exhibit 1). The report from the clinical psychologist who initially assessed the plaintiff gives some insight into his functioning at that time. At the commencement of the program he was severely depressed. His symptoms included "feeling very sad, guilty, sense of hopelessness and perceiving himself as a failure". His level of anxiety was significantly elevated compared to the general population, he had no perceived control over the pain and believed that he had limited ability to decrease it. The plaintiff "tended to catastrophise and externalise control although he used cognitive strategy on occasion to manage the pain". His profile of scores on the multi-dimensional pain inventory "was similar to that of other chronic pain patients who are classified as 'dysfunctional'. He reported a low level of perceived life control and high average degree of pain severity and interference with his life."

[18] The psychologist noted that as a result of the plaintiff's concerns about re-injury and lack of clarity about his diagnosis he avoided particular activities in case they increased his pain. He relied heavily on the use of medication to manage his pain.

He had no goals about his future employment or life situation. During the program the plaintiff initially showed significant improvement in his posture, attitude and mood. He became less tearful and more positive about pain management and started setting goals for his future employment situation. During the second week he experienced an increase in pain, became focused on it and his mood deteriorated. The psychologist recommended that the plaintiff receive ongoing psychological treatment aimed at pain management to assist him to increase control over the pain and to improve his mood and behavioural responses. This did not, however, occur.

[19] The plaintiff was, however, able to cease using methadone. He attempted exercises, walking and bike riding on a daily basis but gave up because of pain and discomfort. He now suffers occasional headaches and pain at the nape of his neck on rotation. He says that he is not able to use his right arm above shoulder height. He requires medication to sleep in order to ease the pain. The plaintiff was referred by his general practitioner, Dr Harvey, to a rehabilitation program conducted by Dr I Yaksich, a consultant neuro-surgeon, and the director of rehabilitation at Belmont Hospital when the plaintiff was there. The plaintiff declined to attend both because of lack of funds and confidence in Dr Yaksich.

[20] A number of medical specialists as well as general practitioners have treated the plaintiff, sought radiological analyses of his spine and have given medico-legal reports. The difficulty has been to reconcile the plaintiff's complaints of severe, disabling pain with the radiological findings and the contraindicators on examination.

[21] No medical opinion has suggested that the plaintiff was fraudulently exaggerating his symptoms of pain and disability. After seeing and hearing him in the trial I would accept that that is the case. The plaintiff's unusual posture has been the subject of comment. He holds himself with his left shoulder hunched up higher than his right and with his head stretched forward. He says that he initially adopted this posture to alleviate pain but is now quite unable to straighten up. There is some relevant scoliosis. Some of the doctors suggested that the opinion of a psychiatrist be obtained as they were unable to offer an organically based explanation for the plaintiff's symptoms. The plaintiff consulted with Dr J Boulnois, a psychiatrist. He saw the plaintiff on 16 July 1999 and concluded that there were no psychiatric factors "in themselves" contributing to the enhancement of the pain experienced by the plaintiff. Dr Boulnois thought the plaintiff's prognosis psychologically was good and could see no reason for any psychiatric or psychological care in the future. That opinion is at odds with Belmont Private Hospital's assessment, albeit two years earlier. I did not find Dr Boulnois's report and evidence of much assistance.

[22] The plaintiff relies on the opinion of Dr R Watson, a specialist in rehabilitation medicine, and to a lesser extent, that of Dr N Langley, an orthopaedic surgeon. Both were medico-legal opinions. Dr Watson's starting point was an acceptance of the plaintiff's account of the severity of his pain; a conclusion on examination that there were no definite Waddell signs present (behavioural responses inconsistent with physical findings); and the results of a subsequent MRI procedure ordered by him which showed significant degenerative disease present at L 3-4 and L 4-5 which had not been seen on a MRI performed within 12 months of the collision. Dr Watson concluded that the collision caused injury to the plaintiff's discs and the large Schmorl's node seen in the inferior endplate between L 3-4 suggested to him traumatic endplate rupture in the collision.

[23] Dr Langley concluded that the plaintiff sustained a cervical and lumbosacral sprain to his back in the collision and it may have been that injury to his lower back which lead to symptomatic degenerative change.

[24] Dr Watson concluded that the plaintiff had a 20 per cent disability and Dr Langley a 10 per cent disability of his whole body.

[25] Doctors R Parkington, P Winstanley and J Fraser, orthopaedic surgeons, and Dr P Nash, a physician rheumatologist, were called by the defendant. Drs Parkington and Winstanley were treating doctors. The former was consulted by the plaintiff at the request of his general practitioner primarily in relation to the presence of a subcutaneous mass in the sacro-iliac region which was thought to be the source of the plaintiff's low back discomfort. Dr Parkington concluded that the second MRI revealed age-related degenerative disease and was not post-traumatic. This, he explained, was because he had not seen any degeneration on the original scan taken in 1996 which would be expected had it derived from the collision. Of some significance to Dr Parkington's conclusion was his understanding that the plaintiff's low back pain did not commence until mid to late August 1996, that is, a month to 5 or 6 weeks after the collision. Even though the plaintiff was Dr Parkington's informant, other contemporaneous evidence suggests that the plaintiff's complaints of low back pain were much closer in time to the collision.

[26] Dr Winstanley was seen by the plaintiff in November 1997 about his lumbar spine symptomatology, the cervical spine pain having considerably reduced by then. Dr Winstanley concluded, after several visits, that the plaintiff had sustained a flexion-extension soft tissue type injury in the collision and his on-going complaints of pain had no organic basis. He noted inconsistent findings on examination (Waddell signs). He concluded that the plaintiff suffered from a 2.5 per cent loss of bodily function from an orthopaedic perspective. In cross examination Dr Winstanley accepted that some who suffer flexion-extension injuries do not recover over time and that degenerative changes that might have been brought to light by the collision could be a cause of the plaintiff's pain.

[27] Dr Nash similarly concluded that the plaintiff had sustained a soft tissue ligamentous injury to his lower lumbar spine in the collision but his continuing symptoms were out of proportion to both clinical and radiological findings. He concluded that the plaintiff demonstrated positive Waddell signs.

[28] Dr Fraser noted the plaintiff's bizarre posture, his inconsistent clinical signs, the lack of any fracture, disc protrusion or nerve root compression in the radiological evidence to support the symptoms reported, particularly pain in the leg and foot. He made no assessment of any permanent partial disability attributable to any orthopaedic injury sustained in the collision. Dr Fraser was influenced by the Tweed Valley Health Services Report (exhibit 7). The plaintiff reported to the Tweed Hospital on the 8 July 1996 following the collision. The Hospital records make no note of complaint of lumbar pain for that visit. The first complaint of low back pain noted in the Hospital records was not until the 6 September 1996. Dr Fraser accepted that had the plaintiff experienced low back pain, even if not as great as that in his neck or upper back, immediately following the collision and that it got worse over the ensuing weeks his opinion about the plaintiff's symptoms would change. He would then conclude that the motor vehicle collision had aggravated a pre-existing degenerative condition.

[29] I am satisfied that the objective contemporaneous evidence points to the plaintiff complaining of low back pain immediately following the collision but it was, in the short term, overshadowed by the more immediate acute pain in his neck and upper back. Dr J Soden's notes provide much of the basis for this conclusion. She wrote (exhibit 6)

> "Gary first presented on 09/07/96. He described having been involved in a MVA on 08/07/96. He stated he had been hit from behind while his car was stationary. He was wearing his seatbelt. He described sudden onset of pain into his neck and mid thoracic spine. He attended Tweed District Hospital where X rays were taken.
>
> EXAMINATION: On 09/07/96 revealed significant tenderness to palpation over C4 – C5. Gary was in obvious distress. He was clammy and sweating on examination. Neck movements were severely limited, particularly in flexion of approximately 10% and rotation 20%. Although Gary described paraesthesiae into his left arm and hand on the anterior surface, as well as tingling in his left foot, there were no overt neurological signs.
>
> PROGRESS: X ray report raised the possibility of fracture in T6. [Not found to be the case] Gary was reviewed on the 12/07/96. At this time he had persistent paraesthesia in his left hand and down his left leg into his toes. There was some diminished sensation in medical aspect of his left foot and in his left little finger. Because of the possibility of fractured T6, bone scan was attended on 17/07/96. There was no abnormal uptake within the thoracic spine. Gary continued to take panadeine forte for pain and valium to relieve muscle spasm. He attended Tweed Heads Physio Rx Department from 09/07/96 to 05/09/96 for 13 treatments. His thoracic and neck pain apparently settled **but his lumbar pain worsened**. He reportedly was to be reviewed by Dr Parkington Orthopaedic Specialist."
> (emphasis added)

[30] Dr R Burgess conducted a CT investigation of the plaintiff's lumbosacral spine on the 29 August 1996. Dr Fraser agreed that for those investigations to have been undertaken there would need to be complaint of lumbar problems.

[31] A report dated the 19 September 1996 from the physiotherapist at the Tweed Hospital describes the plaintiff attending for treatment from 9 July 1996 for 13 treatments. The physiotherapist reported that the plaintiff's thoracic pain settled well "but his lumbar pain gradually worsened". These references to lumbar pain in reports from professionals who saw him the day following the collision lead to the conclusion that the plaintiff did complain immediately following the collision of lumbar pain with the inference that it had some causal effect on the plaintiff's lumbar spine.

[32] Dr Watson's hypothesis commenced with the supposition that there were no signs of degeneration in the plaintiff's lumbar spine seen in the first MRI scan taken within 12 months of the collision. He concluded that the evidence of degeneration on the second MRI some three and a half years after the collision was explicable,

not by a reference to age-related degeneration, but by virtue of trauma sustained in the collision. Dr Watson had not seen the CT scans taken in August 1996 (they had been lost). Dr Fraser had examined the films themselves. He noted degenerative change which he concluded must pre-date the collision.

[33] Dr R Burgess, a diagnostic radiologist, reported on CT scans performed on the plaintiff's thoracic and lumbro-sacral spine and sacro-iliac joints on 28 and 29 August 1996. It was to these films that Dr Fraser referred. Dr Burgess reported

> "There is a large Schmorl's node in the superior L/4 vertebra end-plate and this extends for quite a distance down into the L/4 vertebral body…This is a very large node indeed and reinforces the suggestion of old Scheuermann's disease. A similar node is noted in the inferior L/3 vertebral end-plate as well. There is a slight bulge of the annulus but there is no significant central or lateral canal stenosis."

Dr Burgess noted a bulging of the annulus at L4/5 with no impingement on the thecal sack. The nerve roots were clear. He also noted some slight facet joint arthropathy at the L5/S1 level but no encroachment on the central canal while the lateral canals were "fairly clear".

[34] I conclude that the low back symptoms experienced by the plaintiff are to some extent referable to a pre-existing degenerative condition symptomless before the collision but which was activated by the trauma of the collision. This is consistent with the opinions of Dr Fraser and Dr Langley but not that of Dr Watson. Since Dr Fraser had the advantage of viewing early films of the plaintiff's spine he was in a better position to reach his conclusion. Dr Watson referred to an article in *Spine* (April 2001) (exhibit 40) which suggested that there may be other pain mechanisms of sciatica than the generally understood nerve root compression. Dr Fraser was not familiar with the article although he was with the publication. The conclusion of the researchers who had studied 160 Finnish patients with unilateral sciatic pain that there may be a discogenic mechanism other than nerve root entrapment which generates subjective pain and that magnetic resonance imaging (MRI) is unable to distinguish sciatic patients in terms of the severity of their symptoms is not at odds with Dr Fraser's analysis.

[35] It is not possible to say how soon symptoms would have emerged without that trauma. I accept that the plaintiff may have remained symptom free. No specialist particularly addressed the question. It is an exercise in weighing up possibilities. The plaintiff engaged in very heavy physical work from the age of 14 or 15. He had had at least one episode of back strain after lifting a refrigerator prior to the collision. Although the plaintiff had some idea of running a business making and repairing rods prior to the collision this was unlikely to have eventuated and his best hope of returning to full time work, had he not been injured, was either with BHP at Acacia Ridge or similar or on fishing trawlers – heavy work. Perhaps 10 years, at the maximum, from the age of 33 was the most that he would have remained without disabling symptoms.

Symptoms following the collision and since

[36] The plaintiff was admitted to the emergency department of the Tweed Hospital complaining of neck pain and headaches. He said in evidence that he had pain throughout his spine. He underwent a course of physiotherapy associated with the

Tweed Hospital and took panadeine forte and valium for pain and muscle spasm. The plaintiff had a number of acute episodes of pain over the following weeks which was not controlled by strong analgesics. He was seen subsequently by a number of doctors. In due course the financial strains of not having worked for over a year were impacting and he and his wife and two children moved to the Sunshine Coast of Queensland where the cost of living was thought to be less.

[37] The plaintiff continued taking significant quantities of analgesic medication. He started adopting a posture which was commented upon by the specialists initially to manage his pain level by hunching over to one side. The plaintiff became addicted to analgesic medication and underwent a course at Belmont Private Hospital. The plaintiff was provided with a TENS Machine which he uses regularly at home. It gives him some relief. He has reduced significantly the amount of pain relief medication he takes. He presently takes about 24 tablets per day and over-the-counter medication to assist him to sleep.

[38] The plaintiff suffers stiffness in his neck which he associates with pain at the nape of his neck when he attempts rotation. He says he is unable to use his right arm above shoulder height. He has headaches from time to time and pain in both legs. Perhaps, not surprisingly, he has suffered from depression. His main recreational pursuit both prior to and after the motor vehicle collision was fishing. He still goes fishing quite regularly but generally only from the beach in relatively quiet water and uses a beach rod holder. He used to play competitive ten pin bowls with his wife but has been unable to return to that activity. In effect, the plaintiff says, he and his wife have reversed roles. She goes out to work and he remains at home doing minor household tasks such as a small amount of cooking. This long period of unemployment and suffering chronic pain has put strain on the marriage. Mrs Andrews gave evidence, which I accepted, that prior to the motor vehicle collision they shared household duties. The plaintiff generally did the cooking and yard work. Mrs Andrews now does the mowing, most of the household work, including vacuuming, and most of the cooking and cleaning up.

[39] As mentioned, the plaintiff has considerable skill in repairing and making fishing rods. An example of his work was shown at trial. He does piece work for the Gympie Fisherman's Warehouse. He clearly loves working with rods and gave the impression that he was content enough with his situation within the parameters of his pain and disabilities. He is able to do quite a number of things associated with his manual skills but only in a very limited way. He has been able to involve himself in taking an engine out of his motor vehicle with assistance from others to lift. He does a little grinding, chiselling and hammering. He can fish for several hours and could probably do a few more things around the house than he actually attempts. He has looked after the Fisherman's Warehouse for some hours. It would, however, be quite unrealistic to suppose that this "pottering around" would be sufficient to keep him in regular commercial employment.

The NSW legislation

[40] The *Motor Accidents Act* 1988 (NSW) reinstated a common law based scheme which had been abolished under the previous *Transport Accidents Compensation Act* 1987. Certain limitations were placed on the recovery of damages consistently with the stated objects of the Act to reduce the cost of the former common law based scheme by limiting benefits for non-economic loss in the case of relatively

minor injuries. Part 6 concerns the award of damages for common law claims. It has its own objects set out in s 68A – controlling the amount of damages that may be awarded to ensure the affordability of the scheme by placing the burden on those who suffer relatively minor injuries.

[41] Part 6A has several thresholds which a plaintiff must achieve to recover compensation. By s 70A a court may not award damages for future economic loss or for diminution of future economic capacity

> "…unless the claimant first satisfies the court that there is at least a 25 per cent likelihood that the claimant will sustain a future economic loss or that there is at least a 25 per cent likelihood that the claimant will sustain a diminution of future economic capacity, as the case requires."

[42] Section 72 concerns the provision of home care services. It has its own objects – to limit to average weekly earnings the level for payment for services for additional domestic assistance; to restrict access to those payments to claims where the need is long term; and to exclude claims for the services which would have been rendered as a matter of course regardless of the relevant motor accident. No compensation is to be awarded if the services are provided or are to be provided for less than six hours per week and for less than six months.

[43] If the services provided or to be provided are less than 40 hours per week the amount of compensation must not exceed the amount calculated at an hourly rate of one fortieth of the amount determined in accordance with a formula set out in ss (3)(a) or (b) relating to the average weekly total earnings produced by the Australian Statistician.

[44] The recoverability of damages for non-economic loss is defined in s 68 to mean pain and suffering, loss of the amenities of life, loss of expectation of life, and disfigurement. This definition is to be read disjunctively so that any one is sufficient for non-economic loss. The section has its own object which is to limit the amount of damages for non-economic loss in cases of claims relating to relatively minor injuries in order more fully to compensate those with more severe injuries at a cost the community is able to afford. By s 79A (3) no damages are to awarded for the non-economic loss of an injured person as a consequence of a motor accident unless the injured person's ability to lead a normal life has been, or in the near future is likely to be significantly impaired for a continuous period of not less than 12 months by the injuries suffered in the accident. By ss (4)

> "no damages may be awarded for non-economic loss unless the severity of the non-economic loss of the injured person is at least 15 per cent of a most extreme case."

If the severity of the non-economic loss is assessed to be equal or greater than 15% of a most extreme case, the damages are to be determined in accordance with a table which is set out in ss (6). There are other provisions in Part 6 relating to restrictions on the payment of interest.

Non-economic loss

[45] The first step in assessing whether the plaintiff may recover any amount for non-economic loss as defined in s 68 is to determine whether the plaintiff has demonstrated that his ability to lead a normal life has been or is likely to be significantly impaired for a continuous period of not less than 12 months. In view of my overall finding that the plaintiff has not been dishonest in his expression of the extent of his pain and disability, the consequences of the injury sustained in the motor vehicle collision have significantly impaired his ability to lead a normal life in the past and will continue to do so into the future beyond the requisite period of 12 months.

[46] The next step is to determine the severity of his non-economic loss as a proportion of a most extreme case. A guide to the approach which a court should take was suggested by the Court of Appeal in *Southgate v Waterford* (1990) 21 NSWLR 427 at 440

> "There are a number of ways by which trial judges could approach the task of apportionment required by s 79(2) and s 79(3). It is inappropriate in this case for this Court to mandate any particular way arriving at the 'proportion' required by s 79(2). But clearly, because the task in hand is that of awarding damages for 'non-economic loss', it is appropriate for the trial judge to consider and make findings on those elements which are relevant to such loss. This will require the judge to consider and make findings on the evidence relevant to those heads of damage formerly considered in the award of general damages. Then it is necessary for the judge to conceive 'a most extreme case'. Only for such a case may the maximum amount provided by s 79(3) be awarded. The use of the indefinite article 'a' has already been noted. Opinions of what constitute 'a most extreme case' will doubtless vary. But clearly quadriplegia would fall into that class…but in a ratio which the judge fixes keeping in mind the fact that the cap of a statutory maximum is retained for 'a most extreme case'."

In *Dell v Dalton* (1991) 23 NSWLR 528 Handley JA at 532, with whom Kirby P and Priestly JA agreed, held that an award of damages under s 79 did not require the assessor to compare the injuries of the particular plaintiff against **the** most extreme injuries of a hypothetical plaintiff. Both cases were approved by the Court of Appeal in *Marsland v Andjelic* (1993) 31 NSWLR 162.

[47] The percentage of disability nominated by a number of the medical specialists do not seem to me to provide a comprehensive guide to the appropriate apportionment. They are based on the American Medical Association tables which do not take account of matters such as the amenities of life and the subjective nature of pain and suffering. They should not be discarded but their limited usefulness should be noted.

[48] It is quite difficult to evaluate the non-economic losses sustained by the plaintiff. He presents as significantly more disabled than his organic symptoms would suggest. Without the assistance of a more comprehensive psychological and psychiatric analysis than has been provided some of the plaintiff's conduct is difficult to characterise. The observations in Belmont Private Hospital psychologist's report, although well in the past (1997), may be not far off the mark. That is, he was simply unable to cope with the pain and has little capacity to plan and set goals for dealing

with it and to plan for his economic future. I thought there was a degree of exaggeration but not for fraudulent reasons. It was more to emphasize that he was experiencing significant pain and that he was unable to conduct his life along relatively normal lines.

[49] There can be no doubt that many of the activities that made life worthwhile for the plaintiff are now virtually closed to him. He has, however, some compensations. He works at making and repairing rods which is clearly very satisfying. He still manages to fish although with limitations. He can supervise and participate in a minor way in home and mechanical repairs.

[50] I have concluded that the plaintiff has crossed the threshold in as much as the plaintiff's ability to lead a normal life has been significantly impaired for the requisite period. Compared to a most extreme case I would nominate the percentage at 25%. The table provided in s 79(6) sets out the manner in which the damages for non-economic loss are to be determined. Twenty-five per cent as a proportion of a most extreme case is to be assessed at 6.5% of the maximum amount that may be awarded for non-economic loss. Mr R D Green for the defendant informed the court that the maximum is currently $309,000 which gives an amount of $20,085. In accordance with s 79(7) such an amount is to be rounded to the nearest $500 (with the amounts of $250 and $750 be rounded up) accordingly the amount for non-economic loss is $20,000.

Economic Loss

[51] The plaintiff makes a claim for economic loss for both past and into the future. By s 70A a court may not award damages for future economic loss or damages for diminution for economic capacity unless the plaintiff first satisfies the court that there is "at least a 25 per cent likelihood that the claimant will sustain a diminution of future economic capacity, as the case requires". The defendant contends that there is no basis for a finding that there is such a likelihood so as to justify an award for economic loss. Mr Green points to the telling fact that the plaintiff was unemployed at the time of the collision and had been unemployed for approximately 12 months. Although the plaintiff gave evidence that he had sought work and nominated various employers including several attempts at BHP at Acacia Ridge and his father indicated that he had spoken to trawler captains or owners on his behalf who were positive the plaintiff was still in receipt of social security benefits and had been for the past 9 months.

[52] Prior to the collision the plaintiff was undertaking a NEIS course. He had completed four of a six week small business course and had hoped to set up a business of making fishing rods. The stumbling block was his inability to put together a viable business plan. The plaintiff said his limited formal education made it very difficult to do this and he was unable to afford the assistance of someone such as an accountant to prepare the plan so that he could approach a bank manager for financial backing. It seems most unlikely that this plan could ever have eventuated. The plaintiff had no previous experience of operating a business himself. His considerable skills in the field of rod-making and repairing needed to be in a shop front business which would need financial backing. The comment made in the Belmont Private Hospital notes in 1997 that the plaintiff said he had sought no work since he had resigned and come to northern NSW may be telling. I am, however, prepared to conclude that economic necessity, if nothing else, would have forced the

plaintiff to look for work seriously and that he would have entered the work force. But his commitment to remain in steady fulltime employment may have been questionable.

[53] Mr Green submits that any award for past economic loss must be global and that an amount of $20,000 would be appropriate recompense on the basis that the plaintiff had shown no real indication that he would return to full time employment but was content with social security and making and repairing rods. The plaintiff however claims a loss of income from the 22 September 1996 of $500 net per week. That was to allow a further two months from the date of the collision to obtain employment which he says he was actively seeking at the time and that he would have obtained and that with his past record of being in well paid employment that was realistic. Mr Webb also submits that a global award is appropriate but based on a loss of $500 per week from 22 September 1996 until judgment. That is a period of approximately 370 weeks giving an amount of $185,000.

[54] There is a significant difference between the two approaches. The plaintiff said he was interested in obtaining employment but had, apparently, been content to rely on social security for about nine months. His father seemed confident that there was work available for him in the fishing industry. He had been in steady employment for nearly 20 years and there must have been real pressure on him to bring more money into the family. Notwithstanding the paucity of material, I conclude that averaged over the period from the date of the collision until the present time the plaintiff may have earned $250 net per week which would include what he made from his rods. That is to say, there would have been periods of unemployment during the past seven years when he simply would have chosen not to work. Since $250 has already been discounted it should not be discounted further and gives a figure of $92,500 for past loss of earning capacity.

[55] Mr Green submitted that any award for future economic loss should be assessed on a global basis in the vicinity of $35,000. This takes into account the defence contention that the plaintiff has a residual capacity to earn income which he is not exploiting. The plaintiff claims a diminished earning capacity in the range of $300-$350 per week. He accepts that he has a modest capacity to earn some income from his rod repairing business but that it is so small as to make virtually no inroad into the assessment which the plaintiff advances. Mr Webb has analysed the records from the Fisherman's Warehouse concerning payments to the plaintiff. The plaintiff provides all his own materials to repair or make a rod. He purchased material from the Fisherman's Warehouse on a running account system against which is credited what the customer pays for the repairs or for a new rod. The plaintiff also charges his own fishing needs to this account. The amount of profit is under $10 per week as an average – in effect it pays for his own fishing and gives him something to do which he enjoys. The plaintiff contends that he expected to work to age 65 but makes a claim in the sum of $240,000 on a global basis.

[56] There can be little doubt that the plaintiff's past work history together with the reality of his difficulties with the theoretical side of his apprenticeship when he was a young fellow of 14 and 15 suggests that he is unlikely to be able to be retrained in respect of non-labouring work. It is conceded that he can do some things but it seems to be the case that they are done very slowly and, realistically, not at a commercial rate. His best prospects for the future probably lie in continuing with the work which he enjoys together with some part-time work such as he is offered

from time to time by Mr Mills and his partners looking after the tackle shop. He may be prepared to revive some of the coping skills which he learnt at Belmont Private Hospital. As for the work that he would have been likely to do, the comments made about the plaintiff's past lost are applicable.

[57] I would allow an amount of $200 per week to represent the plaintiff's diminished working capacity. I have concluded that the degenerative disease in the plaintiff's spine would, in any event, have become symptomatic 10 years after July 1996 such that he would gradually have ceased working. It is unlikely that there would have been an abrupt cessation of employment but by 15 years after the collision date that is likely to have occurred. This is an attempt to find a global sum to reflect what might have happened. Using the 5% tables gives a multiplier for 8 years (i.e. 15 years from 1996) of 345.5. A loss of $200 per week gives an amount of $69,100. This is merely a guide. I would allow a figure of $70,000 to represent the plaintiff's loss of future earning capacity.

Gratuitous care and services

[58] Section 72 of the Act operates to limit the level of payment for services for additional domestic assistance and to exclude claims where the services provided would have been rendered as a matter of course regardless of the relevant motor accident. No compensation is to be awarded if the services provided or to be provided are for less than six hours per week and for less than six months, *Geaghan v D'Aubert* (2002) 36 MVR 542 ([2002] NSWCA 260). If the services cross the threshold then the amount of compensation claimed must not exceed the amount calculated in accordance with a formula set out in ss (3).

[59] Mrs Alison Andrews, the plaintiff's wife, gave evidence she has been engaged in extra domestic work as a result of her husband's injuries amounting to 14.25 hours per week. The main thrust of the extra work is that prior to his injuries the plaintiff did all the household cooking whilst she attended to other duties. He now cooks only one or two days per weeks. She washes his car which takes about 45 minutes a fortnight and does car maintenance under his supervision. Prior to his injuries they used to share other households tasks equally but she now mows the lawn once a week in the summer and once a fortnight in the winter and does other domestic tasks such as sweeping and mopping the floors, vacuuming and so on without his assistance. It is recognised that an impaired capacity to contribute to domestic tasks is within the *Griffiths v Kerkemeyer* (1977) 139 CLR 161 principle, *Sullivan v Gordon* (1999) 30 MVR 29 ([1999] NSWCA 338).

[60] I found it difficult to accept that the plaintiff was able to fish and work on his rods but was unable to cook for more than one or two meals through the week. Whilst it is accepted that washing the car, mowing and vacuuming are tasks that would be testing for a person with back pain why he cannot wash and dry the dishes and undertake other household tasks for which he could sit down or rest at his leisure is not explained, apart from exacerbating his pain. In the period following the motor vehicle collision, although the family was living in a caravan with less house work for about two months, the plaintiff would have required more assistance than he needed as his neck and thoracic pain eased although the lumbar pain has been constant. I am persuaded that for the past and future the plaintiff's need for assistance as a consequence of his injuries was and is for six hours per week.

[61] As I have mentioned, it is not possible to be satisfied at what time in the future the degenerative changes seen on the radiological evidence would have come to light so as to require the plaintiff to have domestic assistance for tasks such as mowing and mechanical maintenance. He is likely to have kept doing these things for a longer period than staying at work but there is no real basis for discriminating between them and I would allow 6 hours per week for a further 8 years. Using the 5% tables gives an amount of $39,366. The amount for the past using the rates set out in the schedule is $37,263.

Special Damages

[62] The plaintiff was addicted to the medication which he took for pain relief including narcotics. His treatment at Belmont Private Hospital assisted him to reduce that dependence (completely in the case of methadone). The defendant submits that there should be a reduction in his claim for the cost of medication because of overuse. There was no suggestion that the plaintiff did not take the medication that he purchased in an attempt to alleviate symptoms which he found intolerable. In those circumstances it seems inappropriate to make a deduction because he took more than the recommended dose. The plaintiff said that he now takes about 24 analgesics per day and he ceased his medication for depression about 18 months ago on the advice of his general practitioner. He takes sleeping tablets about one per night. There is otherwise no particular challenge to the amounts for which he has been able to vouch. A schedule is exhibited to his statement and is also exhibit 30. Past medical expenses are claimed and allowed in the sum of $6,250.35. Past pharmaceutical expenses were calculated to the 26 September 2001 at $3,720.95 and as continuing at $21.65 per week thereafter, a period of approximately 99 weeks to date of judgment which amount to $2,143.35. This gives total amount for past pharmaceutical expenses of $5,864.30 which is allowed.

[63] The plaintiff claims travelling expenses to consult with various medical practitioners calculated at 50c per kilometre. He lives some distance from a number of those medical advisors and the claim is well founded. I allow the amount as claimed of $2,737 for travelling expenses.

[64] The total of those special damages is $14,851.

[65] Each week the plaintiff purchases two boxes of pain relieving medication at a cost of $13.95 for a box of one hundred tablets and $8.95 for a box of 48 tablets. He purchases one large and one small box per week for a total cost of $22.90. Approximately once a fortnight he purchases a small box of “codapains” at a cost of $3.95 per box – a weekly cost of $1.98. The plaintiff’s weekly amount spent on medication is $24.88. The defendant contends that some discount should be applied to the medication claim on the basis that the plaintiff overdoses. The plaintiff’s evidence, which I accept, is that he has made a concerted effort to wean himself off narcotic analgesics and stronger pain relief and has attempted to reduce the amount of pain relief that he takes. I would not therefore reduce the amount that he now says that he is dependent upon for reasonable relief.

[66] The extent to which the motor vehicle collision related pain would have been overtaken by the naturally occurring degenerative disease impacts on the claim for future medication. The claim is for the cost of medication for 38 years, being the

plaintiff's life expectancy. I would allow a claim for 8 years at $24.88 per week using the 5% tables which gives an amount of $8,596.

Interest

[67] Interest may only be awarded pursuant to s 73 of the Act. No interest may be awarded for non-economic loss, s 73(3), domestic services, s 72(2). The calculation of interest for other heads of damages which would include past economic loss and special damages is made if the damages assessment is greater than 20 per cent higher than the defendant's highest offer and the highest offer made was unreasonable. I accept Mr Green's submission that it will be necessary to hear submissions about interest after the delivery of judgment.

[68] In conclusion I would award the plaintiff damages under the following heads and in the following amounts.

Non-economic loss	**$ 20,000**
Past loss of earning capacity	**$ 92,500**
Loss of future earning capacity	**$ 70,000**
Domestic services (i) past	**$ 37,263**
(ii) future	**$ 39,366**
Special damages	**$ 14,851**
Future pharmaceutical	**$ 8,596**
Interest	**$**
Total	**$282,576**

[69] In order for the parties to check the calculations I will defer making an order for judgment. Similarly I will defer making an order for interest and costs.