SUPREME COURT OF QUEENSLAND

CITATION:	*Kakoschke v Draper & Anor* [2006] QSC 386
PARTIES:	**JANICE MARGARET KAKOSCHKE** (plaintiff) and **RODNEY ERROL DRAPER** (first defendant) and **ALLIANZ AUSTRALIA INSURANCE LIMITED** **ABN 15 000 122 850** (second defendant)
FILE NO/S:	BS 1964 of 2006
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	14 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	23, 24 November 2006; written submissions 6 December 2006
JUDGE:	Skoien AJ
ORDER:	**Judgment for plaintiff**
CATCHWORDS:	QUANTUM OF DAMAGES MOTOR VEHICLE ACCIDENT; PSYCHIATRIC ILLNESS, NATURE AND CAUSATION; POSSIBLE MULTIPLE CAUSES; LOSS OF FUTURE INCOME; *Civil Liability Act* 2003 *Purkess v Crittenden* (1965) 114 CLR 164 *Watts v Rake* (1960) 108 CLR 158
COUNSEL:	Mr M Grant-Taylor S.C. for the plaintiff Mr K Howe for the first and second defendants
SOLICITORS:	Schultz Toomey O'Brien for the plaintiff McInnes Wilson for the first and second defendants

[1] **SKOIEN AJ:** This is an action for damages for negligence arising out of a motor vehicle collision in which Mrs Kakoschke, then aged 43, suffered personal injury. Only the quantum of damages is in issue.

The collision

[2] On 18 September 2004 Mrs Kakoschke was driving her BMW car on the Yandina-Coolum Road and had come to a halt to make a right turn. While stationary the BMW was struck from behind by a vehicle driven by Draper.

[3] It was a severe impact. The BMW was "written off". She described the impact as "very strong … very bad, very noisy". The back of her seat collapsed until (as she indicated by gestures) she was lying flat on her back. She saw the rear window break and the metal of the car crumpling towards her, some 30 centimetres from her head. She thought she was going to die. Her evidence on this was not challenged.

[4] She managed to get out of the car and collapsed. An ambulance came and took her to the Nambour hospital. She felt confused, dazed, sore. Her hands were tingling.

[5] The parties have settled general damages for pain and suffering, gratuitous care etc., in the sum of $12,000. What remains for me is the assessment of past and future economic loss, loss of superannuation contributions and special damages.

***Sequelae* of the collision**

[6] The physical *sequelae* of the collision were minor. The basis for Mrs Kakoschke's claim for economic loss is the psychiatric illness from which she suffers, which she alleges was brought on by the collision. That she has a psychiatric illness is not disputed. What is disputed is its nature and cause. A complicating factor is that she suffered sexual abuse as a child from her grandfather. Complicating the issue further is the established fact that she carries the gene for Huntington's disease and of critical importance is whether it has become symptomatic and if not, when it is likely to become symptomatic. A further relatively minor complication arises from the fact that since 18 September 2004 she has experienced two further motor vehicle accidents.

Employment

[7] At the date of the accident Mrs Kakoschke was employed as a teacher at Coolum State High School and had been since the start of 2003. On her evidence, supported by that of her superior Mrs Schultz, she was an active, dedicated teacher who filled the somewhat demanding position of youth support teacher, that is, the teacher charged with working with students who were at risk educationally and socially. She worked with guidance officers to support students who were in danger of leaving school before the proper time to try to steer them into continuing their education. She had done such specialised work for the previous six years.

[8] Her physical injuries prevented her from going back to work immediately. She consulted a general practitioner and undertook physiotherapy, but continued to feel exhausted, sore and tearful to the extent that even domestic duties were difficult. She was withdrawn even from her own family. She began to experience panic attacks. This inability to work extended over the balance of 2004. She undertook half a dozen counselling sessions with a psychologist, Paul Jones, in the last quarter of 2004 which helped a little but not to the extent of removing the symptoms. She became frustrated and worried about her ability to work.

[9] In early 2005 she, in consultation with Mrs Schultz, the district rehabilitation officer and Dr Mungomery (the psychiatrist to whom she had been referred in March 2005 by her general practitioner) put together a graduated return to work scheme. As a result she worked on a part time basis. However there were periods of some weeks when she was unable to work at all. Her part time work began at two days a week and built up to three per week.

[10] At the end of 2005 she was transferred to Nambour High School. While she was somewhat surprised at the timing of the transfer I accept that she was prepared to try to manage the new position. However it was not a success and she felt she was not achieving to the extent she was used to. She felt the teachers and the pupils were hostile to her. In cross-examination she said that she felt she did not have the strength or ability to cope with the added difficulties, even on a part time basis. The distinct impression I formed, based on her past capacity to work and the medical evidence is that, free of her undoubted psychiatric problems, she would have been able to cope. Indeed that is what she said in answer to Mr Howe:-

> "Had it been pre-2004 I would have been in a position to have an impact in that school, but since 2004 I didn't have the – I wasn't up – skilled up in handling that situation at that time."

[11] Ultimately, in consultation with Dr Mungomery, and in accord with the recommendation to Education Queensland by Dr Bell, a psychiatrist, she retired from the State teaching service in March 2006. She has not worked since.

Psychiatric Illness

[12] Mrs Kakoschke suffered a depressive illness in 1998 and was treated by a psychologist, Dennis O'Brien, for about four months. This apparently related to sexual abuse which she had suffered at the hands of her grandfather when she was a child. Her reason for seeing the psychologist was her desire to work and in fact she continued to work full-time. None of the psychiatrists (other than, perhaps Professor Varghese) seem to place very much weight on this episode of depression and its cause, noting that from childhood on she consistently appeared to be able to function well. Indeed she continued her full time work even when being treated for depression in 1998. Professor Varghese thought that episode of depression might predispose her to major depression (of course the defendant takes the plaintiff as he finds her) and he also placed some emphasis on a period of alcohol abuse by her as did Dr Bell. However that abuse seemed to me, on the evidence, to have been both minor and brief.

[13] It was Dr Bell's opinion in March 2006 (exhibit 2) that her current psychiatric condition is not related to any pre-September 2004 condition. His opinion was that she was then suffering from a residual depressive illness caused by the accident which prevented her from working as a teacher or any other occupation, probably indefinitely. He did not think she was suffering from post traumatic stress disorder (PTSD). He recommended her retirement from teaching.

[14] Dr Cantor, a psychiatrist, saw Mrs Kakowschke twice in September 2006. He noted her ability to cope with work and life before September 2004. The accident of September 2004, in his view, caused in her a PTSD which revived a PTSD which dated from her childhood abuse. He said that while she may have been able to

manage that long standing disorder the accident, with the PTSD it caused, made that impossible. In evidence he said he did not think she had a depressive disorder. So he accepts that the currently experienced PTSD is accident related. He thinks she will require years of intensive treatment. He thinks that the abuse related condition causes about 60% of her current condition, the accident 40%. That medical opinion (especially in the light of his view that the pre-accident PTSD had been controlled but became uncontrolled because of the advent of the accident related PTSD) does not necessarily result in an assessment of only 40% of her damages. I will return to this matter. Furthermore Dr Cantor is the only expert who essays such a division. Finally, he said in re-examination that he could see no reason apart from the accident, which would have caused her to retire, medically unfit from her employment with Education Queensland.

[15] I have touched in para [12] on some expressions of opinion by Professor Varghese. In his report dated 23 January 2006 (ex. 9) he rejected a diagnosis of PTSD and considered that the accident produced an adjustment disorder with anxiety and depressed mood. He said that because she did not, as would be normal, get better over time and indeed developed a major depression of more than moderate severity he considered that the knowledge that she was carrying the gene from Huntington's disease was the cause of the major depression. He thought the major depression was in remission when he examined her. In a further report of 21 January 2006 (ex. 10) he adhered to his earlier opinion.

[16] In evidence he repeated that Mrs Kakoschke was probably depressed at the time of the accident as a result of being informed in October 2003 of her future with Huntington's disease and referred to Dr Schapel finding her to be depressed in February 2004. It is true that Dr Schapel told her that he considered she had "coincidental clinical evidence of depression of affect" but a few things must be noted. First, he is not a psychiatrist; second he does not describe the severity of the depression; third he did not recommend any treatment; fourth, any suggestion that she had depression to any major degree does not sit with the evidence of her continued ability up to September 2004 to cope with her work and life generally, to which I later turn. Indeed in his evidence he said that he was not making a psychiatric diagnosis, that he was simply recording that she exhibited some depression of affect.

[17] I found Professor Varghese's reasons for rejecting a diagnosis of PTSD to be impossible to accept. It was primarily based on his belief that the motor vehicle accident was trivial and was not actually and reasonably perceived by Mrs Kakoschke to be life threatening. Yet as I record in para [3] she actually thought she was going to die and in my opinion the facts I recite there establish that such a belief was reasonable. Then, when he was asked to assume that she had reacted in a very balanced way to the news of the inevitable onset of Huntington's disease he simply refused, dismissing her ability to do that. He thought that her "symptom spotting", when she saw Dr Schapel, indicated the seriousness of her concern about the disease. I will return to her reaction to the discovery that she will contract Huntington's disease and the question of symptom spotting. I also regard his belief that when she saw Dr Schapel she was suffering from a "recurrence of major depression" to be quite unsupported by the evidence. All in all I gain no assistance from Professor Varghese's evidence, other than his opinion that as at February 2004 when Dr Schapel saw her she was not actually suffering the onset of Huntington's disease, nor was she when he himself saw her in January 2006. There is other

acceptable evidence to support those opinions. I also accept his evidence that her complaints to Dr Schapel constituted "symptom spotting", that also being supported by other evidence.

[18] Dr Mungomery first saw Mrs Kakoschke in April 2005 and has continued to treat her ever since. His opinion is that the psychiatric condition from which she suffers, the initial restriction in her ability to work and her present complete inability to work, are causally related to the subject accident.

[19] Dr Mungomery has written in total six opinions which were tendered as part of exhibit 1, mostly for the second defendant, or for WorkCover Queensland, or for Education Queensland. They date from 22 June 2005 to 1 February 2006. it seems he wrote two more for Education Queensland in May and July 2006 but these were not tendered, apparently because Mrs Kakoschke's lawyers did not know of them.

[20] His opinion, from the outset, has been that she was suffering from PTSD and a major depressive disorder without psychotic features, which by early 2005 had, thanks to treatment by medication and psychotherapy over some seven months, improved to the stage where she was able to take up work two days a week. At first he was hopeful of a return to the pre-injury state within a further six months. In September 2005 he was reporting a mild exacerbation of both diseases caused by intrusive recollections of her childhood abuse. That exacerbation was successfully treated. Incidentally, he records that her increased alcohol consumption was actually associated with her depression and PTSD symptoms. He thought she was fit to continue to work two days per week and hoped she would improve on that, with continued treatment.

[21] On 14 November 2005 Dr Mungomery's report (largely a repetition of his earlier report) referred to a further car accident on 28 October 2005 when her vehicle was again hit from the rear. She suffered some mild soft tissue injuries. This exacerbation of the PTSD and major depressive disorder was made somewhat worse by the verbally abusive attitude of the offending driver. When this latter feature was investigated in evidence it seemed to me that the significance of the other driver's attitude has been rather magnified by some of the doctors. He was verbally abusive but she was not physically threatened and after exchanging customary details she simply drove off. In any event, in Dr Mungomery's opinion the exacerbation was mild and temporary. She returned to her work on 4 November 2005, and by 10 November reported a general settling of her increased symptoms. I mention here that a third very minor car accident in January 2006 caused nothing of significance in her physical condition or psychiatric make-up.

[22] In his report of 1 February 2006 Dr Mungomery said that Mrs Kakoschke's prognosis remained uncertain, although he was hopeful of some further improvement. In fact, however, she resigned from her employment with Education Queensland on 26 March 2006 and that, he said in evidence, was a decision he supported.

[23] In cross-examination he made the point that the amount of time he has actually seen Mrs Kakoschke on a regular basis gave him an advantage over psychiatrists who saw her only once or twice. He said that not only the fact that she feared death, but also her description of disassociation at the time of the accident were significantly in favour of his diagnosis of PTSD. He said that the drugs he prescribed were all to

treat the PTSD even though one or more could also be used to treat other types of psychiatric illness. As to her reporting of episodes of hallucination (which is not typical of PTSD), he pointed out that they were consistent with her depressive illness. On the question whether she became symptomatic because she was told of the horrible fate that awaited her he said:-

> "… Certainly it would be difficult to not attribute some level of ongoing psychological or psychiatric concern or stress associated with the diagnosis for Mrs Kakoschke. The thing that has been interesting in the context of our treatment with her is that the disease itself has not been a significant focus of treatment or been an issue that has been raised in the way we need to put additional clinical effort into in the time we have been with her, that she felt quite comfortable that she had basically made the decision that is the way it was and she was going to get on with her life. Whether this is something she was able to do because of her own philosophical approach to life, but that issues to do with the motor vehicle were more of a prevalent that came forward."

[24] Questions asked by me about assessing her ability to function were given replies which I consider helpful in the light of evidence from Mrs Schultz and from Mr Kakoschke both of which support the view that the sole event which appeared to affect her adversely to any marked degree was the accident of September 2004:-

> "… Do you also pay attention to what people in the workplace say about her ability to function?-- Look, I think that is actually very important, because when attempting to assess a patient's level of impairment associated with an illness you look at the description of symptoms but then you also look at how do these symptoms affect their ability to function."

and:-

> "Friends and family?-- Look absolutely and I, generally speaking when I am assessing people, I do try to get as much information from family as well because sometimes you have patients who actually will minimise their symptoms and in fact with Mrs Kakoschke the general presentation she had with me was one of not actually telling me all the problems she was having. She was doing this in a way that she didn't – she just felt sometimes embarrassed talking about her symptoms and so it can be very helpful to actually get information from other around them to get a feel for what may be happening."

and when it was put to him by Mr Howe that Dr Cantor assessed 40% of the symptomology to the accident and 40% to "other factors" (which were not identified, I note) he gave an answer (which related only to the possibility of the effect of Huntington's disease awareness):-

> "… As to the impact of the diagnosis on her current mental state, all I can say is that in what we have talked abut over the time I have been treating Mrs Kakoschke and the issue of Huntington's disease

> having come up from time to time , brought up by myself in regards to how she has been coping with it, it has not been an issue that she has reported as being a significant ongoing issue for her, although I would attribute some percentage to it, her concern in the future, it would be silly not to, but it wouldn't be seen as 50 per cent of her current concerns. It might be in the ten to 15 per cent range if I was going to put a percentage on it. That's on her presentation with me day–to-day in my clinical treatment of her."

[25] In cross-examination Dr Mungomery demonstrated that he was willing to debate propositions put to him and to admit possibilities. But he was unshaken on his opinion that the accident precipitated Mrs Kakoschke's psychiatric condition, that it was the overwhelming cause of it, that exacerbations were minor and temporary, and that her psychiatric condition prevents her from working. In evidence in chief he said he may have to modify the prognosis he gave in his last report of 6 February 2006, in which he had been guardedly optimistic. She was retired from Queensland Education as medically unfit in March 2006 and he supported her resignation. Dr Mungomery's evidence offered no recognisable prospect of her recovery sufficiently to resume that employment.

[26] I accept Dr Mungomery's evidence as to Mrs Kakoschke's psychiatric condition, their cause, their effect on her and their likely continuation. On what I regard as the central issue, the PTSD, he is substantially corroborated by Dr Cantor. On the question whether there is also a depressive illness he is substantially corroborated by Dr Bell. On the overall question whether the accident caused psychiatric illness which has disabled her Dr Cantor supported Dr Mungomery. Furthermore it seems to me that her history entirely supports Dr Mungomery. Despite her childhood abuse and the depression in 1998 she functioned as a wife and mother and as a teacher in a quite demanding role. The accident occurred in September 2004 and since that date she has not functioned as she did before.

[27] Whatever proportion of her disability is allotted to the child abuse or to her possible fear of Huntington's disease on all of the evidence I accept (Dr Mungomery, Dr Cantor's re-examination, Dr Bell and her history) I am satisfied that the only cause of her serious disability, is the accident of September 2004. I am satisfied this disability prevents her from working.

Employability

[28] As I have said, Dr Bell, a psychiatrist recommended to Education Queensland that Mrs Kakoschke's employment be terminated. He examined her on 2 March 2006 and his report, exhibit 2, is dated 24 March 2006. Although he considered her current symptomology to be mild he considered it "sufficiently significant to prevent her from performing the duties of her position". From his report she does not seem to have been actually working when he saw her, even on a part-time basis, and in those circumstances it is not surprising that the symptomology was mild at that time. As I record in para [13] he considered her psychiatric condition to be directly caused by the accident of September 2004. It was his opinion that her psychiatric treatment will need to be continued indefinitely. He said that given her various problems "it may well be that her current impairment may last indefinitely, albeit with fluctuating intensity". He could envisage no modification to her job to allow a return to work or to do alternative work for Education Queensland. His

opinion of her likely ability to return to teaching was very pessimistic and he thought she was just as compromised for working in any other employment.

[29] As noted in para [14] Dr Cantor shares Dr Bell's pessimism about her future, and as noted in para [25] so does Dr Mungomery. On the balance of probability I conclude she has no realistic prospects of undertaking gainful employment despite her opinion given in evidence of her ability to do some work, which I interpret as evidence of her desire to "get on with life". Even if she attempted relatively stress-free employment such as shop work I think it likely that she would soon have psychiatrically caused episodes of absence from work which would make her employment untenable.

Huntington's disease

[30] Huntington's disease is a condition which is caused by an abnormal gene, the scientific details of which need not be repeated here. It is very rare, occurring in perhaps .005%-.01% of Caucasians. The abnormal gene is passed on to about half of the offspring of a carrier of that abnormal gene. A person who has the abnormal gene will inevitably become symptomatic at some stage and the disease, once symptomatic is progressive and invariably fatal within 5 to 25 years (generally about 15 years) from onset of symptoms. The early manifestations may include difficulty in co-ordination, involuntary movements, difficulty in mental planning and often a depressed or irritable mood. Cognitive changes and motor symptoms worsen and serious psychiatric disturbances are common. The symptoms become so disabling that the sufferer cannot function without help and ultimately death ensues often by suicide. The opinion expressed by the expert witnesses in the trial was that Huntington's disease is perhaps the most unpleasant disease of all.

[31] The main point of dispute on this issue is the likely age at which Mrs Kakoschke will begin to be symptomatic and indeed whether she is now symptomatic. She is now aged 45.

[32] Mrs Kakoschke's father suffered the onset of the disease to a noticeable degree about 10 years ago in his 60's, probably mid 60's. He is still alive. So devastating is the disease that the genetic tests to determine whether a person carries the abnormal gene is carried out by Queensland Health only if that person has undergone counselling and it is then decided that he/she is able to cope with the news if the test result is positive. Mrs Kakoschke and her husband undertook six weeks of counselling with a psychologist and three consultations with a psychiatrist. It is important to note that she was assessed as a person able to cope with learning that she was a carrier of the gene. She was then tested and in October 2003 learned that she carried the gene with a "repeat count" of 43. Her father's "repeat count" is 42. The "repeat count" indicates the abnormality which, if it exceeds 37 means that the carrier will contract the disease. Her increased repeat count is minor, considering it may be measured in the 80's, or higher.

[33] She described to me her reaction to the news thus:-

> "When you were told of the results of your testing?—Oh, of my testing, um, little bit shocked. I mean, I was expecting, yes, or no. I was hoping it was no because that made life nice and simple, you know. It was one less complexity with us, but once I, sort of, had a

> bit of a cry about it and my husband and I spoke about it and Ross and I have got a really good relationship, we've, sort of, helped each other through you know, the good times and the bad times and we – we kind of spoke about our future a lot and we found that – that there was just huge care and concern there for each other and he assured me that he would look after me come what may. I still knew that at that stage I was quite capable of working, carrying on my life as normal. So I think once I got over the shock of it, had a cry, I just, sort of, picked my bags up and got on with it and that was, really, only – I don't know, say two weeks while I phoned my brother and sister and spoke to them about what they decided to do. I told my brother and sister and my parents and my aunty, you know, that sort of immediate family, you know, what the result was. So I didn't sort of – I didn't put it in a broom closet. I spoke to Ms Schultz, Denise Schultz, at school because I was working closely with her and she knew that my dad had been sick. So I spoke to the people that I think I needed to know about it and life went on."

[34] Evidence of her acceptance of her condition and its implications did not come just from Mrs Kakoschke. Her colleague at her work as a teacher at Coolum High School, Mrs Schultz had close contact with her from the time of her arrival at the school at the beginning of 2003. During 2004 Mrs Kakoschke confided in her that her father had been diagnosed with Huntington's disease and she had tested positive to the gene responsible for the disease. When asked about Mrs Kakoschke's demeanour when this was disclosed she said:-

> "I believe at that time she was very resilient and she was – life was going to continue as usual".

[35] Mrs Kakoschke's credibility was not challenged. I accept her as a completely truthful witness. I accept that she is a person of quite remarkable courage, with a most unusual and enviable attitude to life's vicissitudes and a most unusual and enviable ability to face them. Knowing that a dreadful disease awaits her, she is determined to get on with her life normally for as long as is possible.

[36] The next question is whether she has become symptomatic with the disease, as Dr Cameron the consultant neurologist thinks. He examined her on 4 November 2006 and in his report, exhibit 8 he said:

> "On today's examination, there was a suggestion of mild choreiform movements at times but there were no hard features to suggest she is developing any other features of Huntington's disease. I suspect still her recent developments of mood changes, depression and anxiety, probably represent the early stages of Huntington's disease."

[37] It is apparent from that quote that the opinion he expressed could not be described as definite or dogmatic. He clearly regarded the choreiform movements as a possible sign of the disease (and that is accepted by all the experts) but it seems that his diagnosis of the disease (which he describes as a suspicion) relates to three psychiatric symptoms. The use of the word "still" refers to an earlier opinion, that expressed in his report of 17 August 2006, exhibit 7. At that time he did not examine Mrs Kakoschke but relied on reports by other doctors, notably Dr Schapel,

a neurologist who had seen Mrs Kakoschke on 12 February 2004 and in his report, exhibit 15, had recorded that she described to him a number of symptoms which to Dr Cameron were significant (similarities with her father – irritability and moodiness over the last two to three years; occasional loss of balance, co-ordination and strength; clumsiness – bumping into things; involuntary leg movement; confusion in speech and slurring; spitting during speech). Although Dr Schapel attributed those matters to depression which Dr Cameron conceded was possible, he thought it more probable that she was beginning to experience the onset of Huntington's disease.

[38] I find it surprising that Dr Cameron, who did not examine Mrs Kakoschke at that time, should lean towards a diagnosis of symptomatic Huntington's disease rather than depressive illness (which he conceded was possible) and which Dr Schapel, who did examine her, diagnosed, while dismissing a diagnosis of symptomatic Huntington's disease. It is impossible not to harbour the suspicion that Dr Cameron's obviously tentative diagnosis of the symptoms when he examined her in November 2006 was very largely affected by his diagnosis, in the absence of physical examination, in August 2006. Human nature tends to shrink from a retraction of an earlier expressed opinion.

[39] Dr Cameron, as is evident from his finding recited in para [36] above, saw no hard evidence of Huntington symptoms. He saw a possible physical sign of the disease, mild choreiform movements, and he was told of psychiatric symptoms which he suspected were symptoms of the disease. In evidence he described three "major presentation modes" of which psychiatric symptoms are likely to be the earliest and choreiform movements much later:-

> "The classic one, really, is abnormal movement disorders, with what we call choreiform or dystonic movements, fidgets. That's mainly the neurological aspect that we see, but that occurs usually in the far later conditions we see … The earliest presentation usually is in psychiatric behavioural disturbances … that can precede movement disorders by five/ten years.

and :-

> "The age of onset when you pool all these studies is in the mid 40's; people start manifesting one of these three disturbances as I said, either cognitive decline, psychiatric manifestations, choreiform movements are not very common, that's further on. What is choreiform movements? … It's like fidgety."

[40] Yet I note, it was the "suggestion of mild choreiform movements at times" which seems to have influenced Dr Cameron to suspect the presence of symptoms. When he refers to not detecting "<u>other</u> features of Huntington's disease" (my emphasis) he is clearly accepting the choreiform movement as a feature of the disease.

[41] In his evidence Dr Cameron clearly strayed into the field of psychiatry and both significantly and importantly, obviously based his diagnosis of Huntington's disease on his belief as to Mrs Kakoschke's psychiatric condition:-

> "I'm very suspicious a lot of her position is probably due to the psychiatric manifestations related to the onset of Huntington's disease. There's no test but she's just starting to show some of the features that we can put towards this diagnosis." (my emphasis)

and:-

> "You have to talk to psychiatrists as to whether there are other reasons psychiatrically, which I'm not in the field to offer an explanation there, but I assume and suspect there's a fair likelihood this is due to Huntington's." (my emphasis)

and in cross-examination he said:-

> "Leaving aside the psychiatric question, your Honour, I thought there were some fidgets. As I said before, she may have been nervous seeing me. I wasn't going to put that much emphasis on that. They may have been real; they may not have been real."

and at the end of his cross-examination he said:-

> "Anxiety symptoms, not coping, are one of the earliest symptoms of psychiatric manifestations of Huntington's disease?"

[42] To the extent his opinion is based on psychiatry, I prefer the evidence of Drs Mungomery, Cantor and Bell all of whom reject the presence of Huntington's disease symptomology. To the extent it is based on neurology, I prefer the evidence of Dr Todman.

[43] Dr Todman's opinion in his report dated 31 October 2006 (part of exhibit 1) is that Mrs Kakoschke is pre-symptomatic of Huntington's disease. I found his evidence on this to be persuasive and in accordance with the body of expert evidence, other than Dr Cameron. His opinion (supported by a study to which he referred in oral evidence) is that the onset of the disease, on the balance of probabilities, will be similar to her father's history, slightly earlier because she has a slightly increased repeat count. So he assesses her mid 60's as the likely onset date.

[44] I prefer Dr Todman's opinion as the likely onset date to that of Dr Cameron, who simply adopts the statistical average of mid 40's. Bare statistical medical averages, one would think, are likely to be affected by familial factors and Dr Todman's evidence is that there is abundant research to show that the majority of cases are true in succeeding generations. There is also the fact (minor though it may be in isolation) that, as I have found, she has reached 45 with no onset of the disease. And in Dr Schapel's opinion she was at least symptom free in February 2004.

[45] I should say something briefly about the symptoms recorded by Dr Schapel when he examined Mr Kakoschke in February 2004 (see para [37]). If they represented "symptom spotting" I can well imagine that a person who knows that certain symptoms will appear one day may well (and very naturally) elevate normal physical manifestations such as periods of clumsiness, forgetfulness etc, to symptoms of the disease. Importantly, the evidence is that she obviously was not disabled by them; to the contrary she was functioning well physically and has continued to function well for 2½ years since she saw Dr Schapel. Furthermore, I note Dr Schapel's evidence that she did not volunteer the symptoms. He had to extract them from her. All in all I see nothing significant in this topic.

Multiple causation

[46] I now turn to the questions raised by Dr Cantor's assessment of a 60/40 causation of Mrs Kakoschke's current illness only 40% being due to the accident of September 2004 and 60% to the childhood abuse, and to Dr Mungomery's "off the cuff" assessment of 10-15% as being related to Huntington's disease. The law with respect to the disentangling of causation of disability when there are multiple possible causes remains that stated in *Watts v Rake* (1960) 108 CLR 158, as explained in *Purkess v Crittenden* (1965) 114 CLR 164 at 168:-

> "We understand that case to proceed upon the basis that where a plaintiff has, by direct or circumstantial evidence, made out a *prima facie* case that incapacity has resulted from the defendant's negligence, the onus of adducing evidence that his incapacity is wholly or partly the results of some pre-existing condition or that incapacity, either total or partial, would, in any event, have resulted from a pre-existing condition rests upon the defendant. In other words, in the absence of such evidence the plaintiff, if his evidence be accepted, will be entitled to succeed on the issue of damages and no issue will arise as to the existence of any pre-existing abnormality or its prospective results, or as to the relationship of any such abnormality to the disabilities of which he complains at the trial.
>
> … it was stressed that both the pre-existing condition and its future probable effects or its actual relationship to that incapacity must be the subject of evidence (i.e. either substantive evidence in the defendant's case or evidence extracted by cross-examination in the plaintiff's case) which, <u>if accepted</u>, would establish with some reasonable measure of precision, what the pre-existing condition was and what its future effects, both as to their nature and their future development and progress, were likely to be." (emphasis added)

[47] In this case, at para [27] I have found on the balance of probabilities the only real cause of Mrs Kakoschke's inability to work is the accident of September 2004, that is, the defendant's negligence. The defendant has failed to establish any other cause.

Quantum

[48] As will appear, concessions from the defence mean that future economic loss and loss of future superannuation benefits remain the components of general damages to be assessed.

[49] In evidence Mrs Kakoschke said she intended to work as a teacher until age 55 to 60. Mr Grant-Taylor SC has made submissions based on the half-way age of 57 ½. Given that Mr Howe has conceded in his submissions that she could reasonably have been expected to work to age 55, I consider that it is reasonable to adopt Mr Grant-Taylor's mean figure of 57½. But of course allowance will still have to be made for contingencies and I consider it more convenient to do that by discounting by an adopted percentage the figure calculated for net loss of future income and superannuation benefits. Those contingencies are, of course, that she might

otherwise have sustained a disability which prevented or restricted her ability to work and that she might be able to earn some income in future.

[50] I have concluded that the probabilities are that the symptoms of Huntington's disease will not appear until she is in her 60's. I see no reason to advance that to age 57½. Nor do I think that I have any basis to consider that some new event might occur of such a nature as to cause the onset of PTSD. Such an event would have to be actually life threatening and reasonably so perceived by her. Few people are so afflicted during their lives. This woman has already had one such event. There is no reason to believe that fate would be so unkind to have another in store for her. There is, however, a reasonable possibility that her pre-accident psychiatric history relating to her childhood abuse might have been stirred up at some time in the future (as it was in 1998) and to an extent that actually disturbed her ability to work.

[51] Mr Grant-Taylor argued for a discount of only 15% because his calculations for future income are based entirely on the income relating to Mrs Kakoschke's current position as a Senior Teacher and ignore any possibility of promotion to higher paid positions. As there is no evidence to let me speculate on that possibility, I consider I must calculate, as he has done, on what I have accepted to be a securely held employment position. Doing the best I can, I propose to discount by 20% her assessed figure for future lost income to take into account contingencies referred to in para [50].

[52] Reference to Mr Howe's written submissions shows that for many of the items claimed by Mrs Kakoschke Mr Howe argues for 40% of the figures as calculated by Mr Grant-Taylor. So, once I reject the 40% argument it is clear that Mr Howe accepts Mr Grant-Taylor's calculations. I reject the very minor claim of $250 for a TENS machine which is not admitted, nor sufficiently proved.

[53] The plaintiff's future economic loss is quantified in an amount of $404,337 calculated as follows from tendered pay slips and the applicable Queensland Teachers' Award:

Loss of $980.59 net per week discounted @ 5% per annum over 31.14 weeks between 25.11.06 and 30.06.07 (multiplier 30.4)	$29,810
Thereafter, loss of $1,019.04 net per week discounted @ 5% per annum over 52.28 weeks between 01.07.07 and 30.06.08 (deferred multiplier 75.5 minus 25.8 = 49.7)	$50,664
Thereafter, loss of $1,047.70 net per week discounted @ 5% per Annum over 10¾ years between 01.07.08 and 18.03.19 (deferred Multiplier 481.1 minus 75.5 = 405.6) when plaintiff reaches 57½ Years of age	$424,947
	$505,421
Discounted by 20% for contingencies	$404,337

[54] I am aware of the requirement of s. 55 of the *Civil Liability Act* 2003 and in my opinion these reasons sufficiently state the assumptions on which the award for loss

of future earnings and superannuation benefits which have not been agreed is based and the methodology used to arrive at the award.

Conclusion

[55] The plaintiff's damages are thus:-

Agreed general damages for pain, suffering and loss of amenities	$12,000
Agreed past economic loss, calculated as per schedule	$61,925
Agreed interest thereon	$3,737
Agreed past loss of employers' contributions to superannuation,	$5,573
Agreed interest thereon	$336
Future impairment of earning capacity [para 54]	$404,337
Future loss of employers' contributions to superannuation, calculated @9% of the award for future impairment of earning capacity proper: 9% of $404,337.	$38,665
Agreed future expenses to be incurred in undertaking psychiatric Treatment	$28.050
Agreed special damages and out of pocket expenses	$8,384
Agreed interest thereon	$187
	$560.919

[56] There will be judgment for the plaintiff for $560,919.