SUPREME COURT OF QUEENSLAND

CITATION:	*Kenny & Anor v Eyears & Anor* [2003] QSC 439
PARTIES:	**DEBORAH JOANNE KENNY** (first plaintiff) **and** **JOHN ROBERT KENNY** (second plaintiff) **v** **JAY EARLE EYEARS** (first defendant) **and** **TRANSPORT ACCIDENT COMISSION** (second defendant)
FILE NO:	S9334 of 2002
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	23 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	7 – 8 August 2003
JUDGE:	Philippides J
ORDER:	**Judgment for the first plaintiff against the defendants in the sum of $100,242** **Judgment for the defendants against the second plaintiff**
CATCHWORDS:	DAMAGES – PERSONAL INJURIES – where plaintiff's stationary vehicle struck from behind – where plaintiff suffered injury to her neck and back – assessment of damages DAMAGES – LOSS OF CONSORTIUM *Motor Accident Insurance Act* 1994 (Qld) s 55(1)(a), s 55D(1) *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 *North v Thompson* [1971] WAR 103 *Sharman v Evans* (1977) 138 CLR 563 *Wynn v New South Wales Insurance Ministerial Corporation* 133 ALR 154
COUNSEL:	R Stenson and K Jackson for the plaintiffs M Grant-Taylor and D Schneidenin for the defendants
SOLICITORS:	Murphy Schmidt for the plaintiffs Quinlan Miller & Treston for the defendants

PHILIPPIDES J:

[1] The first plaintiff, Mrs Deborah Kenny, seeks damages for injuries suffered as a result of a motor vehicle accident on 20 October 2000. Mrs Kenny was the driver of a stationary vehicle which was struck from behind, pushing her car into the rear of the truck in front of her. The second plaintiff, Mr John Kenny, seeks damages for loss of consortium. All matters of liability have been resolved, leaving the assessment of damages as the only matter outstanding for determination.

[2] Mrs Kenny, who was born on 4 January 1955, works as a Customer Service Officer with Qantas within the customer service department at the domestic terminal at Brisbane airport and has been employed there for some 29 years.

THE EVIDENCE

Evidence of Mrs Kenny

[3] Following the accident, Mrs Kenny experienced pain in her neck and shoulders, with stiffness through her neck, shoulders and back. The pain in the thoracic back and the lower back continued, with pain experienced across her right shoulder and a burning sensation as well as soreness in her lower back. She experienced a burning sensation in her thoracic area when she bent forward with her hands in front of her. She still had some occasional pain in her neck on movement. Mrs Kenny indicated the lower area around the thoraso-lumbar junction and the upper scapular area to the left of the right shoulder blade as experiencing pins and needles sensations. She also said that when lying on her left side at night, she experienced numbness in her legs. She said that standing or sitting still and lying in bed could cause discomfort, and that sitting still caused stiffness and pins and needles in her thoracic area.

[4] Mrs Kenny considered that for a period the pain affected her ability to relate with customers and people at work. In February 2001 she sought assistance as a result of being depressed and feeling suicidal. Her employer arranged for her to see Dr Steinberg, whose report was tendered at trial. She gave evidence about work-related stressors prior to and after the accident, which was consistent with what Dr Steinberg recorded in his report. She said that she no longer felt that she had any psychiatric symptoms.

[5] She could not remember but accepted, on the basis of medical records, that she had consulted Dr Ruberry, her GP, about back pain in 1997. She conceded that the complaint concerned pain in the lower thoracic spine and progressive pain to the cervical thoracic area. She did not recall telling her GP that she had a long history of lumbar spinal pain, but accepted that she could have said that if it was recorded in his notes. Mrs Kenny could not recall seeing Dr Ruberry in July 2000 complaining of back spasm, but accepted that she had done so and was given a certificate for 2 days off work by him and a referral for physiotherapy. She did recall seeing Mr Hewitt, a physiotherapist, a few times for physiotherapy, and accepted that was in October 2000, only three or four months before her accident.

Medical evidence - orthopaedic injuries

Dr Ruberry's evidence

[6] Dr Ruberry prepared two reports dated 8 May 2001 and 28 March 2002 concerning the plaintiff's injuries. On the day of the accident, Mrs Kenny presented to Dr Ruberry's colleague complaining of a generalised headache, posterior neck and right shoulder pain and right side thoraco-lumbar pain. The X-ray report indicated no acute bony injury, but some limited flexation of the neck and rotary scoliosis was noted. The plaintiff saw Dr Ruberry on 26 October 2000, complaining of right shoulder girdle pain, and right lower back and sacro-iliac joint pain. Treatment included anti-inflammatory drugs and physiotherapy.

[7] The report of 28 March 2002 compiled after a consultation on 14 January 2002 records that Mrs Kenny complained of difficulty standing for long periods secondary to thoraco-lumbar pain; occasional right iliac fossa paresthesia when lying on her left lateral side and shoulder girdle pain, particularly in the left area. She indicated that she did household chores, but that this caused pain. She indicated that she was still taking Vioxx and Tramal.

[8] Dr Ruberry gave evidence of attendances on him prior to the accident. In particular on 7 April 1997, when his attendance note recorded that she "complained of pain to the lower thoracic spine recently. A long history of lumbar spine pain and progressive pain to the cervico-thoracic area. Complaints of work stress, secondary to a new computer at work … referred for an x-ray". Dr Ruberry said that the notation was made on the basis of what he was told by Mrs Kenny. Dr Ruberry was also asked about an attendance noted 10 July 2000 which referred to neck pain and intense spasm. Dr Ruberry said that on this occasion, he gave the plaintiff a certificate for two days off work, a referral to a physiotherapist and a script for non-sterodal anti-inflammatory medication called Vioxx.

[9] Dr Ruberry indicated that when he saw Mrs Kenny on 20 October 2000, it seemed that the complaint of spinal pain and stress seemed interrelated, and that this did not seem to be consistent with a long history of lumbar pain, as reported by Mrs Kenny.

[10] Dr Ruberry last prescribed Vioxx in July 2002, with two repeats. He last prescribed Tramal in March 2003, and Panadine Forte on 16 June 2003.

Dr Gillett's evidence

[11] Dr Gillett, an orthopaedic surgeon, examined Mrs Kenny on 2 October 2001. In his report of 2 October 2001, he stated his opinion that as a consequence of the accident, Mrs Kenny had sustained musculo-ligamentous injuries involving the cervical, thoracic and lumbar spines. He noted symptoms of general pain, pins and needles along the right side of her spine, numbness to the right lower abdomen and right buttock and pins and needles in her foot. Dr Gillett noted that Mrs Kenny had clicking and cracking sensations in her neck, which was painful and tended to lock up, requiring her to move it to free it up. The report also noted that holding her head and neck in one position such as is required for computer work caused pain and discomfort. Dr Gillett reported that Mrs Kenny complained of some mid and lower back pain which she noticed

particularly in half bent situations. Lifting and sitting in one place for long periods of time could also aggravate her pain. Dr Gillett's examination revealed no signs of abnormal illness or overstatement of symptoms. Dr Gillett considered that ongoing management of Mrs Kenny's condition involved the passage of time, and maintaining an exercise and strengthening regime.

[12] Dr Gillett considered that Mrs Kenny would be able to continue employment until normal retirement age, though modification of how certain activities were done might be required. In his report, Dr Gillett stated that ironing, vacuuming, food preparation and car cleaning were all activities that would produce pain, and that it was reasonable that Mrs Kenny get some assistance with respect to domestic duties in order to ameliorate the pain. However, he also conceded that an alternative was for the tasks to be done in a modified manner, by taking longer to complete the tasks and taking rests.

[13] Dr Gillett reported that Mrs Kenny had some pre-existing degenerative changes in the areas of her spine, which he regarded as minor. Dr Gillett considered that the effect of the accident was to "produce injury, aggravate and overall make the degenerative changes worse". In his letter dated 11 June 2002, Dr Gillett assessed these degenerative changes as causing a 2% impairment of bodily function, while the accident had caused an impairment of bodily function of 6%, resulting in an 8% total impairment of bodily function. In his report, he indicated that Mrs Kenny may have developed symptoms in all areas of her spine over the next five to seven years from the date of the report (i.e. by 2006-2008), but in general terms the effect of the accident had been to produce injury and make it worse. In cross-examination, Dr Gillett conceded that even without the accident, by 2007 Mrs Kenny would have had problems associated with her spine, which would have affected her ability to do the day to day activities mentioned in the report.

[14] Dr Gillett had been unaware of Dr Ruberry's note of Mrs Kenny's complaint in 1997 of a "history" of back complaints when he compiled his report. Nor was he aware of the further episode in July 2000. However, he considered the latter must have been a relatively mild episode, given that it apparently only resulted in 2 days off work. Dr Gillett stated that these matters did not cause him to alter his views, which he considered were consistent with the known pattern of degeneration of the spine, which would manifest itself from time to time.

Dr Parkington's evidence

[15] Dr Parkington, a consultant orthopaedic surgeon, examined Mrs Kenny on 18 July 2002. In his report of 29 July 2002, he noted Mrs Kenny's symptoms as:

1. Interscapular pain.
2. Pins and needles in the right big toe, but this did not start immediately after the road traffic accident.
3. A clicking sensation in the lower back.
4. Catching of the neck on rotation at times.

[16] Dr Parkington's examination revealed no tenderness of the back. There was full extension and ability to flex forward hands to touch her toes and normal thoracic rotation which was pain-free. However, when lying supine, she preferred to draw her knees up for comfort in her lower back, which indicated lumbar pain. Dr Parkington's evidence was that even if Mrs Kenny had suffered musculo-ligamentous injury with no neurological compromise, she would not suffer from paresthesia of the lower limbs

(pins and needles sensation). He conceded that a burning sensation intrascapularly is not necessarily emotionally based, and that this can be due to localised discomfort.

[17] Dr Parkington stated that Mrs Kenny had some age-related cervical spondylosis, but that her x-rays of 26 October 2000 showed an excellent range of movement of the cervical spine, indicating that she did not have pain and associated muscle spasm with restriction of movement when the x-rays were taken six days after the accident. Dr Parkington's opinion was that Mrs Kenny's continuing symptoms were due to the effects of age-related degenerative disease in both the cervical and lumbar spine. He considered that Mrs Kenny had fully recovered from the physical effects of the accident. Dr Parkington therefore concluded that any continuing discomfort was not due to the accident and that the changes in the lumbosacral spine were pre-existing. Dr Parkington reported that Mrs Kenny had denied any previous history of her current complaints. He was not told by Mrs Kenny that she visited her GP complaining of neck spasm in July 2000, a complaint which Dr Parkington considered was evidence of a pre-existing degenerative disease.

Mr Bishop's evidence

[18] Mr Bishop, a physiotherapist, saw Mrs Kenny after the accident, initially on 27 October 2001, and subsequently on a further 22 occasions, as well as an additional four hydrotherapy sessions. He said that Mrs Kenny struck him as motivated to improve. Initially, Mrs Kenny complained of pain and stiffness in her cervical spine, thoracic spine and lumbar spine. Although the report recorded that Mrs Kenny had been treated for neck and back pain 3 to 4 years previously, it mentioned that the symptoms had been mild and settled quickly with treatment, and made no mention of the incident in July 2000.

[19] The report noted Mr Bishop's initial findings as:

1. Lumbar spine flexation was painful but not limited.
2. Lumbar spine extension was very painful at the limit of movement.
3. Cervical spine rotation was limited to ¾ normal range by pain and stiffness bilaterally.
4. Cervical spine extension was limited to ½ normal range by pain.
5. Cervical spine flexion was not affected.
6. Thoracic spine rotation was limited to ½ the normal range by pain bilaterally.
7. Cervical spine palpitation showed tenderness at all cervical levels.
8. Lumbar spine palpitation revealed tenderness at all levels.

[20] The report noted that active treatment was an exercise program for 3½ months, followed by a modified program for a further three months. In the report, Mr Bishop noted that further time off work would have most certainly have been incurred had Mrs Kenny not taken annual leave to access further treatment. Mr Bishop said that this was because Mrs Kenny had found her workday had become quite painful and irritable, to the point where she had difficulty moving, and had to go home to rest after work.

[21] The report noted a gradual decrease in pain and stiffness, and by 15 December 2000, Mrs Kenny had ceased the use of pain-killers, but continued to take anti-inflammatory medication. Treatment was ceased in December and a hydrotherapy exercise program was commenced. Mrs Kenny was given a set of exercises to complete in her own time two to three times per week until March, when Mr Bishop performed a final review.

Mr Bishop's report noted that in March 2001 Mrs Kenny reported an increase in pain which she felt was due to stress, however, her range of movement had improved. A new 6 month home exercise program was devised.

Medical evidence - psychiatric symptoms

Dr Steinberg's evidence

[22] Dr Steinberg, a consultant psychiatrist, prepared a report on 4 April 2001, outlining the work-related and non-work related stressors described by Mrs Kenny whom he saw on 26 March 2001, on referral from her employer following an incident in February 2001, when Mrs Kenny felt distressed and tearful, with some suicidal thoughts. She was able to see a social worker at the Employee Assistance Program and also saw her GP, who placed her on leave form work. Mrs Kenny saw her manager as recommended by the social worker, which resulted in a successful meeting, in that a number of her work concerns were addressed.

[23] In respect of work-related stressors, reference was made to an incident three years earlier, when Mrs Kenny had reported a co-worker for harassment of another employee. Mrs Kenny considered that she had been humiliated over the incident and not supported by management. Dr Steinberg considered this incident was a vital stressor affecting her condition. A second work-related stressor identified by Dr Steinberg was the accident in October 2000. Dr Steinberg noted that her back pain had clearly debilitated her and this caused some feelings of mild depression. However, Dr Steinberg said that Mrs Kenny had told him that the rehabilitation she undertook for her back condition had been effective, and that he thought it may have improved her overall situation. The report also noted that after returning to work in late January 2001, Mrs Kenny felt stressed by her workload and a number of events that occurred in her workplace.

[24] Dr Steinberg's report listed certain non-work related stressors around the time of the report being Mrs Kenny's stepmother having cancer, her husband's financial decline, her father developing symptoms of dementia and her uncle being ill. Dr Steinberg noted that there was marital disharmony between Mrs Kenny and her husband which led to a short separation.

[25] Dr Steinberg concluded that Mrs Kenny suffered from a diagnosable psychiatric condition, that is, "adjustment disorder with depressed mood – acute", the primary symptoms of this disorder being an emotional response to a stressful situation. Dr Steinberg's opinion was that Mrs Kenny had a number of stressors in her work and personal life, and that her back injury, which caused her to take time away from work, decreased her functioning significantly. Dr Steinberg concluded that it was a combination of this back injury and its subsequent pain in combination with the stressful events in her personal life that contributed to her reduced capacity to cope with the stressors that occurred in her workplace. The report noted that Mrs Kenny's belief that she was unsupported at work by management regarding the harassment claim was a significant feature that contributed to her depressed mood.

[26] Dr Steinberg's evidence was that the condition of adjustment disorder with depressed mood could be a multifactorial condition in terms of the etiology of precipitating factors. He saw the condition arising out of multiple events which had happened in her life, the back injury being one. However, Dr Steinberg said that there was a

probability of Mrs Kenny developing an adjustment disorder, regardless of her back injury, when combined with the number of other stressors she had in her life. Dr Steinberg was asked whether, if the back injury was removed from the history, it was probable that Mrs Kenny would have decompensated anyway as a consequence of the other stressors. Dr Steinberg's response was: "I can't say for certain whether she would have decompensated, but she would have been at an increased risk of developing an adjustment disorder". Dr Steinberg was pressed on whether it was more probable, hypothetically speaking, of Mrs Kenny decompensating because of the combined effect of the other stressors. His response was: "… there is a probability of her developing an adjustment disorder given the number of stressors she had in her life".

Dr Geffen

[27] Dr Geffen was Mrs Kenny's psychiatric consultant, whom she saw on a number of occasions in 2001. Dr Geffen did not give oral evidence, however his report dated 29 March 2001 was tendered. It made no mention of the accident or any back injuries arsing from it as relevant to her psychiatric symptoms. It stated:

> "Although her initial presentation was dramatic (suicide note) she does not meet full criteria for major depression (low mood is not persuasive or sustained and there is little neurovegetative disturbance). She has a number of continued stressors at present:
>
> - Conflict with her employer over work stress
> - Father has early dementia and step mother has breast cancer
> - Relationship issues prominent since her husband has been self employed at home
> - Loss of two close friends (one to cancer and one in an MVA)
>
> Furthermore she is now the same age as her mother was when she was killed in an MVA. She has chosen not to have children and "never expected to live longer than mum". Thus she presents with a number of existential issues in the setting of adjustment difficulties and multiple concurrent stressors".

Evidence as to economic loss

Evidence of opportunity for overtime

Mrs Kenny's evidence

[28] Mrs Kenny's evidence was that prior to the accident, she undertook overtime both discretionary (planned) and non discretionary (ad hoc). She said that she performed discretionary overtime on a regular basis, usually between 5 and 10 hours weekly. Mrs Kenny accepted the following calculations of her average hours of weekly overtime:

1997 financial year: 5 hours
1998 financial year: 3.5 hours
1999 financial year: 2 hours
2000 financial year: 1 hour

[29] Mrs Kenny indicated that the reason that there was a decrease in the overtime that she worked in the 1998/1999 year was that she had two lots of annual leave that fell in the

same fiscal year, and that the decrease in 1999/2000 year was due to time spent training in the international terminal in addition to her holidays.

[30] She said that all of the overtime payments since her accident were for non discretionary overtime. She said that overtime had continued to be available since her accident, and had she felt able to do it, she would have continued to work the same amount of overtime as before the accident. Mrs Kenny said that by the end of the day, her discomfort level was such that she could not undertake any discretionary over time. Mrs Kenny also said that the discretionary overtime available to her was generally as a check-in agent, which required her to check passengers and their luggage into the computer. She said that because this involved very little movement and considerable lifting, this type of work would cause her pain.

[31] Mrs Kenny's evidence was that prior to the accident, about 70% of her overtime was non discretionary. In re-examination Mrs Kenny said that if able, she would do 70% discretionary overtime.

Mr Bourke's evidence

[32] Alan Bourke, a human resources manager for Qantas Airways, gave evidence concerning the two types of overtime offered by Qantas. Mr Bourke said that discretionary overtime was allocated on the basis of employees putting their names on a list detailing the extra hours that they wished to work. Mr Bourke said that although a person in Mrs Kenny's position would be required to perform non-discretionary overtime, discretionary overtime was a matter of choice for her.

[33] On the basis of a table of Mrs Kenny's earnings between 1997 and 2001 (exhibit 7) Mr Bourke calculated the number of hours of overtime performed by Mrs Kenny as follows:

1996/1997 - 250 hours
1997/1998 - 175 hours
1998/1999 - 106 hours
1999/2000 - 48 hours
2000/2001 - 62 hours
July 2001/October 2001 - 20 hours

[34] Mr Bourke calculated the following hours of overtime worked in 2001 to 2003:

2001/2002 - 96.41 hours
2002/2003 - 68.65 hours

[35] Mr Bourke gave three reasons for the reduction in overtime hours in the financial year 1999/2000. Firstly, during this period Mrs Kenny worked in the international terminal for four months, and would not have had the skills to perform overtime there. Mr Bourke agreed that there was a possibility that Mrs Kenny could be called back to the international terminal as a trained person. In this situation, overtime would be available to her, although, because of the time lapse, a refresher course might be required, which may not take as long as the initial training period. Secondly, Mr Bourke's evidence was that Mrs Kenny had taken 10 weeks annual leave during that period. This was based on information he had obtained from the payroll department and had confirmed in a letter written by Mr Bourke to Murphy Schmidt on 12 December 2001. However, when shown Mrs Kenny's annual leave records, Mr Bourke conceded that it was incorrect that Mrs Kenny had taken 10 weeks annual

leave that year, and in fact she had only taken 28 days. Mr Bourke agreed that once other leave entitlements were taken into account (such as 20th day leave, sick leave, public holidays), Mrs Kenny had a total of 49 days leave during this period. Thirdly, Mr Bourke said that it took some time for an employee's name to appear on the overtime list once they returned from leave, as discretionary overtime was allocated well in advance. He accepted that there was nothing to stop an employee from contacting Qantas during their holidays telling them to add their name to the list before they returned to work.

[36] Mr Bourke stated that as at December 2001 overtime was available as a result of the Ansett collapse. The overtime available around this time was a mixture of discretionary and non discretionary overtime, but mainly discretionary overtime. His evidence was that currently, there was still plenty of overtime available due to changes in flight schedules and staff calling in sick. He said that he expected that this would continue in the future.

[37] Mr Bourke prepared a document comparing Mrs Kenny's overtime for the year ending 30 June 2003 with five other employees at the same level as her (exhibit 12). His evidence was that the records indicated that Mrs Kenny was performing the least amount of overtime of all of the 16 employees at her level. However, Mr Bourke conceded that it was possible that the five other employees mentioned in the table also worked more overtime between 1997 and 2002 than Mrs Kenny. I do not consider the document to be of any real assistance in the assessment of lost overtime.

Evidence as to loss of opportunity for promotion

Mrs Kenny's evidence

[38] In addition to working in her current position as a Customer Services Officer, a level 5 position, Mrs Kenny also acts in a level 8 position, usually twice a year for five week periods to cover other employee's holidays.

[39] Mrs Kenny's evidence was that the position of Airport Operations Controller, a level 10 position, became available in early 2001, but that she did not apply for that position, because at the time, she did not feel confident in doing the job. She said that her confidence had deteriorated as a result of an episode in February 2001, when she "treated passengers badly" and became upset. Mrs Kenny said that the person who was appointed to the position was a woman of a similar age and position to herself. She was unaware of any circumstances whereby a level 10 position was likely to become available, except natural attrition or restructuring.

Mr Bourke's evidence

[40] Mr Bourke gave evidence that Mrs Kenny's job as a level 5 Customer Service Officer attracted a base rate of about $41,000 per annum. He said that Mrs Kenny had been called on to relieve in a level 8 position as a Port Co-ordinator, and managed the performance of that task very well. The base rate for a level 8 position was $51,000. However, he said that the likelihood of a level 8 position arising was "very remote".

[41] Mr Bourke also gave evidence that the position of Airport Operations Controller, a level 10 position, had become available after the accident. His evidence was that when the position became available, he discussed it with Mrs Kenny, but that Mrs Kenny

said she did not feel capable of applying for the position because of her injuries. Mr Bourke's recollection was that the position became available in February or March 2002. He was unable to comment on whether the position became available in early 2001, and had been refused by Mrs Kenny on account of the stress episode at that time. Mr Bourke conceded that on this matter, reliance ought to be placed on Mrs Kenny's recollection.

[42] Mr Bourke's evidence was that had Mrs Kenny applied for the position when it became available, she would have had a 90-95% chance of success. Mr Bourke's evidence was that there was no likelihood that the position of Airport Operations Coordinator would be offered again in the next 10 to 15 years. An Airport Operations Coordinator earned about $64,000, which was about $23,000 (not including shift penalties and overtime) more than Mrs Kenny earned as a Customer Service Officer.

ASSESSMENT OF DAMAGES

Damages for pain, suffering and loss of amenities

[43] Mrs Kenny claims $35,000 in general damages, and $1,100 interest for past general damages (2% on $15,000). On behalf of the defendants, it was submitted that an award of $20,000 should be made for this head of damage, with an interest component of $1,100.

[44] It was submitted by the defendants that Dr Parkington's opinions concerning Mrs Kenny's orthopaedic injuries ought to be preferred over Dr Gillett's. Emphasis was placed on Mrs Kenny's failure to disclose her previous back complaint in April 1997 as being made in the context of a complaint of a "long history" of back pain, and her failure to make mention of the July 2000 episode, both of which, it was said, went to confirm Dr Parkington's views. The defendants argued that Mrs Kenny's failure to disclose to Doctors Gillett and Parkington the July 2000 episode was particularly significant and called Mrs Kenny's creditworthiness into question. The defendants submitted that damages ought to be awarded on the basis that Mrs Kenny had made a complete recovery from her injuries and that any residual pain and impairment was due to an age-related degenerative condition.

[45] I accept Dr Gillet's opinion that while Mrs Kenny has a pre-existing degenerative condition, that the injury has impacted to the extent of a 6% impairment of bodily function. I also accept his opinion that while the accident aggravated Mrs Kenny's pre-existing condition, she would in any event have experienced problems with her spine by about 2007, resulting in similar day to day difficulties as was currently experienced.

[46] In respect of Mrs Kenny's psychiatric symptoms, Dr Geffen made no mention in his report of the accident as a contributing factor. It was argued by the defendants that any psychiatric injury for which she claimed was not recoverable on the basis of Dr Steinberg's evidence. It was submitted by the defendants that his evidence on cross-examination indicated even in the absence of the accident, Mrs Kenny would, on the balance of probabilities, have psychiatrically decompensated as she did in February 2001. Dr Steinberg's evidence was that the plaintiff was at "increased risk" of decompensating and that there was "a probability" of this occurring in any event because of the other stressors that were present in her life. In those circumstances,

some, albeit substantially discounted, allowance ought to be made for the claim for psychiatric injury.

[47] In the circumstances, I consider that an award of $28,000 is a sufficient compensation for general damages, in respect of which an interest component of $1,000 should be added.

Assessment of past economic loss

[48] A claim for past economic loss is made on the basis of:

(a) Loss of leave entitlements of $10,261.82 for the period from 20 October 2000 to 20 January 2001;
(b) Lost overtime of $30,000;
(c) Loss of increased earnings of $22,500 from loss of opportunity for promotion to the level 10 position.

Compensation for reinstatement of leave entitlements

[49] The only claim made for the period from the date of the accident on 20 October 2000 to Mrs Kenny's initial return to work on 20 January 2001 is in the amount of the leave entitlements taken of $10,262. No claim for lost wages is made. Mrs Kenny's evidence was that prior to the accident, she had made arrangements to take her annual leave in November 2000 and some additional long service leave thereafter. The claim of $10,262 for reimbursement of leave entitlements for this period (sick leave, 20th day entitlements, annual leave and long service leave) is based on exhibit 13, a memo dated 29 May 2001 from Mr Bourke concerning the breakdown of leave paid over that period. According to the memo, the amount of $10,262 is calculated as follows:

(a)	Annual leave	$2,724.82
(b)	Sick leave	4,147.19
(c)	20th days	1,238.93
(d)	Long service leave	2,150.88

[50] According to the document, if these payments were reimbursed to the employer, then the employer would re-credit the entitlements to Mrs Kenny. There was no evidence to the contrary.

[51] The defendants maintained that Mrs Kenny is not entitled to be compensated for these entitlements because to do so would be double dipping, in that she would be reinstated for benefits that were allowed to her for the purpose for which she took the benefits. Further it was argued that Mrs Kenny conceded that her annual leave and long service leave was pre-arranged prior to the accident and as such, even if it were accepted that she was entitled to recover those benefits by way of private arrangement with her employer, she should not be entitled to recover the benefits on this occasion, given the pre-arrangement. I accept that although Mrs Kenny had prearranged to take annual and long leave for part of the period in question, that period of leave was in fact spent in recuperation and rehabilitation.

[52] As regards the sick leave payments, counsel for the defendants argued that no allowance should be made, referring to Luntz: *Assessment of Damages for Personal Injury and Death* (3rd ed, at para 8.3.2). Decisions such as *Graham v Baker* (1961) 106 CLR 340 require that there be a set off against a claim for loss of earning capacity of any payments received by the plaintiff as ordinary wages. However, the High Court in

that case also observed (at 351) that in an appropriate case, the extinguishment or diminution of sick leave credits may result in damage. In the present case, Mrs Kenny's employer has agreed to re-credit the sick leave, and I accept that Mrs Kenny has in the circumstances suffered compensable loss.

[53] As regards the annual leave and long service leave taken by Mrs Kenny, counsel for the defendants referred to the authorities mentioned in Luntz: *Assessment of Damages for Personal Injury and Death* (3rd ed, at para 8.3.5). The authorities demonstrate a difference of opinion as to the credit to be given to a plaintiff who has used such entitlements during a period of disability. On one view, full compensation should be made as part of a plaintiff's special damages. On the other view, compensation should instead be allowed for loss of enjoyment of the leave as part of the plaintiff's general damages. In the circumstances of this case, I am prepared to adopt the approach taken by the majority in *North v Thompson* [1971] WAR 103 at 105 and permit recovery of the full amount of the leave.

[54] The defendants also submitted, relying on *Wynn v New South Wales Insurance Ministerial Corporation* 133 ALR 154 and *Sharman v Evans* (1977) 138 CLR 563, that if Mrs Kenny were entitled to recover for this period, her savings in respect of travelling to and from work during the relevant period should be offset against any award. There was no dispute that the amount of such savings is $2,188.25.

[55] On the view that I have taken, it is appropriate that Mrs Kenny is compensated for the period from 20 October 2000 to 20 January 2001 by reimbursement of the entitlements of $10,262. However, I accept the defendants' submission that it is also appropriate to make a deduction for saved expenses of $2,188.25. This results in an award of $8,074.

Assessment of loss of overtime

[56] A claim is made by Mrs Kenny for $30,000 for lost discretionary overtime from 20 October 2000. Counsel for Mrs Kenny indicated that this was based on a claim for 7 hours overtime per week at $30 per week over a period of 146 weeks. The claim for 7 hours overtime per week is based on an average the 5 to 10 hours of weekly discretionary overtime which Mrs Kenny claimed she worked before the accident and which she said she would have continued to work but for the accident. The hourly rate of $30 is based on Mr Bourke's evidence of the overtime rate of $46 per hour, after deducting one third for tax. Counsel indicated that no deduction had been made for the period from February 2001 to August 2001, during which period Mrs Kenny was away from work because of psychiatric problems, and in respect of which the defendants contend Mrs Kenny's absence was non-compensable.

[57] Counsel for the defendants conceded that Mrs Kenny was entitled to be compensated for loss of discretionary overtime, but argued that an appropriate award was $2,000, being 122 weeks at $32.50 per hour for ½ hour overtime per week. Excluded from that calculation was the period from February to August 2001. The calculation of ½ hour of lost overtime per week is based on the premise that, of the total overtime worked by Mrs Kenny before the accident, only 30% was discretionary overtime. The defendants referred to Mrs Kenny's evidence given under cross-examination that the proportion of non-discretionary to discretionary overtime worked by her prior to the accident was 70% non-discretionary and 30% discretionary. The defendants submitted that on re-examination, Mrs Kenny stated that the proportion was in fact the reverse, and that this indicated "confusion and indecisiveness" on her part as to the nature of her pre-

accident overtime, such that by the principles of onus of proof alone, the finding ought to be that the proportion of non-discretionary overtime was 70% with the discretionary overtime being 30%.

[58] The defendants' calculation of ½ hour of lost overtime per week is reached by calculating 30% of the pre-accident overtime for a given year and comparing it with a post-accident year to reach a net overtime loss and then taking a median of the net figures. Taking the best year for overtime worked by Mrs Kenny before the accident being 1997, when 250 hours were worked, counsel indicated discretionary overtime was calculated as 75 hours per year (30% of 250 hours). Likewise, counsel indicated taking 30% of the best year post-accident was 2003, when 68.65 hours was worked, resulted in 20 hours and a net loss of 55 discretionary hours per year or about 1 hour per week. When the same exercise is done for comparing the 52.5 hours of discretionary overtime in 1998 (30% of 175 hours) with the 27.3 hours for 2002 (30% of 91.46 hours) a net loss of 25 hours overtime is arrived at. The ½ hour per week figure is taken as a median figure.

[59] I accept the defendants' submission that any calculation of lost overtime should proceed on the basis that prior to the accident only 30% of the overtime worked by Mrs Kenny was discretionary. Her evidence on this matter in cross-examination was clear. I do not consider that her re-examination was to the contrary. In re-examination, the question which Mrs Kenny was asked was: "what percentage discretionary overtime would you do compared with non-discretionary overtime if you were able?" Mrs Kenny replied "I would say 70 per cent". That evidence merely indicated the amount of discretionary overtime that Mrs Kenny would have wished to have worked if she were able to. It does not contradict her earlier evidence that prior to the accident Mrs Kenny's mix of overtime was 70% non-discretionary and only 30% discretionary. Furthermore, given that history, I am unable to accept that there would have been a reversal of the proportion after the accident had Mrs Kenny not been injured.

[60] As regards the position post-accident, Mrs Kenny's evidence, which I accept, was that since the accident, she has only worked non-discretionary overtime, that is, overtime which she is obliged to do. It is therefore not appropriate to take into account any figure calculated as 30% of the post accident overtime as being the current discretionary overtime worked.

[61] The evidence indicates that in Mrs Kenny's best year prior to the accident, 1996/1997, she worked 75 hours of discretionary overtime (1.4 hours per week). On this basis, Mrs Kenny's loss over the period from October 2000 to December 2003 is $7,553 (1.4 hours per week at $32.50 × 166 weeks). However, a discount of 20% ought to be made for the fact that the most favourable year is used in the calculation, for contingencies, including the fact of Mrs Kenny's pre-existing condition and taking into account the likelihood of Mrs Kenny developing the psychiatric symptoms from which she suffered in 2001. This results in an amount of approximately $6,042.

Assessment of loss of opportunity for promotion

[62] A claim for damages of $22,500 was made for the loss of opportunity for promotion to the level 10 position, resulting in loss of the chance of increased wages. Counsel for the plaintiff indicated that the claim is based on a loss of $15,000 per annum ($23,000 less ⅓ for tax). Counsel also indicated that the claim was only made from February

2002, based on Mr Bourke's evidence as to the time when the level 10 position was available.

[63] I prefer Mrs Kenny's evidence as to when the position became available, that is in February 2001. That is accordingly, the relevant period for consideration of the loss of opportunity.

[64] The defendants submitted that no compensation should be allowed for this claim because, on Dr Steinberg's evidence, it was more probable than not that Mrs Kenny would have decompensated as she did in 2001, in any event. However, that approach was specifically rejected in *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638, where it was said (at 643):

> "If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. The probability may be very high – 99.9 per cent, or very low – 0.01 per cent. But unless the chance is so low it is to be regarded as speculative – say less than 1 per cent – or so high as to be practically certain – say over 99 per cent – the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability."

[65] Mrs Kenny's loss of opportunity to become a level 10 Airport Operations Controller must therefore be assessed in accordance with the principles in *Malec*. Mr Bourke's evidence was that Mrs Kenny had a 90 – 95% chance of obtaining the level 10 position. The position was refused by Mrs Kenny in February 2001 because of her psychiatric condition. There was no evidence that the position was available subsequently.

[66] The question arises as to the probability that irrespective of the accident, Mrs Kenny would have developed the psychiatric disorder in any event because of the other stressors present at that time. Dr Steinberg opined that there was "a probability of it occurring" in any event. Dr Steinberg's evidence was that it could not be said for certain that she would have decompensated in any event. That is, it was not a case where there was a 100% probability of the event occurring in any event. His evidence as to the probability was that Mrs Kenny was at "high risk". There was no specific figure placed on what that "high risk" was. But doing the best one can with the evidence, I consider it is not inappropriate to conclude on the basis of his evidence that there was a chance somewhere in the vicinity of 75% - 85% that Mrs Kenny would have suffered the psychiatric symptoms she experienced in February 2001, so that she would not have been in a position to accept the promotion in February 2001.

[67] I therefore only allow 20% of the claim of loss of opportunity for promotion and consequent loss of opportunity to earn increased wages. This results in an award of $9,000, being 20% of $45,000 (for 3 years from January 2001 to December 2003). I make the allowance from January rather than February when the decompensation

occurred as the evidence indicates that the position was on offer in early 2001 and before the episode in February.

[68] The total amount awarded for past economic loss therefore is $23,116:

- compensation in respect of period during which leave entitlements taken $8,074
- loss of opportunity for overtime 6,042
- loss of opportunity for increased earnings in respect of promotion 9,000

Interest on damages for past economic loss

[69] Interest is to be awarded at 2.6% (see s 55(1)(a) *Motor Accident Insurance Act*) on the amount of $14,116 ($8,074 and $6,042) for 38 months which yields $1,178 and on $9,000 for 3 years yielding $702. The total award for interest is therefore $1,880.

Future economic loss

Assessment of loss of opportunity for promotion

[70] No claim was made for loss of future overtime. Rather, counsel submitted that the matter of future economic loss was made on the basis of a claim for loss of earning capacity in the amount of $135,000 ($288 per week for 12 years). In addition, on the basis of Mr Bourke's evidence, a claim is made for loss of superannuation of $28,350 (18% of $157,500).

[71] On the basis of what I have stated above, I make an allowance for loss of opportunity for promotion on the footing that there was only a 20% chance of Mrs Kenny being in a position to accept the promotion in February 2001 and consequent increased wages. Compensation for loss of that opportunity is assessed as $27,000. I do not consider that any account can be taken of the chance of Mrs Kenny being promoted to a level 8 position, given that Mr Bourke referred to the chance of such a position arising as "very remote". An allowance for loss of opportunity for increased superannuation is assessed as $5,670.

Care Allowance

[72] Mrs Kenny gave evidence that before she was involved in the accident of October 2000, she and Mr Kenny had a cleaner come to their house, but the cleaner left a couple of years before the accident, and Mrs Kenny was unable to find a suitable replacement, so she then undertook the cleaning of the house herself. Mrs Kenny said that she had not been motivated to look for a cleaner since her accident. Mrs Kenny's evidence was that she cleaned the shower screens, basins and toilet and Mr Kenny cleaned the floors. She said that she could prepare meals, make beds, do general cleaning, shopping and ironing, but that these all caused her some degree of pain. Mrs Kenny said that her husband did the beds and that she had difficulty with food preparation in that bench work caused her such pain that she needed to take medication. Mrs Kenny's evidence was that before her accident, she would wash her car and Mr Kenny's car, but since the accident she found that she could not do so. She said that she now takes them to a car washing service.

[73] Mr Kenny's evidence was that prior to the accident of October 2000, Mrs Kenny predominantly looked after the housework, which included tasks such as the cooking, ironing, shopping, bed making, vacuuming, sweeping and cleaning of the house. Mr

Kenny said that while he had noticed an improvement in Mrs Kenny's condition, it had levelled such that she is only able to help with domestic duties sporadically. He said that he did 80 -100% of the household tasks, depending on Mrs Kenny's condition and capability and that this averaged at 2 to 3 hours per week.

Assessment – past care

[74] A claim is made for $6,480 (144 weeks x 3 hours per week x $15 per hour, with interest thereon of $544 (3% for 2.8 years).

[75] Section 55D(1) of the *Motor Accident Insurance Act* 1994 provides:

> "**Damages for Gratuitous Services**
> s 55D(1) Damages are not too be awarded for gratuitous services unless –
>
> (a) the services are necessary; and
> (b) the need for the services arose out of the personal injury suffered by in the motor vehicle accident"

[76] The defendants submitted that no allowance should be made for gratuitous services on the basis that it had not been shown that the services were necessary. Counsel on behalf of the defendants submitted that it was not sufficient that the provision of the services was reasonable, what was required was that they were also necessary. In the present case, counsel pointed to Dr Gillet's evidence. Dr Gillett's evidence was to the effect that while it was reasonable for Mrs Kenny to call on others to assist her with certain tasks, given that they caused her pain, it was also an option that she modify her habits, by taking longer to do the tasks and taking breaks, so as to ameliorate the pain. His evidence was that if that approach was taken it "may" obviate the need for assistance. Dr Gillett's evidence was not as unqualified, as counsel for the defendants submitted.

[77] Whilst regard must be had to the evidence that an adjustment in the manner tasks were performed would assist Mrs Kenny, given her evidence and that of Dr Gillett, I nevertheless consider that some allowance ought to be made in recognition of the fact that even after modifying her behaviour, some tasks cannot be performed because they are too painful.

[78] Taking a broad brush approach, I allow 1.5 hours per week at $15 per hour for 164 weeks, which yields $3,690. I also allow interest of $328 ($3,690 at 3%).

Assessment – future care

[79] A claim is made for future care of $30,000 (20 years x 3 hours per week x $15 per hour). Given Dr Gillett's evidence, it is not appropriate to make any allowance beyond 2007, by which time he considered that Mrs Kenny would have experienced her current difficulties in any event.

[80] Again, taking a broad brush approach, I allow 1.5 hours per week at $15 per hour for 4 years (189.6 multiplier) = $4,266.

Past and future expenses

Assessment of special damages

[81] A claim is made for medical expenses of $798.00 (see exhibit 8), travelling expenses which are agreed at $200 and for pharmaceutical and other expenses of $3,444.35 (see exhibit 9). As to the claim for $3,444.35, apart from pharmaceutical expenses, it is comprised of claims for:

car cleaning from July 2002 to May 2003	$588.10
ironing	35.00
therapeutic massages	799.50

[82] Mrs Kenny stated that she took medication daily for pain relief, (one Vioxx tablet for tissue inflammation, and up to six Panadine tablets) and Tramal depending on the severity of her pain. However, there was no evidence that she had obtained a script for Vioxx from Dr Ruberry since July 2002. I also note that there is no claim made for Vioxx after July 2002. There was no scientific evidence to support the need for massages, although Dr Gillett stated that in some individual cases it was beneficial.

[83] Taking a broad brush approach, I allow $1,500 which includes the claim for medical expenses of $798 and the travelling expenses agreed at $200 and a component for interest at 2.6% (see s 55(1)(a) *Motor Accident Insurance Act*).

Assessment of future expenses

[84] A claim is made for future expenses of $10,000 for car detailing, massage and pharmaceuticals. I note that given Dr Gillett's evidence, the allowance should only be made for the period up to 2007. Mrs Kenny's claim that she presently takes Vioxx was not supported by any independent verification. Taking a broad brush approach, I allow $3,792 under this head ($20 over 4 years).

Conclusion

[85] Accordingly, I award damages of $100,242 as follows:

Pain and suffering and loss of amenities	$ 28,000
Interest	1,000
Past economic loss	23,116
Interest	1,880
Future economic loss	27,000
Future superannuation	5,670
Past care	3,690
Interest on past care	328
Future care	4,266
Special damages including interest	1,500
Future medical expenses	3,792

Loss of consortium claim by Mr Kenny

[86] The evidence of both Mrs Kenny and her husband was that since the accident, there had been a change in their sexual relationship. Section 55C(1)(b) of the *Motor Accident Insurance Act* 1994 precludes the award of damages for loss of consortium

unless general damages for the injured person are assessed at $30,000 or more. In the present case, this threshold criterion is not met. Therefore there can be no award for Mr Kenny's claim.

[87] I shall hear the submissions as to costs.