SUPREME COURT OF QUEENSLAND

CITATION:	*McChesney v Singh & Ors* [2003] QCA 498
PARTIES:	**TONI ANNE McCHESNEY (by her litigation guardian JANICE ANNE McCHESNEY)** (plaintiff/appellant) **v** **MUKHTIAR SINGH** (first defendant) **PETER AARON HOPKINS** (second defendant) **SUNCORP INSURANCE & FINANCE** (third defendant) **SUNCORP GENERAL INSURANCE LIMITED** ACN 075 695 966 (fourth defendant/respondent) **FAI GENERAL INSURANCE COMPANY LTD** ACN 000 327 855 (fifth defendant)
FILE NO/S:	Appeal No 10012 of 2002 SC No 8851 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	31 October 2003
JUDGES:	Davies and Williams JJA and Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – NON-PECUNIARY DAMAGE – IN GENERAL – where appellant severely injured in traffic accident – where appellant 17 years old at time of accident – where suffered brain injury along with other permanent injuries – whether $150,000 for general damages in these circumstances is within appropriate range DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF

DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – PARTICULAR CIRCUMSTANCES – where appellant had left home and stopped attending school at the age of 15 – where appellant associated with "undesirable friends" – where appellant enrolled in TAFE course one month before accident with a view to qualifying as a mechanic – where evidence suggested minimal attendance at course – where future economic loss assessed on assumption that she would have qualified as a mechanic – where learned trial judge adopted discount of 25% for contingencies – whether discount within range of proper exercise of discretion

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – OTHER PECUNIARY DAMAGE – where learned trial judge awarded damages for future paid care and future gratuitous care – where surveillance was carried out to determine the amount of paid care actually given to appellant – where there were imperfections in surveillance – where learned trial judge did not make a separate additional award based on an assumption that appellant would have a child – whether learned trial judge was entitled to take surveillance evidence into account when assessing damages – whether damages awarded adequately incorporated a component for possible child care in future – whether learned trial judge's assessment of damages for future gratuitous care was correct

Castro v Hillery & Ors [2001] QSC 510; SC No 11 of 1998, 21 December 2001, distinguished
Castro v Hillery & Ors [2002] QCA 359; Appeal No 590 of 2002, 20 September 2002, cited
Goode v Thompson & Anor [2001] QSC 287; SC No 5829 of 1999, 2 July 2001, cited
Goode v Thompson & Anor [2002] QCA 138; Appeal No 6802 of 2001, 19 April 2002, cited
Hedge & Ors v Trenerry [1997] QCA 406; Appeal No 4911 of 1996, 7 November 1997, cited
Trenerry v Hedge & Ors [1996] QSC 77; SC No 2249 of 1987, 14 May 1996, cited
Van Gervan v Fenton (1992) 175 CLR 327, followed
Winterton v Mercantile Mutual Insurance (Australia) Ltd [2000] QCA 249; Appeal No 8921 of 1999, 23 June 2000, cited

COUNSEL: M Grant-Taylor SC, with C Heyworth-Smith, for the appellant
S C Williams QC, with M J Burns, for the respondent

SOLICITORS: MurphySchmidt for the appellant
Quinlan Miller & Treston for the respondent

[1] **DAVIES JA:** I agree with the reasons for judgment of Williams JA and with the order he proposes.

[2] **WILLIAMS JA:** The appellant was very severely injured in a traffic accident which occurred on 27 August 1995. At the time she was injured the appellant was a young girl just short of her 18th birthday. After a trial the learned judge at first instance assessed damages in the total sum of $1,918,215.75, made up as follows:

Pain and suffering and loss of amenities	-	$150,000.00
Interest	-	$ 10,500.00
Past economic loss	-	$100,000.00
Interest	-	$ 9,750.00
Superannuation (past)	-	$ 6,000.00
Interest	-	$ 2,100.00
Future economic loss	-	$275,000.00
Superannuation (future)	-	$ 24,500.00
Past gratuitous services	-	$132,000.00
Interest	-	$ 46,200.00
Future paid care	-	$825,000.00
Future gratuitous services	-	$ 74,439.75
Accommodation and associated costs	-	$140,000.00
Future aids etc	-	$ 30,000.00
Past expenses (including HIC refund)	-	$ 17,588.00
Interest	-	$ 5,138.00
Future expenses	-	$ 70,000.00

The amended judgment also contained an amount for administration and management fees and an amount for interest.

[3] The appeal to this court attacks the assessments for general damages, future economic loss, future paid care, and future gratuitous services. Other issues raised by the Notice of Appeal were abandoned.

General Damages

[4] The appellant suffered a major brain injury as a result of the accident. As found by the learned trial judge she "suffers memory deficits including severe retrograde and post-traumatic amnesia, mild to moderately impaired capacity to hold information while performing mental operations upon it, profoundly impaired new learning ability for both visual and verbal information, severe visual agnosia involving inability to recognise and remember shapes and objects or to recognise faces, mild to moderate reduction in general intellectual ability, a capacity to become lost if in an unfamiliar location, slowness and paucity of cognition and left hemiparesis and related motor problems." The appellant also underwent surgery to her left foot to correct problems derived from the neurological injury.

[5] In addition to that she suffered a number of orthopaedic injuries; fracture of the left femur, compound fractures of the left radius and ulna, and a fracture to the pubic symphysis. Because of those injuries the appellant underwent a number of operations and was left with significant scarring. She also suffered an abdominal injury involving contusion to the liver.

[6] As a result of all of those injuries the learned trial judge found she had a "slightly reduced expectation of life" and suffered "gross functional incapacity and loss of the capacity to do many things which she would otherwise have been able to do."

[7] After a period of time the appellant was able to enjoy a reasonable degree of independent living. At the time of trial she was living with a boyfriend and was capable of enjoying a lifestyle which included regularly visiting an RSL club, ten pin bowling once a week and going to a gymnasium. Evidence was given by Scott (duty manager Greenbank RSL) and Bichel (assistant manager Browns Plains Ten Pin Bowl) as to the appellant's attendance at those venues. She was able to function independently; purchasing drinks, using a credit card at an ATM machine, and generally managing her consumption of alcohol.

[8] The learned trial judge accepted that she was unable to enjoy normal relationships with her peers, that the injuries had rendered her incapable of properly caring for a child in the absence of significant support should she have one, and that she had a significant degree of insight into her condition. Her desire was not to live "in a managed or quasi-managed environment but to live independently." The learned trial judge was also satisfied on the evidence that she "has increased risk of sexual exploitation as a result of the acquired brain injury."

[9] The reasons of the learned trial judge are extensive and detailed. Though he deals specifically with some evidence relating to general damages under that heading, the totality of his reasoning must be taken into account in properly evaluating his findings with respect to damages for pain and suffering and loss of amenities. It is not necessary to repeat all that was said in the reasons for judgment at first instance here.

[10] On the question of general damages the learned trial judge referred to *Trenerry v Hedge & Ors* (SC No 2249 of 1987, 14 May 1996) and on appeal *Hedge & Ors v Trenerry* (Appeal No 4911 of 1996, 7 November 1997), *Goode v Thompson & Suncorp General Insurance Ltd* [2001] QSC 287 and on appeal [2002] QCA 138, and *Castro v Hillery & Ors* [2001] QSC 510. It should be noted that the last of those cases went on appeal; [2002] QCA 359. The only other case referred to on the hearing of the appeal was *Winterton v Mercantile Mutual Insurance* (Appeal No 8921 of 1999, 23 June 2000). In *Castro* the award for general damages (not challenged on appeal) was $160,000, and senior counsel for the appellant submitted that because the appellant here was younger and had more insight into her injuries the award should be greater than $160,000. Senior counsel for the respondent relied on *Winterton* where at first instance a younger plaintiff, with insight, was awarded $200,000 for general damages, but that was reduced on appeal to $150,000.

[11] Having considered the medical evidence, the findings of the learned trial judge, and the awards in the cases referred to, I am of the view that an assessment of $150,000 for general damages in the circumstances of this case is within the appropriate range. There is no demonstrable error in the reasoning of the learned trial judge and he addressed all issues relevant to the assessment under this head. No basis is established which would entitle this court to increase the award for general damages.

Future Economic Loss

[12] There was a finding that the plaintiff was rendered unemployable by the injuries she sustained in the accident, and that finding was not challenged by the respondent.

[13] The appellant had been an average student through primary school and early high school. Thereafter her conduct deteriorated and she fell into bad company. As the learned trial judge found she was "troublesome at school and rebellious at home." She used to sneak out at night from the home to be with her friends. Just before she was aged 15 she refused to go back to school. She got a part time job at Hungry Jacks and moved out of home. She associated with "undesirable friends" and was convicted of stealing and unlawful use of a motor vehicle. She became sexually active and had a number of boyfriends prior to the accident. She was living with a boyfriend at the time she was injured. Her friends were abusers of drugs and alcohol, but the evidence is not entirely clear as to her use of those substances. Group certificates showed she was employed at Hungry Jacks from 13.10.92 to 30.6.93, from 1.7.93 to 27.1.94, from 25.3.94 to 30.6.94, and from 1.7.94 to 10.11.94. It can thus be seen that prior to the accident there were significant periods of unemployment.

[14] The learned trial judge accepted that about a month before the accident she had more contact with her mother who began teaching her to drive a motor vehicle. She also enrolled in a course at Yeronga TAFE called "Women in Non-Traditional Roles". The learned trial judge said in his reasons that the "evidence does not suggest that she made a concerted effort to fulfil its requirements." Indeed the evidence would suggest very minimal or no actual attendance at the course.

[15] All of that led the learned trial judge to conclude:

> "Counsel for the plaintiff relied on this evidence as an indication that her life had turned around. However, given the circumstances at that stage, her prospects of leading a happy rewarding life were far from assured … . While there was some prospect that, with more maturity, she may have abandoned the lifestyle she was then living, the probability that she would do so was not assured; at the time of the accident, her future was uncertain."

[16] At trial both sides measured the appellant's future economic loss on the assumption that she would have qualified as a mechanic. As such she would have earned of the order of $411 net per week. At trial she was aged over 24 years and a multiplier of 37.5 years was adopted, taking her through to age 62. Counsel for the appellant at trial submitted that there should be a 15% reduction for contingencies, but counsel for the respondent contended for a much higher reduction because of the matters referred to above. In his reasons the learned trial judge adopted a discount of 25% which he said was a "more realistic discount on the figure reached on the plaintiff's assumptions and my view of the likelihood of them being fulfilled."

[17] At the time of the accident the appellant had no employment qualifications and was still leading a lifestyle incompatible with a person likely to be in regular employment over some 30 years into the future. It was a major assumption to base the calculation of economic loss on the net wage which could be earned by a mechanic. It could be said that at most the appellant had lost the chance of being regularly employed in the future as a mechanic. Clearly the facts of this case called for a more significant discounting than is generally made for the ordinary vicissitudes of life. In the circumstances a discount of 25% was clearly well within

the range of proper exercise of discretion. The appellant has not demonstrated any error by the learned trial judge in arriving at his assessment for future economic loss.

Future Paid Care

[18] This was the major component in the overall assessment of damages made by the learned trial judge. It was also the component the subject of the most serious attack mounted by counsel for the appellant.

[19] The learned trial judge noted that the respondent had, prior to trial, been paying for professional care of the appellant; initially 30 hours per week had been paid for but that had been increased, first to 38 hours per week, and at the time of trial to 42 hours per week. That however was the subject of serious challenge by the respondent at trial. Surveillance was carried out over three separate weeks selected at random with a view to checking on the amount of time actually spent by the paid carer (and also family members) with the appellant. The learned trial judge noted that there were "imperfections in the surveillance" largely because of restricted visibility of access to the appellant's residence. Despite that the learned trial judge concluded:

> "However, correlation of timesheets with verified incidents during the surveillance suggests that in material respects there are reasons to doubt that times and events recorded in the timesheets are an accurate reflection of times spent with the plaintiff. I accept generally the references to the evidence in support of this proposition set out in Mr Williams' outline of submissions without repeating them in detail in these reasons. … The component of damages for future care will be assessed with these findings in mind."

[20] The learned trial judge also found that there were two main areas in which the appellant needed care and assistance; firstly, in the efficient management of the household and shopping, and secondly, motivating herself to get through the day. The reasons for judgment also recognised that the need varied according to whether or not the appellant was in a relationship. When she was in a relationship the need for paid care was less, but when she was not in a relationship, or when her partner was at work or away from the home, she had needs which could only be fulfilled by a paid carer.

[21] In addition to the specific needs referred to above the learned trial judge also concluded that she required services in the nature of "community linking". He accepted that "community linking activity is important in attempting to provide as fulfilling a life as possible for the injured person and is a legitimate aspect of care." In that regard the learned trial judge identified the following problem:

> "The notion of a succession of carers each attempting to interest the client in particular activities, without necessarily having knowledge of or regard to whether it has been tried before and been of no interest, which seems to be implicit in some aspects of the evidence, illustrates why I have a concern. … In a case where the person in need of a degree of care retains some capacity, albeit significantly reduced, to engage in social activities, the notion of a carer not accompanying her but carrying out surveillance over her raises delicate issues of the extent to which her privacy may be invaded."

[22] That led his Honour to say that the "assessment in a case like the present is also exceptionally difficult because it involves a high degree of speculation concerning the future over and above the ordinary contingencies of life." Over her life span different lifestyles may prove more attractive.

[23] Finally under this heading the learned trial judge dealt with the issue of care if the appellant should have a child. In her evidence-in-chief she said she "would love to have kids of my own", but she conceded she could not look after a baby. Under cross-examination she agreed with the proposition that there was not really much point in having a child if you couldn't look after it. Other evidence on this issue established that the members of the appellant's family and all the doctors were of the view that pregnancy was not advisable. At the time of trial the appellant was taking the contraceptive pill and practised "safe sex". At the time of trial her sister was in the process of attempting to persuade her to accept a contraceptive implant. The appellant had not discussed the possibility of having a child with her grandmother with whom she enjoyed a close relationship. Her current partner, who was called by the appellant's counsel to give evidence, was not asked about their having a child.

[24] Against that background the learned trial judge concluded:

> "There is also necessarily a high degree of speculation about how her personal life will unfold. The most obvious example of this is whether she will have a child or children. If she does, her need for paid care will be significantly greater than if she does not. The amount of paid care actually needed even if she does have children may depend on whether she has a stable relationship during critical periods. That she would have grave difficulties in caring for a child is not in doubt and is something she realises at this point; objectively, the evidence is that it would be ill-advised to have a child. But the possibility that she may do so must be taken into account as real. It is therefore not inappropriate to make allowance for that possibility."

[25] The learned trial judge then referred to the "rather astonishing annual sum of about $220,000" advanced by the appellant as the cost of full-time care over 12 years of childhood if she had a child.

[26] All of that led the learned trial judge to conclude on the issue of paid future care:

> "In arriving at an appropriate level of care and the cost thereof it is necessary to have regard to the likelihood that the plaintiff's needs will be variable from time to time in the future and that the kinds of services will be varied. While there is a possibility that she may need some particular kinds of services there is uncertainty about whether some of them will ever be required at all. Taking all of the imponderables into account, I have concluded that it is appropriate to allow $825,000 for future care on the basis that it is appropriate to allow 28 hours per week at an average cost of $30 per hour, both figures being a reflection of the variabilities to which reference has been made."

[27] Counsel for the appellant submitted that the learned trial judge erred in not accepting that the appellant had a need for 42 hours per week paid care which should have been costed at the rate of $32.60 per hour. It was contended that the

learned trial judge erred in placing weight on the surveillance evidence and using it as a basis for decreasing the award of damages under this head. Further it was submitted that he erred in failing to make a proper allowance for the care of a child in the future having found that it was a real possibility that the appellant would have a child for whom she could not care. Each of those points was contested by counsel for the respondent in his submissions; he contended that all of the conclusions of the learned trial judge were open on the evidence and no basis had been established for interfering with them on appeal.

[28] It is accurate to say, as already noted, that there were imperfections in the surveillance carried out at the request of the respondent. An easement which gave pedestrian access to the appellant's residence was not readily observable from surveillance points. Also there were certain errors in the surveillance report. Counsel for the respondent frankly conceded to some errors on three days in the three periods of one week each during which surveillance was conducted. The learned trial judge did not treat the surveillance evidence as "gospel" (to quote the term used by counsel for the appellant in his submissions) but rather he treated the evidence as a reasonable guide to the actual number of hours of care provided by the witness Butler.

[29] The relevant findings of fact were open to the learned trial judge on the evidence. His reasons show that he directed his mind to the various submissions addressed to him and it has not been demonstrated that there was any error such as would enable this court to interfere with his conclusion.

[30] The learned trial judge in consequence had evidence before him that in the three weeks during which surveillance was carried out the approximate times the paid carer was with the appellant at her residence were 14 hours, seven hours, and 19 hours. The learned trial judge may well have considered it significant that Dr Hopkins, the director of the Rehabilitation Unit at the Princess Alexandra Hospital, assessed the appellant's need for care as in the range 16 to 20 hours per week. His evidence was not clear as to whether that included time for community linking, but even taking it most favourably to the appellant (all of that time was for real care) it tended to coincide with the surveillance figures. Evidence from Christensen, from the agency actually providing the paid carer, was to the effect that the physical aspects of the appellant's care could be met with 13 hours of paid care per week. In other words two key witnesses called by the appellant on this issue tended to support a much lower figure than was the evidence of Butler as to the actual number of hours care he provided at the home per week, and which it was contended should be the basis of the calculation.

[31] So far as the rate is concerned the figure of $32.60 advanced by the appellant was the highest hourly rate in the range of figures included in the evidence. The figure of $30 selected by the learned trial judge for purposes of the calculation was well within the range established by the evidence.

[32] That leaves for consideration the question of an additional cost of care occasioned by the assumption that the appellant had a child. It was the submission by counsel for the appellant that the court should make a calculation on the basis that the appellant certainly had one child. It was said that adopting that as a certainty, rather than a chance, was offset by the fact that there was a possibility that the appellant would have more than one child. It was contended that the learned trial judge

should have followed the approach of Jones J in *Castro*. The plaintiff in that case had a six year old daughter at the time of the accident; she was aged 11 at trial. Based on what was said to be the approach of Jones J counsel for the appellant placed before this court a calculation supporting an additional $263,205. The calculation assumed the birth of a child on 1 November 2005. Care at the rate of 35 hours per week was then allowed for nine years at the rate of $15 per hour. Thereafter for the next 10 years 20 hours of care at $15 per hour was allowed, and finally for the ensuing five years 15 hours per week was allowed at $15 per hour.

[33] When *Castro* went on appeal the only item of quantum challenged was that for future earning loss; thus this court did not then consider the approach of Jones J to the cost of providing care for the child. The circumstances of this case are so different from those before the court in *Castro* that it is not now necessary for this court to comment on the approach of Jones J therein. Here there is no certainty that the appellant will have a child. The implication in the finding of the learned trial judge quoted above is that if the appellant has a child more likely than not it will be by accident rather than by design. The learned trial judge was clearly correct in making some allowance for the possibility that at some time over the appellant's reproductive lifetime she may have a child. If, for example, that was to occur in 10 year's time any present award would have to reflect the necessary discounting.

[34] Given a finding that the appellant's need for basic care necessitated no more than about 20 hours work from a paid carer, an allowance of 28 hours per week from the date of trial for the balance of the appellant's lifetime adequately incorporates a component for possible child care in the future. The court here is really dealing with chances and with imponderables. Particularly whilst the relationship with her partner continues (absent a child) an allowance of 28 hours per week could well be very generous.

[35] In the circumstances no basis is established for increasing the award under this head as sought by the appellant.

Future Gratuitous Care

[36] In addition to the allowance made by the learned trial judge for future paid care there was a claim by the appellant for future gratuitous care, being care being provided at the time of trial by family members, particular her parents. The claim at trial was for 10 hours per week for 55 years. The learned trial judge concluded that he did "not accept that the evidence establishes a need for almost 1 ½ hours gratuitous care every day, on average." In making that finding he was undoubtedly influenced by the surveillance evidence. Over the three randomly selected weeks of surveillance a total of 4 hours 27 minutes of attendance by family members was recorded; that is an average of 1 hour 29 minutes per week. In evidence the parents did not challenge the surveillance findings. There is force in the submission made by counsel for the respondent that every such attendance was clearly not for the purpose of providing care or assistance to the appellant. Though the learned trial judge did not expressly refer to this evidence, it is clear that some of the assistance rendered by family members prior to trial related to the breakdown of a relationship between the appellant and a male friend. If, as the evidence led at trial would indicate, the current relationship is likely to be a lasting one (though without any guarantee), there will be no specific need in the future for such assistance. The learned trial judge did refer to future need for assistance "for tasks of daily living

including transportation, social activities, gardening, household maintenance and rehabilitation." Ultimately he concluded that future gratuitous care should be assessed on the basis of an average of about three and a half hours per week. That finding is broadly in accord with the evidence given by the appellant's mother.

[37] On the hearing of the appeal counsel for the appellant accepted that the calculation should be based on an allowance of three and a half hours per week. The learned trial judge concluded that "an average rate of $15 per hour is appropriate" for those services and that is the finding which the appellant challenges. Following *Van Gervan v Fenton* (1992) 175 CLR 327 it was submitted that the appellant was entitled to have damages assessed using the market cost of providing the necessary care. The submission both at trial and on appeal was that a rate of $32.60 per hour was appropriate.

[38] In that regard the following observation of the learned trial judge is relevant: "There is no satisfactory basis for thinking that the kind of gratuitous care that will be necessary, having regard to the nature of the tasks to be performed, should be costed at that rate."

[39] In *Van Gervan* there is frequent reference to "the value of services provided", "the proper and reasonable cost of supplying those needs", and "damages are to be calculated by the need for the services". Given the present circumstances observations in the judgment of Mason CJ, Toohey and McHugh JJ at 334 are important. In some cases the market cost may be too high to be the reasonable value of the services. Where there is no relevant market for the services some other method of calculation may have to be employed. The market cost is the cost of providing the particular services needed.

[40] Here, given the fact that the paid carer would provide all the services requiring a particular skill, the needs to be met by family members providing services gratuitously would not require any particular qualification. Further, when one is concerned with the provision of services on an average of three and a half hours per week the engagement of a person through a commercially run care agency is not necessary. The rate of $32.60 per hour referred to by the appellant in submissions includes an agency fee as well as an hourly rate for a trained carer. The learned trial judge adopted an average rate of $15.00 per hour as being appropriate. Undoubtedly he had regard to the evidence that the award hourly rate before tax for a level 1 carer was $18.00 per hour. Given the nature of the unskilled care which the family members would provide the market cost on the evidence would be of the order of $15.00 per hour.

[41] It follows that the learned trial judge was entitled to make the findings which he did and it has not been demonstrated that his calculation of the allowance for future gratuitous care was erroneous.

Orders

The appeal should be dismissed with costs.

[42] **WILSON J:** I agree with the reasons for judgment of Williams JA and with the order he proposes.