SUPREME COURT OF QUEENSLAND

CITATION:	*Theden & Anor v Nominal Defendant & Ors* [2005] QCA 236
PARTIES:	**THEKLA CHARLOTTE THEDEN** (first plaintiff/first respondent) **ULRICH THEDEN** (second plaintiff/second respondent) **v** **NOMINAL DEFENDANT** (first defendant/appellant) **STATE OF QUEENSLAND** (second defendant/third respondent) **THE COUNCIL OF THE SHIRE OF COOK** (third defendant) **THEKLA CHARLOTTE THEDEN** (first plaintiff/appellant) **ULRICH THEDEN** (second plaintiff) **v** **NOMINAL DEFENDANT** (first defendant/first respondent) **STATE OF QUEENSLAND** (second defendant/second respondent) **THE COUNCIL OF THE SHIRE OF COOK** (third defendant/third respondent)
FILE NO/S:	Appeal No 8936 of 2004 Appeal No 9069 of 2004 SC No 63 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury - Liability only Personal Injury - Quantum only
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	28 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	9 May 2005
JUDGES:	McMurdo P, Muir and Wilson JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. In Appeal No 8936 of 2004: Appeal of the Nominal Defendant dismissed. Nominal Defendant pay one half of**

the State of Queensland's costs of and incidental to the appeal
2. In Appeal No 9069 of 2004: Appeal of the first plaintiff/appellant dismissed. The first plaintiff/appellant pay one half of the State of Queensland's costs of and incidental to the appeal

CATCHWORDS: TORTS – NEGLIGENCE – STANDARD OF CARE – where first respondent suffered injury due to actions taken in order to avoid collision with another vehicle – where trial judge found first respondent not negligent as exercised due care required of a reasonable driver – where appellant contends finding not open on the evidence – whether trial judge misused his advantage and acted on evidence inconsistent with the facts

TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE APPORTIONMENT OF RESPONSIBILITY AND DAMAGES – where road configuration at scene of accident found by primary judge to be a risk to road users – where primary judge found that road signs warning of danger would have reduced risk to road users – where appellant disputes apportionment of responsibility between itself and the third respondent – where third respondent disputes apportionment of responsibility between itself and the appellant – whether apportionment should be reversed – whether accident would have occurred irrespective of signage and third respondent's apportionment reduced

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – MEDICAL AND HOSPITAL EXPENSES – LOSS OF AMENITIES OR CAPACITY FOR ENJOYMENT – where respondent contends primary judge erred in concluding costs of future care submitted by the respondent were too high – where respondent contends primary judge compelled to accept their calculation of future care as the only evidence presented to the primary judge at trial on the issue – where respondent contends primary judge erred in discounting for vicissitudes of life – whether primary judge obliged to accept costs calculated by respondent – whether primary judge was unjustified in reaching his findings on quantum and vicissitudes of life

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – METHOD OF ASSESSMENT – LOSS OF EARNINGS AND EARNING CAPACITY – where appellant and third respondent argue primary judge should have made allowance in damages

award for the operation of the *Income Tax Assessment Act* 1936 (Cth) – whether appropriate to consider argument with inadequate evidence as to respondent's future income earning capacity and policy considerations

Income Tax Assessment Act 1936 (Cth), s 159P

Arthur Robinson (Grafton) Pty Ltd v Carter (1968) 122 CLR 649, followed
Baird v Roberts [1977] 2 NSWLR 389, cited
Brunskill v Sovereign Marine and General Insurance Co Ltd (1985) 59 ALJR 842, cited
Federal Commissioner of Taxation v Rowe (1997) 187 CLR 266, cited
Fink v Fink (1946) 74 CLR 127, cited
Government Insurance Office (NSW) v Johnston (1988) 6 MVR 538a, considered
Moss v Cook [1964] WAR 244, followed
Naylor v Yorkshire Electricity Board [1968] AC 529, cited
Owners of SS Hontestroom v Owners of SS Sagaporak [1927] AC 37, cited
Podrebersek v Australian Iron & Steel Pty Ltd (1985) 59 ALR 529, followed
Port Stephens Shire Council v Tellamist Pty Ltd [2004] 235 LGERA 98, cited
Purkess v Crittenden (1965) 114 CLR 164, cited
Sharman v Evans (1977) 138 CLR 563, followed
State of New South Wales v Moss (2000) 54 NSWLR 536, cited

COUNSEL: S C Williams QC, with R B Dickson, for the appellant in Appeal No 8936 of 2004 and for the first respondent in Appeal No 9069 of 2004
D Wheelahan QC, with M D Glen, for the first and second respondents in Appeal No 8936 of 2004 and for the appellant in Appeal No 9069 of 2004
R J Douglas SC, with M J Burns, for the third respondent in Appeal No 8936 of 2004 and for the second respondent in Appeal No 9069 of 2004

SOLICITORS: Broadley Rees Lawyers for the appellant in Appeal No 8936 of 2004 and for the first respondent in Appeal No 9069 of 2004
Carter Capner acting as Town Agents for Stacks Goudkamp for the first and second respondents in Appeal No 8936 of 2004 and for the appellant in Appeal No 9069 of 2004
C W Lohe, Crown Solicitor, for the third respondent in Appeal No 8936 of 2004 and for the second respondent in Appeal No 9069 of 2004

[1] **McMURDO P:** I agree with the orders proposed by Muir J and with his reasons.

[2] **MUIR J:** The first plaintiff/first respondent (who for convenience will be referred to as "the respondent") was severely injured at about 10am on 9 August 1996 when, in avoiding a collision with another motor vehicle, she lost control of the Toyota Landcruiser being driven by her on an unsealed road approximately 35 km north of Cooktown. Her husband, the second plaintiff in the action and a party to these proceedings, was a passenger in the vehicle. The learned primary judge gave judgment for her against the first defendant, the Nominal Defendant, and the second defendant, State of Queensland, in the sum of $4,472,981. There was judgment for the respondent's husband ("Mr Theden") against those defendants in the sum of $55,000.

[3] Judgment for the Nominal Defendant was given against the State of Queensland on the former's claim for contribution and indemnity to the extent of 20 per cent of the damages and costs awarded against him. The State of Queensland, on its claim for contribution and indemnity against the Nominal Defendant, obtained judgment to the extent of 80 per cent of the damages and costs awarded against it. There were other incidental orders which are of no consequence for present purposes.

[4] The Nominal Defendant appealed against the judgment, challenging findings of liability in favour of the respondent and Mr Theden. He also appealed against the contribution orders and contended that there should have been a finding of contributory negligence against the respondent. The State of Queensland did not appeal but in respect of liability, quantum and contribution filed Notices of Contention in which it advanced various grounds for supporting the primary judge's ultimate findings. A similar course was taken by the Nominal Defendant in relation to the respondent's quantum appeal.

[5] It is convenient to consider, in turn, the appeals against liability, contribution and quantum.

Background facts

[6] Before dealing with the Nominal Defendant's arguments on liability, it is convenient to describe, briefly, a few salient facts. At the time of the accident, the sky was overcast and there had been some light rain which had laid the dust on the road. Visibility, however, was good. The respondent was driving northbound on a "sweeping curve to the right" which led to a crest, beyond which the curving road fell steeply, when she saw a red sedan coming in the other direction. She took immediate evasive action by steering sharply to her left. In so doing she lost control of the Landcruiser which crossed the road and overturned down an escarpment. The red vehicle and its driver were unable to be located.

[7] The respondent had about 20 years driving experience including extensive experience in driving four wheel drive vehicles on roads in remote areas of Australia. At the time of the accident she and her husband were travelling north from Cooktown to Laura, a comparatively short distance, and were not under any time pressures. The vehicle's four wheel drive was engaged.

[8] The designated speed limit for the relevant stretch of the road was 100 kph. At one point in his oral evidence, Mr Theden estimated the Landcruiser's speed to be 50 kph at the time of the accident. On another occasion he gave an estimate of "40, 50 kph". The primary judge observed of Mr Theden's evidence, "his estimate of the speed as being 50-60kph would not seem to be unreasonable". That mistook Mr

Theden's evidence but no significance attaches to the mistake. It was not contended on appeal that the Landcruiser was travelling at an unreasonable or unsafe speed or that its speed was higher than that found by the primary judge.

[9] The respondent was unable to estimate the speed of the red car but Mr Theden described it as having "suddenly come out of nowhere" and as "travelling fast". The primary judge found that the red car "was travelling at a speed which, whilst not necessarily exceeding the speed limit, was excessive for the available sight line".

[10] The road surface was in good condition having been recently graded. As is reasonably common with such roads, loose gravel had built up along the sides for a width estimated by one witness to be a metre to a metre and a half. There was a guide post on each side of the road on about the crest of the hill and the distance between them was eight metres. The trafficable width of the road, however, is a little more difficult to calculate for the reasons put forward in the following passage from the primary judge's reasons:

> "The width of the graded areas varies along its length. As vehicles pass over the road gravel is forced to the edge of the surface. This is more pronounced on curves. The table train [sic] at the edge of the trafficable surface is not uniform, so there is no common starting point form [sic] which the measurement can commence. The only reliable measuring points at the time of this incident were the guide posts which had been located after the road was re-sheeted in March 1996. The distance between the guide posts was measured at 8 m, but a driver wishing to avoid loose gravel at the edges would perceive the trafficable surface to be much less. …
>
> On unsealed rural roads, the centre of the trafficable area could be a single wheel rut or, as in this instance, a broad area between nondescript wheel marks as appears in photograph ex 6B. Mr Richards who was the first person on the scene after the incident observed that the skid marks were on the northbound side of the road. This impression by an observer at the time is likely to be more accurate than measurements taken from different, and perhaps irrelevant, features."

[11] Each side called an engineering expert who produced a detailed report expressing opinions based on a range of facts, some of which were susceptible of objective proof but many of which were not. The primary judge reviewed the expert evidence at some length and concluded that the experts' opinions as to the position of the Landcruiser in relation to the imaginary centre line of the road, at the time the respondent commenced her evasive action, were "really no more than possibilities based on their assessment of relative likelihood, which inevitably, must be based on assumptions".

[12] His Honour continued:

> "There is simply no objective evidence linking the recovery attempt to the events leading to the loss of control. As a consequence the resolution of the issue as to why the initial movement occurred depends upon my assessment of the plaintiffs and the reliability of their evidence, having regard to the conclusions that can be reasonably drawn from the scientific approach undertaken by the experts."

[13] There was no criticism of these conclusions as to the limited benefit to be derived from the expert evidence.

The Nominal Defendant's case

[14] The starting point of the Nominal Defendant's argument is that "the evidence was incapable of sustaining findings that the position of the Landcruiser driven by the First Plaintiff '…[was] close to the imaginary centre line of the roadway when she approached the crest, …'; that, '…this was an entirely appropriate position for her to adopt on the roadway.' [Reasons 33]; and 'that when the plaintiff first saw the unidentified motor vehicle she was travelling on her correct side of the carriageway adjacent to the centre line …' [Reasons 35]."

[15] The argument then focused on the evidence of the respondent and her husband as to the positioning of the Landcruiser on the roadway in relation to the imaginary centre line at the time the red car was first observed.

[16] The respondent professed no actual recollection of the placement of her vehicle at the time she first sighted the red car but gave evidence that her practice when driving on dirt roads was to drive with the right hand wheels of her vehicle on the imaginary centre line. Her evidence was that she was driving in accordance with that practice. Mr Theden's evidence was that Landcruiser was in its correct position on the left hand side of the road midway between the imaginary centre line and the left hand edge of the road. In submissions in reply, at first instance, the plaintiffs' counsel had stated:

> "It is accepted that before the tyre marks commenced the Plaintiffs' vehicle would have been moving to the left of the carriageway and in this analysis moving from a position where part of the Plaintiffs' vehicle was on the incorrect side of the road…"

[17] Additionally, the plaintiffs' expert, Mr Brown, had drawn a diagram accompanying his report which showed the right hand edge of the Landcruiser to be slightly over the imaginary centre line of the road when gauged by reference to the guide posts.

[18] Mr Theden contradicted the respondent's evidence, claiming that his wife did not have a tendency to drive with the driver's side wheels of her vehicle in the centre of the road. In a claim form completed by him on 22 August 1996 he had described a left hand bend in the road at the accident scene, whereas at trial he professed to remember a right hand bend. These matters provided the basis for a submission that Mr Theden's evidence should be regarded as unreliable. It was also submitted that his evidence, and that of the respondent, of a sharp or sudden turn to the left to avoid the red car "is inconsistent with an existing lateral position already to the left of the centre line".

[19] The argument then focused on marks on the roadway made by the Landcruiser's tyres prior to its leaving the road. It is common ground that the marks were "yaw" marks made by the tyres of the Landcruiser as the respondent took recovery action after her initial manoeuvre on sighting the red car. The photographs show initially two parallel lines going from a point, so far as the right hand wheel track is concerned, near the imaginary centre line, to the gravel verge on the left of the road and then swinging in a sharp curve to the right, crossing the road and disappearing into the verge. After some distance from the commencement of the marks, the right

hand line divides into two as a result of the slewing of the vehicle, causing its rear wheels to no longer follow the same tracks as the front wheels.

[20] The respondent gave evidence of a "swerve" to the left as her immediate evasive action and Mr Theden's evidence was of a "pull to the left" and "sharp turn to the left". It was submitted that if regard is had to the tyre marks, which may well commence just on the Landcruiser's correct side of the road, the severity of the evasive action "which occurred prior to the commencement of the visible marks, requires the conclusion that the Landcruiser was substantially on its incorrect side of the road when the emergency manoeuvre originated." Once that is accepted, the argument proceeds, the respondents have no case against the Nominal Defendant as the respondent's evidence was that the right hand side of the red car was in line with the right hand side of the Landcruiser and Mr Theden's perception of the position of the red car "in the middle of the centre line" or "on the centre line" was based "on his incorrect perception that at all relevant times the Landcruiser was on the left side of the road".

[21] That part of the argument, based on the location of the commencement of the tyre marks in relation to the imaginary centre line of the road, cannot be sustained. The primary judge observed in relation to the marks:

> "Any attempt to trace the vehicle path would, in the absence of reliable evidence as to speed reaction time and steering angles, be simply speculative. ... The difficulty is that whilst the marks provide objective evidence upon which the experts can work, *those marks are merely the end of an attempted recovery action following a change in driving conditions. In this regard I accept the evidence of Mr Brown that the marks on the roadway were made as part of a recovery action from an initial evasive action.* I accept as more likely that the plaintiff's initial reaction to steer to the left was quickly replaced with an attempt to recover from a danger of losing control in loose gravel or the threat of going off the road." (emphasis added)

[22] The respondent's evidence was that in conditions such as those prevailing at the time of the accident, she drove so as to keep out of the loose gravel on the side of the road. She could hardly be criticised for doing that. I have already set out some of the evidence of the respondent relied on by the Nominal Defendant as to the position of the Landcruiser on the road. In another part of her evidence, she did say, "I didn't drive on the right hand side of the road". The evidence of the expert, Mr Brown, as to the position of the Landcruiser, can be disregarded for the reasons given by the primary judge. Although attacked on the basis of its inconsistency with the evidence of the respondent and its alleged inconsistency with the location of the tyre marks and the claim form difficulty, the evidence of Mr Theden cannot be so readily dismissed.

[23] The alleged inconsistency with the position of the tyre marks is of no moment for the reasons already discussed. The primary judge accepted Mr Theden's explanation for the inaccuracy in the claim form and was also satisfied that he did not "consciously exaggerate the evidence to favour his wife's claim". The primary judge was not obliged to accept one witness's evidence over another's, but was obliged to have regard to all the evidence which he found probative, to arrive at a factual conclusion. That is what he did. His critical findings are contained in the following passage in his reasons:

> "I am satisfied that when the plaintiff first saw the unidentified motor vehicle she was travelling on her correct side of the carriageway adjacent to the centre line at a safe speed in accordance with her perception of the road conditions. I find, relying upon her evidence and that of her husband, that when the unidentified vehicle became visible over the crest it was travelling in the centre of the roadway so as to be straddling an imaginary centre line. As the driver of that vehicle was travelling up the steep incline he/she ought to have been aware of the crest and the fact that the sight line was thus limited. I find that the unidentified vehicle was travelling at a speed which, whilst not necessarily exceeding the speed limit, was excessive for the available sight line."

[24] In order to reach this conclusion, the primary judge drew on his assessment of the respondent as "a responsible person who was well aware of the difficulties and dangers of driving on gravel roads in remote areas" and her experience in handling such conditions. He found that the respondent was driving relatively slowly and under no time constraints. He probably also had regard to the extensive oral evidence given about the appearance of the surface of the roadway at the time of the accident, including the nature and positioning of the tracks caused by use since the road's last grading. Consequently the finding under discussion was open on the evidence.

[25] Even if the primary judge had concluded, as was also open to him on the evidence, that the Landcruiser's right wheel tracks were roughly in alignment with the centre line the same result would have followed. The effect of the evidence in those circumstances would have been that the respondent, although driving with the right hand wheels on the centre line, was driving cautiously and keeping a proper look out. The red car was over the centre line and had travelled up a steep grade to the crest at a speed unreasonable in the circumstances, having created a hazardous situation of which the driver was or ought reasonably to have been aware.

[26] It has not been demonstrated that the primary judge "has failed to use or has palpably misused his advantage"[1] or has acted on evidence which was "inconsistent with facts incontrovertibly established by the evidence" or "glaringly improbable".[2] The determination his Honour made was very much one of fact, based on a great many pieces of evidence both oral and documentary, assembled over six days of hearing. Plainly an appellate court is at a distinct disadvantage to the primary judge when it comes to making the assessment required.

[27] Accordingly, I would dismiss the Nominal Defendant's appeal in this respect. For the reasons under the next heading, particularly in paragraphs [34]-[39] and [41], I do not accept that the Nominal Defendant has established the primary judge erred in failing to make a finding of contributory negligence against the respondent.

The Nominal Defendant's argument on its appeal against the contribution orders

[28] The Nominal Defendant's argument may be summarised as follows. The primary judge found that the road configuration, consisting of the curve, crest and dip,

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1 *Owners of SS Hontestroom v Owners of SS Sagaporak* [1927] AC 37.

2 *Brunskill v Sovereign Marine and General Insurance Co Ltd* (1985) 59 ALJR 842 at 844.

constituted a risk to road users as a permissible speed was 100 kph and there were no warning signs.

[29] In 1999, after the accident, the following signs were installed facing northbound motorists:

(a) Reduce speed;
(b) Crest warning;
(c) Six chevron alignment markers.

[30] The primary judge made these findings:

> "These warning signs I find were appropriate to warn of the dangers arising from the substandard road configuration. I further find that had this appropriate signage been installed at the time of the incident the risks arising from the substandard configuration would have been reduced by reason of road users travelling in either direction being appropriately warned. Specifically, I accept that the first plaintiff would have reduced her speed and moved further to the left side of the carriageway. Appropriately warned, she would have had the opportunity to move to the left. Without that warning the limited sightline did not allow that opportunity for a first time user. *As a result the need for evasive action would probably have been avoided altogether or its extent reduced such that the first plaintiff would not have lost control of her vehicle.*" (emphasis added)

[31] The primary judge further found that the cost of the signs would have been less than $2000 and that the need to erect appropriate signage to warn road users ought to have been obvious to inspectors employed by the State making routine, bi-monthly inspections.

[32] It was also found that:[3]

> "The State's failure to install signage affected the way in which the first defendant [sic] used the road and may also have affected its use by the unidentified driver. One must assume that the presence of signage would have had an effect in reducing the risk since that is its very purpose. However, for the southbound driver, the presence of the crest was an obvious feature of the road configuration. What was hidden was the curve beyond the crest."

[33] Having regard to these matters, it is submitted, the apportionment between the State and the Nominal Defendant does not reflect the culpability of the former; nor the relative importance of the acts and omissions attributable to the State; nor the causative potency of those acts and omissions. The contention is that the apportionment should be reversed.

The State of Queensland's argument on contribution

[34] The State's argument also relies on the primary judge's findings in paragraph [89] of the reasons but places emphasis on the paragraph's final four sentences:

> "The presence of the crest and the reduced sight line was observable to the southbound driver for a considerable distance. There was ample time therefore for this driver to adjust both the speed and

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3 Paragraph [89] of the reasons.

> position of the vehicle on the road. By his failure to do either I find this driver to be mainly responsible for the plaintiff's damage. I have already indicated the State to be in breach of its duty."

[35] It is pointed out that these findings are in addition to the earlier unchallenged finding that the red car was travelling at a speed excessive for the conditions and the further finding that the red car emerged from the dip "straddling" the imaginary centre line. It is said that these matters by themselves support the apportionment.

[36] The State, however, goes further and in a notice of contention challenges the finding in paragraph [89] of the reasons that for the southbound driver "what was hidden was the curve beyond the crest". It is also contended that as a result of the position on the roadway and speed of the red car the respondent would have still engaged in evasive action and suffered a loss of control. Alternatively, it is asserted that the finding that the need for evasive action would probably have been avoided altogether, or its extent reduced, was speculative and contrary to the evidence.

[37] As the State contends, photographs in evidence do appear to establish that a driver of a southbound vehicle exercising reasonable care should have been aware of the existence of a curve beyond the crest even though the curve was not detectable once one entered the dip preceding the steep climb to the crest. It was common ground that the crest was obvious to any southbound driver and the primary judge so found.

[38] It is submitted that in making the findings under challenge, the primary judge ignored the evidence which placed the Landcruiser in close proximity to the gravel shoulder of the roadway and the findings of the respondent's cautious approach as well as her appreciation of dangers, such as the one confronting her, derived from "her passage through kilometres of similarly configured (and unsigned) sections of roadway". It is pointed out that the thrust of the respondent's evidence is that she was already travelling carefully at a leisurely pace and avoiding driving into the loose gravel because of her concerns about it. It is submitted that had the signage erected after accident been present at the time of the accident all a reasonable driver could have been expected to do in response to the signs would have been to:

- Lower the speed of the vehicle to somewhere between about 50 and 70 kph;
- Ensure that the vehicle was on its correct side of the road;
- Keep a watchful eye for any vehicle that might appear over the crest.

[39] It is submitted that the respondent was already doing these things. Finally it is pointed out that in paragraph [45] of the reasons the primary judge refers to "reduction" of risk.

[40] The nature of a finding on apportionment was described in the reasons of the Court in *Podrebersek v Australian Iron & Steel Pty Ltd*: [4]

> "A finding on a question of apportionment is a finding upon a 'question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds': *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197 at 201. Such a finding, if made by a judge, is not lightly reviewed."

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[4] (1985) 59 ALR 529 at 532.

[41] Whilst on the facts found by the primary judge other minds may well have reached a conclusion that the State's contribution should have been higher than 20 per cent, I am not persuaded, particularly in the light of the further considerations advanced by the State, that the exercise of the primary judge's discretion miscarried. The negligence of the driver of the red car was marked. The car was, in part, over the centre line as it travelled up a steep incline to the crest of a hill. Its driver was aware of the existence of the crest and ought reasonably to have been aware that his or her approach would have been obscured from the view of the driver of a vehicle coming in the other direction. Additionally, the car was travelling too fast for the road configuration.

[42] The State's role in the respondent's accident was rather more remote and static. The State failed to erect road signs at one point on a stretch of one country road among innumerable such roads under its jurisdiction. Many considerations affect the erection of such signage. The signs themselves are relatively cheap, as the primary judge pointed out, but their location is a matter for expert judgment and they must be erected and maintained. Financial resources are rarely abundant and priorities must be set. A relevant consideration is the absence of evidence of other accidents at or about the subject crest. Accordingly, the appeal fails in this respect also.

The respondent's quantum appeal

[43] The principal argument advanced on appeal was that, although the primary judge accepted the respondent's submission that the respondent had a requirement for a live-in carer, he rejected the respondent's evidence as to the costs of providing such a carer, despite the absence of any competing evidence from the other parties, and awarded a substantially smaller sum.

[44] The submissions on quantum advanced on behalf of the respondent at first instance divided up the cost of future care into two periods. One for the first seven years and the next for the remaining period of the respondent's life expectancy. The major components of the calculations for the first period were the following weekly amounts:

"Live in housekeeper/attendant-carer 5 days per week	$1,800
Keep (5 days at $38 per day)	$190
Weekend carer 2 days at average of $437.50 per day	$875
Keep (2 days at $38)	$76"

[45] The corresponding items for the second period were

"Live in house couple 5 days per week	$2,200
Keep (5 days at $38 per day per person)	$380
Weekend carer 2 days at $675 per day	$1350
Keep (2 days at $38 per person)	$152"

[46] The total sums for the first and second periods were $1,184,606 and $2,720,037, respectively, making an overall total of $3,904,643. The respondent's figures were extracted from a report of a director of Dial an Angel Pty Ltd ("Dial an Angel"), a company which specialises in the provision of in-home support services for the aged, disabled and handicapped. The report listed a range of rates for live-in housekeeper/attendant-carer, for live-out visiting attendant-carers and handyman/gardeners. For example, the live-in housekeeper/attendant-carer rate for 2004 was "from $1600.00-$2000.00 per five-day plus keep". The live-out visiting

attendant-carer rate for 2004 was "from $22.00-$30.00 per hour" and the live-in house couple rate for 2002-2004 was "from $1850.00 to $2550.00 per week plus keep".

[47] In cross-examination Ms Robertson conceded that Dial an Angel's rates "would be probably the highest rates in the whole of Australia".

[48] Referring to the calculations just discussed, his Honour observed:

> "Using figures at the top of the range rather than the minimum the claims (sic) made is for $3,900,000."

[49] After referring to Ms Robertson's acknowledgement that Dial an Angel's rates were probably the highest in Australia, his Honour remarked:

> "I accept that the reliance upon a live-in carer is the most appropriate and most economic solution for meeting the plaintiff's needs but I do not accept that the costs which will actually be incurred by the plaintiff will be at the level suggested in the Dial an Angel reports.
>
> In the present state of authority I am compelled to assess the cost of future care by reference to market rates, (*Van Gervan v Fenton (*supra); *Grincelis v House)* the plaintiff's situation is such that the recruitment of live-in carers would usually be achieved by the engagement of a reputable agency and with that the inevitable placement costs. At the same time there is no reason why the defendant ought to be called on to pay rates which are acknowledged to be the highest in Australia. *Moreover my assessment of costs of care will take into account my determination of an allowance for the carers accommodation which I consider will reduce the level remuneration payable to a live in carer.* In broad terms for the next 7 years I would allow a weekly cost of $2,200. For the balance period when the demands will be greater and staff turnover more common I would assess the weekly cost at $3,000. The calculation using these parameters totals $2,200 per week. Taking into account the heavy discount already applied to the range of costs identified in the evidence I will not make any further reduction for contingencies.
>
> I allow for cost of future care the sum of $**2,200,000**." (emphasis added)

[50] It is contended that the primary judge erred in concluding that the $3,904,643 claimed by the respondent was "the top of the range" rather than simply a calculation of the cost of a full-time live-in carer. Also, and more importantly, it is contended that the primary judge was obliged to accept the only evidence put before him on the cost of care. Alternatively, it is submitted that "the discounting" effected by him of the order of 43 per cent of the respondent's claim was manifestly excessive.

[51] A separate, and relatively minor, challenge is made to the primary judge's reduction of the remuneration payable to a live-in carer on account of the fact that specific allowance is made in the damages award for renovation of the respondent's house to provide carer accommodation.

[52] Relevant to this argument is the emphasised passage in the paragraph of the reasons just quoted. Later in his reasons, the primary judge accepted that the respondent was entitled to the cost of modifying her home and gave this explanation for taking the home modifications into account in assessing the costs of full-time care:

> "I accept that the fulltime carer needs to have living space that is exclusively used by the carer. This would include a kitchenette and a living area in which to entertain the carer's visitors. I would expect that the weekend live-in carer would have access to one of the remaining two bedrooms and the third bedroom should be available for the plaintiff's family members or guests."

[53] His Honour later added:

> "The provision of a carer's accommodation justifies the reduction in the amount allowed for the cost of employing a carer insofar as it would make easier both the hiring and the retention of the carer."

[54] The final grounds of challenge were that the primary judge erred in discounting for vicissitudes of life in respect of swimming pool expenses and holiday expenses. In both cases the primary judge assessed the respondent's costs over a 20 year period rather than over her agreed life expectancy of 30 years.

[55] In *Moss v Cook*,[5] the appropriate choice of care was described as "what a reasonable man would choose if he had no claim for damages". Barwick CJ's formulation in *Arthur Robinson (Grafton) Pty Ltd v Carter*[6] was what a person would do assuming:

> "… he was spending his own money, and assuming that he had sufficient to do as he would and was well advised and reasonably careful for his own welfare, would be likely to expend in protection of himself and his condition."

[56] The following passage from the reasons of Gibbs and Stephen JJ in *Sharman v Evans*[7] provides further guidance as to the nature of the relevant assessment:

> "The appropriate criterion must be that such expenses as the plaintiff may reasonably incur should be recoverable from the defendant; as Barwick CJ put it in *Arthur Robinson(Grafton) Pty Ltd v Carter* (1968) 122 CLR 649, at p 661. 'The question here is not what are the ideal requirements but what are the reasonable requirements of the respondent', and see *Chulcough v Holley*, per Windeyer J (1968) 41 ALJR 336, at p 338 . The touchstone of reasonableness in the case of the cost of providing nursing and medical care for the plaintiff in the future is, no doubt, cost matched against health benefits to the plaintiff.
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> If cost is very great and benefits to health slight or speculative the cost-involving treatment will clearly be unreasonable, the more so if there is available an alternative and relatively inexpensive mode of treatment, affording equal or only slightly lesser benefits. When the factors are more evenly balanced no intuitive answer presents itself and the real difficulty of attempting to weigh against each other two incomparables, financial cost against relative health benefits to the plaintiff, becomes manifest."

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5 [1964] WAR 244 at 299.

6 (1968) 122 CLR 649 at 622.

7 (1977) 138 CLR 563 at 573.

[57] The primary judge was not obliged to accept the Dial an Angel figures having regard to the evidence that they were probably the highest in Australia. Nor did he have to accept that the services under consideration had to be supplied for all of the time under consideration, or even part of the time, by an agency such as Dial an Angel.

[58] The legal onus of proving that damage was suffered and the quantity of the damage always rests with the plaintiff.[8] But it does not follow from the fact that the Dial an Angel rates were rejected that the primary judge was not entitled to arrive at his own figure and the State of Queensland and the Nominal Defendant do not contend to the contrary.

[59] Looked at generally, if the plaintiff's evidence is inadequate on a question such as that under consideration and the defendant leads no or insufficient evidence on that issue, it is not the case that the cost of providing full-time care must be disregarded in the assessment of damages or that only nominal damages may be awarded. Where the existence of damage is established, difficulty in quantification is not a ground for defeating the plaintiff's claim. The court is entitled, and perhaps obliged, to make the best estimate it can in the circumstances.[9]

[60] Although the primary judge concluded that full-time live in care was reasonable and appropriate, he also took into consideration that there could well be modifications to any such regime from time to time to suit the respondent's wishes and circumstances. At the time of trial, the respondent was receiving many hours of assistance from family members. She also had 21 hours of assistance per week from a carer. That was generally the level of assistance which she had received over the period since the accident. These are matters relevant to the primary judge's assessment.

[61] Referring to the competing approaches to the respondent's needs, the primary judge said:

> "The difficulty with the defendants' approach is that no allowance whatsoever is made for the additional assistance 'as needed' and it particularly limits the number of hours during which the plaintiff could call upon a carer during the day, particularly for transportation needs and being present for exercises. The difficulty with the plaintiff's approach is that it bears no relationship to the existing arrangement in place when family members are residing in the house. It effectively replaces the incidental involvement of family members with a fulltime paid carer for around-the-clock care and at rates which seem to be out of proportion for the work which is to be undertaken on the fulltime employment basis.
>
> …
>
> The task is to find a reasonable basis for care for the plaintiff. This inevitably involves some compromise between the costs of having a carer on hand at all times and the costs of having her needs met for personal and domestic care, supervision and some provision for a reasonable quality of life by a variety of carers employed for specific

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8 *Purkess v Crittenden* (1965) 114 CLR 164 at 167, 168.

9 *Fink v Fink* (1946) 74 CLR 127 at 143; *Naylor v Yorkshire Electricity Board* [1968] AC 529 at 548; *Baird v Roberts* [1977] 2 NSWLR 389; and *State of New South Wales v Moss* (2000) 54 NSWLR 536 at para 87.

> times. It is a compromise which the plaintiff herself will inevitably make in choosing what aspects of available care is most important to her and how that can best be met from the paid carer market. Consequently the level of care required cannot be predicted with any accuracy. The compromise might be to pay a sleep over carer who will make a high contribution to her needs thereby reducing the cost of outside assistance or it might be to increase the hours of outside assistance and expect a minimal contribution from the sleep over carer. I accept that the costs of the respective prescriptions for the parties are not put forward as an absolute figure but rather as a guide to the potential costs which the plaintiff will be faced. The figures for the live-in carer set out in the report of Ms Robertson, on their face, are unreasonably high. Ms Robertson acknowledges that her organisation's rates would 'be probably the highest rates in the whole of Australia' but justifies this on the basis that they provide high quality carers and have available emergency back-up services."

[62] In my view, no error has been shown in the primary judge's approach or in the sum assessed for future live in care. The primary judge, in engaging in this exercise, was not discounting the respondent's proven loss, as the respondent contends, but was assessing the future cost of care having regard, not just to one estimate at the highest end of the spectrum, but to a further level of care and its cost.

[63] Another point made in support of the contention that the primary judge erred, in taking the modification of the house into account in determining the cost of full-time care, was that the Dial an Angel rates were calculated on the basis that the premises would be at the standard of the house as modified. But the primary judge did not accept the Dial an Angel rates, and in making his own assessment it was appropriate to regard the quality of the accommodation to be provided to carers as bearing upon the remuneration they would be prepared to accept.

[64] I am unable to accept also that there was any appellable error in the failure to allow the holiday and swimming pool expenses over 30 years. The primary judge was entitled to conclude that the respondent's desire or ability to avail herself of such holiday travel or pool use could be interrupted or curtailed by many factors including ill health and changing interests.

[65] As with the other challenges to the findings on quantum, this Court may not interfere unless satisfied that the primary judge made an error of the nature of those referred to in paragraph [26] hereof, has taken into account some irrelevant matter, failed to take into account a relevant matter or has arrived at a result so unreasonable or unjust as to suggest that such an error has occurred.[10] I am not so satisfied.

The refusal of the primary judge to allow for the effect of s 159P of the *Income Tax Assessment Act* 1936 (Cth) in the damages award

[66] The State of Queensland and the Nominal Defendant argue that the primary judge should have made an allowance in the damages for the operation of the *Income Tax*

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10 *Port Stephens Shire Council v Tellamist Pty Ltd* [2004] 235 LGERA 98 at 182.

Assessment Act 1936 (Cth). The argument gained some support from Professor Luntz who said in the 4th edition of his work on damages:[11]

> "Under the *Income Tax Assessment Act* 1936 (Cth), s 159P, a taxpayer whose annual expenditure on medical expenses, as defined in the section, exceeded a threshold, is entitled to a rebate of 20% on the excess in the assessment of income tax. Since the damages recoverable in respect of medical expenses are probably not themselves taxable,[12] in principle the damages should be reduced by the value of rebate."

[67] The submissions proceed as follows. Under s 159P, a taxpayer will be entitled to the rebate when the taxpayer's "medical expenses" in a year of income exceed $1500. The amount of rebate is calculated as 20 per cent of the excess of "net medical expenses" over the threshold figure.

[68] Included in the definition of "medical expenses" in s 159P(4) is payments:

> "As remuneration of a person for services rendered by him as an attendant of a person who is blind or permanently confined to bed or an invalid chair."

[69] The respondent is so confined and payments by her to commercial carers thus come within the definition of "medical expenses".

[70] The expression "net medical expenses" is defined to mean the total medical expenses paid by the taxpayer in respect of himself, less any amount paid to the taxpayer from bodies such as Medicare or a private health insurance fund.

[71] The respondent will have a substantial sum to invest as a result of the damages award. She is a sensible woman with a tertiary education and it is probable that she will invest a substantial part of the award. That being the case, the benefit which will flow to her from the application of s 159P should be brought to account.

Consideration of the s 159P contention

[72] The industry of counsel has led to the identification of only one case in which the argument now being put forward was advanced. In rejecting the argument the learned judge observed:[13]

> "Whilst future loss of income is required to be assessed … on an assumed interest rate of 5 per cent to arrive at a present capital sum, I do not know how or in what it will in fact be invested. … I am not satisfied that the assessment to meet this need [for future services] is required to be reduced for some prospect that in future tax years the plaintiff may become entitled to some rebate of tax in her assessment under the operation of s 159P …".

[73] The primary judge added:

> "However, the defendants' argument rests upon two assumptions. Firstly, that the plaintiff will in the future be a taxpayer and secondly,

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11 Luntz, *Assessment of Damages for Personal Injury and Death*, 4th ed, 2002 at para 4.2.6.

12 cf *Federal Commissioner of Taxation v Rowe* (1997) 187 CLR 266.

13 *Government Insurance Office (NSW) v Johnston* (1988) 6 MVR 538a.

> that her income tax liability in any one year will exceed the calculated 20% potential rebate amount.
> The plaintiff has virtually no capacity to earn income from personal exertion. There is no evidence of her receiving taxable income from investments. I am not sure on what bases the defendants contend that the plaintiff will have a future liability to pay income tax. If I am asked to assume that she will invest part of the damages to be awarded in this judgment, then that is something I cannot do. From the third of the "fundamental principles" identified by Gibbs CJ and Wilson J in *Todorovic v Waller* ((1981) 150 CLR 402 at p 412), the Court has no concern with the manner in which the plaintiff uses the sum awarded; the plaintiff is free to do what she likes with it.
> There is no basis for me to determine that the plaintiff in any of the future years will be a taxpayer much less for me to attempt to determine that her taxable income will be at a particular level. These are matters of pure speculation. Added to that is the further speculation of whether the amount of the medical expenses incurred in any one of the future years would be so matched to the taxable liability of that year as to enable the plaintiff to receive the maximum rebate."

[74] I agree with the primary judge that the argument under consideration rests more on speculation than on fact. The argument raises an important point of principle, but in my view, it would be inappropriate to deal with it in the absence of a surer factual foundation. The argument was advanced in the abstract at first instance. There was no exploration of how, if at all, the respondent intended to invest her damages award let alone of what the probabilities were in that regard. There was no evidence or consideration of ways in which such investments could be made through the use of superannuation, allocated pensions or the like, so as to minimise the incidence of income tax. Nor did the argument address the prospect that the respondent may seek to enhance her capital through capital gains or other tax beneficial avenues.

[75] The point also raises a significant public policy consideration, namely the desirability of exposing defendants, in a substantial way, to the risks arising from the possibility that benefits of the nature of those under consideration may be varied or withdrawn from time to time. That is an added reason why it should be determined in the light of an appropriate factual investigation and findings.

[76] As mentioned at the outset of these reasons, neither the State of Queensland nor the Nominal Defendant appealed against the orders made by the primary judge but, in relation to quantum, filed notices of contention. In them they contended that the primary judge should have taken the consequences of s 159P into account in assessing damages but conceded that the assessment did not exceed the bounds of a "reasonable assessment" or "sound, discretionary judgment".

Conclusion

[77] For the above reasons I would dismiss:

1. The appeal of the first plaintiff/appellant.
2. The appeal of the Nominal Defendant.

[78] The only order I would make as to costs is that each of the first plaintiff/appellant and the Nominal Defendant pay one half of the State of Queensland's costs of and incidental to the appeals.

[79] **WILSON J:** I agree with the reasons for judgment of Muir J and with the orders his Honour proposes.