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NICHOLSON v NICHOLSON and ANOTHER †

Court of Appeal: Kirby P, Mahoney JA and Meagher JA

19, 20 April, 8 December 1994

Negligence — Contributory negligence — Motor vehicle accident — Failure to wear seat belt — Onus of proof under Motor Accidents Act 1988.

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Damages — Measure of — Personal injuries — Motor vehicle accident — Statutory compensation — Statutory finding of contributory negligence — Whether damages may nevertheless be reduced by zero percent — Relevant factors for such a reduction — Motor Accidents Act 1988, s 74.

Damages — Measure of — Personal injuries — Motor vehicle accident — Statutory compensation — Assessment of non-pecuniary damage — Whether statutory maximum set at date of trial or appeal is appropriate measure at hearing of appeal — Griffiths v Kerkemeyer claim — whether claim for activities making plaintiff more comfortable while plaintiff subject to full-time hospitalisation recoverable — Claim for future cost of registered nurse — When unreasonable — Claim for future care — Process involved in assessment — Meaning of "reduce", "just and equitable", "services" — Motor Accidents Act 1988, ss 72, 74, 79.

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Damages — Measure of — Personal injuries — Motor vehicle accident — Claim for cost of modifications to home of disabled plaintiff — Modifications producing capital gain — Whether claim should be discounted by financial benefit of gain — Claim for rent — Whether allowable in full — Fund management fee — Whether allowable — Whether claim should be reduced where finding of contributory negligence — Motor Accidents Act 1988, s 45(2).

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Section 74 of the *Motor Accidents Act* 1988 provides that in a claim in respect of a motor accident, a finding of contributory negligence shall be made where the injured person (not being a minor) was not wearing a seat belt as required by the *Motor Traffic Regulations* 1935, and that any damages recoverable in such claim shall be reduced by such percentage as the court thinks just and equitable in the circumstances of the case.

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Section 45 of the Act provides that once a person is found liable, or admits liability, to a claimant, even in part, an insurer must pay for hospital, medical and pharmaceutical expenses, and, subject to Pt 4, rehabilitation expenses, as they are incurred.

Held: (1) In a claim for damages in respect of a motor accident, a finding of contributory negligence for failure to wear a seat belt pursuant to the *Motor Accidents Act* 1988, s 74, does not preclude a court finding that, because such failure had not contributed at all to the claimant's injury or that such failure was completely justifiable, it was just and equitable within the meaning of the Act to reduce such claim by a percentage of nil. (315F, 332F 334E)

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† [EDITORIAL NOTE: An application for leave to appeal from part of the judgment dealing with assessment of future case and past voluntary assistence has been filed.]

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Eastern Extension Australasia & China Telegraph Co Ltd v The Commonwealth (1908) 6 CLR 647, distinguished.

Podrebersek v Australian Iron and Steel Pty Ltd (1985) 59 ALJR 492 at 494; 59 ALR 529 at 532-533, referred to.

(2) The common law rule that the defendant bears the onus of proving contributory negligence has not been altered by the *Motor Accidents Act* 1988, s 74. (315F, 332F, 334E)

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(3) Where between trial and appeal the highest sum of damages for non-economic loss available under the *Motor Accidents Act* 1988, s 79, for a "most extreme case", is increased, the higher amount governs any re-assessment of damages by the Court of Appeal. (319D, 332F, 334E)

Marsland by his Tutor the Protective Commissioner of New South Wales v Andjelic (1993) 31 NSWLR 162 at 165, followed.

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(4) Minor activities which help to improve a plaintiff's level of comfort, engaged in by a relative while the plaintiff is subject to full-time hospitalisation, are not "services" within the meaning of *Motor Accidents Act* 1988, s 72, as they do not fulfil a relevant need within the *Griffiths v Kerkemeyer* principle. (323E, 334C, E)

Van Gervan v Fenton (1992) 175 CLR 327 at 332, 333, applied.

Marsland v Andjelic [No 2] (1993) 32 NSWLR 649 at 653, referred to.

(5) It is unreasonable to allow the cost of a registered nurse in assessing damages to a plaintiff's future nursing care, if there is only a remote possibility that the plaintiff might require such services in the future. (324F, 332F, 334E)

Malec v J C Hutton Pty Ltd (1990) 169 CLR 638 at 642-643, applied.

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(6) Where a plaintiff's disabilities necessitate modifications being made to his or her home, and the modifications, should they represent assets, are likely to deteriorate over the years and thus diminish or eliminate any lasting capital advantage to the plaintiff, it is an error to deduct from damages allowed as the cost of such modifications the benefit of the capital gain. (326G-328C, 332F, 334E)

Marsland by his Tutor the Protective Commissioner of New South Wales v Andjelic (1993) 31 NSWLR 162 at 176, followed.

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(7) Where as a result of an accident a plaintiff can no longer continue to live in premises rent-free, rent paid for accommodation is fully recoverable as an "expenses" within the meaning of *Motor Accidents Act* 1988, s 45(2). (328E, 332F, 334E)

(8) Where a defendant's tort generates a reasonable need in a plaintiff for fund management, and that need is reasonably foreseeable, the plaintiff may recover by way of damages a fund management fee and justice requires that, should there be a finding of contributory negligence, such damages should not be reduced because of that finding. (329F, 332F, 334E)

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Consideration of the process of assessing damages for future care.

Per Kirby P: "… there is no rule that a judge is obliged to award a plaintiff 100 per cent of what is claimed simply because the plaintiff's evidence is unchallenged." (321A)

Note:

A Digest — NEGLIGENCE (2nd ed) [34] [59]; DAMAGES (3rd ed) [31-38] [48]; (2nd ed) [31-38]; VEHICLES AND TRAFFIC (2nd ed) [174.0]

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Cases Cited

The following cases are cited in the judgments:

Abalos v Australian Postal Commission (1990) 171 CLR 167.

Arthur Robinson (Grafton) Pty Ltd v Carter (1968) 122 CLR 649.

CSR Ltd v Bouwhuis (Court of Appeal, 23 August 1991, unreported).

Caswell v Powell Duffryn Associated Collieries, Ltd [1940] AC 152.
De Blieck v Fraser (Court of Appeal, 19 November 1980, unreported).
Eastern Extension Australasia and China Telegraph Co Ltd v The Commonwealth (1908) 6 CLR 647.
Frankcom v Woods (Court of Appeal, 1 October 1980, unreported).
GIO of New South Wales v Planas [1984] 2 NSWLR 671.
Griffiths v Kerkemeyer (1977) 139 CLR 161.
Lewis v Denye [1939] 1 KB 540.
Malec v J C Hutton Pty Ltd (1990) 169 CLR 638.
Marsland by his Tutor the Protective Commissioner of New South Wales v Andjelic (1993) 31 NSWLR 162.
Marsland by his Tutor the Protective Commissioner of New South Wales v Andjelic [No 2] (1993) 32 NSWLR 649.
Nguyen v Nguyen (1990) 169 CLR 245.
Nicholson v Nicholson (Mathews J, 23 June 1993, unreported).
Nominal Defendant v Gardikiotis (Court of Appeal, 19 May 1994, unreported).
Pennington v Norris (1956) 96 CLR 10.
Podrebersek v Australian Iron and Steel Pty Ltd (1985) 59 ALJR 492; 59 ALR 529.
Pring v Hooper (McInerney J, 10 March 1993, unreported).
Van Gervan v Fenton (1992) 175 CLR 327.

The following additional cases were cited in argument:
Bruno v Davies (Supreme Court of South Australia, White J, 29 June 1988, unreported).
Cook v Cook (1986) 162 CLR 376,
Ellis v Wallsend District Hospital (1989) 17 NSWLR 553.
Morris v Hunter (Supreme Court of Queensland, McPherson J, 21 September 1988, unreported).
Ricketts v Laws (1988) 14 NSWLR 311.

APPEAL

An appeal and cross-appeal were brought in respect of a trial judge's assessment of damages in a motor vehicle accident claim.

A S Morrison SC and *D J Hooke*, for the appellant.

J D Hislop QC and *G J Parker*, for the first respondent.

Cur adv vult

8 December 1994

KIRBY P. Mr Ronald Nicholson (the appellant) appeals from an assessment of damages by Mathews J. The damages were awarded as compensation for the injuries suffered by the appellant in a motor vehicle accident which occurred on 21 March 1990. Her Honour allowed the appellant damages of $2,066,316. The respondents to the appeal have cross-appealed. Before I deal with the many grounds of appeal and cross-appeal argued, it will be useful to set out a summary of the evidence as it concerned the appellant's background, the extent of his injuries and his future prospects.

A passenger is rendered a quadriplegic by a motor vehicle accident:

On 21 March 1990, the appellant was a passenger in a car driven by Mrs Angela Savoury (the second respondent). The car veered onto the wrong side of the road. It collided with an oncoming vehicle. At the time of

A the accident, the appellant was lying down unrestrained by a seat belt in the back seat of Mrs Savoury's car. The evidence of the appellant and of Mrs Savoury conflicted as to how the latter came to be driving the car. Her Honour accepted Mrs Savoury's version of events. The resolution of the issues in this appeal do not turn on her Honour's decision in this regard.

The appellant had come to Mrs Savoury's home and asked her to drive him to the factory of Colgate Palmolive Ltd at Villawood for the purpose of B collecting some provisions. She had complied with his request. They had commenced their journey with the appellant sitting in the front passenger seat, restrained by a seat belt. Her son, Mr Garry Savoury, was sitting immediately behind the appellant. Her Honour accepted that Mrs Savoury had driven to and then away from the factory. Mrs Savoury said that, five minutes after leaving the factory, the appellant complained of pain. He moved into the back seat to lie down. Mr Garry Savoury's evidence supported that given by his mother in this regard. He added that the C appellant lay down on the driver's side with his head towards the door and his buttocks somewhere around the middle of the back seat. He did not have a seat belt on. The accident occurred shortly after the journey recommenced, with the appellant in this position. The car was fitted with lap-sash seat belts in the front seats and the back left and right passenger seats. The centre back passenger seat was also provided with a lap seat belt.

Mathews J accepted Mrs Savoury's and Mr Garry Savoury's account of the D events leading up to the accident without expressly rejecting any of the appellant's evidence or reflecting adversely upon the appellant's credibility.

There was evidence that, if the appellant had remained in the front seat secured by a seat belt, his injuries might well have been even more severe than they in fact were. Indeed, the evidence suggested that he might have been killed as it was the left hand side of the vehicle that took the brunt of the collision. It resulted in a significant crumpling of the car body in that E section.

As it transpired, the appellant's most serious injury arising out of the collision was the compression of the spinal cord at the C4 level which caused partial quadriplegia. He also sustained a fracture at the T12 level of his spine. This did not cause any significant disability. The appellant suffered as well a skull fracture through the left frontal bone extending into the frontal sinus and the superior orbital margin. He suffered significant facial injuries, F consisting of abrasions and lacerations as well as fractures of various facial bones.

The appellant's quadriplegia was caused by a protruding disc crushing against the spinal cord. As a result of a work related accident, which had occurred about two years earlier, the appellant had sustained a serious disc lesion at the C4 level with significant indenting into the spinal canal. This earlier disability meant that the appellant was particularly susceptible to G injury at this level of the spine. During the course of the appellant's earlier employment as a forklift driver at Colgate Palmolive Ltd, he had driven into a pillar in the employer's factory. As a result of this accident the appellant underwent a cervical fusion at the C5 to C6 levels of the spine on 25 October 1988. The fusion was performed by Dr Campbell. Unfortunately, the fusion did not alleviate the appellant's problems. They continued. The appellant sought further medical treatment from Dr Matheson. Dr Matheson advised

the appellant to undergo a further fusion at the C3 to CC4 levels of the spine. This was actually scheduled to take place on 27 March 1990. However, the subject accident occurred on 21 March 1990. Dr Matheson and Dr Yeo gave evidence that they believed that the appellant would probably have sustained this same cervical injury even if he had been restrained in a full lap-sash seat belt. Such was his vulnerability from his earlier injuries.

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The evidence before Mathews J suggested that the appellant's head and facial injuries would probably have been averted had he been restrained by a lap sash belt in the rear seat. Wearing the central lap belt only, the appellant's head might have come into contact with the back of the front seat. If this had happened it would probably have led, according to Dr Yeo, to facial injuries but not to the fractured skull. Dr Matheson considered that a lap belt would not have made any real difference at all to any of these injuries.

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The appellant suffers from a deviated septum. This causes him some inconvenience and discomfort. It will probably require future surgery. The rest of his facial injuries have recovered without complication.

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Mathews J accepted the conclusions from the foregoing evidence that the appellant's failure to wear a seat belt in the back seat did not contribute to any of his more serious injuries. In fact, the only lasting injury which the appellant would not have suffered had he been restrained by a seat belt was the fracture at the T12 level of the spine. However, as found by her Honour, this had little or no effect on his overall disabilities although it probably increased slightly his level of pain.

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Mrs Savoury was an inexperienced and unskilled driver. In her evidence, she said that she had veered over to the wrong side of the road at least twice before finally striking an oncoming vehicle. However, in a conversation that took place between Mrs Savoury and her sister on the night of the accident, she allegedly said that she had "just run out of road". Mathews J preferred the latter version of events. She accepted the evidence of Mrs Savoury's sister.

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The appellant lives in a three bedroom unit at Brighton-le-Sands. He shares this accommodation with his son, daughter and occasionally with his niece. They successively help him with his daily care. In addition, he has three hours nursing care each morning and three to four hours nursing care each evening.

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The appellant's injuries seriously impair almost every aspect of daily living:

The appellant is incapacitated and impaired in almost every aspect of his daily living. He has severely limited mobility. With the aid of a stick, the appellant can walk slowly and awkwardly for up to 200 metres. He can negotiate stairs with great difficulty. He has no sensation in his upper limbs. He enjoys limited use of his hands. The appellant has lost all fine motor control. He is consequently unable to perform basic tasks. For example, he needs help with showering. He cannot use a pencil to write. He can use knives and forks to eat soft foods. He can also dress himself. But he needs help with buttons, zips and shoelaces. He does not have full control over his bladder. Occasionally he has bladder accidents which, needless to say, are acutely embarrassing and uncomfortable. He is attached to a urine bottle at

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night. He also has no effective control over his bowel motions. For this reason, he undergoes an enema, administered three times a week. The appellant has lost a great deal of weight.

The appellant cannot use public transport. His concentration is so impaired that he finds it difficult to read. Furthermore, he is unable to turn the pages of books or magazines. He is prone to dizzy spells and spasms. He has lost his sense of smell and most of his sense of taste. Combined with his lack of sensation in his hands and arms, these disabilities place him at serious risk of burning, especially as he is a heavy smoker. He has numerous burn scars on his fingers and torso. There are also burn marks all over his bed and in the surrounding carpet.

The trial judge finds a substantial judgment for the injured appellant:

In summary, the amounts allowed by Mathews J and the amounts now claimed by the appellant are as follows:

Head of damage	Allowed	Claimed by appellant
1. Future care	$637,500.00	$881,450.00
2. Past voluntary assistance	$26,095.00	$74,491.00
3. Future nursing care	$239,700.00	$431,800.00
4. Past economic loss	$36,849.00	$36,849.00
5. Future economic loss	$127,100.00	$205,988.00
6. Past superannuation Benefits	Nil	$1,561.00
7. Future superannuation benefits	$3,800.00	$20,227.00
8. Home alterations and construction	$100,000.00	$142,760.00
9. Additional home purchase costs	$20,000.00	$65,000.00
10. Additional home maintenance and running costs	$15,316.00	$15,316.00
11. Out-of-pocket expenses	$255,000.00	$272,800.00
12. Future transport expenses	$43,784.00	$61,047.00
13. Future medical hospital and like expenses	$135,467.00	$135,467.00
14. Special equipment	$80,667.00	$80,667.00
15. Additional holiday expenses	$52,307.00	$52,307.00
16. Fund management	$81,731.00	$81,731.00
17. Non economic loss	$211,000.00	$212,000.00
18. Interest	Nil	$701 + $13,964= $14,665.00
Total	$2,066,316.00	$2,786,126.00

The appellant contends that the challenged components of his damages award evidence error. The respondent (as cross-appellant) challenged Mathews J's determination on the issue of contributory negligence. It is convenient to deal first with this issue in the cross-appeal.

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Contributory negligence:

Section 74 of the *Motor Accidents Act* 1988 deals with contributory negligence in the case of motor vehicle accidents such as the present. The relevant provisions of the section state:

> "74.(1) The common law and enacted law as to contributory negligence apply to claims in respect of motor accidents, except as provided by this section.
>
> (2) A finding of contributory negligence shall be made in the following cases:
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> ...
>
> (c) where the injured person (not being a minor) or the deceased person was, contrary to the requirements of the Motor Traffic Regulations 1935, not wearing a seat belt as required by those Regulations at the time of the motor accident;
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> ...
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> (3) The damages recoverable in respect of the motor accident shall be reduced by such percentage as the court thinks just and equitable in the circumstances of the case.
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> (4) The court must state its reasons for determining the particular percentage.
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> ...
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> (8) This section does not exclude any other ground on which a finding of contributory negligence may be made."

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The relevant regulation in the *Motor Traffic Regulations* 1935 is reg 110F(2)(A). It states:

> "No person shall, upon a public street, travel as a passenger in a motor vehicle while occupying a seat position in that vehicle to which a seat belt has been fitted for that seat position unless the person is wearing that belt and the belt is properly adjusted and securely fastened."

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It is accepted that Mr Nicholson's (the cross-respondent's) failure to use a seat belt while riding in the motor vehicle was contrary to reg 110F of the *Motor Traffic Regulations*. Section 74 of the *Motor Accidents Act* therefore requires a finding that the cross-respondent was guilty of contributory negligence by operation of the statute. There are two contentious issues presented by Mathews J's finding in this case:

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(1) What factors may a court take into account when deciding on a "just and equitable" amount to reduce a plaintiff's damages? and

(2) Is it open to a court to reduce the damages by zero percent?

Relevant factors in deciding a "just and equitable" amount:

The cross-respondent submitted that the onus of proof in relation to contributory negligence lay upon the cross-appellants. This would certainly be in line with the common law. Section 74 of the *Motor Accidents Act* has not expressly changed the common law. However, the appellant, as cross-respondent, made the following submissions upon this point (in summary form):

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(1) The cross-appellants must prove two critical matters:

(a) The extent to which (if at all) the breach of the regulation contributed to the injuries suffered; and

A (b) That there was no reasonable excuse for the breach;

(2) Section 74(3) of the *Motor Accident Act* provides that in the circumstances adverted to in s 74(2) the cross-respondent's damages are to be reduced by such percentage as is "just and equitable";

(3) The two matters referred to in par (1) above are the most important factors required to be taken into account in assessing, under s 74(3) of the Act, the extent to which the appellant's damages should be reduced to B produce a "just and equitable" result.

The cross-appellants, on the other hand, argued that the effect of s 74(2)(c) of the *Motor Traffic Act* was that, upon proof that the injured person was not wearing a seat belt as required by the regulations, contributory negligence was established, that is, it was conclusively presumed, by force of the Act of Parliament, that:

(a) the non-wearing of the belt was unreasonable;

C (b) the non-wearing of the belt contributed to the injury.

The cross-appellants submitted that, in deciding on a "just and equitable" amount to reduce the appellant's damages by, the court was limited to the consideration of factors which did not contradict the statutory presumption that not wearing a seat belt was unreasonable and required some deduction from the damages otherwise payable. It was not open to the court to determine that the non-wearing of the seat belt had not contributed *at all* to injury.

D To adopt the cross-appellants' interpretation of the section would, in my opinion, render the phrase "just and equitable" in s 74(3) of the Act otiose. Fundamental to the consideration of what is "just and equitable" in the facts of this case, as found by the primary judge, is whether the cross-respondent's actions in moving into the back seat and lying down in an unrestrained position were reasonable in the circumstances. If the cross-respondent's actions were completely justifiable in the circumstances, it is difficult to E imagine that the principles of equity would operate to penalise the appellant. In fact, the very inclusion of the phrase "just and equitable in the circumstances of the case" in s 74(3) precludes the interpretation which the cross-appellants advanced.

The onus of establishing the elements of contributory negligence:

Section 74 of the Act is silent on the issue of the onus of establishing the elements of contributory negligence. The section merely prescribes the F circumstances in which a finding of contributory negligence shall be made. It is possible to infer from this that the legislature had no intention of disturbing the common law on the issue of onus. This construction is strengthened by the terms of s 74(2) of the Act which expressly reverses the onus in blood alcohol cases. I would reject the submission that her Honour erred in deciding that the onus remained with the defendant under s 74. In my view Mathews J was right. Had parliament intended to change the settled G law as to the onus of proof relevant to contributory negligence, it would have said so expressly.

Comparison between actual injuries and injuries which would have been sustained if the passenger had been restrained by a seat belt:

The cross-appellants further submitted that Mathews J was in error in comparing the cross-respondent's actual injuries with the injuries which he

would have sustained if he had been wearing a seat belt in the front passenger seat. The cross-appellants submitted that the correct comparison in the circumstances would have been between the actual injuries suffered by the cross-respondent and those which he might have sustained had he been wearing a seat belt in the back seat.

Mathews J found that the cross-respondent's behaviour in moving from the restrained front passenger seat into the back seat to lie down was reasonable in the circumstances of this particular case. Of the move, she said (*Nicholson v Nicholson* (Mathews J, 23 June 1993, unreported)):

> "Had it been made for the purpose of indulging some whim or fancy of the plaintiff's, then there would have been no question of its reasonableness. But in the circumstances which in fact obtained, the worst that could be said was that he was placing comfort before safety. Bearing in mind the risks involved, this could hardly be described as an unreasonable course of behaviour.
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> Thus it is that whatever comparison point had been taken in relation to the plaintiff's injuries, I would, in any event, have ordered a slight reduction only of his damages by reason of his contributory negligence through his failure to wear a seat belt. As it is, the reduction will be a minimal one, of 1% only."

In *De Blieck v Fraser* (Court of Appeal, 19 November 1980, unreported), Hope JA explained that contributory negligence involves some act or omission which has a relation to the plaintiff's *damage* itself and not to the *act* which may have caused the damage. The onus is upon the defendant to prove, on the balance of probabilities, that the plaintiff's injuries and damage are greater as a result of the plaintiff's failure to use a seat belt. In *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALJR 492 at 494; 59 ALR 529 at 532-533, the High Court of Australia said that:

> "The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris* (1956) 96 CLR 10 at 16) and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 682; *Smith v McIntyre* [1958] Tas SR 36 at 42-49 and *Broadhurst v Millman* [1976] VR 208 at 219 and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance."

Keeping these principles in mind, I am of the opinion that Mathews J's comparison is the only logical one in the circumstances. The cross-respondent moved into the back seat to lie down when (as her Honour found) he experienced pain in his neck and arm from his previous injuries. Prior to this he had been sitting properly restrained in the front passenger seat.

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Reasonableness of the failure to wear a seat belt:

According to the findings of Mathews J, the failure of the cross-respondent to use a seat belt did not contribute to the extent of the injuries suffered by him. In these circumstances her Honour found that his failure to use a seat belt was reasonable in the circumstances of the case. I see no error in these findings or the conclusions which her Honour derived from them.

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Passenger's failure to supervise and instruct the second respondent:

Common law principles of contributory negligence apply to resolve the question whether the cross-respondent's alleged failure to supervise Mrs Savoury in the driving of the motor vehicle was causally related to the injuries suffered by him. The onus is upon the cross-appellants to show this. It was certainly open to Mathews J to accept the version of the circumstances of the accident, that Mrs Savoury had "just run out of road". Upon this basis, C even if the cross-respondent had been sitting beside Mrs Savoury, he could not (and probably would not) have successfully intervened to prevent the accident. Her Honour had the benefit of observing the witnesses giving evidence. Consistent with the repeated instruction of the High Court, it is not open to this Court to disturb her Honour's findings in this respect: *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 178f.

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What does "reduce" mean?

The cross-respondent submitted that it was open to a court to reduce to nothing the allowance for contributory negligence. The cross-appellants, on the other hand, submitted that this is not an available option. In *Eastern Extension Australasia and China Telegraph Co Ltd v The Commonwealth* (1908) 6 CLR 647 at 664, 668, 677, it was held that a contractual power to "reduce" did not include, in the facts of that case, a power to reduce to E nothing or abolish. The cross-appellants urged that a similar conclusion followed from the statutory presumption.

If the cross-respondent's failure to wear a seat belt was not unreasonable, and did not contribute at all to his injuries, it is understandable, and indeed logical, that his damages should not be reduced. But does s 74(2)(b) of the *Motor Accidents Act* preclude this interpretation? Failure to wear a seat belt automatically attracts a finding of contributory negligence. Section 74(3) of F the Act says that the damages awarded *shall* be reduced. This could be a manifestation of the implementation of parliament's overall purpose that all motorists be restrained by seat belts while riding in motor vehicles with the relevant penalty for failure to do so being a reduction in any damages recoverable in the event of a motor vehicle accident. Yet, it would seem to be illogical to adopt a construction of the Act which would prevent a court from refraining from reducing a plaintiff's damages, even if it were the "just and equitable" course to adopt in the peculiar circumstances of the G particular facts. That would defy the explicit injunction to the court to perform the reductions but only according to what was "just and equitable".

Although the appellant's actions did not contribute to his injuries, s 74 of the *Motor Accidents Act* appears to be mandatory that some "reduction" is, at least ordinarily, required. In *Pring v Hooper* (McInerney J, 10 March 1993, unreported), McInerney J solved this quandary by holding: "I infer from

[s 74] that I am obliged to apportion damages and in the circumstances I apportion 99% against the defendant and 1% against the plaintiff." A

In *Eastern Extension Australasia and China Telegraph Co Ltd v The Commonwealth* (at 647), there was an agreement between the Government and the Telegraph Company that the former should have "full power at any time to reduce" the scale of charges for telegrams. It was also agreed that, in each year, the company should be entitled to take "the whole of the proportion of the moneys collected and receivable by them from all sources in respect of such telegrams," called "message receipts," and that "if, after any such reduction in the scale of charges, the message receipts shall not in any year … by reason of such reduction or otherwise, amount to the sum of £5,600, the Tasmanian Government shall guarantee and pay to the Telegraph Company and their assigns the difference between the message receipts and the said sum of £5,600." In the circumstances it was unsurprising that a construction of that agreement should be adopted which made it clear that the government did not have the power to *abolish* under guise of a power of *reduction*. Griffith CJ said (at 664): B C

> "… the words 'shall have power to reduce,' do not etymologically, include a power to reduce to nothing or abolish. I express no opinion on the question of how far reduction, not being abolition, could be carried. Apart from the guarantee, indeed, this point would not be arguable. If one person agrees to render services for another at a specified rate of charge, with a power to that other to reduce the rate, it cannot he contended that the power may be exercised so as to require the services to be rendered gratuitously." D

However, the same considerations do not apply in the present case. Section 74(3) of *the Motor Accidents Act* raises completely different issues. The sub-section is qualified by the phrase "just and equitable in the circumstances of the case". This phrase, with its familiar instruction to a court of justice, provides the key to the construction of the section. By virtue of that statutory phrase it would be open to a court to reduce the damages otherwise recoverable by zero per cent if that would be the only way to achieve a "just and equitable" result in the circumstances of the case. In *Eastern Extension Australasia and China Telegraph Co*, to construe the contractual power to "reduce" as including a power to abolish would have necessitated an unjust result contrary to the agreement. In this case, it is not a matter of reducing to nothing (as in *Eastern Extension Australasia and China Telegraph Co*) but a case of reducing *by* nothing. E F

I do not believe that it was parliament's purpose by the language used in s 74(3) of the Act to produce a logically inconsistent result. It is open to a trial judge to reduce a plaintiff's damages by zero per cent if it would not be "just and equitable in the circumstances" of the case to do otherwise and if that were the only way to produce a "just and equitable" result. In this case, her Honour should not have felt compelled to reduce the cross-respondent's damages by a nominal 1 per cent. The law should discourage such charades which bring it into disrepute. To that extent the cross-respondent's submissions in the cross-appeal should succeed. His submission to the same effect, as appellant in the appeal, should succeed. The deduction for contributory negligence should be reduced to nil. The cross-appellants' G

A contentions in the cross-appeal should be rejected. The cross-appeal should be dismissed with costs.

Damages — reassessment:

I turn now to the issues of damages raised by the appeal. It was common ground that the Court could, in the event of established error, proceed to a reassessment. I consider that it is safe to do so. Where an item in the appellant's damages is not otherwise alleged or found to be in error, I will

B take the course which the parties suggested. That component will be carried into the reassessed judgment. No other course was feasible in a case of this magnitude. No other course was suggested by either of the parties.

Non-economic loss:

The relevant section in the *Motor Accidents Act* which governs quantification of non-economic loss is s 79. That section reads:

C "79. (1) No damages shall be awarded for the non-economic loss of an injured person as a consequence of a motor accident unless the injured person's ability to lead a normal life is *significantly impaired* by the injury suffered in the accident.

(2) The amount of damages to be awarded for non-economic loss shall be a proportion, determined according to the severity of the non-economic loss, of the maximum amount which may be awarded.

D (3) The maximum amount which may be awarded for non-economic loss is $180,000, but the maximum amount shall be awarded only in a most extreme case.

...

80.(1) The Minister shall, on or before 1 October 1990 and on or before 1 October in each succeeding year, declare, by order published in the Gazette, the amounts which are to apply, as from the date specified in the order, for the purposes of section 79."

E Mathews J awarded the highest sum available at the time of judgment to a "most extreme case", viz $211,000. Between trial and appeal, the highest sum available was increased to $212,000. Following *Marsland by his Tutor the Protective Commissioner of New South Wales v Andjelic* (1993) 31 NSWLR 162 at 165 and *Nominal Defendant v Gardikiotis* (Court of Appeal, 19 May 1994, unreported), and subject to the challenge to other aspects of her Honour's judgment, the judgment should be increased by $1,000 to reflect

F the increase in the highest sum available: *Nominal Defendant v Gardikiotis*, per Meagher JA (at 9). It is understood that the High Court of Australia has given special leave to appeal in the *Marsland* case. However, until the rule is altered by the High Court or by parliament, the holding in *Marsland* and *Nominal Defendant v Gardikiotis* must be applied.

Future care:

G The appellant submitted that Mathews J erred because she did not award the maximum amount as claimed. It was submitted that her Honour was bound to do so in view of the uncontradicted evidence tendered. Mathews J found that:

"No evidence was called by the defendant on this issue, either orally or by way of the tendering of reports. The opinions of Dr Yeo and Dr Bleasel go uncontradicted. Accordingly, as a matter of principle, I find

> that the plaintiff does need live-in supervisory care and I thus propose to allow him a large part of the amount he claims under this head.
>
> I say 'a large part' for this reason. The amount claimed by the plaintiff assumes that he will require supervisory care for twenty-four hours a day, seven days a week. Such intense supervision is not necessary in his case, as it might be in the case of a full quadriplegic. He is, after all, able to move about and perform many of the daily tasks of self help which would be beyond the capacity of a full quadriplegic … However, I am confident that he will be able to arrange for appropriate live-in supervisory care, together with suitable day-time domestic assistance, at a cost of considerably less than the $1,000 per week which is presently claimed under this head. After all, this service has been rendered until now by his own young children (as well as by nurses who have been caring [sic] out domestic chores). Accordingly, I think some reduction must be made to the amount claimed.
>
> It is not possible to ascertain a lower figure from the evidence with any precision. However I think it appropriate to allow the amount of $750 per week under this head."

In *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649 at 661ff, Barwick CJ said:

> "… yet the sum to be awarded in compensation is not calculable by any mathematical process. At best, it is and must remain a matter of judgment. First, the range of the recurrent amount likely to be reasonably required must be considered. The question here is not what are the ideal requirements but what are the reasonable requirements of the respondent. The jury must be warned, in my opinion, against blindly accepting the views of the medical practitioners. What is reasonably required is a matter for the jury — or for the judge if sitting alone. As in the case of life expectancy dealt with in *Thurston v Todd* (1966) 84 WN (Pt 1) (NSW) 231 — with which I agree in this connexion — the jury are no doubt to hearken to the evidence — all of it including those opinions of the medical practitioners which they are qualified to give but, having done so, to come to their own conclusions on the question, not being bound to any opinion, however expert or apparently expert any witness expressing it may be. The jury, in my opinion, should be told to consider what the respondent, on the assumption that he was spending his own money, and assuming that he had sufficient to do as he would and was well advised and reasonably careful for his own welfare, would be likely to expend in protection of himself and his condition. It is neither fair nor just to award a sum which might be expended by others in different circumstances but which it is realised the injured person will not spend for the purposes in question."

Mathews J was not obliged to accept the expert evidence. Nor was the bound to award 100 per cent of the appellant's claim for future care. The fact that the respondents did not challenge the expert evidence adduced by the appellant was a relevant consideration in deciding how much of the claim should be allowed under this head. However, there is no rule that a judge is obliged to award a plaintiff 100 per cent of what is claimed simply because the plaintiff's evidence is unchallenged.

A In *Nguyen v Nguyen* (1990) 169 CLR 245 at 261-262, Dawson, Toohey and McHugh JJ expressed the proper approach thus:

> "… In reaching its conclusion, the Court followed the decision of the Court of Appeal in *Donnelly v Joyce* [1974] QB 454, and viewed the damages in question as damages for one component of the plaintiff's loss occasioned by his physical disability. The disability gave rise to the need for nursing and other care. The need was met by the services B gratuitously provided. The value or cost of those services was, in the circumstances, an appropriate means of quantifying that aspect of the plaintiff's loss which was represented by the need. As the need represented the loss, the value of the services required to fulfil that need served as a means of assessing the loss. The fact that there were persons, prompted by motives of concern for the plaintiff who were prepared to provide the services gratuitously was, it was held, not C something which should diminish the damages to the advantage of the defendant. It was only right in the circumstances that the plaintiff should benefit rather than the wrongdoer whose negligence was the cause of the plaintiff's loss."

In *CSR Ltd v Bouwhuis* (Court of Appeal, 23 August 1991, unreported), Priestley JA agreed with the following passage in *GIO of New South Wales v Planas* [1984] 2 NSWLR 671 at 676-677:

> D "Of course, it is still the obligation of judges and juries to look to the final resulting figure and to ensure that it is reasonable. It may well be that according to the facts of a particular case some deduction will be appropriate for the possibilities that a wife has provided and will continue to provide household services and attendance and that a figure calculated by reference to the full rate of gross salary of commercial attendants would be unreasonable. It may involve unfairly, as against the defendants, a profit element. It may involve, with equal unfairness, an E allowance for taxation which the plaintiff will not have to pay. Indeed, it may involve an over-compensation having regard to the intensity and nature of the services. It must also be remembered that Mason J was careful to say that it was in *general* that the value or cost of providing voluntary services will be the standard or market cost of providing such services. Although this seems to us clearly to mean the cost the recipient of the services would be liable to pay to a non-voluntary provider, and F thus include any tax payable by the recipient, the general rule will bow to the force of particular factual situations. Each case must be determined on its own facts."

Similarly, in the present case, it was open to Mathews J to take the appellant's children's services into account in quantifying the damages for future care. Her Honour was exercising her function of determining whether the amount claimed by the appellant for future care was a reasonable one. I G do not think that her Honour erred with respect to this or that this Court should reach a different conclusion.

Past voluntary assistance:

The entitlement to damages for past voluntary assistance is now qualified by s 72 of the *Motor Accidents Act* 1988 which states:

> "72.(1) An award of damages shall not include compensation for the

value of services of a domestic nature or services relating to nursing and attendance which have been or are to be provided to the person in whose favour the award is made by a member of the same household or family as the person, except in accordance with this section.

(2) No compensation shall be awarded unless the services are provided, or are to be provided, for not less than 6 months and may be awarded only for services provided or to be provided after the 6-month period.

(3) No compensation shall be awarded if the services would have been provided to the person even if the person had not been injured by the motor accident.

(4) No compensation shall be awarded unless the services provided or to be provided are not less than 6 hours per week and may be awarded only for services provided or to be provided after the first 6 hours.

(5) If the services provided or to be provided are not less than 40 hours per week, the amount of the compensation shall not exceed:

(a) the amount per week comprising the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in New South Wales for:

(i) in respect of the whole or any part of a quarter occurring between the date of the injury in relation to which the award is made and the date of the award, being a quarter for which such an amount has been estimated by the Australian Statistician and is, at the date of the award, available to the court making the award — that quarter; or

(ii) in respect of the whole or any part of any other quarter — the most recent quarter occurring before the date of the award for which such an amount has been estimated by the Australian Statistician and is, at that date, available to the court making the award; or

(b) if the Australian Statistician fails or ceases to estimate the amount referred to in paragraph (a), the prescribed amount or the amount determined in such manner or by reference to such matters, or both, as may be prescribed.

(6) If the services provided or to be provided are less than 40 hours per week, the amount of the compensation shall not exceed the amount calculated at an hourly rate of one-fortieth of the amount determined in accordance with subsection (5)(a) or (5)(b), as the case may be."

Her Honour found that no "services" within the meaning of s 72 of the *Motor Accidents Act* were provided to the appellant until June 1990. Her Honour found that the appellant's sister did not provide such services when she saw him every day while he was in hospital, from about 11 am until 3.30 or 4 pm when she "would massage his hands or rub cream, just comb his hair, general things like that, I would give his lunch, try to make him as comfortable as possible."

In *Marsland by his Tutor the Protective Commissioner of New South Wales v Andjelic [No 2]* (1993) 32 NSWLR 649, Meagher J A and I said (at 653):

"… we are moved to accept Mr Morrison's argument that the principle of *Griffiths v Kerkemeyer* does not require any actual expenditure by the

A plaintiff as long as the need is one which would ordinarily be productive of economic loss. It should be entirely irrelevant whether the provider has actually sustained an economic loss by payment."

In *Van Gervan v Fenton* (1992) 175 CLR 327 at 333, Mason CJ, Toohey J and McHugh J held that:

"… it should now be accepted that the true basis of a *Griffiths v Kerkemeyer* claim is the need of the plaintiff for those services provided B for him or her and that the plaintiff does not have to show, as Gibbs J held, that the need 'is or may be productive of financial loss'."

Before June 1990 the appellant was subject to full-time hospitalisation. The respondent should not have to compensate the appellant for the cost of the full hospitalisation as well as for gratuitous services provided in that time by his sister. *Griffiths v Kerkemeyer* (1977) 139 CLR 161 aims to compensate relatives for the cost of the gratuitous nursing services provided. This view is C supported by the following passage in *Van Gervan* (at 332):

"… [i]n *Donnelly*, the Court of Appeal made it clear that the plaintiff's loss was 'the existence of the need'. The approach of Gibbs J is also inconsistent with what Stephen J called 'the principle that it is for the plaintiff's loss, represented by his need, that damages are to be awarded' and with the statement of Mason J that the plaintiff's 'relevant loss is his incapacity to look after himself as demonstrated by the need for nursing services'."

D Section 72 itself refers explicitly to services of a domestic and nursing nature. The services performed by the appellant's sister, which certainly helped improve his level of comfort, could not be classified as fulfilling a relevant "need" in view of the fact that the appellant was already enjoying full-time hospitalisation. Although it may not be realistic to expect the nursing staff at all times to apply the creams to the appellant, the respondent already bears the burden of providing compensation for the costs of E hospitalisation. I do not believe that it should be required to compensate the appellant's sister as well for their minor activities. Her Honour was entitled to find that the appellant's sister's services did not represent services within *Griffiths v Kerkemeyer*.

Claim for supervisory care:

Supervisory care is compensable under the common law. However, the F common law is now qualified by s 72(3) of the *Motor Accidents Act*, set out above. Her Honour rejected this claim essentially for two reasons. First, that the claim was not particularised in the Pt 33 particulars and secondly, that the case had been conducted on the basis that the claim was not made.

I can dispose of the first reason because the appellant did, in fact, particularise a claim for supervisory care:

"The plaintiff claims for the past and future cost of home help, *supervision*, domestic, household and other services provided G gratuitously by members of his family." (Appeal book, vol 1 at 14.)

However, her Honour did consider if the claim would have been made out, if particularised (as she wrongly thought not):

"This is a matter which must be established by the plaintiff. *There is no direct evidence at all that the plaintiff's children returned to live with him because of his injuries*. It is possible that it suited them very well to do

so. After all, they were provided with comfortable, rent-free accommodation. *Nor is there any material from which inferences can be drawn that their return was related to the accident*, particularly in the light of Dr Jolly's cross-examination." (Emphasis added.)

It was open to Mathews J to find that the elements of the claim for supervisory care were not fulfilled. Unless, there is an obvious error demonstrated by her Honour's finding, this Court would not disturb her finding of fact. I see no such error.

Future nursing care:

The appellant claimed for seventeen hours of nursing care per week. Her Honour allowed the cost of an enrolled nurse but not the cost of a registered nurse because the former provided the same service at a lower cost. The appellant claims that there is greater continuity with a registered nurse because of continual availability through a nursing service which is not necessarily so in the case in respect of a nursing aide. Mathews J found no evidence to support this claim. Dr Yeo in cross-examination did say:

"… whether we prescribe a nurse, a registered nurse or nursing aide often depends on availability, continuity if you like of care. In some areas nursing aide care is readily available and is highly efficient and is as good as any registered nursing care in this area. In other words where we consider this need we have to prescribe registered nursing care not just because of the particular needs of the client but because there is a continued availability through some nursing service that would not otherwise be available in nursing aide care." (Appeal book, vol 2, at 255S.)

I see no error in her Honour's allowing the cost of an enrolled nurse. Mathews J did not have to allow what was ideal for the plaintiff but what was reasonable in the circumstances to require of the defendants. There is no evidence that the appellant is going to move out of Sydney. It would be unreasonable to allow the cost of a registered nurse if there is only a remote possibility that the appellant might require such services in the future. In *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 at 642-643, the High Court said:

"… A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred. Hence, in respect of events which have or have not occurred, damages are assessed on an all or nothing approach. But in the case of an event which it is alleged would or would not have occurred, or might or might not yet occur, the approach of the court is different. The future may be predicted and the hypothetical may be conjectured. But questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof. If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. The probability may be very high — 99.9 per cent — or very low — 0.1 per cent. But unless the chance is so low as to be

A regarded as speculative — say less than 1 per cent — or so high as to be practically certain — say over 99 per cent — the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an B event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability. The adjustment may increase or decrease the amount of damages otherwise to be awarded. … The approach is the same whether it is alleged that the event would have occurred before or might occur after the assessment of damages takes place."

The appellant also claims that Mathews J should have provided for tax and agency fees. I would accept the respondent's argument that her Honour C applied the figures advanced by the appellant in his submissions to calculate the damages for future nursing care. It cannot be said that her Honour erred in so doing.

Future economic loss:

Section 71 of the *Motor Accidents Act* 1988 applies to the appellant's claim for future economic loss:

D "71.(1) Where an awards of damages is to include compensation, assessed as a lump sum, in respect of damage for future economic loss which is referable to:

(a) deprivation or impairment of earning capacity; or

(b) loss of expectation of financial support; or

(b1) the value of future services of a domestic nature or services relating to nursing and attendance; or

E (c) a liability to incur expenditure in the future,

the present value of the future economic loss shall be qualified by adopting:

(d) a discount rate of the percentage prescribed by the regulations; or

(e) if no percentage is prescribed as referred to in paragraph (d), a discount rate of 5 per cent.

F (2) Except as provided by this section, nothing in this section affects any other law relating to the discounting of sums awarded as damages."

It was submitted that Mathews J committed a mathematical error when she reduced the comparable wage by 60 per cent. The 60 per cent reduction was comprised of a 40 per cent chance that the appellant would not have worked as a forklift driver and a 20 per cent allowance for ordinary and special vicissitudes in the case. I accept that her Honour should have reduced the comparable wage by 40 per cent and then reduced the resultant figure by G 20 per cent not added the 40 per cent and the 20 per cent and then reduce the comparable wage by 60 per cent.

The respondents submitted that Mathews J underestimated the probability of the appellant's ever returning to work and that her Honour should have allowed 80 per cent of the earnings of the comparable forklift driver to age sixty. The respondents submitted, however, that the appellant had been

overcompensated under this head because her Honour overestimated the probability of the success of the second cervical fusion operation which was scheduled to have occurred under Dr Matheson on or about 22 March 1990. Consequently, they submitted that this Court should not disturb her Honour's quantification under this head. There was evidence that, notwithstanding the second operation, there was a very real probability that the appellant's neck and arm problems would have continued. The respondents submitted that it was very unlikely that the appellant would have returned to work. I consider that this was a distinct possibility. In view of this, I believe that Mathews J's findings on this point should not be disturbed. However, the mathematical error should be corrected. The figure of $152,870 should be substituted for the sum of $127,100 allowed at trial.

Superannuation benefits:

The appellant makes four submissions in respect of superannuation:

(a) her Honour made no allowance for past superannuation lost;

(b) her Honour calculated the future loss at the rate of 3 per cent when the correct rates were those specified in the *Superannuation Guarantee (Administration) Act* 1992 (Cth);

(c) her Honour calculated on nett instead of gross earnings as required by the legislation; and

(d) her Honour calculated on a future economic loss component which was itself erroneously low.

I accept the respondents' submission, advanced during oral argument that:

> "… no claim had been made in respect of lost superannuation benefit in the Pt 33 particulars or in any particulars. Senior counsel for the plaintiff approached me during the course of the case and asked if I would agree to a claim being made only in respect of the future and at 4 per cent. His principle argument — and at the time I thought it was a fair enough argument — was it was only a small amount involved and accordingly I foolishly agreed to that claim being made."

The parties should be held to this agreement. Had it not been for the agreement, the appellant would have had a more substantial claim under this head and would have been entitled to the rates as set out in the Act. However, in accordance with the agreement, the appellant is entitled to the 4 per cent as this is less than the minimum rate prescribed by the Act. The appellant is thus entitled to recover $5,084 under this head and not the $3,800 allowed.

Home alterations:

The appellant submitted further that Mathews J erred in not allowing the $142,760 claimed for home alterations. Her Honour said of this:

> "Even this amount is, is my view, excessive. For the modifications suggested by Mr Watts are at the optimum possible level for someone in the plaintiff's position. I very much doubt whether many of them would in fact be adopted by the plaintiff. Even if they were, they would lead to a very substantial increase in the plaintiff's capital investment in the property. Many of these 'modifications' are in fact extensions to the house, which will inure to the plaintiffs benefit indefinitely. In this respect, this case differs from *Frankcom v Woods* (Court of Appeal, 1 October 1980, unreported) where many of the significant additions to

A

> the plaintiff's home were likely to deteriorate over the years, thus diminishing or eliminating any capital advantage to the plaintiff."

Her Honour had earlier found that:

> "… the tenuous nature of the plaintiff's mobility and reaffirmed that he requires accommodation with easy wheelchair access. He also requires accommodation which will allow a measure of independent living for his live-in carer. All of this would be difficult if not impossible to obtain in a unit. In my view, therefore, the claim that he requires a house with appropriate modifications is an irrefutable one."

B

In *Frankom v Woods* (Court of Appeal, 1 October 1980, unreported) at 8, Glass JA said that: "it is proper for the defendants to require the plaintiff to bring to account any capital gain which may have accrued to him in compensating for his needs."

C

However, on the facts, Glass JA found that the special facilities that were involved in that case — air-conditioning, garage and pool represented assets but that other features such as the concrete ramp and the location of switches and things of a similar nature would represent liabilities. He found that because the air-conditioning, the garage and the swimming pool would deteriorate, no credit should be given for the capital gain to the plaintiff of having his house altered to meet his needs.

D

Mathews J allowed $100,000 of the $142,762 claimed. The modifications at issue in this case include building and modification costs of an aggregate of approximately $121,000, furniture and furnishings for the carer's accommodation of about $5,000 and professional fees of about $20,000. The appellant would require a garage with remote control doors and covered access to the house, wide doorways and adequate circulation space for a wheelchair and air-conditioning. Her Honour accepted the need for the modifications but doubted whether the appellant would in fact adopt many of the modifications.

E

I would accept the appellant's submission that the precise nature of the modifications which the appellant might choose to adopt is (within reason) a matter for him and not a matter for the court. Furthermore, I accept the appellant's proposition that this case is not relevantly distinguishable from *Frankom v Woods* and that the modifications may not result in a lasting capital benefit to the appellant. Furthermore, in *Marsland by his Tutor the Protective Commissioner of New South Wales v Andjelic* (at 176), Meagher JA and I held that:

F

> "… although such alterations as are allowed for will improve the capital value of the property, no deduction ought to be made to account for this. A number of reasons support such a conclusion. First, such an increased capital value would only accrue upon the death of the appellant. Secondly, no doubt the alterations and adaptations will deteriorate over time and will require repair and maintenance at the expense of the appellant: cf *Frankcom v Woods* (Court of Appeal, 1 October 1980, unreported). In these circumstances we see no need in the facts for a deduction for the benefit of the capital value."

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Accordingly, the appellant was entitled to the full $142,762 claimed which was reasonable and not excessive to his circumstances.

Additional home purchase costs:

The appellant submits that her Honour erred when she only allowed $20,000 of the $65,000 claimed for the difference between the cost of a home site suitable for adaptation for the appellant and the cost of an ordinary home in the same area. In *Marsland by his Tutor the Protective Commissioner of New South Wales v Andjelic*, this amount was allowed in view of the uncontested facts before the master. Similarly, as the amount claimed in this case was not contested, the appellant should be allowed the full amount of the marginal cost of securing the suitable accommodation claimed.

Out-of-pocket expenses:

The appellant submitted that Mathews J also erred in only allowing $10,000 out of the $27,800 claimed for rent. Section 45(2) of the *Motor Accidents Act* 1988 provides:

> "Once liability has been admitted (wholly or in part) or determined (wholly or in part) against the person against whom the claim is made, it is the duty of an insurer to make payments to or on behalf of the claimant in respect of:
>
> (a) hospital, medical and pharmaceutical expenses; and
>
> (b) rehabilitation expenses, subject to Part 4, as incurred."

A plaintiff would not normally be entitled to receive rental costs as part of their out-of-pocket expenses. However, the appellant claims that, if the accident had not occurred, he would have continued to live rent free in a caravan on his mother's property. Her Honour was critical of the lack of direct evidence called on this aspect and the fact that this issue was only addressed during final addresses and then in the later written submissions received from both parties. The appellant invites the Court to infer that the caravan accommodation was rent free. I believe that the appellant is entitled to recover the rent paid under s 45 if it is shown that it is an expense which resulted from the accident. The respondents concede that, if this is so, then credit ought in any event to be given. I would accept the appellant's contention that he lived rent free in a caravan on his mother's property. I do not entertain any difficulty in drawing that inference from the evidence. The appellant was entitled to the $27,800 claimed under this head.

Additional transport expenses:

The appellant also claimed that Mathews J should have allowed the full differential of $57.31 per week claimed as additional transport costs necessarily incurred as a result of his substantial immobility and that she should not have discounted this amount by $20 per week. Her Honour had compared over 15,000 kilometres, the annual cost of maintaining a 1989 Toyota Camry sedan with the cost of the 1992 modified vehicle. Her Honour found:

> "… serious difficulties with the plaintiff's calculation of this claim. For one thing the vehicle types are not precisely the same. The Camry Ultima is a considerably more luxurious and expensive car than the Toyota Camry. Perhaps it is necessary to have the more expensive car for the purpose of fitting the appropriate modifications. In any event, I am prepared to make this assumption, in the absence of any evidence from the defendant on the matter. However it is quite wrong in my

A opinion to compare the weekly costs of a modified 1992 car with those of an unmodified 1989 vehicle. Even if the plaintiff's vehicle at the time of the accident was a 1989 Camry and he was, by dint of his disabilities, required to purchase and modify a 1992 Camry Ultima, nevertheless, it would be entirely inappropriate to allow the difference between the operating costs of these two vehicles as a basis for his future claim.

> Other material contained in the NRMA reports indicates that it costs B approximately $20 per week more to run an unmodified 1991 Toyota Camry than its 1998[sic] equivalent. I assume that this differential is fairly constant over the three year age variation of any of these vehicles. Accordingly, I propose to reduce the plaintiff's claim by $20 to $37 per week."

The respondents submitted that the appellant currently drives a 1991 Camry Ultima which is not fitted with a wheelchair lift nor a swivel seat and thus her Honour's quantification should not be disturbed. I would accept the C respondents' submission under this head. Since we are concerned with additional transport costs in the future when the appellant will be effectively confined to a wheelchair, it involves no error to compare the costs of running a 1992 modified Camry Ultima with the costs of running a 1991 unmodified Camry sedan in view of the fact that the respondents did not object to comparing the more expensive model with the less expensive model. The appellant's submission on this head of claim must therefore be rejected.

D

Fund management:

In *Nominal Defendant v Gardikiotis*, the Court allowed a fund management fee. Meagher JA held (at 16) that:

> "I cannot see why if a defendant's tort has generated a reasonable need in a plaintiff for fund management, and that need is reasonably foreseeable, the plaintiff is not entitled to recover a sum representing E that need by way of damages."

Sheller JA agreed that this was a recoverable head of damages (at 6 of the judgment).

In this case, Mathews J allowed the fund management fee but reduced it by 1 per cent for contributory negligence. The appellant submitted that her Honour erred in doing this. The appellant stated that:

> "… the $5,000 is the amount needed to manage the sum already F reduced for contributory negligence so as to produce an appropriate return. If the amount allowed for fund management is itself reduced then there will be an inadequate amount to administer and manage a sum already reduced for contributory negligence with the result that that sum must inevitably prove inadequate for the purpose for which it was intended. In other words, there would be double reduction."

Strictly speaking, this issue does not arise in light of my conclusion that the finding of contributory negligence, required by the statute, does not oblige G the Court to reduce the damages by the nominal 1 per cent which Mathews J felt obliged to provide. However, in case I am wrong on that point and because the issue is one of general importance, I will deal with the parties' submissions.

I would accept the appellant's argument that to reduce this head of damages would involve a double reduction. The reason this head of damage

is allowed is because the plaintiff is incapable (either intellectually or physically) of managing the damages which have been awarded. To reduce the fund management fee for contributory negligence would leave a plaintiff with inadequate funds to manage his damages. That would defeat the very purpose of providing damages on that head. Although the amount allowed for fund management is part of the damages recoverable, it would not be just or equitable to reduce this component for contributory negligence. This would especially be so in this case in view of the fact that the amount allowed for fund management was calculated on an already reduced figure. The underlying premise to recovery of damages is that the amount awarded should be just and equitable in the circumstances of the case: see s 74(3) of the *Motor Accidents Act* 1988. Justice requires that the fee for fund management should not be reduced for the contributory negligence which the Act requires the Court to fund although the basis of that claim was, in the particular facts of this case, causally irrelevant to the appellant's damage.

Interest:

The appellant abandoned his claim for interest for non-economic loss and past voluntary assistance. However, he maintained his claim at three-quarters of the interest rate prescribed in the *Supreme Court Rules* 1970 in respect of past economic loss and paid out-of-pocket expenses.

Section 73 of the *Motor Accidents Act* 1988 regulates the circumstances in which interest may now be ordered:

> "73.(1) Except as provided by this section, a court shall not, in relation to an award of damages, order the payment of interest, and no interest shall be payable, on an amount of damages in respect of the period from the date of the death of or injury to the person in respect of whom the award is made to the date of the award.
>
> (2) A court may order the payment of interest:
>
> (a) if the defendant has not taken such steps (if any) as may be reasonable and appropriate to assess the merits of the plaintiff's claim and liability of the defendant in respect of the claim; or
>
> (b) if, where it would be appropriate to do so, the defendant has not made an offer of settlement; or
>
> (c) if:
>
> (i) the defendant has made an offer of settlement; and
>
> (ii) the amount awarded by the court (without the addition of interest) is more than 20 per cent higher than the highest amount offered in settlement by the defendant; and
>
> (iii) the court is satisfied that the highest amount offered by the defendant was not reasonable having regard to the information available to the defendant at the time the offer was made.
>
> (3) An offer of settlement is not to be regarded as an offer of settlement for the purposes of this section unless it is made in writing.
>
> (4) Rules of court may be made for or with respect to ordering the payment of interest in accordance with the principles set out in this section.
>
> (5) Except as provided by this section, nothing in this section affects

A

any other law relating to the payment of interest on an amount of damages."

In *Gardikiotis* (at 17 of judgment), Meagher JA said that: "the cross-appellant has, on the authorities, almost a vested right to this interest unless the defendant's last offer can be seen to be reasonable."

The respondents did not make any offer at all before trial. In this case, Mathews J believed that this was reasonable in the circumstances because of the sharp contest on the issue of contributory negligence. That conclusion was open to her Honour in the circumstances. This Court should not disturb it. I would therefore reject the appellant's appeal against the disallowance of interest.

B

Cross-appeal:

Most of the grounds raised by the respondents (as cross-appellants) in the cross-appeal have been dealt with above. The only grounds which are left to be dealt with in the cross-appeal are the complaints about her Honour's awards:

C

"21. in allowing the appellant the cost of future psychiatric consultations;

22. in allowing the appellant the cost of future occupational therapy consultations;

23. in allowing the appellant the cost of future massages."

D

The cross-appellants submitted that there is no evidence that Mr Nicholson, the cross-respondent, would actually incur the cost of future psychiatric consultations, occupational therapy consultations and massages. However, the cross-respondent, in his evidence said:

"Q. Have you followed the advice of your doctors as best you can? A. Yes, I have.

Q. Did you intend to follow their recommendations in future? A. Yes, I do."

E

As such advice contemplated the possibility of such attendances in the future (see appeal papers, vol 3 at 450, 476, 544 and 577), I would dismiss the cross-appellants' submission in this respect.

Conclusions and orders:

In summary, I would reassess the appellant's damages as follows (* indicates unchanged):

F

Head of damage	Reassessment
Future care	$637,500.00*
Past voluntary assistance	$ 26,095.00*
Future nursing care	$239,700.00*
Past economic loss	$ 36,849.00*
Future economic loss	$152,870.00
Future superannuation benefits	$ 5,084.00
Home alterations and construction	$142,760.00
Additional home purchase costs	$ 65,000.00
Additional home maintenance and running costs	$ 15,316.00*
Out-of-pocket expenses	$272,800.00
Future transport expenses	$ 43,784.00*

G

Head of damage	Reassessment
Future medical hospital and like expenses	$135,467.00*
Special equipment	$ 80,667.00*
Additional holiday expenses	$ 52,307.00*
Fund management	$ 81,731.00*
Non-economic loss	$212,000.00
Interest	Nil
Total	$2,199,930.00

Looking at the total of the various components (many of them unchanged from those allowed by the primary judge) I am of the view that it represents the aggregate judgment which is reasonable and which should be entered in favour of the appellant for his various claims and losses.

Although the Court should record a finding of contributory negligence on the part of the appellant, in accordance with the statute, the amount of his damages should not be reduced in respect of such finding, as it would not be just and equitable in the circumstances to do so.

I favour the following orders:

1. Appeal allowed with costs;
2. Cross-appeal dismissed with costs;
3. Orders of Mathews J set aside;
4. In lieu thereof, enter judgment in favour of the appellant in the sum of $2,199,930 such judgment to take effect from the date of the orders of Mathews J; and
5. The respondent to have, in respect of the costs of the appeal, if otherwise so qualified, a certificate under the *Suitors' Fund Act* 1951.
6. Liberty to apply reserved to all parties to make further submissions upon the mathematical calculations before orders are entered provided such liberty is exercised within twenty-eight days of the publication of the judgments of the Court.

MAHONEY J A. I have had the privilege of reading in draft the judgment of Kirby P. I agree with the orders which his Honour proposes and, except to the extent to which I shall refer, I agree generally with his reasons. There are, however, certain matters upon which I shall make some observations of my own.

1. Contributory negligence:

An issue arises in this regard in the following way. The effect of s 74(2)(c) of the *Motor Accidents Act* 1988 is, put generally, to require that "a finding of contributory negligence shall be made … where the injured person … was … not wearing a seatbelt as required" to do so. I shall assume for present purposes that the plaintiff was not wearing a seatbelt when he was required to do so. That fact, it is argued, did not cause the plaintiff to be injured nor did it contribute to the injuries which he suffered. Section 74(3) provides that, where an injured person was not wearing a seatbelt as required, damages recoverable "shall be reduced by such percentage as the court thinks just and equitable in the circumstances of the case". The issue is whether, in such circumstances, it is permissible, consistently with the section, to find the plaintiff guilty of contributory negligence but to refuse to reduce the damages to be recovered by him. In my opinion, it is.

A The position under s 74 is different from that under the general law. Under the general law, the concept of contributory negligence involves, as an essential part of it, that the defendant's lack of care for his own safety actually contributed to the occurrence of the injury or the nature or extent of it: see *Caswell v Powell Duffryn Associated Collieries, Ltd* [1940] AC 152 at 186; *Lewis v Denye* [1939] 1 KB 540 at 554. Under the common law, the existence of contributory negligence of any degree meant that the plaintiff B could not recover any damages. Now, the *Law Reform (Miscellaneous Provisions) Act* 1965, s 10, provides that the damages recoverable "shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage". It is not necessary for present purposes to decide whether, if there be contributory negligence and accordingly a contribution to such matters, it can yet be permissible to hold that the plaintiff should recover damages for 100 per cent of the loss suffered by him because he was not "responsible" for any portion of the loss. C At first sight, it may be thought difficult to conclude that no portion of the loss should be borne by the plaintiff where there has been culpability, that is, departure from the standard of care of the reasonable person: see generally *Pennington v Norris* (1956) 96 CLR 10 at 16; *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALJR 492 at 494; 59 ALR 529 at 532-533.

However, the nature of the liability imposed as contributory negligence by s 74 is different. The omission to wear a seatbelt may have no causal D relationship to the loss: it may be such that, under the general law, a finding of contributory negligence could not be made. Notwithstanding this, the statute requires that a finding of contributory negligence be made. This, I think, does not require the Court to assume, contrary to the known fact, that the omission to wear a seatbelt in fact contributed to the accident or the injuries; it means no more than that such a finding must be recorded against the plaintiff and the damages reduced in accordance with s 74(3).

E It is possible to envisage cases in which, though the plaintiff was not at the time of the accident wearing a seatbelt, that omission had nothing to do with the occurrence of the injury or the nature or extent of the loss. Thus, the plaintiff may be injured because a slight blow to the petrol tank of the car in which he was seated caused the car to burst in flames and to cause the injury for which the plaintiff claims. The fact that he was not wearing a seatbelt may have contributed nothing to the occurrence of the fire or the extent of F his injuries; that fact may, indeed, have reduced his injuries by allowing him to escape the car more rapidly. Again, the plaintiff's injury may have occurred because the tabletop of a nearby truck may have intruded into the vehicle and struck the plaintiff in such a way that, seatbelt or no seatbelt, his injuries would have been the same.

Such examples as these would no doubt have been the subject of consideration by the legislature or at least by the legislative draftsman. The G formula chosen for the purposes of s 74(3) ("such percentage as the court thinks just and equitable in the circumstances of the case") differs from that ordinarily applicable in cases of contributory negligence under the general law: ("having regard to the claimant's share in the responsibility for the damage"). It may be that the former was used in place of the latter to enable the Court, in examples of the kinds to which I have referred, to recognise that, there being no contribution by the deemed contributory negligence, it

would be unjust and inequitable to reduce the damages otherwise recoverable. A

In these circumstances, I see no reason why, within s 74, a plaintiff should not recover the whole of the loss suffered if the failure to wear a seatbelt contributed nothing to the accident or the loss suffered.

2. Voluntary services:

In *Marsland by his Tutor the Protective Commissioner of New South Wales v Andjelic* (1993) 31 NSWLR 162; *Marsland by his Tutor the Protective Commissioner of New South Wales [No 2]* (1993) 32 NSWLR 649, I expressed my views in relation to, inter alia, compensation for voluntary services and the incidents of such compensation, for example, interest. My views were, in those cases, minority views. Accordingly, I accept for the purposes of the decision in this case the views of the majority as stated by Kirby P in his judgment. B

3. Other aspects of damages:

In relation to some of the other matters dealt with by Kirby P, for example, the costs of fund management, I have elsewhere expressed views which are not congruent with those of the President. In this appeal, Meagher J A has agreed with the views of Kirby P. In relation to the matters on which I would differ from my brethren, I accept that my views are minority views and that I am bound by previous decisions of this Court or by the implications to be drawn from them. C

For these reasons, I agree with the orders proposed by Kirby P.

MEAGHER J A. I agree with Kirby P. D

Appeal allowed.
Cross-appeal dismissed.

Solicitors for the appellant: *Stacks — The Law Firm with Goudkamp Mahoney*.

Solicitors for the first respondents: *McCulloch & Buggy*.

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R J DESIATNIK,
Barrister.

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