SUPREME COURT OF QUEENSLAND

CITATION:	*Castro v Hillery & Ors* [2002] QCA 359
PARTIES:	**LOLINY CASTRO (BY HER LITIGATION GUARDIAN ANTONIO CASTRO)** (plaintiff/respondent) **v** **BRIAN ERNEST HILLERY** (first defendant) **SUNCORP METWAY INSURANCE LIMITED (formerly SUNCORP GENERAL INSURANCE LIMITED)** ACN 075 695 966 (second defendant/first appellant) **NORTH QUEENSLAND ELECTRICITY CORPORATION LIMITED** ACN 078 848 978 (third defendant/second appellant) **COUNCIL OF THE CITY OF MOUNT ISA** (fourth defendant)
FILE NO/S:	Appeal No 590 of 2002 SC No 11 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Mt Isa
DELIVERED ON:	20 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	1 August 2002
JUDGES:	McMurdo P, Williams JA and Wilson J Separate reasons for judgment of each member of the Court; Williams JA and Wilson J concurring as to the orders made, McMurdo P dissenting in part
ORDERS:	**1. Appeal allowed with costs;** **2. Order that the judgment at first instance be varied by:** **(a) deleting the amount $4,551,900.06 and inserting in lieu the amount $4,492,500.06;** **(b) in paragraph 5 of the order deleting the words "on the indemnity basis" and inserting in lieu thereof "on the standard basis".** **3. The Court will allow the parties 7 days within which to make written submissions with respect to costs thrown**

away by the late abandonment of grounds of appeal.

CATCHWORDS: *Rules of the Supreme Court* 1900 (Qld), O 26, O 39 r 29C
Uniform Civil Procedure Rules 1999 (Qld), r 360

Campbell v Jones & Anor [2002] QCA 332; Appeal No 11496 of 2001, 3 September 2002, followed
Elford v FAI General Insurance Company Limited [1994] 1 Qd R 258, followed
Gaskins v British Aluminium Co Ltd (1976) QB 524, considered
Hiscox v Woods & GIO General Limited [2002] QSC 64, considered
Proetta v Times Newspapers Ltd (1991) 1 WLR 337, considered
Rolls Royce Industrial Power (Pacific) Ltd v James Hardie & COI Pty Ltd (2001) 53 NSWLR 626, followed

TORTS – NEGLIGENCE – CONTRIBUTORY NEGILIGENCE – PARTICULAR CASES – ROAD ACCIDENT CASES – where respondent struck by taxi whilst using a pedestrian crossing and severely brain damaged – whether respondent was contributorily negligent by walking into the taxi

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – FINDINGS ON ISSUE OF NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – appeal against finding by learned trial judge that immediately before being struck the respondent jumped back from the taxi – where evidence-in-chief of witness stated the respondent had jumped backwards – where cross-examination of witness showed the witness did not have the respondent constantly in vision – whether any inconsistency in evidence-in-chief and cross-examination – whether there was anything unreasonable or unjustifiable in the findings of the learned trial judge – whether learned trial judge misinterpreted or misapplied the evidence of the witness – whether any last moment movement by the respondent is determinative of the issue of contributory negligence

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – PARTICULAR CIRCUMSTANCES – where respondent suffered severe brain damage as a result of her injuries thereby destroying any capacity for work – appeal against quantum assessed for future earning loss and the consequential assessment of loss of superannuation – whether learned trial judge erred in finding that the

respondent who was a kitchen hand at the time of the accident would have built upon her existing foreign qualifications to become a nutritionist, dietician or restaurant manager – whether the learned trial judge erred in assessing the amount to be discounted for contingencies – whether the court should interfere with the assessment made by the learned trial judge on the basis that the error has substantially altered the total award which was in excess of $4 million

PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OF THE WHOLE ACTION – WHERE MONEY PAID INTO COURT OR OFFER OF COMPROMISE MADE – OTHER CASES – where respondent had refused appellants' offer to settle which was significantly lower than that finally awarded – whether the learned trial judge erred in awarding costs on an indemnity basis pursuant to Order 26 of the *Rules of the Supreme Court* in circumstances where the operative statement of loss and damage at the time the Offer to Settle was made did not include any claim for past and future care and failed to disclose certain material – where an Offer to Settle must be evaluated in the light of circumstances disclosed in the proceedings

COUNSEL: M Grant-Taylor SC for the appellants
J D Griffin QC, with A J Williams, for the respondent

SOLICITORS: Quinlan Miller & Treston for the appellants
Conroy & Conroy for the respondent

[1] **McMURDO P:** The relevant facts and issues are set out in the reasons for judgment of Williams JA.

[2] I agree that the appeal as to contributory negligence fails for the reasons given by Williams JA.

[3] I am not, however, persuaded that the learned primary judge's award of $320,000 for future economic loss and the related award of $25,600 for future loss of superannuation contributions warrant this Court's interference.

[4] The respondent, who was 41 years old at trial, was born and raised in the Philippines. She is now completely unable to earn income because of the grave injuries received in the accident in September 1996.

[5] She completed a four year course in Foods and Nutrition leading in March 1982 to the degree of Bachelor of Science in Foods and Nutrition (BSFN) from the University of the Immaculate Conception, Davao City.

[6] The respondent's husband noted in his tendered quantum statement that the respondent, who was one of nine children, could not afford to go to Manila to do the Board exam to become a dietician. She became an apprentice nutritionist at Maguindanao Hotel for about six months then worked for Singer Sewing Machine

Company in a responsible clerical position. They married on 8 April 1989 and their daughter, Annalise, was born on 24 November 1990. The family migrated to Australia on 4 August 1993 to join other family members in Mount Isa. She was an excellent home cook and housekeeper and looked after the family finances. In June 1995 she commenced work with the Irish Club as a kitchen hand, working fulltime in two shifts from 10am to 2pm and 5pm to 10pm. She planned to continue working and to buy her own car. She intended to have her qualifications recognised in Australia and establish her own business and a restaurant. He observed she was a determined woman.

[7] Mr Fitzpatrick, the Irish Club's catering manager, supervised the respondent and regarded her as an excellent worker, the best of his team of 18 employees. He described her as able, very intelligent, effective, with good organisational skills and leadership. Whilst this was not his decision, he thought it likely that in time she would have filled his position as manager because such talented, long term employees were not easy to find and keep in Mount Isa. The position of catering manager became available shortly before the trial in September 2001. It was plain from Mr Fitzpatrick's evidence that the respondent loved her work; she wanted to return after the accident, despite her completely incapacitating injuries.

[8] His Honour found it probable that the respondent would have built upon her existing qualification and obtained recognised qualifications in the field of nutrition or as a dietician, especially in the future if the family moved to Brisbane where she would have greater opportunities for education and employment.

[9] His Honour accepted Mr Fitzpatrick's evidence and found that the respondent would over time have found employment at a supervisory level or as a manager when the demands of child-raising had reduced. His Honour also accepted the calculations of the respondent's accountants that the future economic loss from the two most likely scenarios, first, of a kitchen hand progressing to dietician retiring at 60 years, and, second, for a kitchen hand progressing to catering manager retiring at 60 years was $364,155 and $398,381 respectively. These figures were calculated on the basis that the respondent would become a dietician by August 1998 and catering manager by July 2001, but his Honour found that either scenario was more realistic by about 2006. The learned primary judge reworked these calculations in accordance with that finding to establish a loss of $342,000 for a dietician or $365,000 for a manager. His Honour observed that by adopting 60 years as the retirement age he was already discounting those sums; he then applied a further discount for the usual contingencies, including the possibility that the respondent may have had some time off work if she had another child, to reach the figure of $320,000 damages for loss of future earning capacity.

[10] There was no evidence as to what would be required for recognition of the respondent's qualifications as a nutritionist and dietician in Australia or what prospects of employment she would then have. His Honour's findings as to her future income as a dietician were not supported by the evidence. There was, however, ample evidence to support his Honour's conclusion that this intelligent, well educated, capable woman was likely, but for the accident, to have obtained increasingly well-paid responsible work at a level of catering manager by 2006. There was always some prospect she may have left the full-time workforce for a time in the event she had a second child, but this was not her plan. On the other hand, there was also a possibility that her family circumstances may have changed,

requiring her to be the primary or even sole income-earner; she would then have maximised her income-earning for the benefit of the family; she may even have earned more than Mr Fitzpatrick's managerial income. It is not possible to accurately predict the effect of any move to Brisbane on her educational and income-earning prospects but it seems very probable that someone with her skills would have made the most of the greater opportunities offered in a large city. The respondent's English before the accident was relatively good; she had successfully joined the Australian workforce where she made a remarkably positive impact upon her manager; she was a well educated, capable, determined woman with excellent future prospects of improving her income. Assessing future economic loss in these circumstances involves a balance of uncertain predictions. It was open to his Honour to conclude that the respondent would have been earning an income equivalent to a manager in Mr Fitzpatrick's position by 2006. The judge then discounted the accountants' calculation, first, by making no allowance for any income after 60 years of age and then by an additional $45,000. Whilst this was a generous award which could have been further discounted, it was open on the facts and there is no justification for this Court's interference. This ground of appeal is without substance.

[11] Finally, the appellants contend that the learned primary judge's discretion miscarried in ordering the appellants to pay the respondent's costs of the trial on the indemnity basis. The learned primary judge gave leave to appeal against that costs order.

[12] On 5 November 1998 the respondent made an offer to settle under RSC O26 for $1.5 million, clear of the WorkCover refund, plus the respondent's party and party costs. The appellants did not accept that offer, which was much less than the judgment sum of $4,551,900.06.

[13] By the time of the trial, the UCPR were in force. Rule 360[1] provided that:

> "(1) If –
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> (a) the plaintiff makes an offer to settle that is not accepted by the defendant and the plaintiff obtains a judgment no less favourable than the offer to settle; and
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> (b) the court is satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer;
>
> the court must order the defendant to pay the plaintiff's costs calculated on the indemnity basis unless the defendant shows another order for costs is appropriate in the circumstances."

[14] The appellants contend that the respondent was not at the time of the offer "willing and able to carry out what was proposed in the offer"; the respondent's case on liability was strong and any assessment of contributory negligence would only be small; the respondent's brain damage caused by the accident meant that any settlement would have to be sanctioned by the court and this offer was so unrealistically low that no reasonable court could have been satisfied of its appropriateness.

[15] The extent of the respondent's injuries, the size of the award appealed from and the limited bases of this appeal demonstrate the correctness of that submission; the offer to settle was premature and may well have been tactical rather than genuine; it was

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[1] cf RSC O26 r9.

so low it would not have been sanctioned by the courts; the respondent was not at the time of the offer "willing and able to carry out what was proposed in the offer" and UCPR r 360(1)(b) does not require that "the court must order the [appellants] to pay the [respondent's] costs calculated on the indemnity basis unless the [appellants] show another order for costs is appropriate in the circumstances." His Honour erred in concluding otherwise. There was therefore no satisfactory reason to depart from the usual order that the appellants pay the respondent's costs on the standard basis to be assessed. It follows that I would allow the appeal as to costs.

[16] The appellants have either abandoned at a late stage or been unsuccessful in 13 of their 14 grounds of appeal, with success only in the appeal against the costs order. The respondent should pay the appellants' costs of the appeal as to costs; otherwise the appellants should pay the respondent's costs of the appeal.

Orders:

Allow the appeal against the costs order with costs to be assessed by deleting the words "on the indemnity basis" and inserting instead the words "on the standard basis".

Otherwise dismiss the appeal with costs to be assessed.

[17] **WILLIAMS JA:** The respondent, then a woman aged 36, was seriously injured when struck by a taxi whilst using a marked pedestrian crossing in Mt Isa on 13 September 1996. The appellants admitted negligence but contended that the respondent was in the circumstances guilty of contributory negligence. The learned trial judge rejected that contention; there is an appeal against that finding. Damages were assessed in the total sum of $4,551,900.06. The Notice of Appeal challenged that assessment in a number of respects, but on the hearing of the appeal senior counsel for the appellants abandoned all grounds relating to quantum other than that the award for future economic loss was manifestly excessive or erroneously calculated, and that there should be a corresponding adjustment to the item for future loss of superannuation. Finally, there is also an appeal, brought by leave of the trial judge, against the order that the appellants pay indemnity costs.

[18] The pedestrian crossing was located in Fourth Avenue, a well trafficked street, some 60 metres south of its intersection with Eleventh Avenue. The incident occurred at about 11.15 p.m. on a Thursday evening. The respondent was crossing from west to east, which means she was coming from the right hand side of the taxi. At the time there was a problem with the overhead street lights; the learned trial judge found, and this was not challenged, that at the time of the incident there was no street light operating in the vicinity of the crossing. The driver of the taxi (the first defendant at trial) was aware that the street lights were not working, having already passed along Fourth Avenue a number of times that evening.

[19] The taxi was travelling in a southerly direction along Fourth Avenue. As it approached the pedestrian crossing there was a dog leg or S bend in the road. Traffic islands through the bend prevented vehicles cutting the corner. The learned trial judge made a finding that there was a distance of 60 metres between the end of the S bend and the crossing. That road feature meant that a vehicle travelling in the direction of the taxi had to veer firstly to the left and then to the right. King, a passenger in the taxi, estimated its speed to be approximately 70 kms per hour but

the driver said he was travelling at between 50 and 55 kms per hour. The finding of the learned trial judge was that "the speed of the vehicle was probably closer to the estimate given by the first defendant than that given by Mr King". In order to appreciate the time lapse between the taxi negotiating the S bend and impact senior counsel for the respondent drew attention to the fact that at 60 kms per hour 60 metres would be traversed in 3.6 seconds.

[20] There was also an unchallenged finding that the first defendant did not see the respondent at any stage before impact. There was obviously no impediment to his doing so. There was no braking or swerving before impact. King, who was sitting in the middle of the back seat of the taxi, saw a woman on the crossing as the vehicle was entering the S bend. His evidence was that another passenger in the cab observed to the driver that there was a woman on the crossing. King "thought she was gunna land in me lap". That caused him to use an expletive. His evidence was that the woman "was pretty well lined up with the centre of the car". But then the impact was to "the right hand side around the corner of it – round near the light". When asked to explain how the woman came to be struck by the right hand corner of the vehicle when she had been lined up in the centre of the car King said, "I'd say she jumped backwards".

[21] There was also a vehicle approaching the pedestrian crossing from the opposite direction, but it was further away from the crossing than was the taxi. A passenger in that vehicle, Mrs Erkens, said she saw the respondent "walk into the vehicle on the crossing". The learned trial judge concluded that "her version of the plaintiff's movements should not be relied upon". He accepted the observations of King as to the plaintiff's movements "as being the more accurate".

[22] The finding of the learned trial judge was that the respondent was wearing a dark skirt, white blouse and black vest; she had just left her employment at the Irish Club and was walking to her home. The learned trial judge concluded that areas of the white blouse would have been visible and created a contrast with the other black clothing. There was a finding that the respondent was "able-bodied and had no impediment affecting her capacity to walk".

[23] The respondent sustained very serious head injuries and was incapable of giving evidence at the trial.

[24] In relation to the issue of contributory negligence the learned trial judge held that the respondent was under no threat from the north bound vehicle, that when she stepped onto the crossing it was likely that the taxi was not in her view, and that as she had right of way she was entitled to assume that a vehicle would stop for her. He found on the balance of probabilities that the respondent "was already on the eastern side of the roadway when she would have become aware of the danger that the taxi was not going to stop". He then referred to her jumping backwards as being an "agony of the moment" decision.

[25] In those circumstances he concluded that he was "not satisfied on the evidence that there was any failure of lookout on the part of the plaintiff". He also expressly found that there was "no evidence to suggest that when she made her entry on to the crossing it was otherwise than safe for her to do so".

[26] The essential submission by counsel for the appellants with respect to contributory negligence is contained in the following extract from his oral argument addressed to this court:

> ". . . It's that evidence of King and his Honour's acceptance of that evidence which is at the centre of the attack upon the absence of a finding of contributory negligence. The appellants' position is this. That if his Honour were justified in making as he did a finding that immediately before being struck the respondent jumped back from the taxi it was quite impossible for the appellants to successfully advance a case she was guilty of contributory negligence. If, however, as was the appellants' case at trial, the respondent, rather than jumping back or attempting to jump back from the path of the cab, simply walked into the side of the cab so as to bring about the impact such circumstance in my submission must sound in a finding of contributory negligence."

[27] As already noted, the learned trial judge quoted in his reasons a passage from King's evidence which included his assumption that "I'd say she jumped backwards" in getting from being "lined up with the centre of the car" to being struck by "the right hand corner around the corner of it – round near the light". That appears to have been accepted by the learned trial judge. However, counsel for the appellants drew this court's attention to answers in the cross-examination of King where he conceded that he did not have the respondent constantly in vision. That was probably because at some point in the taxi negotiating the S bend the driver of the taxi would have been between the respondent and King. It appears that it was after that point that King noticed her in the centre of the windscreen, such as to cause him to believe that she would land in his lap.

[28] Under further cross-examination King conceded: "I just assumed she jumped back". He said that he did not actually see her jump back at any time; that was repeated on at least two occasions.

[29] Reading the whole of King's evidence I do not see any inconsistency between his evidence-in-chief and what he said under cross-examination. Because at one point of time the respondent appeared to be in his line of vision in the centre of the vehicle and the impact occurred on the right hand front corner of the vehicle he assumed she must have jumped back. All the evidence suggests, and there is a finding to the effect, that the vehicle did not swerve before impact.

[30] The argument of counsel for the appellants is that if King did not actually see the respondent jump backwards then she must have walked into the car in accordance with the evidence given by Mrs Erkens. I do not see that that necessarily follows.

[31] All of the relevant events occurred in the space of approximately 3½ seconds. The respondent was seen by at least two of the passengers in the taxi. One made an observation to the driver and the other, King, uttered an expletive. King got glimpses of the respondent as the taxi was negotiating the S bend. The movement of the taxi caused the angle between her and the vehicle to change from time to time. It is not unlikely that the respondent would have jumped backwards, or taken a step backwards, in the immediate split second before impact; it would not be an unlikely thing to do once she appreciated the oncoming taxi was a danger to her. If

she had jumped backwards, or taken a step backwards, that is not necessarily a movement which would have been noticed by a witness in the position of Mrs Erkens. From the aspect of a passenger in an oncoming car the critical thing would have been the closing of the gap between the taxi and the pedestrian. But in any event Mrs Erkens' evidence was rejected by the learned trial judge, something he was entitled to do.

[32] There is nothing unreasonable or unjustifiable in the findings made by the learned trial judge. I am not persuaded that he misinterpreted or misapplied the evidence of King. Ultimately he concluded that the respondent was not guilty of contributory negligence, and I am not persuaded that he erred in so doing. Any last moment movement, if any, by the respondent is not determinative of the issue of contributory negligence.

[33] It follows that the appeal on the question of contributory negligence cannot succeed.

[34] The learned trial judge made findings relevant to the assessment of quantum; the following are relevant to the assessment of damages for future economic loss.

[35] The respondent was aged 41 at trial. She was born in the Philippines on 2 September 1960 and educated there. She completed a four year degree course obtaining a Bachelor of Science in nutrition from the University of the Immaculate Conception. In the Philippines she worked in a clerical position and also as a nutritionist. She married her husband on 8 April 1989 and there is one child who was born on 24 November 1990. The family migrated to Australia in August 1993 and settled in Mt Isa where the respondent's sister was then residing. The respondent and her husband became Australian citizens on 26 January 1996.

[36] The respondent commenced work with the Mt Isa Irish Club in June 1995 as a kitchen hand and worked there until the accident. She worked two shifts per day – 10 am to 2 pm and 5pm to 10 pm. Shortly prior to the accident she had been offered the position of kitchen supervisor but had declined that promotion at the time.

[37] The respondent's husband worked as a welder/mechanic in the Philippines but his qualifications were not recognised in Australia. In consequence he commenced employment as an apprentice boilermaker with Mt Isa Mines and was in the second year of that apprenticeship when the accident happened. He has since completed his trade qualifications.

[38] In the accident the respondent sustained severe brain damage. It is sufficient for present purposes to say that the respondent has been left with gross physical disabilities. She is unable to walk normally but moves with a shuffling gate. She requires a wheelchair from time to time, and will require more frequent use of a wheelchair in the latter stages of her life. One of the most significant consequences of the brain damage is that she has lost the power of speech. She can write instructions with difficulty and communicates with hand signals and sounds. The learned trial judge found that she understood what was being said to her but could not communicate her feelings or opinions.

[39] It is obvious from that description of her present condition that her earning capacity was totally destroyed as a consequence of the accident. As already noted the only challenge to the assessment of quantum made by the learned trial judge is with

respect to future earning loss and the consequential assessment of loss of superannuation.

[40] The learned trial judge found that at the time of the accident the respondent was in established employment as a kitchen hand and her prospects of advancement were good. She had refused the offer of promotion to kitchen supervisor because of the need at that time to care for her husband and her five year old daughter. The learned trial judge concluded that "her refusal was not unreasonable, nor would I regard it as showing lack of ambition and drive on her part". The catering manager for the Mt Isa Irish Club, Mr Fitzpatrick, gave evidence that he regarded the respondent as "an excellent worker", she was the best of his team. She was very hard-working and got on well with fellow employees. He expressed the opinion that the respondent "would likely have filled the position of manager after his departure from the position which was a short time prior to the trial". That appointment would have been the responsibility of the Club Manager and not Mr Fitzpatrick.

[41] The findings of the learned trial judge went on:

> "It is more likely, in my view, that she would have built upon her existing qualification and obtained recognised qualifications in the field of nutrition or as a dietician. That course may not have been possible in Mt Isa but as the family intended one day to move to Brisbane, her opportunities for education and for employment in this field would have increased.
>
> I accept as accurate the statement Mr Fitzpatrick made as to the plaintiff's ability and capacity. I assess that the plaintiff would over time have found employment in a supervisory level or as a manager. This was more likely to occur when the demands of child-raising had reduced".

[42] The learned trial judge then referred to scenarios and calculations put into evidence by accountants. He concluded that progression to the rank of dietician or similar higher position would not have been gained until approximately 2006. In consequence he assessed the respondent's loss on the basis of her continuing at kitchen hand level for a further five years and then at dietician or managerial level for a further 15 years. That would have taken the respondent to age 60-61 and the learned trial judge observed that in using that as the cut-off age for her employment there "has been already some discounting". That gave a primary calculation for future economic loss of $342,000 if she became a dietician and $365,000 if she became a manager. That was then discounted to $320,000 to make "further allowance for the usual contingencies and the contingency that the plaintiff may have lost some time at work if she and her husband had another child".

[43] The contention of counsel for the appellants is that, at best for the respondent on the evidence, the assessment of future economic loss should have been made on the basis that she would have worked as a cook (weekly wage $460) from the date of trial for about 22 years which would have taken her to age 63. That would give a primary figure of $323,748 which counsel submitted should be discounted by 20 per cent leaving a figure of $258,998.

[44] The main reason why it was submitted the assessment should be made on the basis that the respondent would have worked as a cook was that there was insufficient evidence on which to base a finding that the respondent would have qualified in Australia as a nutritionist or been able to find employment at managerial level. The respondent had only been working at the Mt Isa Irish Club for approximately 14 months prior to the accident. Her English was apparently not good, but improving. She had done nothing prior to the accident about obtaining qualifications as a nutritionist in Australia, and inferentially that was because she was happy in the job she had. According to her husband her only stated ambition prior to the accident was owning her own restaurant. As the evidence did not particularise what the respondent would have had to do to obtain qualifications as a nutritionist it is difficult to justify drawing an inference that she would have been so qualified within five years of the date of trial.

[45] Whilst the evidence indicated that the respondent and her husband had some thoughts of moving to Brisbane there were no definite plans. Undoubtedly any move would have been dependent upon the availability of work for both the respondent and her husband in Brisbane.

[46] It may well have been easier for the respondent to obtain a position such as catering manager in Mt Isa rather than in Brisbane where competition for the position would have been much greater.

[47] The calculations before the traditional discounting demonstrate the following range in broad terms:

(i) Kitchen hand for five years then 15 years as a dietician - $342,000;
(ii) Kitchen hand for five years then 15 years at managerial level - $365,000;
(iii) Cook for 22 years - $323,748.

[48] One could also do another exercise allowing the respondent 10 years as a cook ($460 per week) followed by 10 years as a manager ($617 per week). The value of that loss at the date of trial using the five per cent discount table comes to $346,238. Thus it can be seen that the loss before discounting for the usual contingencies and the contingency that the respondent may have lost some time by having another child was in the range $324,000 to $365,000.

[49] But by allowing $320,000 the learned trial judge hardly discounted at all for such contingencies. True it is that there is some discounting in only taking the respondent's working life to approximately aged 60. But the primary figure reached should, in my view, have been discounted by something of the order of 20 per cent to cover for the contingencies in this case. Those contingencies here included uncertainties created by the possibility of the family moving to Brisbane, uncertainties created by the possibility of the family being enlarged by the advent of another child, uncertainty as to whether, if at all, the respondent would have qualified as a dietician or obtained a managerial position, and finally the usual contingencies of life. An award of $320,000 does not sufficiently reflect those contingencies.

[50] It follows in my view that there is a demonstrable error in the calculation made by the learned trial judge. If one adopts as the starting point the range $324,000 to

$346,000 and discounts by 20 per cent the relevant range for future economic loss becomes $259,200 to $276,800. The appropriate figure to allow would then be $265,000.

[51] The question then becomes whether, applying the approach adopted by this court in *Elford v FAI General Insurance Company Limited* [1994] 1 Qd R 258, this court should interfere with the assessment made by the learned trial judge on the basis that the error has substantially altered the total award. In my view, even allowing for the fact the total award was in excess of $4 million, the difference here does justify the court intervening.

[52] I would set aside the figure of $320,000 for future economic loss and substitute for it the figure of $265,000.

[53] It was agreed that the superannuation benefit should be calculated at the agreed rate of eight per cent on the amount allowed for future economic loss. It follows that the award of $25,600 should be set aside and that the sum of $21,200 should be substituted.

[54] The amount of the judgment ($4,551,900.06) should be reduced by $59,400 producing a substituted amount for the judgment of $4,492,500.06.

[55] I turn now to the appeal against the order for costs.

[56] Relevantly the respondent made an offer to settle on 5 November 1998. By that notice the respondent (plaintiff) offered "to settle all matters in respect of which the plaintiff claims against the defendants in these proceedings by payment by the defendants to the plaintiff of the sum of One million five hundred thousand ($1,500,000) for damages, clear of the refund to WorkCover Queensland in the sum of Two hundred and eighty five thousand, six hundred and thirty six dollars and seventy one cents ($285,636.71) plus the plaintiff's party and party costs of the action up to and including the day of acceptance of this Offer to Settle, to be taxed". The Offer remained open for acceptance for a period of 14 days after service.

[57] The offer was not accepted and ultimately the matter went to trial in September 2001. As is obvious the respondent succeeded in recovering substantially more than the amount specified in the Offer to Settle. The Offer to Settle was made pursuant to Order 26 of the Rules of the Supreme Court (the UCPR were not in force at the time). The cost ramifications of the appellant's declining to accept the offer to settle were governed by Order 26 rule 9. Essentially that rule provided that the "Court shall order the defendant to pay the plaintiff's costs fixed on a solicitor and client basis, unless the defendant shows that another order for costs is proper in the circumstances".

[58] It was the appellants' contention before the learned trial judge that in the circumstances another order was proper; there was no dispute that the appellants should pay costs. The only issue was whether (to use the terminology of the UCPR which were in force at the time of judgment) costs should be awarded on a standard basis or on an indemnity basis.

[59] Pursuant to Order 39 rule 29C of the RSC the respondent was obliged, within 28 days after the close of pleadings, to file and serve a statement of loss and damage.

By virtue of that rule that statement had to contain particulars of all amounts sought to be recovered by way of damages. The respondent was also obliged to serve supplementary statements of loss and damage "whenever there is a significant change in the information given in the statement of loss and damage after the making of the statement".

[60] In purported compliance with that obligation the respondent filed a statement of loss and damage dated 7 July 1998. It was the operative statement of loss and damage at the time the Offer to Settle in question was made. In that statement there was no claim for aids and equipment, no claim for home modifications, no claim for any gratuitous care whether past or future, no claim for any commercial care past or future, no claim for assistance required to replace services provided by the respondent to her daughter, and no claim for Public Trustee administration expenses. Counsel for the appellants submitted to the learned trial judge and again to this court that the Statement of Loss and Damage dated 7 July 1998 supported a maximum claim for damages of the order of $500,000.

[61] The respondent filed a further statement of loss and damage on 9 February 1999, after the time for acceptance of the relevant Offer to Settle had expired. That supplementary statement included a claim for gratuitous assistance provided to the plaintiff, being $185,285.23 for past assistance and $2,061,142.40 for future assistance. There was also a claim for past gratuitous services to replace the services provided by the respondent to her daughter in the sum of $49,265.28. But that supplementary statement failed to disclose any medical reports post-dating the report of Dr Guazzo of 12 February 1998, failed to disclose the report of Helen Coles dated 29 July 1998, and failed to make any claim with respect to aids and equipment, home modifications, travel expenses and Public Trustee administration fees. A further supplementary statement of loss and damage was delivered on 18 February 1999. Significantly it increased the claim for past gratuitous care to $310,085.39, and the claim for future gratuitous care to $3,285,626.40.

[62] The contention of the respondent, both before the learned trial judge and repeated in this court, was that the appellants were generally aware in November 1998 that some claim was going to be made for past and future gratuitous care and for other costs. For example, as at that date the statement of claim contained the following allegation: "It is extremely unlikely that she will ever be able to live independently in the future and makes a claim for past and future gratuitous and paid assistance". No particulars of that claim were provided in the statement of claim and, as already noted, none had been otherwise provided.

[63] In the plaintiff's supplementary statement of loss and damage dated 29 August 2001 (shortly before the trial commenced) the following claims were made:

1. Past gratuitous care – husband - $481,019.76
2. Past gratuitous care – carers - $461,597.40
3. Future care and services - $4,637,453.20
4. Care for Miss Annalise Castro - $148,609.71
5. Equipment cost - $7,715.00
6. Future equipment costs - $19,374.00

[64] Counsel for the appellants contended before the learned trial judge, and again in this court, that the respondent was not in a position where she was willing and able to carry out her part of what was proposed by the Offer to Settle. Because she was

clearly incapable of managing her own affairs any settlement was subject to sanction by the Court. If, as would have been their obligation, legal representatives of the respondent fully disclosed the extent of her claim to the judge dealing with a sanction application if the appellants had accepted the offer, the settlement would not have been sanctioned. If that had have happened the appellants would not have been at risk on the issue of costs after trial.

[65] In his reasons for ordering payment of costs on an indemnity basis the learned trial judge referred to the fact that in the circumstances the respondent was prima facie entitled to costs on that basis. He then referred to and set out the submissions by counsel for the appellants to the effect that the operative statement of loss and damage at the time the Offer to Settle was made did not include any claim for past and future care.

[66] He then recorded submissions by counsel for the respondent which included reference to the fact that in Dr Gauzzo's report of 6 December 1996 there was mention that the respondent would "require constant attention for her usual daily care". The doctor also referred to the fact that she would require "full nursing care". The learned trial judge then also referred to the fact that the first appellant had by November 1998 for some time been paying for the respondent's care and had obtained a report setting the rehabilitation care needs with respect to the respondent.

[67] The observation was then made that such matters "must be seen against the background that the loss and damage statements were in those days, and still are, often amended to included omitted heads of claim."

[68] The learned trial judge rejected a contention that the respondent had not made disclosure of certain medical reports in her possession as at November 1998. That issue was not further agitated on appeal.

[69] Critically the learned trial judge said:

> "As at November 1998, the likely allowances for future care for the plaintiff and her daughter, for future treatment and for the other usual needs could have been assessed in such a way as to allow a reasonable appraisal by the defendants of the plaintiff's offer. It appears that this was not done. Had it been done there was on the material available to the defendants, ample evidence that the plaintiff's award might exceed the offer. The force of the costs rule must apply".

[70] It was that reasoning which led to his Honour ordering that indemnity costs be paid.

[71] Counsel for the appellants submitted that an Offer to Settle must be considered in the light of matters revealed in the pleadings and other documents associated with the proceedings (such as a statement of loss and damage) as at the date the offer is made. It was further submitted that to have cost consequences an Offer to Settle must have been in such terms as would result in a binding compromise if accepted, albeit after sanction by the court.

[72] The basic principle in my view is that the recipient of the Offer to Settle must have an informed opportunity to assess the chances of either side doing better than the

offer. Further that issue must be decided on material disclosed in the proceedings; it is the claim as made in the proceedings which is under consideration.

[73] A similar issue was considered by the New South Wales Court of Appeal in *Rolls Royce Industrial Power (Pacific) Ltd v James Hardie & COI Pty Ltd* (2001) 53 NSWLR 626. Stein JA (with whom Davies A-JA agreed) observed at 642 that the learned judge at first instance did not err in concluding that the offeree did not have an informed opportunity to assess its chances because, in that case, the cross-claim was brought at a later point of time. He said: "Surely what must be relevant is the circumstances which exist at the time the offer is made?" Stein JA then quoted with approval a passage from a judgment of Mahoney A-P in an unreported case *Fowdh v Fowdh* (4 November 1993); there it was said:

> "It is one thing for a plaintiff to present her evidence, make an offer of compromise, and to succeed at trial on that evidence. In such a case, indemnity costs may be warranted. It is another thing for the plaintiff to present a case and make an offer of settlement, and then to succeed at the trial upon a relevantly different case. A plaintiff who has done that may not readily receive indemnity costs. I do not mean by this that minor differences between the case at offer and the case at trial will be of significance or that, if the difference be significant, a discretionary judgment for indemnity costs may not be given. But where the difference between the position at offer and the position at trial be as the Master assessed it to be, a decision to refuse indemnity costs may readily be understood".

[74] Stein JA also referred to some English cases concerned with the somewhat analogous situation of a payment into court. The Court of Appeal in *Gaskins v British Aluminium Co Ltd* (1976) QB 524 was concerned with the question whether the court could order payment out to the plaintiff after the trial had commenced. Each member of the court concluded that the trial judge was correct in refusing to so order. Lord Denning MR at 532 observed that "the plaintiff's prospects were considerably diminished – so much so that he ought not to be allowed to take the money out". Orr LJ at 574 and Browne LJ at 539 spoke of the risks having substantially changed to such an extent that it would be wrong to allow the money to be taken out. To similar effect is the reasoning in *Proetta v Times Newspapers Ltd* (1991) 1 WLR 337. The Court of Appeal there held that a payment into court was made by the defendant in the light of his perception of the case at the time of making the payment; if thereafter the risks of the case changed adversely to the plaintiff the court should not allow the plaintiff an extension of time in which to accept the payment.

[75] Those English cases to my mind reinforce the proposition that a procedure such as an Offer to Settle must be evaluated in the light of circumstances as they exist at the time the offer is made. If a plaintiff enlarges his case after an Offer to Settle is made and rejected then there will be good reason for refusing the plaintiff indemnity costs notwithstanding that the judgment is better than the offer. As Mahoney A-P pointed out a minor difference in the claim will not ordinarily have that consequence. But where the difference is significant, where the risk to the defendant is significantly altered, there would have to be careful analysis before a proper exercise of discretion could result in indemnity costs being ordered. Cases such as *Hiscox v Woods & GIO General Limited* [2002] QSC 64 (Moynihan SJA) demonstrate that in particular circumstances an award of indemnity costs can be

justified even though further particulars of the claim have emerged after the offer was made.

[76] In *Campbell v Jones & Anor* [2002] QCA 332 (judgment therein was delivered after argument was heard in this case) Fryberg and Mullins JJ ordered that costs be recovered on the standard basis though the plaintiff did better than her offer to settle. Again that was a case where the statement of loss and damage at the time the offer to settle was made did not disclose significant material which affected the ultimate assessment of damages. The reasoning of their Honours is in accord with the reasoning herein.

[77] Within a matter of a couple of months of the offer in this case being made and rejected additional claims more than doubling the amount of the offer to settle were made. Though the appellants were, or at least should have been, aware that some claim would be made for past and future care, it was unrealistic for them to assume that the claim for past and future care alone would ultimately be for double the amount of the offer to settle.

[78] What to my mind makes it clear that the offer in November 1998 was not a genuine offer to settle is that no judge could have sanctioned a settlement at that figure in the light of information then available to the respondent's legal representatives but not disclosed to the appellants in documents in the proceeding.

[79] Under the Rules of the Supreme Court, and now the Uniform Civil Procedure Rules, there is a clear obligation on plaintiffs to fully particularise claims for damages from the outset of the litigation. The Offer to Settle procedure is designed to focus attention on early resolution of the dispute. The sanction is with respect to costs. In those circumstances it is not unreasonable to say that the Offer to Settle must be evaluated in the light of circumstances disclosed in the proceedings. If the plaintiff's case changes substantially after an Offer to Settle is made and declined, the defendant ought not be penalised for rejecting the offer. If the principal were otherwise the Offer to Settle procedure would be open to abuse.

[80] Though this is an appeal from an exercise of discretion I have come to the view that the learned trial judge erred in failing to give due weight to the fact that there was a substantial change in the respondent's case after the offer of settlement was made. The appellants were entitled to respond to the offer in the light of particulars of damage provided in the statement of claim and statement of loss and damage as they stood at that date. The respondent was in possession of additional relevant material about her case at the time the offer was made but had not disclosed that information to the appellants. In the circumstances the appellants ought not have to pay indemnity costs.

[81] I would therefore order that the order of the learned trial judge be varied by deleting in paragraph 5 thereof the words "on the indemnity basis" and insert in lieu thereof "on the standard basis".

[82] The orders of the court should therefore be:

(i) Appeal allowed with costs.

(ii) Order that the judgment at first instance be varied by:

(a) deleting the amount $4,551,900.06 and inserting in lieu the amount $4,492,500.06;

(b) in paragraph 5 of the order deleting the words "on the indemnity basis" and inserting in lieu thereof "on the standard basis".

(iii) The Court will allow the parties 7 days within which to make written submissions with respect to costs thrown away by the late abandonment of grounds of appeal.

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