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Dust Diseases Tribunal of New South Wales

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Bill Bramwell Roberts v Amaca Pty Limited [2009] NSWDDT 28 (20 November 2009)

Last Updated: 12 July 2010

NEW SOUTH WALES DUST DISEASES TRIBUNAL

CITATION:

Bill Bramwell Roberts v Amaca Pty Limited [\[2009\] NSWDDT 28](#)

PARTIES:

Bill Bramwell Roberts (Plaintiff)

Amaca Pty Limited (Defendant)

MATTER NUMBER(S):

83 of 2009

CATCHWORDS:

DUST DISEASES TRIBUNAL :-

Damages

Pension in lost years

LEGISLATION CITED:

CASES CITED:

Skelton v Collins [\[1966\] HCA 14](#); [\(1966\) 115 CLR 94](#)

Husher v Husher [\[1999\] HCA 47](#); [\(1999\) 197 CLR 138](#)

TEXTS CITED:

CORAM:

Curtis J

DATES OF HEARING:
20 and 21 October 2009

DATE OF JUDGMENT:
20 November 2009

LEGAL REPRESENTATIVES

Mr P C B Semmler QC with Mr S Tzouganatos instructed by Turner Freeman appeared for the plaintiff

Mr G M Watson SC with Ms W Strathdee instructed by Ellison Tillyard Callanan appeared for the defendant

JUDGMENT:

Dust Diseases Tribunal of New South Wales

Matter Number 83 of 2009

Bill Bramwell Roberts

v

Amaca Pty Limited

20 November 2009

JUDGMENT
CURTIS J

Introduction

1. The plaintiff, Mr Roberts, is a 64-year-old dentist who inhaled asbestos dust and fibre from asbestos cement building products during the course of home renovations in Brisbane, Queensland in 1966 and 1967. As a result he suffers from malignant pleural mesothelioma.

2. The building products were manufactured by the defendant Amaca Pty Limited which admits liability.

General damages

3. Mr Roberts was born on 19 October 1945. Prior to his illness he had achieved a lifestyle that he regarded as idyllic. He was economically secure, and worked three and one half days each week in his successful dental practice which work he found "immensely satisfying. His modest workload permitted him to fully enjoy his leisure pursuits of fishing, travelling, golf, which he played twice a week, and gardening on weekends at his beach house at Forresters Beach.

4. Mr Roberts had undergone triple coronary bypass surgery in October 1997, but he had recovered well, and was relatively fit. Although he suffered intermittent and relatively minor shortness of breath

negotiating hills or stairs before he fell ill, he regularly walked the 20 minutes between his home in Cremorne and his dental practice in Mosman.

5. In early 2007 Mr Roberts experienced increasing shortness of breath, lost weight, and felt unusually lethargic and lacking in energy. On 19 October 2007 he collapsed while playing golf at the Royal Melbourne course. He came under the care of Dr Charles Thorburn, a cardiologist, and on 26 November 2007 his aortic valve was replaced by Dr Alan Farnsworth, a cardio-thoracic surgeon. A pacemaker was installed after the surgery.

6. Despite these interventions the symptoms did not improve. By March 2008 Mr Roberts had developed a dry cough and chest wheeze. He was referred to Dr Janet Rimmer, a respiratory physician, who diagnosed late onset asthma or acute bronchitis. Increasing breathlessness and fatigue led him to return to his treating cardiologist, Dr Charles Thorburn, in October 2008. Dr Thorburn diagnosed bacterial endocarditis.

7. In November 2008 Mr Roberts returned to Dr Rimmer who recommended a lung biopsy. This was performed on 21 November 2008 and, following analysis, Mr Roberts was informed that he suffered from malignant mesothelioma. He says that he finds it impossible to describe his shock and devastation upon learning of this diagnosis.

8. All hope was crushed when Dr Farnsworth, a cardiothoracic surgeon, advised that the mesothelioma was not surgically resectable, a view confirmed by a second opinion sought from Professor Brian McCaughan.

9. Chemotherapy was administered on 23 April 2009, 6 May 2009, 26 May 2009, 16 June 2009, 7 July 2009 and 28 July 2009. During this treatment Mr Roberts suffered continuous nausea, vomiting, eye irritation, great fatigue, lack of appetite and skin rashes. He says that since August 2009 his symptoms have been less severe and his appetite has recovered. This remission permitted him to go on holiday to Europe from 3 September 2009 to 12 October 2009, although for the last few days of this holiday he was confined by fatigue to the apartment.

10. Mr Roberts continued in his dental practice until April 2009. As recently as April 2008 he told Dr Rimmer that he "had a good exercise tolerance on the flat and was able to walk and play golf without any problems". He still plays golf although he now uses a motorised cart. He can still drive his motor car. His present symptoms are moderate breathlessness, fatigue and depression.

11. Although Mr Roberts has not yet been visited with acute pain, his future is bleak. Because the disease in his case is only slowly progressive, Professor Eva Segelov, his treating oncologist, says that he may live for a further 18 months to three years. He will suffer increasing breathlessness, fatigue, pain, helplessness and despair. Only death will relieve his misery.

12. Mr Roberts is not as young as many who suffer this awful fate, and he has not endured the severe pain of some who have sought surgical relief.

13. I assess general damages in the sum of **\$275,000**.

Interest on general damages

14. The greater part of Mr Roberts' suffering will be in the future. I allow interest on \$100,000 at 2 per cent for 2.75 years; **\$5,500**.

Loss of Expectation of Life

15. Upon the tables Mr Roberts has lost 21.48 years. I allow a conventional sum of **\$20,500**.

Past Out-Of-Pocket Expenses

16. These are agreed in the sum of **\$25,237**.

Future Out-Of-Pocket Expenses

Medical expenses

Attendances of General practitioner and Palliative Care Specialist

17. Dr Christopher Clarke, a consultant thoracic physician who has treated patients dying of mesothelioma, says that the general practitioner may not be involved very much in the early stages because of the care given by the attending specialist. Mr Roberts already has the care of a palliative physician. Nevertheless, he says that "at a later stage, the general practitioner may be required to give additional symptomatic relief, in which case the consultations could then be weekly, and may become more frequent". The cost of each visit could be anywhere between \$50 and \$100.

18. The midpoint in the life expectancy range of 18 months to three years from August 2009, is 15 November 2011. A great deal of uncertainty attaches to the opinion of Dr Clarke, and I propose to allow fortnightly visits for the penultimate three months of Mr Roberts' life, commencing on 15 May 2011, and weekly visits for the last three months, each at \$75. The total comes to **\$1,500**. Because the sum is small and the period brief I do not propose to discount for deferral.

Although the cost of palliative care is not quantified I think it reasonable to allow a further **\$1,500**.

Oxygen

19. Although Mr Roberts' is not presently using oxygen, Dr Clarke says that in the future this equipment will be required "for palliation". He does not otherwise indicate the period during which the oxygen will be required to relieve Mr Roberts' symptoms. I assume it will be in the last six months of life. The cost is \$150 per month. I allow **\$1,100** which includes the one-off cost of equipment.

Attendances of oncologist

20. This is agreed in the sum of **\$2,545**.

Second round Chemotherapy

21. This is agreed in the sum of **\$15,050**.

Third round Chemotherapy

22. Professor Selgelov says that it is more likely than not that this will take place. I allow the discounted sum of **\$10,000**.

Radiology

23. Dr Clarke says that the schedule fees for chest CT scans can range between \$295 and \$400. I allow **\$1,000**.

Pharmaceutical costs

24. These costs are not quantified in the evidence, however it is obvious that powerful analgesic drugs will be required in the future. Doing the best I can I allow **\$5,000**.

Total of Future Medical Expenses \$37,695

Other Expenses

Home Modifications

25. Mr Roberts, who lives in a narrow terrace house in Paddington, claims for the cost of a portable wheelchair lift, \$9,500, the installation of a chairlift from ground floor to first floor, \$10,300, and for renovations to the bathroom at a cost of \$29,950.

26. In the course of the trial the plaintiff sought to tender a letter written by George Antonopoulos, a director of GHA Constructions Pty Ltd, who estimated the cost of those items in the amounts claimed. I deferred ruling on the tender at the time. Because the letter includes a builder's licence number I infer that Mr Antonopoulos is qualified by experience to express an opinion as to cost. The letter had been duly served and it should be admitted into evidence.

27. Mr Roberts only moved into the Paddington home in September 2008, after his diagnosis. Mr Watson SC for Amaca submits that in this circumstance it is unreasonable to ask for the defendant to pay for the capital renovations, because, although the defendant takes a plaintiff as it finds him, when the entitlement to damages arose (not later than diagnosis) Mr Roberts' existing premises may not have required the works.

28. The question is always one of reasonableness, and in the circumstances of this case, if the capital costs are of modest proportion in relation to general damages, I think it reasonable that the plaintiff should, despite his diagnosis, be free to change his domestic circumstances in the same manner as if he had been uninjured. In any event, although he moved into Paddington only after his diagnosis, it appears from the report of the occupational therapist, Ms Joanne Oates, that the home was purchased before diagnosis.

Portable Wheelchair Lift

Ms Oates recommended installation of a grab rail at the front steps to improve safety and support when entering the premises and the provision of a temporary ramp at a cost of \$150 to improve access in the future "if a wheelchair is used". I do not understand from the evidence what Mr Antonopoulos proposed to construct at a cost of \$9,500, however there is no evidence to support the need for anything but a portable ramp.

Chairlift from Ground Floor to First Floor

Ms Oates recommends this device. The defendant, having been served with the letter of Mr Antonopoulos, was free to qualify evidence that the work could be done less expensively. I allow this claim in the sum of **\$10,300**.

Bathroom Renovations

Ms Oates recommended no more than "revision" of access to the bathroom, "potentially involving installation of grab rails, use of a shower chair and widening of the doorway". Mr Antonopoulos' estimate of \$29,950, includes in addition to the widening of the doorway, what is in effect installation of a completely new bathroom. The provision of a shower/commode chair is otherwise included in an equipment schedule prepared by Ms Oates. I allow **\$2,500** as a cost of widening the doorway and installing grab rails.

Various other aids

29. Scissors, sponges, washers, grab rails, bed linen and portable wheelchair ramps are claimed in the sum of **\$358**. The defendant does not dispute this cost.

30. Further items including a wheelchair, a hoist, and a hospital bed will be needed during the final stages of Mr Roberts' illness that Ms Oates anticipates may last two to eight weeks. The plaintiff claims the capital cost of these items at \$6,634. Ms Oates reports that they may be rented at a cost of

\$242 per week. I think it reasonable to allow six weeks rental. The total is **\$1,452.**

Occupational Therapy Instruction

31. Ms Oates includes this item in her schedule of cost as six hours at \$135 per hour, but does not otherwise in her report refer to this need or explain what is entailed. Although Ms Oates is an expert in providing for the needs of persons in Mr Roberts' position, the rule in *Makita v Sprowles* requires that experts should disclose their reasons. With some misgivings I allow this claim in the sum of **\$810.**

Total of Other Expenses \$15,420

Total Future Out-Of-Pocket Expenses: \$53,115

Past Services

Personal Care

32. Mr Roberts is fortunate to have enjoyed the benefit of much care and assistance provided by his loving wife and two daughters. Nevertheless, damages for such services may only be awarded where the care and assistance are required to meet a need generated by incapacity.

33. Until April 2009 Mr Roberts was able to conduct his highly skilled dental practice. In April of 2008 he enjoyed good exercise tolerance on flat ground, and played golf. Although he presently suffers from moderate breathlessness, fatigue, and depression, he is independent in the activities of daily living. He can cook his own meals, attend to his own laundry and drive his motor car. He still plays golf, very occasionally, with the assistance of a motorised cart.

34. Mr Roberts did have six cycles of chemotherapy, each of three weeks. During these periods it is reasonable to suppose that he needed the assistance of his wife for personal care, meal preparation, laundry and driving. Ms Oates, the occupational therapist, in her report of 29 May 2009, estimated the value of gratuitous services for personal care during these six cycles at \$1,899.40. It is reasonable to allow during these periods one further hour per day in respect of cleaning, laundry, meal preparation and shopping. At the rate of \$22.62 per hour the value of this further assistance over 18 weeks is \$2,850.12. Total **\$4,749.52.**

35. A claim is made in respect of assistance provided by Mr Roberts' daughter Sophie in relation to a period between December and April 2009 when she performed general office and administrative duties in his dental practice, and also "brought him cups of tea and Panadol if he required it". She also assisted him in preparing paperwork for the sale of the practice. From time to time she drove him to medical appointments and a claim is made for her time occupied in driving, and also in waiting.

36. Another claim is made in respect of assistance provided by his daughter Victoria. This claim includes the time she spent driving her father to medical appointments, talking to medical specialists, supervising his exercise program, and "liaising with medical practitioners". It also includes time spent "researching the diagnosis and understanding what the implications were for prognosis with the correct treatment of it in a holistic manner". Another claim is advanced for the time Victoria spent "looking after his hydration". This turned out to be mixing a powder with water in a glass and handing the glass to Mr Roberts.

37. I am unpersuaded that, with one exception, the assistance provided to Mr Roberts by his daughters resulted from his need, rather than from their natural love and affection.

38. Victoria Roberts was an elite athlete who trained at the Institute of Sport. She massages her father's shoulders for periods totalling about one hour each week. This gives him symptomatic relief. The evidence is unclear as to when this treatment commenced however I allow 12 months at \$22.62 each week. Total **\$1,176.**

39. I appreciate that Ms Oates estimated the value of past care at over \$20,000, however she did so upon the assumption that Mr Roberts relied on his family for assistance with the management of his medical care and transport, and had reduced capacity to perform domestic tasks. Although Mr Roberts may have relied on his family for the management of his medical care and transport, the evidence does not support the proposition that he was otherwise unable to attend to these matters himself.

Gardening and Maintenance

40. Mr Roberts gave evidence that he has employed someone to do landscaping and gardening work on his holiday house at Forresters Beach, and that his daughters have also contributed. The amount paid is not revealed in the evidence. Landscaping work is a capital cost reflected in increased property value. Work necessary to maintain the value of the property would consist of lawn mowing, weeding, and minor items of maintenance. I allow two hours each week for 18 months at \$22.62 per hour. Total **\$3,528.75**.

Total Value of Past Services: \$9,454.27

Interest on Past Services

41. I allow interest on \$9,454.27 at 4.5 per cent for 1 year; **\$425.44**.

Future Services

42. Because of Mr Roberts' unusually extended life expectancy, and the vagaries of this disease, the calculation of future personal services is fraught with uncertainty. Mr Roberts has a probable life expectancy of 27 months or 107 weeks until November 2011.

43. Ms Oates has some experience in the task of assessing the needs of persons dying from mesothelioma and I propose to adopt her estimates as to the length and cost of the final stages of high dependence, very high dependence, and complete dependence. Ms Oates has included both the value of gratuitous care and the cost of commercial care in her estimates.

44. Those estimates are as follows:

Complete Dependence: 4.14 weeks at a cost of \$21,248.63

Very High Dependence: 8.57 weeks at a cost of \$35,940.78

High Dependence 12.71 weeks at a cost of \$15,812.51

Total \$73,001.92

45. In her report Ms Oates refers to studies that demonstrated functional decline is greatest during the last three months of life. The above estimates cover the last 25.42 weeks, or approximately 6 months of life. The problem is to estimate the likely need for services during the preceding 21 months.

46. The value of gratuitous services during future cycles of chemotherapy must be allowed. One cycle is certain, and the other cycle a probability. In accordance with earlier estimates I allow **\$8,500** in respect of this care.

47. Other than the need for an hour's massage to his shoulders, and maintenance on his Forresters Beach property, Mr Roberts presently stands in no need of care. His treating oncologist, Professor Segelov, says that it is likely that his deterioration will probably be slow.

48. The value of future weekly massage and property maintenance services over 107 weeks is **\$7,261.02**.

49. I will assume that Mr Roberts remains relatively well, and independent of care, for 3 months, and thereafter, for 18 months will require additional assistance in household tasks, laundry, meal preparation and transport for nine hours each week at \$22.62 per hour. The cost over 78 weeks is **\$15,879.24.**

50. Because the period is short, and the estimations only approximate, I do not propose to discount these allowances for future care and services.

Total Cost of Future Care and Services: \$104,642.18

Past and Future Loss of Earnings

51. Mr Roberts purchased his dental practice at 2 Brady St Mosman in October 1987 and sold it when he ceased practice on 24 April 2009. I accept that he intended to continue in this practice until the age of 75.

52. In evidence Mr Roberts said that from early 2008 until the sale of the business on 24 April 2009 he saw fewer patients because of tiredness and fatigue. This state of affairs is reflected in the gross earnings of the business which fell from the pro rata expectation, based on previous years, of \$403,492, to \$360,928, a loss of \$42,564. I find that past economic loss commenced on 1 January 2008.

53. The plaintiff retained Mr Chris Katehos and the defendant retained Ms Tamara Lindsay as forensic accountants to calculate the quantum of past and future economic loss. Different approaches taken by the two accountants account for different conclusions as to the extent of the loss.

54. I resolve those differences as follows:

55. Probable Earnings

(a) For the purpose of calculating future losses Ms Lindsay applies the average profit, expressed in present-day dollars, of Mr Roberts' dental practice over the five years 2003 to 2007.

Mr Katehos first calculated the losses upon the assumption that the gross earnings of Mr Roberts' practice would increase proportionally to increases in net personal income of dentists as revealed in the responses to questionnaire surveys conducted by the Australian Dental Association.

This approach was obviously unsound. Only 41 per cent of New South Wales dentists responded to the 2007 survey, and dentists in salaried employment accounted for 34 per cent of those responses. Responses were higher for public sector dentists (56 per cent) than those in private practices (42 per cent).

The surveys could not justify a conclusion that the increase in average net income of all dentists is due to increased fees of dentists in private practice.

After criticism by Ms Lindsay of this method, Mr Katehos prepared a supplementary report in which he adjusted the future gross earnings, and costs, of Mr Roberts to accord with the average increase in fees charged for 70 items of service recorded by the Australian Dental Association in fees surveys between 1 July 2005 and 1 July 2008.

Although the increases were greater than the CPI index of inflation, the surveys did not report on costs which may have exceeded the rate of fee increase. Further, Mr Roberts may have been unable to increase his fees because of competition in the locality of his practice. For these reasons I am not persuaded that this alternate method of Mr Katehos fairly represents the probable future net earnings of the practice

The approach of Ms Lindsay is to be preferred.

56. Superannuation

(b) In calculating lost income Ms Lindsay ignores the plaintiff's practice of minimising the incidence of taxation by making significant superannuation salary sacrifice contributions. It is plain that Ms Lindsay misunderstands the reasoning in *Husher v Husher* [1999] HCA 47; (1999) 197 CLR 138. In calculating damages the Tribunal must award "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation" (per Lord Blackburn in *Livingston v Rawyards Coal Co* (1880) (5 Appeal Cases 25 (HL) at 39).

The High Court in *Husher v Husher* held that, although the injured plaintiff previously shared his income with his wife for the purpose of tax minimisation, the financial loss occasioned by the impairment of his earning capacity was the loss of his ability to generate that income which he may control and dispose of as he wished. To restore him to his pre-injury circumstance it was necessary to award him the whole of the loss.

Had Mr Roberts not been injured he would have enjoyed the benefit of a favourable taxation regime which permitted the accumulation of a superannuation fund that was itself taxed on favourable terms.

The approach of Mr Katehos is to be preferred.

57. Discount Rate

(c) Mr Katehos initially calculated future loss of income applying the common law rate of 3 per cent interest to reflect the gradual depletion of the award by inflation. Ms Lindsay applied the 5 per cent tables. Mr Roberts was injured in Queensland where the common law has been displaced by s16 of the [Supreme Court Act 1995](#) (Qld) which provides that the appropriate rate is 5 per cent.

The approach of Ms Lindsay is correct.

58. Return on Superannuation Fund

(d) Mr Katehos adopts a future real investment earnings rate of 6 per cent upon the plaintiff's superannuation. This assumption was based on superannuation fund data up to 30 June 2002. This data is now significantly out of date. Ms Lindsay says that the probable return on the superannuation fund will only be three and a half per cent above inflation. The financial statements of Mr Roberts' superannuation fund reveal a reasonably conservative approach, with investments in cash, interest-bearing deposits, and shares. In Ms Lindsay's experience the return on such investment options are usually in the order of 2 per cent to 5 per cent above inflation.

Ms Lindsay's approach is to be preferred.

59. The Cost of Maintenance

(e) Mr Katehos, on instructions from the plaintiff's solicitors, initially allowed \$150 per week for the plaintiff's personal expenditure in the last years. Subsequently this figure was arbitrarily revised to \$200 per week. Mr Roberts gave no detailed evidence on this matter. Ms Lindsay, in reliance upon the *Household Expenditure Survey 2003/2004* published by the Australian Bureau of Statistics, and relating the data to Mr Roberts' personal circumstance, estimates his expenditure at \$226 per week. I think this approach is more than reasonable; the published data does not include any allowance for the cost of transport.

The approach of Ms Lindsay is to be preferred.

60. Vicissitudes

(f) Mr Katehos and Ms Lindsay have produced tables with differing discounts for vicissitudes. Dr

Thorburn, in a report of 12 February 2009, said that Mr Roberts' life expectancy was only mildly reduced from normal by his cardiac condition. Because the claim for economic loss relates only to the first 11 of the 20 lost years and because Mr Roberts had maintained a successful practice over many years, negating the contingency of unemployment, I think it proper to apply the discounts of 5 per cent to age 70, and 10 per cent from 72 to 75, adopted by Mr Katehos.

(g) Mr Katehos and Ms Lindsay have made different assumptions concerning the proposed purchase of new equipment for the dental practice. The differences are minor and because I otherwise accept the calculations of Ms Lindsay, I accept her assumptions.

61. *Summary of Past and Future Loss of Earnings*

Upon these findings the total loss of earnings is that set out in the table *Total Economic Loss Assuming Superannuation Salary Sacrifice Contributions Scenario 3, Alternative B* appearing in Schedule 9.2 in the supplementary report by Ms Lindsay of 16 October 2009, with the addition of \$31,585 as calculated by Mr Katehos in respect of economic loss between 1 January 2008 to 30 June 2008. Ms Lindsay concedes that this sum is reasonable.

62. The table with this amendment reads as follows:

	\$
Loss to 24 April 2009	51,707.00
Loss from 24 April 2009 to 20 October 2009	88,592.00
Interest on past loss	4,031.00
Future loss	1,155,277.00
TOTAL	1,299,607.00

63. I appreciate that this table calculates the loss as at 20 October 2009 rather than the date of this judgment. If the difference is significant, either party has leave to apply for amendment of the judgment sum pursuant to [s13\(6\)](#) of the [Dust Diseases Tribunal Act 1989](#).

Future Loss of United Kingdom Pension Benefits

64. Since the age of 60 Mr Roberts has been in receipt of a pension of approximately \$500 per week pursuant to the National Health Superannuation Scheme of the United Kingdom. He became entitled to this benefit because he worked for 15 years in the United Kingdom during which time he made compulsory contributions to the scheme. The pension will be paid until his death, assumed to occur 15 November 2011, and thereafter Mrs Roberts will receive the pension at about half rate.

65. The life expectancy tables predicted that Mr Roberts would, uninjured, live a further 21.48 years from now. Upon his premature death he will lose the opportunity to accumulate nearly 20 years of pension payments. His estate has lost the opportunity to succeed to those moneys, and he has lost the power of testamentary disposition over them.

66. Mr Roberts must be awarded *"that sum of money which will put [him] in the same position as he would have been in if he had not sustained the wrong for which it is now getting his compensation"*.

67. In *Skelton v Collins* [\[1966\] HCA 14](#); [\(1966\) 115 CLR 94](#), a case which considered the accumulation of moneys in the lost years, Windeyer J said at 128: *"The one principle that is absolutely firm, and which must control all else, is that damages for the consequences of mere negligence are compensatory. They are not punitive. They are given to compensate the injured person for what he has suffered and will suffer in mind, body or estate"*. (Emphasis added)

His Honour went on to say: *"The next rule that, as I see the matter, flows from the principle of compensation is that anything having a money value which the plaintiff has lost should be made good"*

in money." (at 129)

68. Mr Watson SC for Amaca submits that because the theoretical basis of the entitlement to economic loss consequent upon personal injury is a loss of earning capacity, not a loss of income, no compensation may be awarded for the loss of this passive income. This submission is unsound.

69. In most cases compensation is not awarded for the loss of passive income because the tort has not deprived the victim of that capital asset which produces the income. The income continues for the benefit of the victim's estate.

70. Where death resulting from a tort deprives a victim of future income which would not have been generated by his personal exertion, he has nevertheless lost something *having a money value which [loss] should be made good in money.*"

71. Any contrary conclusion would create a serious anomaly. If a victim sued before his death he would not be compensated for the loss of passive income (generated perhaps by a life estate) during the lost years, whereas, if he did not sue, and a surviving wife, dependent upon the income, brought an action against the tortfeasor pursuant to [s4](#) of the [Compensation to Relatives Act 1897](#) she would recover damages "*proportioned to the [financial] injury resulting from such [a] death*", that is, proportioned to so much of the passive income as was directed to her support.

72. Mr Katehos's most recent calculation of the value of the lost pension in his report of 21 October 2009 is \$170,501. His earlier calculation of \$189,942 was based upon a different exchange rate. In the light of Mr Roberts' cardiac history, and the opinion of Dr Thorburn, this sum should be discounted by 5 per cent against the contingency of an earlier death than that predicted on the tables. I allow \$161,975.95.

Summary of Damages

	\$
General damages	275,000.00
Interest on general damages	5,500.00
Loss of expectation of life	20,500.00
Past out-of-pocket expenses	25,237.00
Future medical expenses	37,695.00
Other future expenses	15,420.00
Past care and services	9,454.27
Interest on past care and services	425.44
Future care and services	104,642.18
Loss of pension benefits	161,975.95
Past and future loss of earnings	1,299,607.00
TOTAL	1,955,456.84

73. Judgment for the plaintiff in the sum of \$1,955,456.84.

The defendant is to pay the plaintiff's costs.

Mr P C B Semmler QC with Mr S Tzouganatos instructed by Turner Freeman appeared for the plaintiff

Mr G M Watson SC with Ms W Strathdee instructed by Ellison Tillyard Callanan appeared for the defendant

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