IN THE SUPREME COURT OF QUEENSLAND No. 2331 of 1979

FULL COURT

BETWEEN:

PETER WILLIAM THORLEY by his next friend RUBY EILEEN THORLEY (Plaintiff) Respondent

AND:

IAN JAMES McBAIN (Defendant) Appellant

The Acting Chief Justice

(Mr. Justice Andrews S.P.J.)

Macrossan J.

Shepherdson J.

Judgment delivered by the Acting Chief Justice and Shepherdson J. on the 12th October, 1983. Macrossan J. concurring.

"APPEAL DISMISSED WITH COSTS TO BE TAXED."

IN THE SUPREME COURT OF QUEENSLAND No. 2331 of 1979

BETWEEN:

PETER WILLIAM THORLEY by his next friend RUBY EILEEN THORLEY (Plaintiff) Respondent

-and-

IAN JAMES McBAIN (Defendant) Appellant

JUDGMENT: THE ACTING CHIEF JUSTICE

Delivered this 12th day of October 1983.

This is a defendant's appeal against an award of damages in the sum of $352,674.44 for personal injury sustained on 16th December, 1976 by the respondent who was born on 10th August, 1953.

The assessment included damages as follows:

	$
For loss to trial	20,000.00
For future economic loss	145,000.00
For pain and suffering and loss of amenities	60,000.00
Cost of home care by parents to date of trial	18,200.00
Future cost of parents' care	28,910.00
Capitalization of payments for services of housekeeper for fifteen (15) years, beginning ten (10) years hence, at $150.00 per week (present rates of pay).	51,150.00
Cost (at present rates) of being an inmate in an institution for fifteen (15) years, beginning twenty-five (25) years hence	40,000.00
Medical and chemists' expenses for twenty (20) years	9,990.00
Cost and expenses of administration of the fund established by the judgment	20,000.00

A sum of $955.23 was allowed for special damages and adjustments were made in respect of interest, which in my view of the matter overall need not be considered.

In the accident the plaintiff received a severe brain stem injury and other, relatively minor, injuries to his head. The details of his treatment and his present condition need to be considered but for the moment it can be said that he is principally affected by the brain stem injury and on the evidence must be considered unemployable.

A trial of the action took place before Dunn J. in December, 1982, but judgment had not been delivered before the untimely death of His Honour. The matter was then listed for trial by the Learned Trial Judge. By consent all exhibits tendered at the earlier trial were retendered and a transcript of all evidence at that trial was also tendered as an exhibit. The plaintiff gave evidence in the later trial to afford the Learned Trial Judge the opportunity of seeing and hearing him in the witness box. The parties agreed that the plaintiff should bear fifteen (15) per cent of the responsibility for the accident with eighty-five (85) per cent attributed to the defendant. The plaintiff, having been found unable to manage his affairs, sanction by the Court of this apportionment was sought and obtained. The grounds of appeal set out by the plaintiff are eight in number. They are all more or less to the effect that the damages assessed were manifestly excessive as to each head of general damages, pre-trial loss or earnings and future economic loss, that the Learned Trial Judge failed to take into account the plaintiff's previous work history; that due weight was not given to the evidence tending to show that the reasonable cost of a full time housekeeper would be substantially less than the amount as found; that due weight was not given to the limiting factor upon the plaintiff's life expectancy by his tendency to administer drug overdoses to himself.

At the hearing of the appeal heads of argument on behalf of the appellant were as follows:—

"1. The Learned Trial Judge overstated the extent of past and future care provided or to be provided by the plaintiff's parents as a consequence of the accident.

2. The Learned Trial Judge in any event overstated the extent of future care which was appropriate.

3. The Learned Trial Judge used too high a base rate to calculate the cost of appropriate domestic care.

4. The Learned Trial Judge gave inadequate weight to evidence to the effect that after the plaintiff's parents become unable to provide him with appropriate care it would be provided by other members of his family.

5. The Learned Trial Judge failed to give adequate weight to the plaintiff's pre-accident work attitude and history and to the contingencies which they reflected.

6. In respect of the above matters the Learned Trial Judge failed to give proper weight to evidence of the plaintiff's attempt on his life and their bearing on his life expectancy."

The appellant has made no attack upon the assessment of $60,000.00 in respect of pain and suffering and loss of amenities and that amount is no longer in dispute. I propose dealing with the heads of the appellant's arguments in reverse order.

There is no evidence that the plaintiff's life expectancy was materially shortened by his injuries. One would think as a matter of logic that his tendency to take overdoses of medicine might well be relevant. The evidence here however is that there is a decreasing likelihood of harmful effects from such overdoses. Of course this incidence was very much a factor during the first two or three years after the accident and at first he was allowed quantities of sedatives which would provide sedation for two days only at a time. He has now reached the stage of being allowed possession of a week's supply at a time. During the earlier part of his history since the accident there were episodes of psychiatric treatment but more recently this has become rather more supportive. During his early treatment particularly in relation to a tracheostomy which had been necessary, he attended surgery quite often and was extremely frustrated and disgusted with his personal appearance. The closure of the tracheostomy has been a total success and his circumstances have indeed

improved. Doctor Daniel Bricknell, who gave evidence, referred to periods of great frustration mainly because of the plaintiff's appearance. He said that his tracheostomy was really revolting even to a medical practitioner. It seems on the evidence that the plaintiff did not intend to kill himself in these so called suicide attempts but of course he was brought into danger by the steps which he actually took. For example, in the earlier part of his history he would pull out tubes which were inserted in the tracheostomy and clearly needed urgent attention as a result. Dr. Bricknell's evidence showed that an overdose from frustration and accidential reasons is now much less likely. Doctor Norman Charles Connell said that his view of the plaintiff was that he was fed up at these times and wanted relief from the way he felt and probably might not on some occasions have cared too much about what happened. He did not think, however, that the plaintiff ever formed the specific intention to kill himself. The plaintiff said in relation to the occasions when he took too many tablets, “At the time I was, well, silly to what I am now. I was real bad, sort of thing, and I did not know I took the overdose until I ended up in hospital.” He said on such an occasion that he really thought that the overdose had been taken by accident. There was evidence to the effect that his having the services of a live-in housekeeper would be beneficial from the safety point of view in relation to possible drug overdoses. The evidence is clear that he is incapable of managing his affairs and he has been dealt with by the Learned Trial Judge on the basis that he will need care by his parents or later by a housekeeper or later by the staff in some appropriate institution.

It is a fact that he spends time on his own walking about the district or riding his cycle, for example, to a place where cars are kept and serviced but he is not likely to be in possession of sedatives at these times and generally speaking will have the benefit of supervision while in his ordinary domestic surroundings.

It must not be overlooked of course that there were numerous occasions when he returned to hospital for treatment after such overdoses. The last occasion was in September, 1981. The Learned Trial Judge commented on the fact (supported by evidence) that doctors do not like to give the plaintiff large amounts of medicine because of his past history but prefer to see him on a fairly regular basis, even once a week.

Again as His Honour said because of problems related to the tracheostomy the plaintiff does suffer from a number of chest infections, colds and the like, which require regular medication. In all the circumstances he relied upon medical and other evidence in coming to the conclusion that at the time of trial the plaintiff's life expectancy was of the order of forty-three (43) years and in my view no good reason has been advanced for questioning this view.

It is, I think, particularly significant that he will probably spend a good deal of time in his later life in an institution where he will be under supervision and given nursing care. I think too much weight is sought to be given to the plaintiff's earlier work attitudes and history. It seems indeed that in his early teenage years (he left school at the age of fourteen (14) years) he did not spend much time working in continuous employment. Doctor Bricknell knew the plaintiff before the accident and described him as a healthy, attractive, alert, energetic and above average young man. This, I think, was a description of him as a person and does not relate to his intellectual capacity. It seems clear enough that although he was a “typically normal teenager” he was not very bright intellectually. He did however appear to have considerable skill as an untrained motor mechanic, a very good “backyard mechanic”. He was proficient at repairing engines and at spray painting and panel beating. The evidence of his activities such as playing cricket seems to indicate that he was an interested responsible young person.

The Learned Trial Judge was satisfied that the evidence established that the plaintiff had a number of jobs between the time when he left shcool and the time of the accident. His Honour rejected a suggestion that the plaintiff had worked on an average only 8.3 weeks per year. As a result of the plaintiff's brain injury he has substantial memory loss or impairment. His Honour held that the plaintiff had clearly changed jobs quite frequently but that he could not recall full details of those jobs. For example, he worked for some time in a vehicle spare-parts yard at Dalby of which no particulars were available. The plaintiff's mother also persuaded the Learned Trial Judge that the plaintiff earned money from his backyard mechanical activities. His Honour was satisfied that the plaintiff had been “an alert bright personable young man who would have had no difficulty in finding work even in difficult times particularly when sufficiently motivated”.

This is a matter about which the advantage of seeing and hearing the plaintiff in evaluating other evidence as to his pre-accident characteristics and personality is particularly significant. His Honour formed the view that the plaintiff had an earning capacity as a strong, healthy, not unintelligent, young man whose personality would have undoubtedly endeared him to prospective employers.

It is, I think, sensible and entirely supportable to take the view which His Honour did that with the undertaking of responsibility the plaintiff would undoubtedly have settled down in a steady job. This is by no means outside the normal pattern of behaviour of most people and I do not think any valid reason has been advanced for upsetting His Honour's findings in this regard.

The balance of arguments dealt with the cost of care and was critical of the findings in that regard both as to the degree of care that might be required and the cost. As to the help that might be sought from members of the respondent's family when his parents become unable to look

after him, I think the Learned Trial Judge's view was practical. It is, I think, a matter of common knowledge that as siblings become mature and involved in their own lives and domestic situations they become less likely to provide care of this type to other siblings. In a case like this where damages are being assessed in respect of a long period into the future one can only be guided by probabilities and I could not see any proper reason for disagreeing with His Honour as to the view taken by him in this regard. The hopes of devoted parents could easily foster an unreal optimism in their expectations of what other members of their family might provide. What one is concerned with in the case of this respondent is to ensure as nearly as possible that he will have the advantage of adequate care and supervision for seven days in every week for every week in each year for a considerable period of time which will not begin, so far as care by people other than the parents is concerned, for some time in the future. In my view the Learned Trial Judge adopted the only practical approach to this particular question.

The criticism of the calculation of the cost of appropriate domestic care at a time when the respondent would need the services of a housekeeper seems to be based upon the submission that there was evidence to the effect that the services of a housekeeper might be secured for a payment of $80.00 to $100.00 per week. His Honour was not bound to act upon the lowest figure mentioned. It is proper in a case like this to have regard to difficulties which might be encountered in securing the services of a person who would look after a man with the disabilities besetting the respondent. His Honour took the view that there are such people but there may well be times when quite high payments will need to be made even temporarily in circumstances where a housekeeper having left the respondent's employ, the securing of another for an extended period of time may present temporary difficulties. The amount of $150.00 per week which was argued to be too high can be seen to be conservative bearing in mind that the employed housekeeper is to be housed and fed. The

amount to be paid to persons employed through the Dial-an-Angel system is $27.00 per day, which of course clearly exceeds the rate adopted by His Honour for calculation purposes. There was nothing to suggest that the lowest range of pay, namely $80.00 to $100.00 per week applied to a seven day week. If in fact it was relevant to a five day week the average rate per day through that range is about $18.00. For a seven day week this comes to $126.00 in addition to which there are the other expenses to which I have referred. In my view the amount allowed has not been shown to be excessive. I thought that the evidence was adequate to support His Honour's finding that the value of help given to the plaintiff by his parents was $70.00 per week. He has not purported to enable them to be paid at an ordinary employee/employer relationship rate. The parents have in fact provided their services gratuitously. The respondent's father has retired. The services on the evidence obviously extend beyond the range of activities usually undertaken by parents for the benefit of children.

His Honour has relied upon Griffiths v. Kerkemeyer (1977) 139 C.L.R. 161. In my view in refusing to cost the services on an employer/employee relationship basis but calculating the help as being worth $10.00 per day His Honour has made the proper application of the principles laid down in this Court in Carrick v. The Commonwealth of Australia, No. 1413 of 1978 delivered on 9th March, 1983 (unreported), particularly in the judgment of Kelly J. and in the majority decision in Kovac v. Kovac (1982) 1 N.S.W.L.R. 656 and in Sharman v. Evans 138 C.L.R. 563 (See especially p. 573).

His Honour has in my view properly assessed the reasonable cost of satisfying the respondent's need and has not applied a value of the services of what people in the appropriate section of the labour market might charge by way of wages if engaged to perform such services.

I respectfully agree that not every item of assistance and support rendered by one member of a family to another

ought to be regarded as sounding in damages. It is those services which go beyond such a range of items of assistance which ought to be brought into calculation in an assessment which must be seen to be reasonable. As to other contentions I am unable to see that the Learned Trial Judge overstated the extent of past and future care provided or to be provided by the parents. I thought that His Honour's view as to the extent of the need for future care was conservative and reasonable. It is to be borne in mind that the respondent is shown to be unemployable. Some references were made to his doing something in a sheltered workshop environment. The evidence is in accordance with common knowledge that this type of activity is not productive of earnings in any practical sense and has a therapeutic rather than an economic relevance.

I have not thought it necessary to consider the award for future economic loss in detail other than to say that I thought the calculation proceeded from a base net rate, namely $170.00 per week, which was probably too low and to the appellant's advantage.

I am of the view that the decision of the Learned Trial Judge as to the heads of damage brought into contention was quite correct. I would dismiss the appeal with costs to be taxed.

IN THE SUPREME COURT OF QUEENSLAND No. 2331 of 1979

BETWEEN:

PETER WILLIAM THORLEY by his next friend RUBY EILEEN THORLEY (Plaintiff) Respondent

- and -

IAN JAMES McBAIN (Defendant) Appellant

JUDGMENT - SHEPHERDSON J.

Delivered the 12th day of October 1983.

The appellant before us is the defendant in the above suit in which the plaintiff claimed damages for personal injuries sustained in a motor vehicle accident which occurred on 16th December 1976. After a trial in which the only substantial matter for the learned trial judge was the fixing of the plaintiff's damages his Honour mace the following assessment:—

1. Pain, suffering and loss of amenities	$60,000.00
2. Economic loss to date	20,000.00
3. Cost of care and services to date	18,200.00
4. Future economic loss	145,000.00
5. Cost of future care and provision of services	130,050.00
6. Special damages	955.23
	$374,205.23

Because the parties had agreed that the plaintiff was to bear 15% of the blame for contributory negligence the learned trial judge reduced this figure to $318,074.44.

To this sum the learned trial judge added the following:—

Interest on pain and suffering	$10,200.00
Interest on economic loss to date	3,400.00
Interest on special damages and cost of care and services to date	1,000.00
Public Trustee Administration charges	20,000.00
	$34,600.00

In the result he gave judgment for $352,674.44.

The appellant has appealed against the assessment of the damages and he attacks the components in respect of cost of care and economic loss.

Before turning to these there are some preliminary matters which he pointed out and which were not in dispute. The plaintiff was born on 10th August, 1953 and so he was 29 years old at the date of the judgment delivered on 20th May, 1983. He received a severe brain stem injury and other relatively minor injuries to his head. He was an inpatient

at the Princess Alexandra Hospital for some 10 months and then in Lowson House. Not long after he was admitted to hospital, a tracheostomy was performed. He had problems with this tracheostomy which remained until 12th February, 1980. The plaintiff had personality problems requiring psychiatric treatment and assessment. The learned trial judge reviewed the plaintiff's injuries, the history of his treatment and their consequences. One matter which should be mentioned is that the evidence disclosed that the plaintiff is fully aware of the socio-economic consequences of his injuries. I return now to the components which are attacked by the appellant.

1. CARE AND PROVISION OF SERVICES

The appellant did not challenge the view that the respondent who is a bachelor had established a need for the provision of domestic services. The learned trial judge divided the cost of care in respect of the period up to date of trial and the period thereafter. As to the first of these the learned trial judge came to the conclusion that it was reasonable to allow an average of three to four hours per day as the extent of care provided by the respondent's parents. He had regard to certain evidence as to the cost of the housekeeper being $27.00 per day plus keep with no hourly rate being given. His Honour said:—

> "Taking that figure into account I find that the reasonable value of the parents services (based on an average of three to four hours per day) is $10.00 per day or $70.00 per week."

He then went on to refer to the fact that the respondent's parents had started caring for him in about May 1978 and he assessed the cost of that care over the ensuing five years to date of trial at $18,200.00. In Carrick v. The Commonwealth of Australia and Ors. (No. 1413 of 1978 - unreported) Kelly J. who wrote the leading judgment of this court discussed at some length the limits of the principle enunciated in Griffiths v. Kerkemeyer (1977) 139 C.L.R. p.

161 which is the leading authority for the award of damages on this head.

Kelly J. pointed out that the limits of the decision in that case had been examined on several occasions by the New South Wales Court of Appeal and most recently in Kovac v. Kovac (1982) 1 N.S.W.L.R. 656. He adopted the following statements by Samuels and Mahoney JJ.A. in that case:—

> "Put shortly, ... it authorises the proposition that where by reason of the defendant's tort the plaintiff has incurred a need for supportive services of some kind he is entitled to recover the reasonable cost of satisfying it although the services have not been supplied at all or have been provided gratuitously by the benevolence of family or friends.
>
> Secondly, what must be assessed is the reasonable cost of satisfying the plaintiff's need and not the value of the services which are in fact being furnished; because the provider may be offering more than a reasonable satisfaction of what the plaintiff's need demands." (per Samuels J.A. at p. 663).
>
> "I do not believe that any head of policy (or theory of loss distribution) requires the ordinary currency of family life and obligation to be wholly ignored; or the inclusion in the area of compensation of the support commonly expected and received amongst the members of a family group even though the actual occasion for its provision may be the tort-caused disability of the recipient. As I said in Johnson v. Kelemic (1979) F.L.C. 78, 487 at p. 78, 493: 'I agree with Mahoney J.A. that not every item of assistance and support rendered by one member of a family to another ought reasonably to be regarded as sounding in damages' (per Samuels J.A. at p. 668.
>
> "... it is open to a defendant to contend that, granted the reasonableness and necessity of gratuitous services and their potential cost he ought not to have to pay for them or all of them either having regard to the character of the benefit they represent (per Gibbs J. supra) or by dint of the overriding principle of reasonableness which must inform all assessments of damages at large in cases such as the present." (Per Samuels J.A. at p. 669).

> "... does the principle apply where the service gratuitously provided are provided and are such as would reasonably be seen as provided according to the incidents of ordinary or family life? In my opinion even if it is accepted that the principle in Griffiths v. Kerkemeyer is relevant in the context there is yet to be applied to its application in the particular case a principle of reasonableness." (per Mahoney J.A. at p. 678).

The above reference to the judgment of Gibbs J. was to Griffiths v. Kerkemeyer ((supra) at p. 169).

In the result, this court in Carrick's case has made it clear that the principle of reasonableness must be applied when one is considering a case where services are gratuitously provided according to the incidents of ordinary or family life. In the view which I take of the matter now before this court the allowance of three to four hours per day was on the evidence reasonable as also was the allowance of $10.00 per day for such services. I would not disturb the assessment of $18,200.00 as the cost of care to date of trial.

The above principles referred to in Carrick's case are of course applicable to the component of future care. The total allowed on this head was $130,050.00 and in the course of his judgment the learned trial judge particularised this as follows:—

"(a) Ten years care provided by parents	$28,910.00
(b) Then 15 years on basis of services provided by a housekeeper	$51,150.00
(c) Thereafter 15 years in a nursing home	$40,000.00
(d) Medical and chemist expenses of $15.00 per week over 20 years	$9,990.00
	$130,050.00

No challenge was made to the periods chosen by the learned trial judge.

For the first period of ten years the learned trial judge continued the figure of $70.00 per week which he had adopted for calculating the cost of care and provision of

services up to the date of trial. He applied the 5% discount tables and in the result obtained the figure of $28,910.00. It was submitted by the appellant in relation to this and the other major components for future care that the learned trial judge had overstated the extent of such care to be provided by the parents and had used too high a base rate. In my opinion these submissions fail in relation to the first period of 10 years from the date of trial.

As to the next period the learned trial judge found that it was more likely than not that the respondent will have to seek housekeepers in the market place to ensure that he is provided with the necessary services during this period. I point out that at the expiration of the next 10 years the respondent's parents, if they are alive, will be at ages when it will be difficult for them to provide care and necessary services for the respondent. In respect of this component the appellant submitted that the learned trial judge gave inadequate weight to evidence to the effect that after the respondent's parents were unable to provide appropriate care other members of the family would do so. In his reasons for judgment the learned trial judge did consider evidence from the respondent's mother that she had extracted a “promise” from her other children that they will care for the respondent when she is no longer capable of doing so. However as the learned trial judge pointed out each of the other children is married and has a young family and he considered it would be a real burden for any one of them (or even all of them in rotation) to provide the necessary services for the respondent. In the result, the finding by the learned trial judge that the respondent would have to seek housekeepers was one which was properly open on the evidence and was in my opinion the only realistic conclusion to which the learned trial judge could come. Now his Honour had before him evidence as to certain costs of care. This evidence included the cost of a private nursing home (Marooma) which in a ward situation for ordinary care was $37.00 per day ($259.00 per week). There was evidence from a Mrs. Mountford who runs a housekeeping agency called “Dial an Angel”. Her evidence was that if a

housekeeper were provided the respondent would really need two persons — one for five days and one for two days. Her organisation's costs were $27.00 a day i.e. $189.00 for a seven day week or $135.00 for a five day week. These costs are based on the housekeeper living in and there was no extra charge for weekend rates. In addition, the housekeeper is treated as one of the family and thus the respondent will be responsible for the housekeeper's food costs. Mrs Mountford also "guessed" that a live in housekeeper could be obtained through an advertisement for $80 - $100 per week. These figures did not include cost of keep for the housekeeper.

In his reasons the learned trial judge considered various possibilities. He referred to the fact that the plaintiff had insight into his circumstances and was very much opposed to any form of rigid institutionalisation. The learned trial judge concluded that it was reasonable to use a figure of $150.00 per week as being the cost of providing the necessary services for the 15 year period commencing in 10 years time. The learned trial judge expressly had resort to the 5% discount tables and bearing in mind that the cost would not commence for another 10 years arrived at the figure of $51,150.00. He specifically said that he thought this assessment was reasonable particularly when one had to bear in mind that on the evidence the respondent might require short periods of hospitalisation which would be extremely expensive and His Honour had not specifically allowed for that cost. In my opinion the $51,150.00 is a reasonable assessment for this 15 year period and I do not accept the appellant's submissions that the learned trial judge has overstated matters which it was necessary for him to take into account.

This leaves the third period of 15 years in a nursing home which is estimated to commence after the 15 years with the housekeeper. The learned trial judge found that the medical evidence suggested that by that stage the respondent's condition will be such that he will require admission to a nursing home. His Honour found it reasonable

and appropriate to assess the cost of provision of such services by taking present costs for Marooma. He allowed for two specific contingencies - firstly that the respondent would be wholly maintained whilst in such an institution and allowance should therefore be made for the cost of his board and lodging and secondly it might well be that the plaintiff will not achieve his full life expectancy.

In the result he allowed $40,000.00 for this cost which will probably commence in 25 years time. I do not consider that the learned trial judge erred in arriving at this figure.

It is appropriate here to mention a general submission that the learned trial judge failed to give proper weight to the implications of the respondent's attempts on his life on his future life expectancy. Certainly there were some attempts and the learned trial judge considered these in his reasons. Most of the attempts appear to have occurred in the two to three years after the incident. They were described as “overdose incidents”. Admittedly there was one in about July 1982 but the doctor who examined him concluded that it was not a deliberate attempt at suicide. According to the doctor the respondent was “fed up and wanting relief from the way he felt” and may not have cared about what happened. One important factor considered by the learned trial judge was that the respondent is fully aware of the consequences of his injuries.

I am unable to see that the trial judge did fail to give proper weight to the implications of what were called the “overdose incidents” in his assessment of the respondent's life expectancy. In my opinion the various components in the amount allowed for cost of future care and provision of services were all reasonable and I would not interfere with any of them. For the record I should add no challenge was made to component (d) i.e. the cost of medical and chemist expenses of $15.00 per week over 20 years. Before us the respondent submitted that that amount

was somewhat on the low side because there was evidence that the respondent will need psychiatric treatment from time to time, some hospitalisation and as well as recurrent medical and chemist expenses.

2. THE IMPAIRMENT OF EARNING CAPACITY

The learned trial judge has dealt with this under the headings of “Economic loss to date” and “Future economic loss”.

As to the first of these the learned trial judge awarded $20,000.00. He found that the respondent's working capacity had been totally and permanently destroyed and this finding is not challenged. His Honour referred to the difficulty in assessing damages for impairment of earning capacity due to the fact that the respondent did not have a stable work history prior to the accident. Some six years and five months had elapsed between accident and date of judgment. At the time of the accident the respondent had a life expectancy of approximately 43 years. Thus at the date of judgment that life expectancy was reduced to some 36 years. The learned trial judge found that the respondent clearly had a pre-accident capacity to work as a general hand or general labourer and that but for the accident would (with short interruptions whilst unemployed) have continued to work in that general field for the rest of his life. He thought that once the respondent married and settled down the only periods of unemployment would have been those which beset skilled workers in the community. In the result the learned trial judge was satisfied that as at the date of the accident the respondent's average weekly earnings over a 12 month period was $70.00 net per week at least and probably more. He therefore thought it preferable to err on the low side and adopted that figure of $70.00 per week as the measure of his loss up to date of trial. His Honour then said - “After making allowances for contingency factors the appropriate sum to award for economic loss to date of trial is $20,000.00”. He accepted the Storemen and Packers Award wage as the most reliable

indicator of the respondent's earning capacity Evidence before the learned trial judge showed that that award's rates ranged from $127.71 per week (gross) at the date of the accident to $221.90 per week (gross) at the 11 date of trial. Even allowing for tax on these gross award rates the figure of $70.00 per week is certainly on the low side. For a period of 6 years and 5 months a loss of $70.00 per week is approximately $23,500.00. It can be seen that the learned trial judge discounted this figure and it seems to me there was some double discounting. The $70.00 per week took into account the absences from work and for my part I should have thought a figure of some $23,500.00 a more reasonable figure for this period.

As for the future, the learned trial judge calculated the present value of future economic loss for impairment of earning capacity on the basis that the respondent would have worked for 35 years from the date of trial. He used a figure of $170.00 net per week and applied the 5% discount tables. The result was $145,000.00 under this head. It seems that the learned trial judge arrived at the $170.00 net per week which he said was a rough figure after referring to the gross weekly salary under the Storemen and Packers Award of $196.90 at the end of 1981. His Honour referred to what he called “present tax scales” and apparently deducted some $27.00 from this gross weekly salary. He pointed out that the $170.00 per week “would certainly be below the base figure in that award as at the date of trial”. It appears that the learned trial judge overlooked some other evidence before him which showed that as at the date of trial the gross weekly salary under that Award was $221.90 per week. In fairness to the learned trial judge it must be borne in mind that the trial was conducted in a somewhat unusual way. There had been a trial before Mr. Justice Dunn but unfortunately that learned judge died before giving judgment. The matter was tried again but the parties agreed that save for oral evidence from the plaintiff the whole of the transcript of the evidence before the late Mr. Justice Dunn be tendered. Consequently it is easy to understand how the learned trial

judge did overlook this other evidence. Before us the respondent's counsel told us that a gross salary of $221.90 per week resulted in approximately $180.00 per week after tax. It thus seems that in making his calculation of the present value for loss due to impairment of earning capacity the learned trial judge really discounted the net earnings by some 5-6% and made virtually no discount for contingencies affecting his working life. In my opinion the learned trial judge in calculating this component for future loss failed to discount sufficiently to allow for the vicissitudes of life and I regard the figure of $145,000.00 as too high. This is the only head of damages which in my opinion is high. As already mentioned the component for impairment of earning capacity to date of trial is on the low side. Despite my criticism of the component for future loss the overall assessment of damages of $374,205.23 is not in my opinion unreasonably disproportionate to the circumstances of the respondent's injury (Gamser v. The Nominal Defendant (136 C.L.R. 145 at p. 159) and I would not interfere with that assessment.

In the result I would dismiss the appeal.

IN THE SUPREME COURT OF QUEENSLAND No. 2331 of 1979

FULL COURT

BEFORE:

The Acting Chief Justice (Mr. Justice Andrews S.P.J.)

Mr. Justice Macrossan

Mr. Justice Shepherdson

BRISBANE, 12 OCTOBER 1983

BETWEEN:

PETER WILLIAM THORLEY by his next friend RUBY EILEEN THORLEY — (Plaintiff) Respondent

- and -

IAN JAMES McBAIN — (Defendant) Appellant

JUDGMENT

MR. JUSTICE ANDREWS: In this matter I would dismiss the appeal with costs to be taxed. I publish my reasons. I am authorised by my brother Macrossan to say that he agrees with my reasons and the orders proposed.

MR. JUSTICE SHEPHERDSON: I would dismiss the appeal with costs to be taxed and I publish my reasons.

MR. JUSTICE ANDREWS: The appeal is dismissed with costs to be taxed.

IN THE SUPREME COURT OF QUEENSLAND — No. 2331 of 1979

BETWEEN:

PETER WILLIAM THORLEY by his next friend RUBY EILEEN THORLEY — (Plaintiff) Respondent

-and-

IAN JAMES McBAIN — (Defendant) Appellant

JUDGMENT: THE ACTING CHIEF JUSTICE

Delivered this 12th day of October 1983.

This is a defendant's appeal against an award of damages in the sum of $352,674.44 for personal injury sustained on 16th December, 1976 by the respondent who was born on 10th August, 1953.

The assessment included damages as follows:

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For loss to trial	20,000.00
For future economic loss	145,000.00
For pain and suffering and loss of amenities	60,000.00
Cost of home care by parents to date of trial	18,200.00
Future cost of parents' care	28,910.00
Capitalization of payments for services of housekeeper for fifteen (15) years, beginning ten (10) years hence, at $150.00 per week (present rates of pay).	51,150.00
Cost (at present rates) of being an inmate in an institution for fifteen (15) years, beginning twenty-five (25) years hence	40,000.00
Medical and chemists' expenses for twenty (20) years	9,990.00
Cost and expenses of administration of the fund established by the judgment	20,000.00

A sum of $955.23 was allowed for special damages and adjustments were made in respect of interest, which in my view of the matter overall need not be considered.

In the accident the plaintiff received a severe brain stem injury and other, relatively minor, injuries to his head. The details of his treatment and his present condition need to be considered but for the moment it can be said that he is principally affected by the brain stem injury and on the evidence must be considered unemployable.

A trial of the action took place before Dunn J. in December, 1982, but judgment had not been delivered before the untimely death of His Honour. The matter was then listed for trial by the Learned Trial Judge. By consent all exhibits tendered at the earlier trial were retendered and a transcript of all evidence at that trial was also

tendered as an exhibit. The plaintiff gave evidence in the later trial to afford the Learned Trial Judge the opportunity of seeing and hearing him in the witness box. The parties agreed that the plaintiff should bear fifteen (15) per cent of the responsibility for the accident with eighty-five (85) per cent attributed to the defendant. The plaintiff, having been found unable to manage his affairs, sanction by the Court of this apportionment was sought and obtained. The grounds of appeal set out by the plaintiff are eight in number. They are all more or less to the effect that the damages assessed were manifestly excessive as to each head of general damages, pre-trial loss or earnings and future economic loss, that the Learned Trial Judge failed to take into account the plaintiff's previous work history; that due weight was not given to the evidence tending to show that the reasonable cost of a full time housekeeper would be substantially less than the amount as found; that due weight was not given to the limiting factor upon the plaintiff's life expectancy by his tendency to administer drug overdoses to himself.

At the hearing of the appeal heads of argument on behalf of the appellant were as follows:—

> "1. The Learned Trial Judge overstated the extent of past and future care provided or to be provided by the plaintiff's parents as a consequence of the accident.
>
> 2. The Learned Trial Judge in any event overstated the extent of future care which was appropriate.
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> 3. The Learned Trial Judge used too high a base rate to calculate the cost of appropriate domestic care.
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> 4. The Learned Trial Judge gave inadequate weight to evidence to the effect that after the plaintiff's parents become unable to provide him with appropriate care it would be provided by other members of his family.
>
> 5. The Learned Trial Judge failed to give adequate weight to the plaintiff's pre-accident work attitude and history and to the contingencies which they reflected.

> “6. In respect of the above matters the Learned Trial Judge failed to give proper weight to evidence of the plaintiff's attempt on his life and their bearing on his life expectancy.”

The appellant has made no attack upon the assessment of $60,000.00 in respect of pain and suffering and loss of amenities and that amount is no longer in dispute. I propose dealing with the heads of the appellant's arguments in reverse order.

There is no evidence that the plaintiff's life expectancy was materially shortened by his injuries. One would think as a matter of logic that his tendency to take overdoses of medicine might well be relevant. The evidence here however is that there is a decreasing likelihood of harmful effects from such overdoses. Of course this incidence was very much a factor during the first two or three years after the accident and at first he was allowed quantities of sedatives which would provide sedation for two days only at a time. He has now reached the stage of being allowed possession of a week's supply at a time. During the earlier part of his history since the accident there were episodes of psychiatric treatment but more recently this has become rather more supportive. During his early treatment particularly in relation to a tracheostomy which had been necessary, he attended surgery quite often and was extremely frustrated and disgusted with his personal appearance. The closure of the tracheostomy has been a total success and his circumstances have indeed improved. Doctor Daniel Bricknell, who gave evidence, referred to periods of great frustration mainly because of the plaintiff's appearance. He said that his tracheostomy was really revolting even to a medical practitioner. It seems on the evidence that the plaintiff did not intend to kill himself in these so called suicide attempts but of course he was brought into danger by the steps which he actually took. For example, in the earlier part of his history he would pull out tubes which were inserted in the tracheostomy and clearly needed urgent attention as a result. Dr. Bricknell's evidence showed that an overdose

from frustration and accidential reasons is now much less likely. Doctor Norman Charles Connell said that his view of the plaintiff was that he was fed up at these times and wanted relief from the way he felt and probably might not on some occasions have cared too much about what happened. He did not think, however, that the plaintiff ever formed the specific intention to kill himself. The plaintiff said in relation to the occasions when he took too many tablets, “At the time I was, well, silly to what I am now. I was real bad, sort of thing, and I did not know I took the overdose until I ended up in hospital.” He said on such an occasion that he really thought that the overdose had been taken by accident. There was evidence to the effect that his having the services of a live-in housekeeper would be beneficial from the safety point of view in relation to possible drug overdoses. The evidence is clear that he is incapable of managing his affairs and he has been dealt with by the Learned Trial Judge on the basis that he will need care by his parents or later by a housekeeper or later by the staff in some appropriate institution.

It is a fact that he spends time on his own walking about the district or riding his cycle, for example, to a place where cars are kept and serviced but he is not likely to be in possession of sedatives at these times and generally speaking will have the benefit of supervision while in his ordinary domestic surroundings.

It must not be overlooked of course that there were numerous occasions when he returned to hospital for treatment after such overdoses. The last occasion was in September, 1981. The Learned Trial Judge commented on the fact (supported by evidence) that doctors do not like to give the plaintiff large amounts of medicine because of his past history but prefer to see him on a fairly regular basis, even once a week.

Again as His Honour said because of problems related to the tracheostomy the plaintiff does suffer from a number of chest infections, colds and the like, which require

regular medication. In all the circumstances he relied upon medical and other evidence in coming to the conclusion that at the time of trial the plaintiff's life expectancy was of the order of forty-three (43) years and in my view no good reason has been advanced for questioning this view.

It is, I think, particularly significant that he will probably spend a good deal of time in his later life in an institution where he will be under supervision and given nursing care. I think too much weight is sought to be given to the plaintiff's earlier work attitudes and history. It seems indeed that in his early teenage years (he left school at the age of fourteen (14) years) he did not spend much time working in continuous employment. Doctor Bricknell knew the plaintiff before the accident and described him as a healthy, attractive, alert, energetic and above average young man. This, I think, was a description of him as a person and does not relate to his intellectual capacity. It seems clear enough that although he was a “typically normal teenager” he was not very bright intellectually. He did however appear to have considerable skill as an untrained motor mechanic, a very good “backyard mechanic”. He was proficient at repairing engines and at spray painting and panel beating. The evidence of his activities such as playing cricket seems to indicate that he was an interested responsible young person.

The Learned Trial Judge was satisfied that the evidence established that the plaintiff had a number of jobs between the time when he left shcool and the time of the accident. His Honour rejected a suggestion that the plaintiff had worked on an average only 8.3 weeks per year. As a result of the plaintiff's brain injury he has substantial memory loss or impairment. His Honour held that the plaintiff had clearly changed jobs quite frequently but that he could not recall full details of those jobs. For example, he worked for some time in a vehicle spare-parts yard at Dalby of which no particulars were available. The plaintiff's mother also persuaded the Learned Trial Judge that the plaintiff earned money from his backyard

mechanical activities. His Honour was satisfied that the plaintiff had been “an alert bright personable young man who would have had no difficulty in finding work even in difficult times particularly when sufficiently motivated”.

This is a matter about which the advantage of seeing and hearing the plaintiff in evaluating other evidence as to his pre-accident characteristics and personality is particularly significant. His Honour formed the view that the plaintiff had an earning capacity as a strong, healthy, not unintelligent, young man whose personality would have undoubtedly endeared him to prospective employers.

It is, I think, sensible and entirely supportable to take the view which His Honour did that with the undertaking of responsibility the plaintiff would undoubtedly have settled down in a steady job. This is by no means outside the normal pattern of behaviour of most people and I do not think any valid reason has been advanced for upsetting His Honour's findings in this regard.

The balance of arguments dealt with the cost of care and was critical of the findings in that regard both as to the degree of care that might be required and the cost. As to the help that might be sought from members of the respondent's family when his parents become unable to look after him, I think the Learned Trial Judge's view was practical. It is, I think, a matter of common knowledge that as siblings become mature and involved in their own lives and domestic situations they become less likely to provide care of this type to other siblings. In a case like this where damages are being assessed in respect of a long period into the future one can only be guided by probabilities and I could not see any proper reason for disagreeing with His Honour as to the view taken by him in this regard. The hopes of devoted parents could easily foster an unreal optimism in their expectations of what other members of their family might provide. What one is concerned with in the case of this respondent is to ensure

as nearly as possible that he will have the advantage of adequate care and supervision for seven days in every week for every week in each year for a considerable period of time which will not begin, so far as care by people other than the parents is concerned, for some time in the future. In my view the Learned Trial Judge adopted the only practical approach to this particular question.

The criticism of the calculation of the cost of appropriate domestic care at a time when the respondent would need the services of a housekeeper seems to be based upon the submission that there was evidence to the effect that the services of a housekeeper might be secured for a payment of $80.00 to $100.00 per week. His Honour was not bound to act upon the lowest figure mentioned. It is proper in a case like this to have regard to difficulties which might be encountered in securing the services of a person who would look after a man with the disabilities besetting the respondent. His Honour took the view that there are such people but there may well be times when quite high payments will need to be made even temporarily in circumstances where a housekeeper having left the respondent's employ, the securing of another for an extended period of time may present temporary difficulties. The amount of $150.00 per week which was argued to be too high can be seen to be conservative bearing in mind that the employed housekeeper is to be housed and fed. The amount to be paid to persons employed through the Dial-an-Angel system is $27.00 per day, which of course clearly exceeds the rate adopted by His Honour for calculation purposes. There was nothing to suggest that the lowest range of pay, namely $80.00 to $100.00 per week applied to a seven day week. If in fact it was relevant to a five day week the average rate per day through that range is about $18.00. For a seven day week this comes to $126.00 in addition to which there are the other expenses to which I have referred. In my view the amount allowed has not been shown to be excessive. I thought that the evidence was adequate to support His Honour's finding that the value of help given to the plaintiff by his parents was $70.00 per

week. He has not purported to enable them to be paid at an ordinary employee/employer relationship rate. The parents have in fact provided their services gratuitously. The respondent's father has retired. The services on the evidence obviously extend beyond the range of activities usually undertaken by parents for the benefit of children.

His Honour has relied upon Griffiths v. Kerkemeyer (1977) 139 C.L.R. 161. In my view in refusing to cost the services on an employer/employee relationship basis but calculating the help as being worth $10.00 per day His Honour has made the proper application of the principles laid down in this Court in Carrick v. The Commonwealth of Australia, No. 1413 of 1978 delivered on 9th March, 1983 (unreported), particularly in the judgment of Kelly J. and in the majority decision in Kovac v. Kovac (1982) 1 N.S.W.L.R. 656 and in Sharman v. Evans 138 C.L.R. 563 (See especially p. 573).

His Honour has in my view properly assessed the reasonable cost of satisfying the respondent's need and has not applied a value of the services of what people in the appropriate section of the labour market might charge by way of wages if engaged to perform such services.

I respectfully agree that not every item of assistance and support rendered by one member of a family to another ought to be regarded as sounding in damages. It is those services which go beyond such a range of items of assistance which ought to be brought into calculation in an assessment which must be seen to be reasonable. As to other contentions I am unable to see that the Learned Trial Judge overstated the extent of past and future care provided or to be provided by the parents. I thought that His Honour's view as to the extent of the need for future care was conservative and reasonable. It is to be borne in mind that the respondent is shown to be unemployable. Some references were made to his doing something in a sheltered workshop environment. The evidence is in accordance with common knowledge that this type of activity is not productive of

earnings in any practical sense and has a therapeutic rather than an economic relevance.

I have not thought it necessary to consider the award for future economic loss in detail other than to say that I thought the calculation proceeded from a base net rate, namely $170.00 per week, which was probably too low and to the appellant's advantage.

I am of the view that the decision of the Learned Trial Judge as to the heads of damage brought into contention was quite correct. I would dismiss the appeal with costs to be taxed.