SUPREME COURT OF QUEENSLAND

CITATION:	*Karanfilov v Inghams Enterprises P/L* [2003] QCA 242
PARTIES:	**ZAKLINA KARANFILOV** (plaintiff/respondent) **v** **INGHAMS ENTERPRISES PTY LTD** ACN 008 447 345 (defendant/appellant)
FILE NO/S:	Appeal No 5365 of 2002 SC No 9969 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury - Quantum
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	26 March 2003
JUDGES:	McPherson and Jerrard JJA and White J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – CONSIDERATION OF EXTRINSIC MATTERS – OTHER MATTERS – whether claim under s 315 *WorkCover Queensland Act* 1996 (Qld) could be entertained where respondent's husband had provided gratuitous services from time of respondent's injury until trial WORKERS' COMPENSATION – WORKERS' COMPENSATION – SUFFICIENCY OF EVIDENCE AND ONUS OF PROOF – PARTICULAR ACCIDENTS AND DISEASES – ARTHRITIS, RHEUMATISM AND OTHER BONE AND JOINT DISEASES – whether the respondent relied exclusively on a failure by the appellant to provide a "safe system of work" – whether, if so, the appellant had made no "reasonable attempt" to put in place an appropriate system of work APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – ASSESSMENT OF DAMAGES – whether trial judge acted on a wrong principle of law or misapprehended

facts or made a wholly erroneous estimate of damage suffered

WorkCover Queensland Act 1996 (Qld), s 312, s 315

Elford v FAI General Insurance Co Ltd [1994] 1 Qd R 258, considered
Mansini v Martin [1998] QCA 222, considered
Miller v Jennings (1954) 92 CLR 190, considered
Plumb v State of Queensland [2000] QCA 258, considered

COUNSEL: G C Martin, with R M Treston, for the appellant
W D P Campbell, with F H Dawson, for the respondent

SOLICITORS: B Thomas Lawyers for the appellant
Sciaccas Lawyers for the respondent

[1] **McPHERSON JA:** I agree with the reasons of White J which I have had the advantage of reading, for dismissing this appeal. I also agree with what is said by Jerrard JA about the interpretation of s 315 of the *WorkCover Queensland Act 1996*.

[2] The appeal should be dismissed with costs.

[3] **JERRARD JA:** I have read the reasons for judgment and orders proposed by White J and respectfully agree with those. I note that the critical finding of fact regarding the medical evidence, not challenged on the appeal, was:

> "What is known in this case is that Mrs Karanfilov developed painful supraspinatus tendinitis with calcification as a result of her work at Inghams. Appropriate medical treatment was undertaken to relieve her pain but unfortunately to do so left her with a frozen shoulder which has left her disabled, in pain, and unable to use her left arm, and so unable to work, and unable to perform many household tasks that she was previously able to perform."

[4] I agree with White J that when determining if s 312(2) of the *WorkCover Queensland Act* applies to a claimant, a court must necessarily look at the substance of both what is pleaded and what is actually relied upon. I also agree that s 312(2) did apply to the respondent because the substance of the pleaded case she actually relied upon was, as particularised in paragraph 12 of the respondent's amended statement of claim, a failure to provide her with a safe system of work. Claimants do not escape the intended reach of s 312(2) by pleading, but not seriously attempting to prove, other asserted breaches of duty, of contract, or statutory duty, when their claim against an employer can accurately be described as a failure to provide a safe system of work.

Section 315

[5] The *Griffiths v Kerkemeyer*[1] services provided by the husband up to trial are precisely those the commercial costs of which can no longer be recovered as damages, by reason of s 315 of the *WorkCover Queensland Act* 1996. The appellant submits that the respondent likewise cannot be awarded damages for the cost of what the learned judge described as "professional assistance", which the judge was

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1 (1977) 139 CLR 161

satisfied would be engaged by the plaintiff in the future. The appellant complained about the award, both as a matter of construction of s 315, and because the respondent herself gave no evidence on that topic at all.

[6] Section 315 provides as follows:

> "A court can not award damages for the value of services of any kind-
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> (a) that have been, or are to be, provided by another person to a worker; and
> (b) that are services of a kind that have been, or are to be, or ordinarily would be, provided to the worker by a member of the worker's family or household; and
> (c) for which the worker is not, and would ordinarily not be, liable to pay."

[7] The judgment under appeal relevantly records as follows at [77]:

> "Section 315 of the *WorkCover Act* is headed 'gratuitous services' and prevents an award of damages for service 'for which the worker is not, and would ordinarily not be, liable to pay.' This appears to leave open a claim by a plaintiff for the value of paid care. This conclusion is supported by the Explanatory Memorandum relating to s 211 of the Act which deals with an entitlement to a lump sum for gratuitous care:
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> 'The lump sum is designed to replace the Griffiths v Kerkemeyer 'head of damage' under common law which is abolished under chapter 5. It is not designed for the provision of professional care or services for the worker – *this is still available under common law*' (emphasis added)".

[8] After considering submissions on the section and the judgments of the High Court in *Blundell v Musgrave*[2], *Griffiths v Kerkemeyer,* and *Van Gervan v Fenton*[3]*,* the learned judge held further at [81] that those decisions demonstrated:

> "that the basis of an award of damages for nursing or caring services is the need for the services and not the cost of providing them. This point is made in the context of gratuitous services, but it would appear to have equal application when the need is met by professional services. Hence, the ability to claim damages is not dependant upon liability to pay, but rather upon the need that is in existence at the time of trial."

The judgment then went on:

> "It follows that s 315 does not prevent a plaintiff from claiming damages for future paid care. Provided that at the time of trial the plaintiff genuinely intends to engage professional services, even if that intention is formed after taking legal advice, there is no reason why the claim for paid care should not succeed."

[9] No reason emerged to doubt that the respondent's husband was genuine in his stated intentions of returning to work, and of causing the damages awarded to the

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2 (1956) 96 CLR 73

3 (1992) 175 CLR 327

respondent to be applied, if sufficient, to the provision of household care. As the husband expressed it:

> "If I have the money, why not?"

While that evidence assumes a capacity to apply the respondent's money at his choosing, it could be descriptive of a relationship in which money is pooled and applied to agreed goals. Other answers by the respondent's husband did show past agreement about expending money[4]. Although the evidence was sparse indeed, the learned judge was entitled to find that provided a sufficient award of damages was made, the husband would return to work and paid care for household services would be engaged. Further, that the respondent would have at least an equal liability with her husband to the service provider for the cost thereof.

[10] If the learned trial judge was correct in holding that in such circumstances s 315 does not prevent an award of damages for the cost of those services, then it is difficult to see why many plaintiffs will not make the like claim for the future costs of commercial provision of services provided without charge by family members up to the date of trial, (or the date of getting legal advice on quantum). Many such service providers might be grateful for the opportunity to do other things, provided that damages awarded to a plaintiff were considered sufficient by the decision makers in that family to allow for paid care. Sometimes, of course, family members would prefer to continue the provision of that unpaid care. When they do not, and if the learned trial judge is correct, then an obviously unintended consequence of enacting s 315 will be to convert unpaid family care into paid non family care. In those cases s 315 will provide no relief at all for defendants.

[11] The appellant's first submission was that the learned trial judge had erred in law by focusing only upon s 315(c), whereas the section provided three conjunctive requirements which, when all three were established, disentitled a worker to an award of damages. As part of that submission the appellant contended that each of the first two conjunctive requirements ((a) and (b)), contained within them a number of disjunctive requirements. The appellant's submission was that if any one (or more) of the disjunctive matters within either of (a) and (b) were satisfied in circumstances where those same matters also satisfied (c), then there was no capacity to award damages.

[12] In this case, so the submission ran, the requirement in (a) was satisfied because the household services provided by the respondent's husband were ones "that have been ……provided" by another person (the husband); and for good measure the second disjunctive requirement in (a) was satisfied too, because the household services the respondent needed "are to be" provided by another person (the paid carer).

[13] The next step in the appellant's submission was that the requirements in (b) were satisfied, in that those services provided in the past by the husband were "services of a kind that have been" provided to the worker by a member of her family; and they also satisfied the description in (c), namely they were services for which the respondent was not liable to pay.

[14] That particular argument broke down upon closer examination. It would result in a court being unable to award damages where, for example, a member of the

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4 AR 226 at L 50-60, 227 L1-5 and 228 L50-60.

claimant's household had provided services for a (relatively short) period without charge, and then been unable to continue to do so. The example discussed in argument was that of a plaintiff confined to a wheel chair, who had been lifted in and out of the wheel chair on a number of occasions by his spouse, and whose spouse herself suffered a permanently disabling injury when providing that service (or alternatively died as a result of having done so). On the appellant's argument, the plaintiff who had thereafter in fact paid for the provision of the services previously supplied without charge by his wife, and who would need such services in the future, could not recover their cost as damages.

[15] The appellant sought to justify that construction by reference to s 211 of the Act, which entitles a worker to lump sum compensation (**not** an award of damages), where a worker has sustained an injury resulting in a work related incapacity of 50% or more, and has a moderate to total level of dependency on day to day care for the fundamental activities of daily living.[5] However, that entitlement to lump sum compensation only applies when the day to day care for those fundamental activities is provided at the worker's home on a voluntary basis (s 211(2)(a)). That would not apply to the example discussed in argument.

[16] The appellant's alternative argument focused upon the description in s 315(b) of "services *of a kind*" that have been provided by a member of the worker's family or household. The submission was that the learned judge ought to have inquired whether the services, for which the respondent proposed in future (if awarded sufficient damages) to pay, were services *of a kind* that had been provided by her husband. If so, the submission ran, damages for the value of services of that particular kind could not be awarded, irrespective of whether the plaintiff incurred a liability in the future to pay for them. This is because the section intentionally prohibits damages being awarded for services *of the kind* which are, or ordinarily would be, provided to that worker by family or household members, and free of charge.

[17] The basic intent in enacting s 315 is obvious from its terms. Damages are not to be awarded for the past or future provision of gratuitous services ordinarily provided to a claimant by family or household members.[6] However, the section as drafted actually says a lot more than that. It prohibits the award of damages for the value of services "of any kind" that answer the description provided by the three conjunctive and cumulative subclauses. The appellant would have a strong argument if the words in 315(c) themselves formed part of 315(b), or qualified only the "services of a kind" described in (b), but that is not how the section is drafted. The words in (c) qualify the "services of any kind" in the introductory phrase in the section, and not just those in (b).

[18] Had the words in (c) qualified only those in (b), they would have been readily understandable in that context. Those services of the kind that have been, or would be, or ordinarily would be, provided by a member of the family or household would be ones for which the worker was not, and would ordinarily not be, liable to pay because there would be no intent to enter into any contractual relationship when those services were sought and provided. However, the words in 315(c) can equally be comprehended when construed as a "stand alone" clause qualifying "services of

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5 Section 211(1).

6 This is also what the Explanatory Notes to the *WorkCover Queensland Act* 1996 say, at page 121.

any kind" in the introductory phrase. So used in that context, they describe services for which there is no past unsatisfied contractual obligation to pay, or obligation to use and pay for in the future ("is not"); and which would ordinarily not be provided without a contractual relationship creating an obligation to pay. In this case the learned judge has found the respondent intends to obtain services for which payment will be required. Section 315(c) does not apply to those. The respondent will ordinarily be liable to pay for those services, and the judge was not prohibited from ordering their estimated cost as damages.

[19] This construction may enable plaintiffs to frustrate an underlying goal of the interests who encouraged passing s 315, but that is a consequence of its drafting. It is not an incongruous or irrational result that services for which charges are made should be compensated for, though it may be an inconvenient one[7] for defendants. The wording of the section clearly excludes any intent to prohibit damages being awarded for services ordinarily provided only for money.

[20] **WHITE J:** This appeal concerns the construction of certain provisions in the *WorkCover Queensland Act* 1996 which have largely been replaced. The respondent was injured in 1997. The *WorkCover Queensland Act* 1996 was substantially amended by the *WorkCover Queensland Amendment Act* 2001. By s 588 of the *WorkCover Queensland Act* 1996, incorporating the 2001 amendments, an injury occurring before 1 July 2001 is governed by the provisions in force immediately before that date. Reference to "the Act" in these reasons is to the *WorkCover Queensland Act* 1996 prior to the 2001 amendments.

[21] The respondent developed painful symptoms in her left shoulder which the learned trial judge found were caused by the repetitive nature and conditions of her work as a chicken boner at the appellant's premises. The medical treatment undertaken appropriately, as her Honour found, to relieve her pain left her with a frozen left shoulder which has resulted in pain, an inability to use her left arm and an inability to work or do many of the household tasks that she could previously perform.

[22] The grounds of appeal concern the learned trial judge's construction of s 315 of the Act dealing with a claim for the cost of future care in performing domestic tasks; the quantum of her Honour's assessment of those damages; the construction of s 312 of the Act and, in particular, whether the respondent had relied exclusively on the failure to provide a safe system of work in her proceedings for damages, and, if so, whether the appellant had made no genuine or reasonable attempt to put in place an appropriate system of work and her Honour's assessment of the quantum of loss of future earning capacity.

[23] The respondent was born on 14 January 1969 in the former Yugoslav Republic of Macedonia and migrated to Australia on 30 May 1992. She and her husband then had a young son. She had previously worked in a factory in Macedonia on two occasions for a period of three or four months each, the first when she had just left school and on the second occasion after she was married. After her arrival in Australia the respondent gave birth to another child in 1993.

[24] When they arrived in Australia the respondent and her husband spoke little English but attended classes in order to improve their skills. They moved to Queensland from Melbourne in 1997. The respondent obtained the first job for which she

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[7] See *Cooper Brookes (Wollongong) P/L v FC of T* (1981) 147 CLR 297 at 304-305; 320-321.

applied with the appellant at its chicken abattoir at Murarrie. This was her first job in Australia. She had been unable to work in Melbourne because her husband had been involved in an accident and she needed to look after him and the new baby.

[25] The learned trial judge accepted the respondent's evidence that had she not been injured she intended to remain in her position at the appellant's factory until her retirement at the age of 65. She planned to have a third child after learning that the appellant provided for 12 months' maternity leave for its employees. About three months after she started working for the appellant the respondent and her husband bought a house and were paying off the mortgage. They had made financial commitments and choices about the kind of life they wanted for themselves and their children which required them both to earn an income.

[26] The respondent's husband worked in the security industry and because of their different shift times they were able to share the care of their children with some paid assistance. After she commenced full time work the respondent still carried out all of the household tasks apart from yard work and washing the car without assistance from her husband or paid help.

[27] A great deal of the evidence at trial concerned the induction and training which was given to the respondent at the appellant's factory when she commenced. She was assessed by a nursing sister for strength and flexibility and allocated to work in the boning room in the abattoir. On her first day she and other new employees were given lectures about many aspects of their employment including safety procedures. They received lectures from the training officer and an occupational health and safety nurse. The nurse told them to avoid engaging in cutting or pulling activities which put the dominant arm at a level higher than the shoulder. She told them about stretching exercises and to report any pain or twinges or discomfort to the leading hand or supervisor. The respondent, as found by her Honour, ticked and signed an induction training record which showed the 62 different topics upon which she had received verbal instruction on her first day at work. There was, as her Honour found, no ongoing relationship between the training officer and the employees after the first day's induction. There were then no refresher courses although the evidence showed that subsequently they were introduced. Her Honour noted that instruction given on the first day was contradicted by what workers observed or were told on the factory floor and concluded that the likelihood of what workers were told on induction day being followed, even if recalled, would be markedly reduced. Her Honour noted that the problem of workers not complying with instructions and not taking seriously warnings over failure to follow safety directions was known to the appellant by at least January 1996 when it received a report known as the Coyle Report alerting the appellant to that amongst many other problems.

[28] The main findings against the appellant concerned the duration of the work, the need for the respondent to exert force when her arm was raised above 60°, the crowded conditions on the boning line and the attitude of the appellant to complaints of pain and fatigue.

[29] Evidence was given about advice taken by the appellant on occupational health and safety matters prior to 1997 and its response to it. Ms Lesley Stephenson, an experienced occupational therapist, prepared a booklet entitled "Safety Procedures – Boning Room" for the appellant to give to its workers on the boning line. The

booklet showed, in an illustration, the boner's arm being kept by the side and bent at the elbow when sharpening knives in what was referred to as the mousetrap sharpener. As her Honour found, as shown on the video, on the boning line workers had to stretch out their arms at shoulder height to sharpen their knives. The booklet contained, as her Honour found, a number of useful instructions and exercises to be undertaken to relieve problems caused by activities: "For too long, using too much force, or too often". That booklet was not given to the respondent or to the fellow employees called by the respondent or an employee called by the appellant.

[30] Her Honour has made detailed and meticulous findings about the system of work and the evidence of the witnesses. When the respondent commenced working for the appellant the normal working hours were 8 hours a day, 5 days a week. Employees in the boning room commenced work at 6.15 am and finished at 3.00 pm. They had various breaks through the day. About two weeks after the respondent started working on the moving line in the boning room the hours were changed to 9.5 hours a day, 4 days a week. The starting time remained at 6.15 am but the employees finished at 4.30 pm. The lunch break was slightly shortened and the afternoon break extended by the same amount. Apart from toilet breaks, which were regulated to seven minutes, no other breaks were permitted. Her Honour accepted the evidence of the respondent and co-workers that the longer hours made the work more tiring. The appellant's loss control manager, a Mr Peatey, gave evidence that the appellant consulted the appellant's part-time occupational physician who gave the opinion that the extra hours "would be OK". His advice was sought and given orally rather than in writing. He was not a witness at the trial and no ergonomic assessment was made of any risk attached to increasing the working hours from 8 to 9.5 hours per day.

[31] There was rotation of tasks on the boning line but the most difficult work, as found by her Honour, was cutting the wings, then removal of the breast and then cutting the tenderloins. While there was some difference in the tasks all required similar movements of the hands and arms – flexion, forward reaching and abduction - except for wing cuts.

[32] After she started working on the boning line the respondent noticed that other employees were not keeping their arm level lower than their shoulders. This was supported by video evidence of work on the boning line after the respondent had left. The leading hand and the employee who was the respondent's designated "buddy" when she started working said that they would correct a worker who lifted her arm above 90° abduction. This was to take account of the fact that any abduction above 60°, particularly if repeated, was known to be unsafe from an occupational health and safety perspective. The leading hand who gave evidence could not recall giving instruction to a boner not to work with her dominant arm above shoulder level and yet this was clearly shown on the video.

[33] The Coyle Report observed that cutting tasks on the boning line involved loading on the shoulders, forearms and hands. The author noted the lack of facility to adjust the height of the work station and that the use of height adjustment stands was "unsympathetic". Another area of potential danger for a worker on the boning line was the distance between operators. The workers tended to crowd, as found by her Honour, too close together. They would be as little as 23 cm apart although a consultant retained by the appellant had nominated a minimum spacing of not less than a metre between operators. In 1994 a physiotherapist prepared a "soft tissue

education" brochure for the appellant. There was no evidence that this was given to employees. It noted that space constraints added risks to the job. The Coyle Report said that workers in the boning room identified inadequate and cramped work space as the most important problem in that area. Her Honour accepted the evidence of Dr Low, an expert in occupational health and safety, that the workers should have been located a greater distance from each other than that which he had observed. The boning line was long enough to allow a greater distance between them. Her Honour found that it would have been difficult for an individual boner unilaterally to increase the space on either side of her but it would have been simple for an instruction to be given and enforced by the leading hands.

[34] A further health and safety issue explored at the trial was the respondent's dominant left-handedness. No allowance was made for this and she assumed a position on the line as any other employee. There was no instruction to increase the space to the employee on her left even though, if the person on her left was right-hand dominant, a significantly greater space than the one metre otherwise advised was needed. There was no suggestion that the respondent was directed to the end of the line.

[35] Her Honour found that there were no audits for checking the boning room work environment while the respondent was employed by the appellant.

[36] In late October 1997 the respondent started to experience pain in her left shoulder. Initially she put up with the pain and did not complain. Her Honour accepted her explanation that most of the other workers had shoulder pain and did not complain. Her Honour also accepted her evidence that the attitude of leading hands and supervisors was that an employee should work hard and not complain and they indicated they did not like complaints. The poor attitude of some leading hands and management had been identified as a problem in the Coyle Report. The author had expressed concern that there was inadequacy in the incident/accident records kept by the appellant. He noted there were a number of near misses, minor incidents and real injuries which were not reported and there were positive disincentives against reporting accidents, problems and injuries. From an occupational health and safety perspective it was well recognised that early signs of repetitive-motion disorders in the workplace could reduce the risk of more severe problems.

[37] On 27 November 1997 the respondent complained of the pain to her supervisor. She was sent to the appellant's nurse who in turn sent her to see her general practitioner. She was certified for light duties but her shoulder did not improve and she ceased work on 6 December 1997. She returned to light duties later in the month until 13 February 1998 when she ceased working for the appellant and has been unable to work since then.

[38] The respondent underwent a number of operative procedures. Her Honour accepted the accuracy of the observations, the efficiency of his treatment decisions, and his view about the aetiology of the respondent's problems of Dr Mark Robinson, the respondent's leading orthopaedic surgeon. He ascribed the cause of her severe shoulder pain to her repetitive work as a chicken boner. The x-rays demonstrated calcific tendonitis of the supraspinatus tendon of the respondent's left shoulder. There was no radiological evidence that the respondent had calcific deposits in her shoulder prior to working for the appellant. After a number of operative procedures to lessen the pain and to increase mobility, there was, in effect, no improvement and the treatment resulted in a frozen left shoulder. Dr Robinson assessed her

permanent incapacity at 45 per cent of upper limb function. Dr Gillett, an orthopaedic specialist, was of the opinion that the respondent had a 60 per cent permanent impairment of upper limb function due to work related events and her subsequent treatment. Dr Duke, orthopaedic specialist, was of the opinion that the respondent's work situation caused an aggravation of an underlying calcific tendonitis of her shoulder. He was of the opinion that she had a very high chance of developing symptoms in relation to her tendonitis if she had not undertaken work with the appellant and that the symptoms may have developed within one or two years which would require surgery.

[39] The learned trial judge accepted Dr Robinson's evidence that even if the respondent had independently developed calcification she would not have developed a frozen shoulder from surgery since she was unlikely to have had surgical intervention. In a domestic environment, as her Honour found, the respondent would have been able to adapt her work habits to suit her own needs whereas in the boning line at the appellant's factory she had no such option. In over four years her Honour found the respondent had not developed symptoms in her right shoulder in a domestic rather than a work situation.

[40] Her Honour found that prior to her injury the respondent was a "fit, healthy, active young person with a happy outlook and many friends with whom she socialised" [72]. As a consequence of her physical pain and immobility her Honour accepted that the respondent suffered from an adjustment disorder with depressed and anxious mood. She had received treatment from an experienced psychiatrist for her psychological problems. Her Honour found that prior to her injury the division of responsibility for household tasks was very much "along traditional lines". The respondent's husband attended to gardening, washing the car and odd jobs about the house. She attended to all other housework such as cleaning, vacuuming, washing, ironing, making the beds and cooking. Once she commenced work she still undertook all household tasks without assistance from her husband or paid help. In order to take over these tasks after the respondent's injury her husband reduced his hours of employment and then gave up paid employment altogether in November 1999 after his wife had made a serious attempt on her life once she realised her condition was unlikely to improve. There were no other family members in Australia who could help.

[41] The respondent's husband gave evidence that if his wife was successful in the litigation he would return to work as they would be able to pay someone to come in and do the domestic tasks formerly done by her but which he had attended to since her disabling injury. It was a cause for criticism that the respondent herself did not give evidence on this topic. The evidence from her husband, in answer to a question in evidence-in-chief by the respondent's counsel, was as follows:

> "Now, after this case is over, if Jackie [the respondent] does succeed and recovers a sum of money will you return to work? -- Yes, I would.
>
> Why is that? What will you do about looking after – or the things to be done at home and looking after Jackie? -- Well, I will be able to afford to pay somebody to do what I was doing. It won't be done in exactly the same way that I was doing and probably that person won't be that caring, but it will be something. Will give me the opportunity to go back to work.

> There is an agreement between the parties that somebody would be employed for about 12 hours per week for about $15 per hour which is about $180 a week. Would you pay that sum to somebody to come into the house to look after Jackie? -- Yes, I would, yes. If I have the money, why not." t/s 222.

A little further on he was asked:

> "And do you believe, though, you'd still be able to leave her and go back to work as she now is? --Yes. It all depends on the outcome. It all depends what would the future bring us." t/s 224.

[42] Her Honour then asked the respondent's husband:

> "… but why haven't you employed a professional person to come into the house and do all those domestic duties before now? -- I couldn't afford it with one income and so many expenses, including the mortgage."

[43] In cross-examination defence counsel asked the respondent's husband why they did not pay someone to come in and do the domestic tasks at home when they were both working. He answered that it was unnecessary because his wife was happy to do the domestic tasks. He was then asked:

> "All right. Now, you have not paid somebody to do those tasks since her injury because, as I understand it, you say that you've been unable to afford it; is that correct? -- Yes.
>
> All right. Now, your wife obtained a payment of some $45,000 from WorkCover in – as a consequence of her injury, didn't she? -- about $40,000 as I remember.
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> Well, $40,000. Did you consider using the – any part of that money or the income from it to pay for someone to assist with the tasks around the house? -- I did consider but I have made decision not only me, with her, and that was some relief for her, as well as for me, to put more so of the money on to the mortgage and financially means a psychological relief as well. So we decided to put some of the money there. We decided to clear out the debt we had before because we had borrowed money from a friend. We had a credit card debt as well. So the rest of the money went into the mortgage. That was a choice and decision between both of us, not only mine." t/s 226-227.

[44] The respondent's evidence, limited as it was on this topic, indicated that she and her husband had joint goals about their financial future and the disposition of their income.

Claim for Paid Future Care – Section 315

[45] The learned trial judge awarded the respondent an amount of $175,716 in damages being the cost of household care services at $15 per hour for 12 hours per week for a further 50 years of life expectancy. The life expectancy figure was not agreed between the parties although the amount per hour and the number of hours was.

There was no challenge to the finding that the respondent was unable to perform many household tasks that she had previously performed because of her substantially impaired dominant left arm. The respondent accordingly had a need for the provision of household services, the accepted basis of recoverability at common law, *Van Gervan v Fenton* (1992) 175 CLR 327 at 333 and 347.

[46] Section 315 of the *WorkCover Queensland Act* precludes a claimant worker from recovering damages in proceedings for damages for past and future gratuitous care. There is provision in s 211 for a lump sum by way of compensation for voluntary care if the worker sustains an injury that results in a physical work-related disability of 50 per cent or more and the assistance is provided on a voluntary basis in the home. This, however, is part of a worker's compensation package and does not relate to a claim for damages in litigation proceedings.

[47] The appellant argued below and submitted on appeal that the respondent was precluded from recovering any sum for damages for the cost of future paid care on the proper construction of s 315 on two bases: because her husband had, in the past, provided domestic services gratuitously to her whatever her future intention about paid care might be; and because the services referred to in s 315 which were recoverable were for "professional" services not services of a domestic kind. Her Honour concluded that on its proper construction s 315 did not operate to prevent a claimant, in the respondent's circumstances, from being awarded damages for future care if evidence was given and accepted that she "genuinely intends to engage professional services, even if that intention is formed after taking legal advice", [82].

[48] Section 315 provides:

> "**315.** A court can not award damages for the value of services of any kind –
>
> (a) that have been, or are to be, provided by another person to a worker; and
>
> (b) that are services of a kind that have been, or are to be, or ordinarily would be, provided to the worker by a member of the worker's family or household; and
>
> (c) for which the worker is not, and would ordinarily not be, liable to pay."

[49] This infelicitously expressed provision does not immediately reveal its meaning and neither is it readily amenable to the process of statutory construction commended in *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381. Does it mean, as the appellant contends, that once services of a domestic kind have been provided voluntarily for however short a time in the past a claimant is precluded from recovering their cost even if there is a need, there is no one to fulfil it, and those services would be obtained commercially if in funds? If a claimant does not fail that hurdle, is the claim limited to "professional" services whatever they might be? The explanatory memorandum, which is mirrored in the second reading speech of the Minister, states:

> "*Clause 315* relates to the head of damage commonly referred to as a Griffiths v Kerkemeyer award … This clause prevents the court

> awarding the worker damages for the value of gratuitous services of a domestic nature or gratuitous services relating to nursing and attendance when those services are provided by another person i.e. spouse, parents, siblings, other relatives or friends of the claimant. Examples of, but not limited to, services for which a claimant can not receive damages include housekeeping, assisting with personal hygiene needs, mowing of lawn, gardening, changing bandages, dressing wounds. The Bill recognises there will be a need in certain circumstances for gratuitous care. Therefore, provision has been made in the statutory compensation benefits design (under chapter 3) [s 211] for payment of a lump sum in lieu of gratuitous care awards under common law for the more seriously injured workers in need of ongoing unpaid care assistance."

[50] Taken alone this explanation might tend to support the appellant's submission but the explanatory memorandum to s 211 states:

> "The lump sum is designed to replace the Griffiths v Kerkemeyer 'head of damage' under common law which is abolished under chapter 5. It is not designed for the provision of professional care or services for the worker – this is still available under common law."

[51] This statement suggests not that no services provided domestically are able to be claimed but that the focus is on the characterisation of the care as "professional". The appellant has criticised the learned trial judge's approach where she said at [79]:

> "As to the first argument, once [the respondent] engages a professional service provider, she will immediately become liable to pay for the services. Section 315 twice recites the phrase "that have been, *or are to be*, provided" suggesting that the liability to pay may arise in the future. In addition, s 315 is headed "gratuitous services" and is clearly aimed only at services which are provided free of charge. The section should not be interpreted so expansively that the phrase, "is not, and would ordinarily not be, liable to pay" should be taken to exclude a debt that has not yet been incurred but will create liability as soon as the services are engaged."

[52] Here, it is said, her Honour erroneously identified only sub-para (c) of s 315 whereas three circumstances are envisaged– those in (a), (b) and (c) – and, if present, no damages may be awarded. Within each subsection there are two or more disjunctives. It is necessary only, so the appellant's argument goes, as a matter of construction, that one of the disjunctives is satisfied within a particular sub-paragraph in order for that sub-paragraph to be satisfied. So much may be accepted. The appellant argues that since the services "have been … provided" to the respondent by another person (her husband), (a); and that the services "are of the kind that have been" provided to the respondent by a member of her family, (b); and the respondent would not ordinarily be liable to pay for those services, (c); the court cannot award her damages for future care. The better approach to s 315, in my view, would be to construe it with an eye to what is actually claimed, not what is not claimed, namely, services in the past, so that the appropriate characterisation may be made. The claim then is for "services" that "are to be provided by another person to" the respondent, (a); and are not to be or ordinarily, would not be provided to the respondent by a member of her family, (b); and for which she is and

would ordinarily be liable to pay, (c). "Ordinarily" must mean the usual arrangements which prevailed in *this* family prior to the work-related injury by use of "the" before "worker". It would be unattractive to conclude that if, for example, the respondent's husband left the marriage or died, prior to the trial the respondent was disentitled to any assistance because she fell just short of the 50 per cent threshold of s 211 without clear words to that effect. Justice Jerrard has given another example in his reasons which emphasises this point.

[53] The appellant further submits that the kind of services for which damages will be recoverable are those which can be described as "professional". This expression is to be found only in the explanatory memorandum to s 211 and not within any legislative provision. Just what the appellant contends is meant by the expression "professional" if it does not mean services which are provided for on a commercial basis from sources outside the group broadly described as family and volunteer friends, is unclear. It cannot be confined to what were once known as the "learned professions" (divinity, law and medicine). It must mean, as the Oxford Concise Dictionary gives as its second meaning, a "vocation" or "calling" giving as examples "military profession; a carpenter by profession". The section itself gives no limitation to the expression "services of any kind" – except as the context of the section provides. When the expression is used in the explanatory memorandum it surely means no more than services provided by those who, by vocation or occupation, provide such services at a cost to others. If the legislature had intended that claims for all assistance with "household" tasks were to be excluded it could have expressed that intention.

[54] The overall objects of the Act provide little assistance in interpreting s 315. Section 5(2)(b) tells the reader that one of the objects of the scheme is to regulate access to damages and in s 5(4) that the scheme is intended to maintain a balance between providing fair and appropriate benefits for injured workers and ensuring reasonable premium levels for employers. Statements in the second reading speech by the Minister suggest that some level of "nursing/caring services" will remain and it is only those which are provided gratuitously by friends and family which the Act abolishes:

> "Griffiths v Kerkemeyer awards are named after the 1977 case of that name, which established that nursing/caring services provided gratuitously by friends or family may be compensated by damages representing the value of the services rendered. The Bill abolishes common law damages awards for gratuitous services." Hansard 27 November 1996, p 4460.

I am not persuaded that the construction contended for by the appellant should prevail.

[55] It was open to her Honour to accept the evidence of the respondent's husband that if an adequate award of damages was made he and the respondent would engage outside paid assistance with respect to those tasks which the respondent formerly did but no longer was able to carry out and limited though the evidence was, the respondent had that intention also. Having done so, s 315 allowed an award to be made.

[56] I will consider the appellant's contention that the quantum awarded under this head was excessive when considering other aspects of quantum.

Section 312(1)(a) and section 312(2)

[57] There are two respects in which the appellant submits the learned trial judge erred in her construction of s 312 of the Act. It provides:

> " **312.(1)** In deciding whether a claimant is entitled to recover damages not reduced on account of contributory negligence, or at all, all courts must have regard to whether the claimant has proved such of the following matters as are relevant to the claim –
>
> (a) that the employer had made no genuine and reasonable attempt to put in place an appropriate system of work to guard the worker against injury arising out of events that were reasonably readily foreseeable;
>
> (b) that the actual and direct event giving rise to the worker's injury was actually foreseen or reasonably readily foreseeable by the employer;
>
> (c) that the worker did not know and had no reasonable means of knowing that the actual and direct event giving rise to the injury might happen;
>
> (d) that the injury sustained by the worker did not arise out of a relevant failure of the worker to inform the employer of the possibility of the event giving rise to the injury happening, in circumstances in which the employer neither knew nor reasonably had the means of knowing of the possibility;
>
> (e) that the worker did everything reasonably possible to avoid sustaining the injury;
>
> (f) that the event giving rise to the worker's injury was not solely as a result of inattention, momentary or otherwise, on the worker's part;
>
> (g) that the injury sustained by the worker did not arise out of a relevant failure of the worker to use all the protective clothing and equipment provided, or provided for, by the employer and in the way instructed by the employer;
>
> (h) that the worker did not relevantly fail to inform the employer of any unsafe plant or equipment as soon as practicable after the worker's discovery and relevant knowledge of the unsafe nature of the plant or equipment;
>
> (i) that the worker did not inappropriately interfere with or misuse or fail to use anything provided that was designed to reduce the worker's exposure to risk of injury.

> **(2)** If the claimant relies exclusively on a failure by the employer to provide a safe system of work and fails to prove the matter mentioned in subsection (1)(a), the court must dismiss the claim.
>
> **(3)** If the claimant fails to prove the matter mentioned in subsection (1)(b), the court must dismiss the claim.
>
> **(4)** If the claimant fails to prove any of the matters mentioned in subsection (1)(c) to (i), the court must –
>
> (a) dismiss the claim; or
>
> (b) reduce the claimant's damages on the basis that the worker substantially contributed to the worker's injury.
>
> **(5)** In deciding whether a worker has been guilty of completely causative or contributory negligence, the court is not confined to a consideration of and reliance on the matters mentioned in subsection (1)(c) to (i)."

[58] The appellant contends that the learned trial judge erred in her approach to s 312 in two respects:

- that it was wrong to conclude that the respondent was not relying exclusively on a failure by the appellant to provide "a safe system of work" so as to require her to prove the matters referred to in s 312(1)(a) if she were to avoid having her claim dismissed; and

- that it was wrong to conclude, if the respondent had relied exclusively on a failure by the appellant to provide "a safe system of work", that the appellant had made no "reasonable attempt" to put in place an appropriate system of work.

As originally filed, the appellant sought to disturb her Honour's finding on contributory negligence but abandoned that ground of appeal on 25 March 2003.

[59] Her Honour concluded that the respondent did not rely exclusively on a failure to provide a safe system of work relying on the judgment of Davies JA in *Plumb v State of Queensland* [2000] QCA 258. His Honour said at [16]:

> "Thus s 312(2) appears to assume a pleading alleging a failure to provide a safe system of work but no other allegation of negligence against the employer and, in that event only, requires the claimant to prove that the employer had made no genuine and reasonable attempt to put in place an appropriate system to guard the worker against injury arising out of reasonably readily foreseeable events. As it appears here that the claimant has not relied exclusively on a failure by the employer to provide a safe system of work …"

[60] The President and Moynihan J dealt with the matter strictly as a point of pleading in a strikeout application and held that s 312 did not require the matters set out therein to be pleaded. *Plumb* is not of assistance here when the "reliance" is to be seen in the context of the respondent's case as a whole.

[61] Her Honour said at [109] that although the respondent pleaded the failure to provide and maintain any or any proper or safe system of work in para 12(e) of her amended statement of claim there were other particulars of negligence, of breach of contract or breach of statutory duty on which she relied. Her Honour instances para 12(a) to para (c) of particulars of breaches of contract and tort:

> (a) Failing in take [sic] of any adequate precautions for the safety of the plaintiff whilst she was engaged in carrying out her work;
>
> (b) Exposing the plaintiff to a risk of damage or injury of which it knew or ought to have known;
>
> (c) Failing to provide and maintain for the plaintiff's use safe and adequate plant and equipment."

[62] Other particulars of breach in para 12(f) to para 12(l) were said by her Honour to be not particulars of negligence which concerned reliance on a safe system of work. They were:

> "(f) Causing, permitting or allowing the Plaintiff to work at an excessive and unsafe speed in work requiring forceful repetitive movements of her shoulders and upper limbs when a reasonably prudent employer would not have done so;
>
> (fa) Causing, permitting or allowing the Plaintiff's position on the boning line to be too close to the operator on her left hand side resulting in her left (dominant) arm being held in a more abducted position than was necessary or safe for the efficient performance of her required tasks;
>
> (g) Failing to provide and maintain a safe and adequate system of rotation of tasks;
>
> (ga) Failing to make allowance for the fact that the Plaintiff was left hand dominant by adapting her work position on the boning line to cause and to maintain an increase in the space between the Plaintiff and the operator on her left hand side;
>
> (h) Failing to provide a sufficient number of rest breaks of adequate lengths;
>
> (ha) Requiring the Plaintiff to reach forward and to raise her left arm after approximately every three cuts in order to sharpen her knife in a device located in an elevated position in front of her;
>
> (hb) Positioning the knife sharpener too far away from and above the Plaintiff requiring an elevated arm reach for its use;
>
> (i) Failing to ensure that the class of workers of which the Plaintiff was a member undertook proper and adequate stretching exercises at a frequency which ensured protection

from injuries caused by the repetitive nature of the work they performed;

(j) Failing to give the Plaintiff any or any proper or adequate or timely warning or instruction in the avoidance of injuries caused by the repetitive nature of the work she performed;

(ja) Failing to instruct the Plaintiff to report immediately to her superiors at the onset of any symptoms in her arms;

(k) Failing to provide the Plaintiff with sufficient and adequate training in the safe performance of her duties;

(l) Requiring the Plaintiff to work overly long shifts without adequate rest breaks between shifts when a reasonably prudent employer would not have done so.

[63] The expression "safe system of work" in s 312(2) cannot, in my view, be confined solely to the use of that expression in a pleading. It is necessary to look at the substance, not only of what is pleaded but what is actually relied upon by the claiming party. At what point in the proceedings that will be decided may be a matter for debate. I am inclined to the view that it is what is put forward on behalf of the claiming party at the end of the hearing. In many cases pleadings are abandoned after there has been a failure to elicit any evidence in support of them and it cannot be a reference to the basis on which a claiming party is ultimately successful because there may be reliance which is unsuccessful. In my view the expression "safe system of work" will cover most if not all of the matters which make up how the work is done. Fleming in *The Law of Torts*, (9th ed., 1998), at 563 describes "safe system of work" as follows:

> "Although of relatively modern formulation, one of the most important facets of the employer's duty is to establish and enforce a safe system of work. Managerial control over organisation exacts a corresponding responsibility for such matters as the co-ordination of activities, layout of equipment, method of using machines and carrying out particular processes, safety instruction of personnel, provision of safety devices and encouragement of their use; in addition to the residual task of planning and supervising the general conditions under which the work is carried out. It requires protection not only against physical injury from accidents, but also against impairment of health, such as nervous breakdown from excessive workloads. The duty is continuous, demanding vigilance and attention to the need for modification and improvement; and extends to the organisation of isolated tasks no less than of permanent systems. Since the demise of the common employment doctrine, it has become less important to distinguish between managerial failure to enforce a safe system of work and a casual failure by a co-employee, but it may still occasionally be relevant, as where the culpable worker is himself injured or is an independent contractor." (footnotes omitted)

[64] The particulars of negligence set out in para 12 of the respondent's amended statement of claim all relate to the way in which the respondent carried out her work. The additional *Workplace Health and Safety Act* 1995 claim is also concerned with a safe place of work. It was the failure of the appellant to be responsive to the needs of the respondent as part of its operation which was the basis of the respondent's complaint and upon which she relied in bringing her claim. To that extent, in my view, her Honour erred in concluding that the respondent had not relied exclusively on a failure by the appellant to provide a safe system of work.

[65] Nonetheless her Honour, having reached that conclusion, considered whether had she so relied, the respondent had proved, as required by s 312(2), that the appellant had made "no genuine and reasonable attempt to put in place an appropriate system of work to guard [the respondent] against injury arising out of events that were reasonably readily foreseeable". Her Honour concluded at [111]:

> "Although the defendant made attempts, no doubt genuine, to put in place a safe system of work, they failed to satisfy the more stringent objective test of reasonableness. In view of the fact that the defendant knew or ought to have known of the dangers in the system of work it imposed in the workplace, the attempts made by the defendant to guard the plaintiff against injury were not reasonable. The events which led to the injury, which was the way in which the plaintiff worked in the chicken boning line, were reasonably readily foreseeable. Nothing unexpected happened to cause the injury."

[66] Her Honour had received considerable evidence about advice taken by the appellant on occupational health and safety matters prior to 1997. It had obtained advice from a physiotherapist, Mr Mitchell. It had received advice from Ms Lesley Stephenson between 1988 and 1993. In 1990 Ms Stephenson had identified that the boning room at the Murarrie plant was responsible for the majority of injuries in the abattoir that required physiotherapy. The two major reasons were the complexity and repetitive nature of the tasks and that the training procedures lacked consistency as different supervisors used different techniques. Ms Stephenson had concluded that the inherent nature of the task did not mean that injuries could not be reduced. In 1990 Ms Stephenson made a detailed proposal for boning room staff to address a number of factors: encouraging consistency of boning techniques; promoting improved teaching methods; giving staff increased awareness and confidence in a teaching role; improving communication with the boning room leading hands to increase job satisfaction and morale. Ms Stephenson recommended that the training schedule should be held at the end of each day, once every three weeks for a period of 40-45 minutes. Her Honour found, and it is not contested, that it did not appear that that recommendation was ever implemented. Leading hands were not re-trained or re-briefed and neither were the boners.

[67] Her Honour found that in about 1991 a boning manual was prepared for the appellant by Mr Hewell, an engineer. Her Honour noted the following from the manual at [52]:

> "It is important that management and line operators, be made aware of the five basic rules for avoiding strain injuries, when working on a boning line.
>
> - Drop shoulders.
> - Keep elbows in.

- Grip knife no harder than necessary.
- Relax grip frequently.
- Do not make jerking movements, all movements should be smooth …
- To allow each individual operator to perform each act using the prescribed method, a spacing of not less than one metre between operators is recommended."

Her Honour concluded that it did not appear that those recommendations were adequately implemented.

[68] Her Honour found that in 1993 Ms Stephenson had recommended against a new wing cut and thigh cut which had been introduced on a trial basis because of excessive load on the shoulder. Her Honour apparently accepted the evidence of Mr Peatey that that recommendation was acted upon.

[69] As already mentioned, in February 1996 the appellant received a report it had commissioned from Mr Coyle on "Manual Handling Processing Operations Accident Prevention and Occupational Health and Safety Issues". Her Honour quoted from his findings and conclusions at [54]:

> "The Murarrie plant poses significant problems for effective Occupational Health and Safety management. It is poorly designed and requires significant capital expenditure to improve working conditions to an acceptable level. In particular some physical hazards were identified which have the potential to cause very severe injury or death. Indeed, it is our opinion that many of the problems identified in the plant are intractable and can only be comprehensively dealt with by major rebuilding. Notwithstanding this, in the medium term it is possible to greatly reduce the risk of injuries by relatively minor capital expenditure.
>
> The Ergonomics of processing operations are poor in most areas. However, there is scope for a job rotation scheme which will very significantly reduce the risk of injuries occurring. This has important implications.
>
> Apart from the problems posed by poor plant design, there are significant problems with Occupational Health and Safety Management as far as resources, training, policy and procedures are concerned. These latter issues are readily resolvable."

Her Honour found that the appellant had taken some steps to put in place a safe system of work by 1997 but that those steps were clearly insufficient. She noted that a new plant to replace the Murarrie plant was opened in August 2001.

[70] The appellant contends that in accepting the evidence of Mr King, an occupational health and safety specialist, her Honour had erroneously accepted an "optimum" ergonomic environment in which the respondent might work. The appellant contended that this was a much higher level of safety than that required by the legislation. This is to misunderstand Mr King's evidence. He identified a number of areas where the system of work in the boning room was far from safe for the workers and could be remedied at little or no cost. Her Honour recognised this in

the summary of Mr King's conclusions which she set out at [49] of her reasons. The passages in the evidence of Dr Ian Lowe, a specialist in occupational health and safety, fall rather short of the submission by the appellant that he had expressed the opinion that the appellant could not have been expected to do more than it had done. Her Honour was entitled to prefer the more detailed approach of Mr King which was consistent with the findings which her Honour was able to make from the evidence of the witnesses and from the various Occupational Health and Safety reports prepared for the appellant prior to 1997.

[71] It is clear that the appellant had knowledge of all the areas of risk in its premises which exposed the respondent to injury of the kind she actually experienced. I am not persuaded that her Honour erred in reaching the conclusion that she did that the appellant made no reasonable attempt to implement the recommendations which had been made to it.

[72] Section 312(3) requires a claimant to prove that the event giving rise to her injury was "actually foreseen or reasonably readily foreseeable" by the appellant as provided for in s 312(1)(b). Her Honour after analysing the meaning of "event" characterised it as "the highly repetitive work on the boning line for long hours in overcrowded conditions where the plaintiff, as a lefthander, used unsafe arm and shoulder abduction of 90° or more to bone the chicken meat", [114]. She concluded that this was foreseeable and reasonably and readily so because these were the conditions under which the respondent worked in the abattoir. In view of all the other findings made by her Honour, particularly in light of the various advices which the appellant had received from a range of occupational health and safety experts, her Honour's conclusion must be correct.

[73] The balance of the matters in s 312(1)(c) to (i) were canvassed by her Honour and concluded in favour of the respondent. The appellant no longer pursues the ground of appeal of her Honour's findings on contributory negligence.

Quantum of Damages Awarded

[74] Her Honour awarded the respondent damages for her loss of future earning capacity at a rate of $482.21 net per week for a period of 32 years using a multiplier of 845. Her Honour accepted that the respondent had intended to continue working with the appellant until retirement age at 65. Her Honour concluded, in view of the respondent's previous employment history for such limited periods and other contingencies, that a discount should be made "more in the region of 25 per cent" "than the usual 15 per cent". She made an award of damages of $305,600.58. The appellant contends that her Honour should have allowed only for a further 20 years of paid employment for the respondent and have to discount that amount by 35 per cent to take account of the respondent's minimal past employment history in her country of birth and then after arriving in Australia. Her employment history in Australia is explained adequately. Her Honour was entitled to accept the evidence of the respondent and her husband that they had made financial and lifestyle commitments which would see the respondent working for as long as she could. Evidence was given of the respondent's own parents and grandparents' working history in Macedonia, although her Honour makes no reference to it in her reasons. It might be thought that such a completely different environment would be of little assistance in assessing what the respondent would have been likely to have done in Australia had she not been injured. Whilst a different judge may well have

concluded that it was unlikely that the respondent would continue working in hard unskilled employment until 65, particularly as her children could be expected to be no longer dependent after 20 years, it cannot be said that in doing so and in choosing a 25 per cent reduction, her Honour acted on a wrong principle of law or misapprehended the facts or made a wholly erroneous estimate of the damage suffered, *Miller v Jennings* (1954) 92 CLR 190 at 196; *Elford v FAI General Insurance Co Ltd* [1994] 1 Qd R 258 at 265; and *Mansini v Martin* [1998] QCA 222 unreported decision of 7 August 1998.

[75] The other area challenged by the appellant is the award for the value of future care. The respondent had claimed 12 hours per week at $15 per hour which was agreed between the parties. What was not agreed was the duration of that care. Her Honour allowed for 50 years, the respondent's life expectancy on the actuarial tables. The amount was $175,716. The appellant complains that her Honour has failed to take into account that at some time prior to the expiration of the respondent's statistical life expectancy she would have needed some domestic assistance whether she had been injured or not. The respondent's counsel contended that there was no evidence to suggest that she might later suffer from a medical condition unrelated to her injuries which would call for such household services in advanced age. Mr Campbell, for the respondent, pointed out that even if her Honour allowed the amount for 40 years on the basis that in the last 10 years of her statistical life expectancy other needs would supervene, that would give an amount of $165,168, a difference of only about 6 per cent of the sum awarded and 1.6 per cent of the whole award. He submitted that that would not warrant interference on appeal. In *Elford v FAI General Insurance Co Ltd* the Court held at 265:

> "… (I)f a particular component of such an award is plainly an under-estimate or over-estimate *and* if substituting a proper figure for that component will substantially alter the total, then the substitution should be made; but if there is nothing more than a wrong estimate of one component which has no substantial effect on the total, the award stands. The pointing out of a relatively small error in one estimated component of a judgment which is in substance a sum of estimates does not necessarily make the judgment as a whole wrong. It may be that some types of mistakes, for example arithmetical errors, will require correction irrespective of their effect on the total award, but the general rule should be as we have stated.
>
> Here, this rule has the result that the award should not be corrected on account of the indefensible estimate the Master made of the value of lost bonuses; that could only alter the award by about 2 per cent at most."

[76] I consider that there should have been some reduction to take account of the respondent's possible need for care in the last 10 years of her statistical life. There was a chance that she would have succumbed to symptomatic calcific deposits in any event. But bearing in mind that the Court of Appeal in *Elford* considered 2 per cent of the total award to be insufficiently substantial to alter the judgment below, I would not interfere.

[77] The orders I would make are to dismiss the appeal with costs.