SUPREME COURT OF QUEENSLAND No 4524 of 1988

CIVIL JURISDICTION

RYAN J

MARTIN PATRICK MORAN (by his next friend IAN FREDERICK HOLLAND) Plaintiff

and

THOMAS DANIEL MAGINNIS Defendant

BRISBANE

..DATE 08/04/93

JUDGMENT

HIS HONOUR: I have concluded that a sanction of the settlement on the issue of liability is not necessary and I have assessed damages in the sum of $908,581.

...

HIS HONOUR: I order that judgment be entered for the plaintiff for the sum of $726,864.80.

I order the defendant to pay the plaintiff's costs of and incidental to the action, including any reserved costs, to taxed.

I publish my reasons.

IN THE SUPREME COURT OF QUEENSLAND No. 4524 of 1988

Before Mr. Justice K.W. Ryan

[Re: Martin Patrick MORAN]

BETWEEN:

MARTIN PATRICK MORAN (by his next friend IAN FREDERICK HOLLAND) Plaintiff

AND:

THOMAS DANIEL MAGINNIS Defendant

REASONS FOR JUDGMENT - RYAN J.

Judgment delivered 08/04/1993

Counsel: J. Griffin Q.C. with W. Martin for the Plaintiff
R. Douglas Q.C. with K. Geraghty for the Defendant

Solicitors: Holland & Holland for the Plaintiff
Quinlan Miller & Treston for the Defendant

Hearing Dates: 9, 10, 11, 12, 15, 16, 17 and 18 March 1993.

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The plaintiff was injured on 12 February 1987 when he was riding a pedal cycle which collided with a motor cycle ridden by the defendant.

Liability was settled during the trial, subject if necessary to the sanction of the Court. This course was necessary because there was evidence that the plaintiff had suffered brain damage as a consequence of the collision. The action had been commenced without a next friend, but a solicitor had pursuant to O. 3 r.17A adopted the proceedings on behalf of the plaintiff and agreed to be appointed as his next friend in the cause. I have however concluded for reasons set out later that a sanction of the settlement is not necessary. I am satisfied that the plaintiff's mental capacity is such that he is able to manage his affairs and to give proper instructions to his solicitors with respect to the settlement.

The plaintiff was born on 22 May 1949 in the United Kingdom. He was therefore aged 38 years at the time of the accident. He is now aged 43 years.

Evidence was given by a witness of the accident that when the collision occurred, the plaintiff went over the top of the motorcyclist. He was not wearing a helmet. It appears likely that he hit his head on the roadway or kerb.

The plaintiff was admitted to the Royal Brisbane Hospital following the accident. He had suffered a right sided acute frontotemporal subdural haematoma. On arrival he was conscious but drowsy and confused. However his neurological condition deteriorated and he became unconscious. An emergency right frontotemporal craniotomy and evacuation of the acute subdural haematoma was performed under a general anaesthetic. There was considerable brain swelling which prevented replacement of the bone plate. Next day, under a general anaesthetic he underwent a right occipital craniotomy and evacuation of the acute right occipital subdural haematoma and right acute occipital extradural haematoma.

On 14 February 1987, a CT head scan demonstrated considerable right hemisphere swelling and some residual subdural haematoma in the left parietal region.

A CT head scan performed on 2 March 1987 demonstrated ventriculomegaly consistent with obstructive hydrocephalus. On 28 March 1987 the right frontal craniotomy wound was explored under general anaesthesia. Surgery was undertaken for removal of necrotic brain tissue and a cerebrospinal fluid collection was undertaken. It was considered that he was suffering from a meningitis and/or ventriculitis and he was commenced on antibiotics.

On 15 May 1987 the right frontal skull defect was covered by acrylic cranioplasty (that is a plastic replacement of the bone defect). On 26 May 1987 under general anaesthetic a ventriculoperitoneal shunt was created. This consisted in the insertion of a plastic tube within the ventrical of the brain then running that tube subcutaneously beneath the skin and inserting it into the peritoneal cavity so that cerebrospinal fluid under increased pressure could drain freely into the peritoneal cavity and thus stop a build up of pressure. Later it was discovered that he had developed a shunt infection. On 4 June 1987 under a general anaesthetic the shunt was removed and he was treated with antibiotics. On 13 July 1987, the shunt was re-inserted.

On 16 July 1987 a left leg venogram was performed which confirmed the clinical diagnosis of a left leg deep vein thrombosis.

The plaintiff had been transferred to the Princess Alexandra Hospital for further rehabilitation on 2 June 1989. At the time of transfer he was noted to have a mental status score of 8/10. It was explained that this was a very simple bedside test in which he got 8 of the questions put to him right out of the ten. He had evidence of weakness of the left arm and leg, he had loss of the left visual field, and sensory inattention on the left side (that is, with

sensory impact on the left at the same time as on the right, he ignored the one on the left.)

Dr. Harrison, an ophthalmologist, stated that the plaintiff had a substantial visual problem as the result of the accident. He has a moderately severe permanent visual defect in each eye amounting to 45 per cent loss of visual efficiency in each case as a direct result of the accident.

A neurologist, Dr. Landy, stated as a result of his head injury he is left with quite severe cognitive impairment and impairment of recent memory. He is suffering from Jacksonian Motor Epilepsy affecting his left arm and leg, which is still not controlled by his dilantin treatment, and while he is not suffering episodes of loss of consciousness, he is suffering from epileptic attacks. His mobility is considerably affected. His balance has been affected, and he has problems with co-ordination.

Dr. Landy thought that the plaintiff's epileptic condition was permanent. He said that his co-ordination had improved but his epilepsy had not improved.

Dr. Spork, an urologist, stated that during the surgical procedures following the accident the plaintiff was required to have an in-dwelling catheter (a tube stuck into the bladder via the penis). He thought that the plaintiff has an acute onchronic prostatitis, and that it was more than likely that this had occurred as a result of tubes being put into his bladder repeatedly and left for long periods of time. In oral evidence he explained that once the prostate has become infected and becomes chronically affected, persons are prone over the course of time to get acute flare ups of their problem. He expected that the plaintiff would need a cystoscopic examination every three or four years, and that an operation to his prostate may be brought forward 10 or 15 years.

Dr. Morris, an orthopaedic surgeon, reported that he could find no orthopaedic abnormality in the plaintiff's legs or arms. He thought that any problems the plaintiff

has relates to his head injury and not to his orthopaedic injuries.

The plaintiff has suffered from recurrent peri-umbilical abdominal pain, intermittent minor dyspepsia, and constipation. Dr. Harris, a gastroenterologist, stated that these conditions, except for the peri-umbilical pain, are likely to improve and have been intermittent in nature since his accident.

Dr. Klug, a psychiatrist, reported that mental state examination revealed mildly impaired concentration and immediate recall and moderately impaired recent memory. He expressed the opinion that the plaintiff had sustained a severe head injury, as a result of which he has developed past traumatic epilepsy, visual problems, intellectual impairment, and a personality change.

Mr. Salzman, a clinical neuropsychologist, assessed the plaintiff's verbal I.Q. of 106 as being in the average range, and his performance 1.Q. of 82 as being in the low average range. His full scale I.Q. of 95 was also in the average range. He stated that on the results of a neuro-psychological assessment the following deficits were identified:

(1) His verbal and visual spatial memory are moderately impaired.

(2) There were indications of right hand tactile agnosia, and left hand apraxia.

(3) His visual scanning is severely impaired and there is evidence of a left visual field neglect.

(4) There were significant signs of frontal lobe impairment as evidenced by verbal perseveration, poor visual organisation and impaired hand movement.

(5) His right-left orientation is impaired.

(6) There was evidence of constructional apraxia.

(7) On a general level his cognitive processing abilities are considerably slower than that of the normal adult.

(8) He has experienced a significant loss of visual spatial intellect.

The situation which emerges from these reports is that the plaintiff suffered as a result of the accident a very serious head injury. As Dr. Klug said he had two subdural haematomas, he had evidence of cerebral shift, he developed various complications such as a left hemiparesis, third nerve palsy, obstructive hydrocephalus and post traumatic epilepsy; he has the visual impairment described by Dr. Harrison; he has severe cognitive impairment and impairment of recent memory, he has suffered a personality change and he has urological problems. He does not suffer severe physical pain, but he has full insight into his deficiencies.

The plaintiff gave evidence that he completed five “O Level” subjects In England, and was offered a trip to Australia under a “Big Brother” scheme. He was placed in employment as a jackeroo for 12 months, and then worked for some months at a service station. He decided to enter Portsea Military College as an officer cadet and graduated as a second lieutenant, but he resigned about 1970 or 1971. He obtained a job with an office systems firm and stayed with it for 9 months, until it closed down. He started work as an insurance salesman about 1973. He began with New Zealand-Victoria Life and stayed with it for 12 months. He said that he was second in Queensland in sales for the company. He then joined Living Insurance, and said that he earned $40,000 to $50,000 per year in gross commission.

After he became involved in selling insurance, he started competitive bicycle riding at about age 28. He won a silver medal for Queensland as a result of his track races. He left Living Insurance to go back to the United

Kingdom, in order to try out for the British cycling team for the Commonwealth Games. He was unsuccessful, and returned to Living Insurance. He then joined Legal and General Insurance. I shall refer later to the evidence in relation to his insurance work.

The plaintiff said that he engaged in snow skiing at Thredbo, and that he went annually to Europe for skiing holidays for 5 years prior to the accident. He engaged in water skiing, and he had his own boat. He had done work at a gymnasium, and he has attended a gymnasium since the accident, in order to counteract boredom and to get fit again. He used to fish before the accident, but is unable to do so now, because of visual difficulties and lack of co-ordination.

The plaintiff said that he had a hobby prior to the accident of collecting antiques for aesthetic appeal and investment. He said he was fascinated with motor cars. He leased a Lancia when he was with Legal and General, and then he had a series of Porsches. He has been unable to drive since the accident, by reason of difficulties with his sight, his inability to judge distances and his epilepsy.

He said that his marriage broke up when he was aged 26. He had his own unit, and he attracted female company. He said that his libido was now very poor, and that he was not so attractive to females now. He described his libido as being two to three per cent of what it used to be.

The plaintiff said that he did not recall the accident. He had great pain around his chest and in his stomach as a consequence of the operations. He has had a number of turns of epilepsy, in which he has done damage to objects and suffered injuries. He has difficulty in passing urine and in control of his bladder, and he suffers from constipation. He has an ache in his abdomen which is not constant and which varies in intensity. His lack of co-ordination results in him bumping against objects and he is worried when he has to cross roads. He is very concerned

that it is difficult for him to have relationships with the opposite sex. He admitted that he could walk reasonably well, and this seems to be so from a film which was tendered.

After discharge from hospital, the plaintiff went to live with his ex-wife. Her new husband and the plaintiff's daughter were also living at the house. His ex-wife was working. She did the cooking for him, and he thought that she must have done the washing. He stayed there four or five months. He then decided to go to the United Kingdom. He went there on 4 March 1988, and stayed there until 6 June 1988. He said that his parents did the cooking and his mother did the ironing. He returned to Australia and stayed with his former mother-in-law. She cooked his meals and did some ironing. In August 1988 he went back to the United Kingdom, and stayed there for 14 months. He said that his parents “put me up with a landlady”. He returned to Australia on 11 November 1989, and stayed again with his former mother-in-law. As he found the heat trying, he went back to the United Kingdom on 19 March 1990. He returned to Australia on 26 June 1990. He then lived on his own at the Gold Coast. He had a lady come in for two hours a fortnight to iron and clean. He went to cafe's for his meals. For four or five months he had a girlfriend who assisted with domestic tasks. He then went to live with Mr. & Mrs. Skerry with whom he is presently residing. He has been living with them for 12 months.

Mrs. Skerry gave evidence that the plaintiff is unable to cook and that she would not allow him in the kitchen, as his memory deficit makes him a danger. He is capable of reheating a meal in a microwave oven. She washes his clothes. He finds it difficult to do up buttons on the cuffs of his shirts. He is unable to use a knife properly. She considered that he needed regular supervision. She estimated that she did two to three hours work per day for him.

According to Mr. and Mrs. Skerry, the plaintiff was not caring for himself adequately at the Gold Coast.

For pain, suffering and loss of the amenities of life, I assess damages in the sum of $90,000. I allow interest on $30,000 at two per cent per annum from the date of the accident. That amounts to $3,600.

Evidence was given by a representative of a home care agency, Domicare, that the hourly rates for care would be $7.50 per hour to January 1988, $8.50 per hour from February 1988 to January 1989, $9.00 per hour from February 1989 to February 1992, and $9.50 per hour from March 1992 until the present. I have not taken into account administration costs over the pre-trial period.

It is difficult to make a precise assessment of the number of hours during which services were provided to him gratuitously over the pre-trial period. There were periods when no such services were provided, namely when he was in hospital and at the Gold Coast. The evidence he gave of services provided by his ex-wife, his parents, his landlady and his former mother-in-law was meagre. I consider it reasonable to make an allowance based on 2 hours per day for four years at a rate of $8.00 per hour. That amounts to $23,360. I allow interest on this at six per cent for five years. That amounts to $7,008.

I am satisfied that he will require two to three hours assistance per day in the future, and eventually he will need more assistance. His life expectancy is 31 years. For the period up to age 55, I make an assessment on the basis of two hours per day at $12.50 per hour or $25 per day. That amounts to $82,950. Thereafter I make an assessment on the basis that he will require more assistance, but I do not consider it appropriate to make an allowance for a live in housekeeper at the rate of $100 per 24 hour shift, which is the figure set out in the Domicare letter. He is not confined to bed or to a house, he is able to walk and look after his own affairs, and he keeps himself physically fit. He will certainly need assistance on a daily basis to help

with his meals, his laundry, and with supervision. I make an assessment on the basis of care for 28 hours per week at $12.50 per hour. The amounts to $126,000. Accordingly, I allow $208,950 for future care.

In relation to special damages, the plaintiff seeks to recover the costs of airfares to and from the United Kingdom on two occasions, amounting to $11,800.

I consider that the claim cannot be justified. It is understandable that he should have returned to live with his parents after he left the home of his former wife. They had visited him while he was in hospital, and he had made visits to the United Kingdom before the accident. There is however no reason to suppose that proper care could not have been provided for him in Australia, or that it was reasonable to incur these expenses to receive treatment which was not available to him in Australia.

The plaintiff seeks also to recover the costs of expenditure on equipment and courses to maintain or improve his level of fitness. The claim is for $1,340 for gymnasium training, $329 for a wind trainer, $650 for an aerolite bike, $149 for pedals, $159 for Axo shoes, and $15 for maintenance.

The question whether they are recoverable is whether need for such equipment and courses has been created for the plaintiff by the injury he has suffered. The evidence establishes that the plaintiff had involved himself extensively in sporting activities, and in particular in competitive cycling before his accident. He had also undergone training at a gymnasium, though I accept that this had ceased on at least diminished some time before the accident. I regard the expenditure after the accident as a continuation of an interest in maintaining his strength and fitness which he had shown before the accident. The form which this interest takes is necessarily different by reason of the injuries he has suffered, but I am unable to come to the conclusion that the injuries created the need for the expenditure. Accordingly I disallow this claim.

I allow pharmaceutical expenses amounting to $205; travel expenses to medical appointments of $2,015; Royal Brisbane Hospital fees of $184, and fees of Dr. Spork at $168. These amounts have been paid, and interest is allowable on them. I allow $605 interest for the pharmaceutical expenses, $60 for the travel expenditure and $10 for the medical fees.

I allow also hospital and anaesthetist fees of $69,323. These have not been paid and hence attract no interest.

I allow $32.50 per month for future pharmaceutical charges, and $30 per month for visits to a general practitioner. That amounts to $13,340. I allow $600 for further urological reviews, $2,000 for future cystopic examinations, and $1,000 for possible future prostatic surgery.

I am satisfied that a Protection Order under s.65 of the Public Trustee Act 1978 should not be made in the circumstances of this case. A report by Dr. Klug dated 7 August 1992 (ex.4) refers to opinions by two doctors to the effect that he would not be capable of managing a large sum of money, but Dr. Klug thought that his condition had improved since he was seen by those doctors, and he expressed the opinion that he was fit to manage his own affairs. Mr. Salzman thought that the plaintiff is probably quite capable of taking care of his weekly and monthly finances, and stated that from a psychological point of view it wold be extremely damaging to Mr. Moran's ego if his financial affairs were turned over to a trustee.

The plaintiff gave extensive evidence in the trial. I concluded from his testimony that he is interested in and understands financial matters, and that he is able to manage his affairs. There is nothing to suggest that he is subject to or liable to be subjected to undue influence in respect of his estate. On the contrary, his own evidence and that of Mrs. Skerry indicated that he was mean rather than prodigal in the disposition of money.

There remains the assessment of past and future economic loss. The circumstances of this case make the calculation of economic loss a matter of some complexity.

I have already mentioned that the plaintiff had started work as an insurance salesman in approximately 1973. After he came back from England apparently in 1978, he joined Legal & General Insurance as a tied agent. For four or five years prior to the accident, he was working for Tyndal Insurance (then known as Associated National Life). He carried on business under the name of Patrick Systems. In the mid-1980s, he met an accountant, Mr. Hart, who became his accountant in 1985. According to Mr. Hart, if any of his clients wanted insurance, he referred them to the plaintiff, and reciprocally the plaintiff referred people who wanted accounting or tax advice to him. The plaintiff said that in the mid-1980s, Hart had recommended to him that he set up a trust structure to minimise taxation. Monchelsea Pty. Ltd. was established as trustee for the Moran Family Trust.

On 1 April 1986, the plaintiff formed a partnership with one Kenneth Macrae under the name of Danomont Business Consultants. He was still in partnership with Macrae when the accident occurred.

For the year ended 30 June 1981, the plaintiff's taxable income was $8,074. For the following year, it was $12,985.

A copy of an amended assessment for the income tax year ended 20 June 1983 shows that the plaintiff's taxable income was $25,105. His statement of income and expenses for the year showed an income of $32,971 and expenses of $23,871, the net income being $9,100. The expenses included $9,784 in respect of a motor vehicle, of which $6,222 was for leasing and $3,716 for running expenses, and $2,713 for entertaining. The basis for issuing the amended assessment is not known. The plaintiff's accountant Mr. Hart assessed the gross income for that year at $48,000.

In the year 1983/84, the plaintiff earned a net income of $4,479. The net income from his insurance business was $8,689, and there was a $4,210 loss from Moran Smith & Associates. This was a firm which was set up to sell an agricultural product; it was not involved in insurance. According to Mr. Hart, the plaintiff would have had to receive commissions of approximately $60,000 to make a net income of $8,689, having regard to his expenses.

In the year 1984/85 the plaintiff received an income of $5,900 as an employee of Monchelsea Pty. Ltd. He received also a net income of $6,300, which as I understand the evidence was derived by Patrick Systems. He received also net income of $3,013, as his half of a distribution to Moran Smith & Associates from a partnership “Finance & Management Account of Skerry Imports Pty. Ltd. and Moran Smith & Associates trading as Terra-Sorb. This income was not derived from insurance receipts. Mr. Hart estimated that the gross commission for 1985 would have been approximately $70,000. He based this on a figure for gross commission from Monchelsea of $35,494, which he then doubled.

In the year 1985/86, the plaintiff received $30,000 as an employee of Monchelsea Pty. Ltd. He had a loss of $9,316 from the involvement in Moran Smith and Associates Pty. Ltd., and also a loss of $9,980 from commodity trading. The profit and loss statement of Monchelsea Pty. Ltd. for that year shows gross commissions received of $69,415.99. Expenditure included the $30,000 paid to the plaintiff as director's salaries, leasing charges of $20,540 and rent of $2,880. The leasing charges were $12,000 for a Porsche motor vehicle, and the balance for antique office furniture. The rent was part of the rent of his apartment.

The picture that emerges from this analysis is that over the period of June 1982 till June 1986, he was received commission rising from approximately $48,000 to $70,000. By this time he had been involved in selling insurance for approximately 13 years.

The plaintiff was injured in the course of the year 1986-1987. According to Mr. Hart, the plaintiff's income was running substantially higher in that year than in the previous year. He thought from memory that it was between $60,000 and $70,000 for the seven month period. Mr. Calabro, an accountant, made an analysis of figures in the bank account of Monchelsea Pty. Ltd. and found that the total gross income to the date of the accident was $56,627. This showed a 15.68 per cent increase in income over the previous year. Mr. Calabro estimated the gross commission that the plaintiff should have earned in the 1986/87 financial year by applying the 15.68 per cent increase to the actual gross commission earned by the trust in the 1985/86 financial year of $69,416. Hence he calculated the commission to be $80,300. He calculated the estimated net income for the 1986/87 financial year, had the accident not occurred, as $63,720.

This contrasts strongly with the evidence given by Mr. Macrae, who was in partnership with the plaintiff at the time under the name Danomont Business Consultants. Mr. Macrae described himself as an accountant/consultant. He is still involved in the insurance business. He said that all the records for the year 1986-1987 were given to Mr. Hart. From memory, he thought that Danomont had a $27,000 loss. He said that in that year about 90 per cent of the business involved selling a wealth plan product. In April 1987, the company they were dealing with, Associated National Life, took it off the market with barely any notice so that they could not write any more business. He said that the loss of the product had the effect that he had no product to sell. About a month or two later he left Associated National Life and got an agency with AMEV Life. He said that he had earned about $15,000 a year after expenses were deducted for the last five years. His gross commissions last year amounted to $90,000. He has 26 staff spread around Queensland, but they are involved also in his accountancy work. He specialises in corporate superannuation business and insurance bonds/superannuation. He described 1986 and

1987 as being two of the best years he had ever had in the insurance industry, though he was doing better now.

Accordingly to the plaintiff, at the time of the accident he had been writing insurance solely for Tyndal for one and a half years. There was however nothing to prevent him from moving from Tyndal to another company. He thought that the major item he was selling at the time of the accident was called Tandem, and that commission for that product when sold was 90 or 100 per cent of the premium in the first year. He agreed that this sort of product was a great part of his business. It appears from commission statements from Associated National Life to Patrick Systems that he sold inter alia “Tandem”, and “Unit Link”.

Mr. Grahame Evans was appointed national superannuation manager at Associated National Life in November 1986. In January 1988 he became assistant general manager of Associated National Life, and he was appointed to its board in February 1989. He described “Tandem” as an investment savings contract coupled with a life policy. It was a capital guaranteed contract. Unit Link was also an investment savings contract. In Unit Link all the investments were, he said “bundled together and in fact the nature of the investments were then guaranteed in a unit value and the unit value was the value of your investment”. After the unit link (Wealth Plan) was introduced Tandem was stopped as a product. Unit link was taken off the market in April 1987. When a substitute was put back onto the market in April 1988, it was exactly the same as Wealth Plan except that the commission was reduced from 90 per cent to 30 per cent of the first year's premium. The commission was an advance commission. In the case of the Wealth Plan, if the policy lasted for less than the first four months, the insurance company wrote the full amount of commission back. Thereafter the agent kept five per cent for each month for the next 20 months, so that after 24 months he kept the whole of the commission.

Mr. Evans said that the stock market crash in October 1987 was devastating for a number of companies. Tyndal's (Associated National Life's) unit prices for the unit linked policies continually slided because of poor investments. Many policyholders cashed in their policies. He said that the company lost many agents when Wealth Plan was withdrawn in April 1987, and after the crash, many agents lost a lot of face with their clients and went elsewhere to seek better returns. In early 1987, the company had approximately 3000 agents on its books; it reduced these numbers down to 800, and they are now about 1200. Danomont Business Consultants did not move to another company after the Wealth Plan was withdrawn in April 1987, but it owed a debt to the company of approximately $23,000 in respect of commissions which were repayable to the company.

According to Mr. Evans, at present in comparison with early 1987 the level of commissions in the savings plan areas have significantly reduced (more than half the commissions have dropped by more than half). In respect to risk insurance, commissions had reduced slightly but premium rates had reduced significantly because of competition in that area. The insurance industry has moved significantly towards the risk insurance area. In relation to superannuation, he said that insurance companies employed agents to sell superannuation to self-employed people. They also are able to sell employer sponsored superannuation to employees. The commission rate is only about three per cent, but an agent may achieve a large commission if he sold superannuation to a large business.

In cross-examination, Mr. Evans said that when Tyndal withdrew Wealth Plan, a number of agents went to other companies, but in many instances they continued with Tyndal because they were happy with the disability policy that Tyndal offered. He agreed that while in general the level of agent's commissions had gone down over the last few years, this had been compensated until last year by the fact that the overall level of superannuation business had

gone up. From January 1992 to 31 December 1992 personal superannuation business had gone down. It was pointed out to him that according to figures produced by the Insurance and Superannuation Commission there had been an increase in annual premiums by 28.3 per cent from September 1987 to September 1988, and he was asked how he reconciled that with his evidence that the stock market crash had a devastating effect on superannuation business. His answer was that it had a devastating effect on all of the unit linked business. There was a flight into capital guaranteed funds. He agreed there was money in that for agents. He agreed also that the overall volume of superannuation business had vastly increased in 1988 to 1990, and it had increased in 1991, but it had not increased in 1992.

Mr. Daniel, who has been Queensland State Manager for Tyndal since 1990, has known the plaintiff since 1982. He said that prior to entering into the partnership with Macrae, the plaintiff was selling risk insurance and also superannuation, savings and lump sum investment. He was not a tied agent. After entering into the partnership, he sold much more superannuation, but he also sold disability and term insurance. He described the plaintiff as being in the top 10 per cent of agents with the company. At one stage he was possibly one of the top five writers in the company. He said that he worked very hard, he was a very ethical agent and had a good clientele.

Mr. Daniel said that when Wealth Plan was removed from the market in April 1987, Tyndal still had insurance bonds, a corporate superannuation plan and risk products. About 80 per cent of the agents that were writing wealth plans left and went to other companies to find contracts of a similar nature, but they continued to write risk insurance with the company. He thought that agents with the experience and standing of the plaintiff were unaffected by the withdrawal of Tyndal from the Wealth Plan field. He thought that the stock market crash would not have affected him greatly, as he had a risk insurance background and he was able to adapt because he knew the market well.

According to Mr. Daniel, the income of agents with the experience and standing of the plaintiff had gone up since 1987. Most of them earn between $200,000 and $500,000 a year. Tyndal in Queensland has at present 10 general agents who receive between $150,000 and $250,000 a year in commission, and the plaintiff would have been offered one of these agencies. He expected that he would get commission from other companies as well. He would be surprised if the plaintiff would not be earning between $200,000 and $500,000 personally, together with “overriders” which are intended to indemnify the agent in relation to the costs of running his business.

Mr. Daniel said that disability insurance had increased dramatically since 1987.

In cross-examination, Mr. Daniel said that the big increase in the plaintiff's income in 1986 was due to his relationship with Mr. Hart, which involved him in selling superannuation to his clients. He agreed that the savings and investment products of Associated National Life were very attractive at that time because of the returns of 60, 70 or even more per cent they were making. This lasted until the crash of 1987, and returns of that kind have not been seen again.

Mr. Daniel agreed from an examination of records of Danomont Business Consultants (Part of Ex. 11) that more than 95 per cent of what was sold by Danomont was unit linked products.

Mr. Gerathy, an insurance consultant and risk manager, was transferred to Queensland from Tasmania in 1987 as Queensland State Manager of Associated National Life in January 1987. Prior to the stock market crash in October 1987, the number of its agents had been reduced. After the crash, the ability of agents to sell investment related products had virtually disappeared, and the only agents that stayed were ones selling life insurance. About 75 per cent of the total agency force left. He thought that the plaintiff would not have continued with Associated National

Life, as its policy from early 1987 was to move away from savings plan/high commission related products. Prior to February 1987, Danomont was selling predominantly investment and savings plan related contracts. After the decision was taken to cancel Wealth Plan, a large portion of the agency force stopped writing any business with Associated National and moved to other companies that had a similar product. At present the market place for investment related business products is a tiny portion of the market.

According to Mr. Gerathy since the stock market crash as a consequence of the entry of the banks into the marketplace and the education of the public by industry investors and consumer group, there had been massive reductions on charges on investment products and in commissions on them. There had been a shift back by life companies to risk products and a huge reduction of charges. He said that at the present time gross incomes being earned were between $50,000 and $60,000 (including overriders). He thought that expenses would be about $15,000 per annum.

Mr. Skerritt, who is managing director of a company involved in the marketing of life insurance products and disability insurance products, said that in the period from 1983 there was an enormous growth in the number of insurance agents and the development of new products including superannuation plans which concentrated on shares or property or international shares or resources. In relation to Wealth Plan type products in the years 1986,1987 he was asked, “whether this had any impact upon the incomes received by insurance agents in the field of selling such products?” He replied, “It was a dream.” Predictions were being made of future earnings of 30, 50, 70 per cent. He said that it was a period of great prosperity for agents at that time in the insurance industry and financial planning industry. The good times lasted until the crash in October 1987. After that, there was a flight to capital guaranteed funds and also to property. There was an enormous property boom after that,

and that boom had collapsed. Agents could still sell capital guaranteed funds and risk insurance.

Mr. Skerritt thought that the average earnings of an agent in Queensland or in Australia would be between $40,000 and $50,000 before expenses of approximately $14,000. He thought that $70,000 to $80,000 before tax was not unreasonable for “a pretty good agent”. In his opinion, agents now are earning 50 to 60 per cent of what they were earning in the years ended June 1989 and June 1990. He described the year ended June 1987 as a super boom year, a period when anybody could sell investments. In 1988, 1989 and 1990 the average good agent might have been earning $65,000 before expenses.

Mr. Stone, an insurance agent who has been involved in the insurance industry for 33 years, said that in his experience the share market crash did not have any significant effect on the viability of insurance consultancy business. It increased opportunities for income earning because people realised the need to insure their income. He has concentrated on disability insurance. He said that he had earned in commissions $33,350 in 1984/85; $62,000 in 1985/86; $96,000 in 1986/87; $118,000 in 1987/88; $135,000 in 1988/89; $158,000 in 1989/90; $167,000 in 1990/91; $140,000 in 91/92; and he expected to earn $140,000 to $150,000 in 1992/93. This did not include overriders, which amounted to $20,000 to $25,000 on an annual basis. Expenses would have been 30 to 35 per cent of these incomes.

Miss Borradale is a partner of Mr. Stone. He specialises in risk insurance and she specialises in the financial planning, superannuation and investment side. She came into the business in 1987. She said that the stock market crash did not have any impact on the superannuation business she was writing. All it meant was that instead of buying equity based superannuation products, people bought capital guaranteed based products or property based investments. She agreed that the commission paid to agents

may have been reduced by half, but she said they were getting paid on an increased amount. She said that from 1988 onwards she had earned $25,000 net of expenses per year until she now earned about $72,000. She explained that this was net of her office expenses and that overriders were used to meet office expenses. Her taxable income last year was approximately $25,000 or $26,000. The major items which reduced her income of $72,000 to $25,000 were car leases, the cost of running a car, and her personal disability insurance policy and her professional indemnity costs.

The conclusions I have reached are these:—

(1) The plaintiff had been engaged in the insurance business for approximately 13 years at the time of the accident.

(2) Over the financial years 1981 to 1985 he had earned taxable income from insurance business ranging from $8,674 to $15,208 (apart from the amended assessment for 1983). I accept that the taxable income was lower than otherwise it would have been because he leased expensive motor vehicles. The maximum commission he earned over the period 1981 to 1986 amounted to approximately $70,000. For much of the time it was considerably less than that.

(3) In the financial year 1987, he had earned $17,456 net prior to his injury. I do not accept that he would have continued to earn at that rate or at an increased rate for the remainder of the year. His commissions were being received almost wholly from the sale of a product which was withdrawn from sale very shortly after the accident. He would probably have been obliged to pay back part of the commissions he had earned by reason of lapses of the policies he had written. Though the effect of withdrawal of Wealth Plan would probably have been that he would have moved to the sale of a similar product offered by another company, there would

probably have been a period when he was unable to sell until he had arranged an agency with another company.

(4) In the year 1988, the plaintiff's ability to sell products similar to Wealth Plan would have come to an end with the stock market crash in October 1987. I accept however that he would have been able to convert to the sale mainly of risk and disability insurance, and to have continued as an agent selling a wide range of products, including superannuation.

(5) I accept that the plaintiff was a very good insurance agent, that he had a good clientele and that he understood the industry and the market well, and that he was in the top 10 per cent of the agents who sold Associated National products.

(6) At the same time, I consider that the most reliable way to estimate his income over the pre-trial period is to have regard to his pre-accident income and the changes in the insurance industry over the period from 1987 until now.

(7) In the light of the evidence I have summarised I consider that on average over the six years from the date of the accident until the date of trial he would probably have earned commissions (including overriders) in the order of $75,000 per annum. From this there would be deducted expenses of approximately $35,000 per annum, leaving a taxable income of $40,000 per annum. After deduction of tax that amounts to $29,266. I have made that assessment having regard in particular to the evidence of Mr. Skerritt and to the evidence as to the plaintiff's level of expenses.

(8) I accept that it is likely that he would have been offered appointment as a general agent of Tyndal if he had not been injured. He may have followed the course of establishing an office with a number of

sub-agents and staff, with the consequence that both the total amount of his commissions and his expenses would have increased. Nevertheless I consider that any assessment based on an assumption of a gross income ranging up to $500,000 a year with an undefined level of expenses would be quite unreliable.

I have assumed that the plaintiff would have continued to lead an expensive lifestyle with a consequent effect on his taxable income, but I consider that the loss of a satisfying manner of life should be reflected in the assessment of loss of enjoyment of life (and I have done this) rather than in the assessment of economic loss. That assessment should, I consider, be made on the basis of determining the plaintiff's net income after tax, having regard to the manner in which he chose to conduct his business. It would, I think, be wrong to assess damages for economic loss on the basis that he may have derived a higher net income after tax if he had not expended more than he did on the lease of expensive motor vehicles or antique furniture. He cannot, in my opinion, prove that he has lost more than a sum based on his net income after tax as it emerges from the way in which he managed his affairs.

I would discount the resulting figure for past economic loss by 10 per cent for the usual contingencies, and hence would assess past economic loss in the sum of $158,036.

I assess his future economic loss on the basis that he would have continued as an insurance agent until age 60. At a net income of $29,266 a year, that would be assessed at the sum of $338,886. I discount this by 20 per cent for the usual contingencies, and assess his future economic loss in the sum of $271,229.

Accordingly, I assess damages as follows:—

(a)	Pain, suffering and loss of the amenities of life	$90,000

	Interest thereon		3,600
(b)	Pre-trial care		23,360
	Interest thereon		7,008
(c)	Future care		208,950
(d)	Special damages:		
	Pharmaceutical expenses	2,015	
	Interest thereon	605	
	Travel expenses	200	
	Interest thereon	60	
	Medical fees	352	
	Interest thereon	10	
	Hospital fees	69,323	72,565
(e)	Future pharmaceutical and medical expenses		16,940
(f)	Past economic loss		158,036
	Interest thereon at six per cent per annum for six years		56,893
(g)	Future economic loss		271,229
	Total		$908,581