Dust Diseases Tribunal of New South Wales

Wilson v Eraring Energy [2002] NSWDDT 17 (3 September 2002)

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NEW SOUTH WALES DUST DISEASES TRIBUNAL

CITATION: Wilson v Eraring Energy [2002] NSWDDT 17

PARTIES:
Clifford James Wilson
Eraring Energy

CASE NUMBER: 120 of 2002 of 2002.00

CATCH WORDS: Damages

LEGISLATION CITED:

CORAM: Duck J

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EX TEMPORE DATE: 03/09/2002

LEGAL REPRESENTATIVES

FOR PLAINTIFF: Mr D Letcher QC instructed by Turner Freeman appeared for the plaintiff

FOR DEFENDANT: Mr J Burn instructed by Goldrick Farrell Mullan appeared for the defendant

JUDGMENT:

1. The plaintiff brings proceedings for damages against the defendant alleging that he was negligently exposed to the inhalation of asbestos dust and fibre as a result of which he has contracted mesothelioma. Liability has been admitted, diagnosis has been admitted and the matter has proceeded as an assessment of damages. To understand the case it is convenient to go to the narrative disclosed by the plaintiff's affidavit, PX3.

2. He is a man who was born on 17 August 1941 and he recently turned 61. He commenced employment with the Electricity Commission of New South Wales as it was then known on 15 April 1957 at the Tamworth Power Station. He was there exposed to the inhalation of asbestos dust and fibre in the manner more particularly set out in paragraphs 5 to 14 of his affidavit. On 6 July 1964 he commenced to work at the Vales Point Power Station once again as a fitter employed by the Electricity Commission of New South Wales. He had finished at Tamworth the day before. Once again he was exposed to the inhalation of asbestos dust and fibre. Details of the exposure are set out in paragraphs 14 to 16 inclusive of his affidavit.

3. In May 1966 he commenced to work as a technical assistant at the Munmorah Power Station. He was once again exposed to the inhalation of asbestos dust and fibre at that power station in the manner described by paragraph 17 of his affidavit. He resigned from the Electricity Commission on 8 January 1971.

4. He then owned and ran a succession of laundry and drycleaning businesses. The first of them was known as American Dry Cleaners in Cessnock. About 6 months later he purchased Deeps Dry Cleaners in Cessnock which he later renamed Hunter Valley Dry Cleaners. He also purchased a dry cleaners known as Kurri Dry Cleaners and finally Raymond Terrace Dry Cleaners. He ran the businesses for a time and then sold the shops one by one, the last of them being sold in 1989.

5. On 12 December 1985 the plaintiff commenced employment as a maintenance fitter at the Bulga Coal Mine which was then run by BHP. He was laid off on 8 August 1987 but went back to work at the mine on 12 December 1988. His job at the mine was to maintain the heavy mobile equipment used in the coal mine. He left the coal mine in August 2001 when he turned 60.

6. In 1987 the plaintiff started to grow wine grapes on a property that he had acquired at Lochinvar. As the years passed from 1987 he increased the areas under vines on the property. Later, he increased the acreage that he had by buying some land from the people next door. In 1987 he planted three acres of cabernet. A few years later he put in a further two acres of cabernet. A few years after that he planted 10 acres of grapes including chardonnay and sauvignon blanc. Thereafter he planted two and a half acres of cabernet franc and in 1999 planted 10 acres of shiraz. It was in 1997 that he bought a further piece of land consisting of 25 acres from an adjoining land owner.

7. He now has 50 acres, 27 of which are planted to grape vines. It was the plaintiff's intention to plant a further 10 acres of chardonnay grapes in the spring of 2004 and another seven acres of chardonnay grapes in 2006. It had been the plaintiff's hope to utilise as much of the harvest from his property as possible in the manufacture of wines bearing his own label. This was more than a pipe dream. He had in fact produced wine and in 1999 and in one vintage thereafter had sold 150 cases of it to distributors in the United Kingdom. He had not sold wine in Australia except for a few sales from the cellar door. He had stored at his property about 1200 cases of wine yet to be disposed of. The plaintiff had engaged a consultant, Mr Anthony Keys, to act as his agent in selling the wine in the UK. It was following the efforts of Mr Keys on two separate occasions that placements were made of 150 cases of the vineyard's wine in that market.

8. The issue to which the parties have devoted most attention in the case has been the proper measurement of the interference with the plaintiff's income earning capacity caused by the illness from which he now suffers and which will shortly take his life.

9. Returning to the narrative for a moment, the plaintiff said at par 31 that in October 2001 he felt that he was becoming tired and felt run down. In February 2002 he noticed a shortness of breath. He went to see his general practitioner, Dr Mitchell, at East Maitland. He had a chest x-ray. The doctor told him that the x-ray showed a build up of fluid on the left side of his chest so he referred the plaintiff to Dr John Gillies, a thoracic surgeon in Newcastle. He saw Dr Gillies on 11 March 2002. The doctor looked at the x-ray and told the plaintiff that he thought that he was suffering from mesothelioma. Fluid was drained from the left side of the plaintiff's chest with a needle.

10. The plaintiff was then admitted to Lake Macquarie Private Hospital on 13 March 2002. He there

underwent a thoracoscopy and three and a half litres of fluid were drained from his left pleural cavity. A biopsy and talc pleurodesis were undertaken. The plaintiff remained in hospital on that occasion until 17 March 2002. He said that it was a very bad time in hospital and that he suffered great pain and suffered from weakness. He said that his wife was with him and helped him. On the day the plaintiff left hospital Dr Gillies told him that the tests had confirmed that he was suffering from mesothelioma and that the condition was incurable.

11. The plaintiff was then referred to Dr Stephen Ackland, an oncologist, for treatment. He first saw Dr Ackland on 18 March 2002. The plaintiff said at par 34 of his affidavit, before he saw Dr Gillies he did not know what mesothelioma was. When Dr Gillies told him about it he said he was in a state of overwhelming shock. He then said that he is still having trouble coming to terms with what has happened to him.

12. After his discharge from Lake Macquarie Private Hospital on 17 March the plaintiff said at par 35 that he was in a lot of pain. The pain was in his chest and in the area where the operation had been undertaken. He was being administered MS Contin 30 milligrams each morning and night, Panadeine Forte as well. He said that he was unable to do anything at all around the house for about three weeks. He spent most of his time sitting in a chair or in bed. The plaintiff said that he felt helpless.

13. At the end of March he started to do some things for himself. He did not like being a burden on his wife. He was trying to regain some personal independence. His observation at the end of par 35 was that he has bad night and profuse day sweats, loss of weight, nausea and fatigue together with anxiety about his family's future. He said that he is breathless if he exerts himself. He is not able to walk more than a couple of hundred metres, slowly, without having to stop to regain his breath. He is no longer able to do things that he used to do at home. Details are set out at par 36 of the affidavit.

14. On 21 April 2002 the plaintiff saw Dr Boyer at Prince Alfred Hospital, Sydney. The doctor recommended that he try chemotherapy with a drug called Glivec. He took this drug in tablet form for about three weeks starting on 5 May and finishing on 27 May. He said that during the time he was taking the drug he seemed to get a lot worse. He suffered from increasing shortness of breath and chest pain and loss of appetite. It was determined then that the drug was not helping him and that he should stop taking it. Instead radiation therapy was proposed. That commenced on 3 June 2002. Then on 26 June the plaintiff started a further course of chemotherapy at Royal Prince Alfred Hospital in which a drug he describes as Vinorelbine was utilised. The last of the treatments with that drug was to have been administered on 21 August 2002. An assessment was then to be made about whether it was worth going on with another course of it.

15. In early August 2002 the plaintiff was suffering from a bloated stomach and at Royal Prince Alfred Hospital they drained four litres of ascites fluid from his abdomen on 6 August 2002. The plaintiff was then informed that the tumour had spread to his peritoneum. He lost a further four litres of fluid the following week when administered with a diuretic. The plaintiff said that in par 40 and par 43 of his affidavit that he is feeling run down and extremely fatigued most of the time. He has a sleep most afternoons. He has been sleeping poorly at night. It was suggested to him that he not rest in the afternoon and go to bed a bit later and he said he is not able to do that, he is exhausted anyway. He sweats during the night and he sweats profusely during the day if he makes any physical or mental effort.

16. He is taking Normison to help him sleep. He said he found it very difficult to sleep because he was anxious and constantly thinking about what had happened to him. The Normison helps him get some sleep but it is still broken sleep. He has chest pain which disturbs his sleep and which causes discomfort during the day. He takes 60 to 80 milligrams of MS Contin to relieve pain as well as another form of liquid morphine as a breakthrough dose two to five times a day. He takes Maxolon for nausea and Dexamethasone to give him some appetite, and a diuretic. His appetite is poor. His weight has fallen from 95 kilograms to 76 kilograms depending on how much fluid his body is retaining. Although his wife cooks several times each day for him he finds it difficult to eat.

17. He said at par 44 of his affidavit he is finding it difficult to get around the house. It is difficult for him

to climb the stairs at night. He needs assistance with showering and washing and dressing. He needs to sit down to get dressed. His wife has to help him put his socks and shoes on and to get them off again at night. He speaks in his affidavit of the increased washing that his wife must do because of his sweating. He also mentions the driving that she has to undertake to get him to medical treatment.

18. There have been some modifications done to his house. The parties have been able to agree on the fair costs to be allowed for them.

19. The plaintiff at par 47 of his affidavit said this:
I still can't believe what has happened. It seems so unfair. I have worked hard all of my life. I have never smoked and I am not much of a drinker. I was looking forward to years in my own wine business. I had planned it so the vineyard would provide me with a job, an income for the years ahead. I loved working in the vineyard. I liked the idea of my own label. I have always enjoyed hard work and was prepared to put the time in to make the vineyard work. I have always been a very independent man. It has been very difficult to watch as my future has been taken away from me. It has been very difficult for me to be deprived of my independence.

20. I have utilised the plaintiff's affidavit to convey the essence of his evidence because it was a convenient way to do it. He did give evidence before the tribunal at Newcastle on Monday last week. His evidence was broadly confirmatory of the material that I have recounted. The fact that he gave evidence permitted the tribunal to see him and to form some assessment of him as a witness. It has been said of him in submissions that he was a conservative man. I think that is a fair observation. There were times when he gave evidence against his own interests because the truth required it, or so it seemed to me. I thought he was a good witness and I have little trouble accepting his evidence.

21. It is convenient to turn for a moment to the vineyard operation which is the matter which has exercised the minds of those appearing in the case the most. The vineyard enterprise is conducted by a company TNV Enterprises Pty Limited. The land on which the vineyard is located is owned by the Wilson Family Trust. The trustee of the trust is Ansellino Pty Limited. That company is also the trustee for Ansellino Unit Trust. The unit trust owns three investment town houses which the plaintiff has acquired in Raymond Terrace. It may be noted that the plaintiff married his wife Gloria on 28 May 1966. They have five children, Tracy born 10 April 1967, Natalie born 3 February 1969, Vanessa born 8 July 1972, Paula born 29 June 1979 and Joshua born 17 July 1982.

22. It is suggested by the evidence that his expected date of death is 13 March 2003. The evidence appears in the report of Dr C W Clarke who allowed the plaintiff a life expectancy of 12 months from diagnosis. Dr Gillies thought that the range of life expectancies was between three and 12 months although given a satisfactory response to treatment it could be considerably longer. Dr Ackland thought that the plaintiff's life expectancy was between nine and 15 months from April 2002. The mean point in that range, of course, is about 12 months from that time.

23. A submission has been made on behalf of the defendant to the effect that the plaintiff appears to be unwell and that the Court would at least discount any damages calculated by reference to a life expectancy coming to an end in March next year. The case is one in which the only medical evidence has come from the plaintiff's side. It is, as I have attempted to recount a moment ago. In the light of it and in the absence of anything to the contrary it seems to me to be reasonable to proceed on the footing that the plaintiff will continue to live until March of next year.

24. As regards loss of earning capacity the plaintiff's accountants, Furzer Crestani, have submitted a very detailed analysis in which they have done their best to calculate the losses to be suffered by the vineyard undertaking because of the plaintiff's illness and impending death. There are four different scenarios contemplated by the accountants. In the first scenario the whole production of the vineyard will be bottled as wine and exported to the United Kingdom. The second scenario is one in which most of the grapes will be sold to other winemakers in the Hunter Valley and a small proportion of it will be made into wine with the plaintiff's own label. The third scenario attempts to calculate the losses to be suffered in the event that

the further acreages contemplated by the plaintiff are in fact planted out and bear fruit as he hoped and the wine sold in the United Kingdom. The fourth scenario is a repeat of the third except that the prices to be obtained for the wine from the increased acreage were to be reduced a little because of the bulk involved. All four scenarios considered by the accountants involve a calculation of the profits to be foregone from the vineyard operation because of the plaintiff's illness and impending death.

25. The defendant's accountants, Horwath Pty Limited, deal with, if that be the correct expression, the contentions advanced on the plaintiff's behalf by Furzer Crestani but in addition they submit that the approach taken by the plaintiff's accountants is not the correct approach to properly measure loss of earning capacity. It is the contention of Ms Lindsay, from Horwath accountants, that the proper approach to the measurement of the plaintiff's loss of earning capacity is the cost of replacement labour made necessary by the plaintiff's absence. In developing that approach learned counsel for the defendant, Mr Burn, has submitted that the projection of future expected vineyard profits is inappropriate for two reasons.

26. Firstly, it disregards the fact that the profits include not only reward for actual labour input but also a significant element of return upon the capital invested in the vineyard. Secondly, the steadily rising profit upon which the forecasts are predicated by the plaintiff's accountants is not supported by the evidence. It is said of those projections that they really are based on the expectations of the plaintiff rather than a hard nosed assessment of the facts.

27. In support of the contention that the appropriate method of calculating the loss of earning capacity in the particular circumstances of this case is the imposing of future cost for replacement labour, the following arguments are advanced. Firstly, such an approach removes all the vagaries and variables implied but unaddressed in the plaintiff's argument for future profits. Secondly, it eliminates any element of double dipping which is said to be present in the event that damages are obtained and then the vineyard continues to trade. Thirdly, the costings associated with the cost of replacement labour come from expert evidence supplied in the plaintiff's case. It is acknowledged by the defendant in the submission of learned counsel appearing for it that there may be properly considered an additional margin of damages, to use the term of the submission, which could be argued for over and above the cost of a replacement viticulturist because the plaintiff in addition provided managerial and entrepreneurial input for the vineyard and that will be lost. In respect of that argument it is submitted that the additional margin ought not be substantial because the replacement viticulturist would handle most of the operation or alternatively if overseas sales became a reality the services of Mr Keys will be utilised for a fee.

28. At the risk of taking too much time I think it convenient to identify the correct principles to be applied. The first case to which I wish to refer is that of *Husher v Husher* (1998-1999) 197 CLR 138. That case concerned an appellant who, before injury was a block layer. He carried on business in partnership with his wife. He and his wife engaged no employees for the purposes of the business. It was the appellant's skill and labour which generated income for the partnership. His wife's only contribution to the business was to perform some minor bookkeeping and message taking tasks. See 141. At the foot of 146 the following appears from the joint judgment of Gleeson CJ, Gummow Kirby and Hayne JJ:
But the decisions reached in particular factual contexts must not be permitted to obscure what we have referred to as the basic principles.
Those principles require identification of what earning capacity has been impaired or lost and what financial loss is occasioned by that impairment or loss. In the present case there is no doubt that the capacity that the appellant lost was a capacity to earn whatever he could have earned working as a block layer. But the enquiry does not stop at what the appellant could have earned. It is necessary to ask what loss the appellant suffered because of the diminution of that capacity and that invites attention to what would have happened but for the negligent infliction of injury (as best a court can predict that future course of events). The latter question (what would have happened but for the negligent infliction of harm) was said to be answered in this case by identifying that it was highly probable that the partnership at will would have been retained but for the occurrence of the accident but it is necessary to consider the content and consequences of that conclusion with some care.

29. At the bottom of 148 the joint judgment continues in the following way:
Deciding what value is to be ascribed to the loss of future earning capacity of an injured plaintiff requires close attention to the facts of each case. The task is not one to be undertaken by seeking to classify cases as concerning 'sole traders' or 'partnerships' or 'wage earners' or' trading trusts', and then attempting to deduce some rule of general application to all classes falling within the classification thus devised. Rather the enquiry is about what could the plaintiff have done in the workforce but for the accident and what sum of money would the plaintiff have had at his or her disposal. Only when those enquiries are pursued can a judgment be made about what capital sum to allow as damages for the impairment of the plaintiff's earning capacity. In doing so, regard must be had, of course, to all those contingencies of life that might reasonably be expected to affect the course of events in the future.

30. In a subsequent case of *Rauk v Trans State Pty Limited* and a related matter of *Restile Pty Limited v Trans State Pty Limited* (2000) NSWSC 1020, the principles of *Husher v Husher* were applied to a financial structure different from that of mere partnership.

31. The next matter I wish to comment on is that there is a very helpful examination of authorities in the Court of Appeal decision of *State of New South Wales v Moss* (2000) NSWCA 133 in particular in the judgment of Heydon J.A. The Court emphasised that the difficulty in assessment does not necessarily result in the non-recovery of damages. On page 22 of the judgment it is said:
The task of the trier of fact is to form a discretionary judgment by reference to not wholly determinate criteria within fairly wide parameters. Though the trier of fact in arriving at the discretionary judgment must achieve satisfaction that a fair award is being made since what is involved is not the finding of historical facts on the balance of probabilities, but the assessment of the value of the chance, it is appropriate to take into account a range of possible outcomes even though the likelihood of any particular outcome being achieved may be no more than a real possibility.

32. Within the judgment I have just referred to there is reference to the well known authority of *Malec v J C Hutton Pty Limited* (1990) 169 CLR 638. I think for present purposes there is no need to recite at length passages from that case.

33. There is a passage in the case of *GIO v Johnson* (1981) 2NSWLR 617 which is of assistance. The passage to which I wish to refer is at 627 (d). Huntly JA writes:
Loss of earning capacity is the capital asset consisting of the personal capacity to earn money from the use of personal skills. This is not the same as earnings where the person concerned has capital. If a millionaire rentier is killed, under circumstances giving rise to an action for damages, his loss of earning capacity is not the value of the interest he collects. Examples can be indefinitely multiplied. Where a person has capital employed in a business it is necessary to split his earning capacity from his income.

34. The next matter to which I wish to refer is the fourth edition of the Assessment of Damages for Personal Injury and Death by Harold Luntz. That edition was published this year. Section 5 of chapter 5 deals with business losses. At par 5.5.3 the author writes:
Loss of Profits Must Result from Injury. Profits that reflect a return on the labour of others, a return on invested capital and the results of an active or inactive market are not usually subject to the owner's influence and the plaintiff's disability cannot be said to have caused any loss of profits of this sort.

35. In the present case, while I acknowledge it is a matter of degree, there is an element of the return to the vineyard which results from the labour of others, that is to say contract pickers and contract harvesters; part of the return of the vineyard is a return on invested capital, that is the capital comprising the vineyard itself, and the machinery which is used to run it; part of the return results from a market, that is to say both in grapes and in bottled wine. To that extent it seems that vineyard loss of profits does not properly measure the plaintiff's loss of earning capacity but the loss of profits incorporates the additional factors to which I have made reference.

36. The last two authorities to which I wish to refer deal with the concessional submission advanced on the part of the defendant that if replacement labour is accepted as the correct measure that some increment

may be allowed for the plaintiff's managerial input. The authorities which directly support that concession include the following. *Dunlany v Hunters Hill Bus Co Pty Limited* NSWCA 191 of 1982 in which judgment was given on 12 May 1983, and *Circosta v Falzon* (1999) NSWCA 308 in which judgment was given on 24 November 1999.

37. For the reasons set out I accept the submission of the defendant that the correct approach to the measurement of the plaintiff's loss of earning capacity should proceed by reference to the cost of replacement labour. Such an approach is also consistent with the duty of the plaintiff to mitigate his damage. I further accept that in measuring the cost some increment ought be allowed for the plaintiff's managerial input, both in the general sense and in particular in relation to the marketing of his grapes and wine. As was made clear in the evidence of Mr Keys the type of wine being produced by the vineyard was adjusted by the plaintiff in the hope that he might better meet the needs of the UK market. Further, the vineyard was described by Mr Keys as excellent. Further, the winemaker retained was a good winemaker. Such material appears respectively at pages 27 and 24 of the transcript.

38. As to what it would cost to employ a replacement viticulturist the evidence is provided in the plaintiff's case by Ms Valerie Cranwell-Smith and not disputed. She contemplates in her letter of 3 July 2002 a total remuneration package of around $57,000 plus. It seems to me that to make some provision for the managerial input of the plaintiff is a difficult matter. I was invited by the parties to carry out the full calculation and then add a lump sum to take account of the extra fact. But no one could assist in submissions about how such a sum would be calculated. Learned counsel for the defendant attempted to assist by saying that a figure of $20,000 or thereabouts would be a reasonable allowance.

39. In the end I have come to the view that there are too many difficulties with that approach. The best way, it seems to me, given the evidence in this case, to measure that aspect of the loss is to add an increment of 15 per cent to the cost of a replacement viticulturist. That would take the gross cost of replacement to $65,000 per annum or $1,250 per week. From that must be deducted firstly income tax. The tax to be deducted according to the plaintiff's accountants is $15,175. If one adds an increment of 15 per cent to that a figure is arrived at of $17,451.25 or $335.60 per week. It was the contention of the defendant's accountant that the tax to be deducted should take into consideration the whole of the financial affairs of the plaintiff and all of the entities which he has set up so that the deduction proposed by that accountant was greater than the amounts that I have spoken of, but it seems to me that if you step back and ask what is it that is being measured it is the cost of a replacement worker. In respect of that consideration the details affecting the plaintiff are not a relevant consideration.

40. Proceeding therefore, the nett cost of replacement per week is $914.40. From that must be deducted the cost of the plaintiff's support in the lost years which support would have permitted him to exercise his earning capacity. His own estimate was that that figure was $80 per week. The defendant's accountant undertook a detailed analysis of his cheque accounts, credit card accounts and the like, and came up with a figure of $124 per week. An exercise was then undertaken by the defendant's accountant by reference to statistical matters made available by the Federal government but I do not know that statistical considerations assist much in determining this case.

41. I do think, however, that the detailed analysis of the available banking records provides a better basis for proceeding than a global estimate given by the plaintiff in the witness box. It seems to me that the cost of supporting the plaintiff in the lost years should be the figure thrown up by that examination, that is to say $124 per week. If that comes off the nett after tax figure previously mentioned a balance is obtained of $790.40 per week. That must be subject to vicissitudes.

42. The defendant's accountant was instructed to make calculations on the footing that the vicissitudes should be 50 per cent. The purported basis of that approach was a judgment given by Maguire J in a matter of *Graham John Claydon v Amaca Pty Limited* on 20 November 2001. As was pointed out in submissions that case has some signal differences from this one, not the least of them being that the judge thought that the plaintiff in that case was exaggerating. Further, I note that in *Sullivan v Gordon* (1999) 47 NSWLR 319 the Court of Appeal described an allowance for vicissitudes of 40 per cent as high.

43. The considerations in respect of which some allowance should be made, I think, are these.

44. Firstly, the age of the plaintiff. The lost years are those from now until he is 70, approximately nine years, so that he would have the ordinary vagaries imposed by age to deal with. Another matter which I think requires some discount for vicissitudes is the fact of the ordinary commercial ups and downs attached to the vineyard. For example he has managed by selling a large part of his grape production to Tyrells. What would happen if they for their own reasons decided not to buy any more from him. He would then have to make some alternative marketing arrangements and who can tell how effectively that would be done? Thirdly, there are the ordinary risks of life which would still affect him.

45. In the circumstances it seems to me that the proper discount for vicissitudes is one of 25 per cent. If that is applied to the subtotal previously arrived at a figure of $592.80 a week is obtained. If that is capitalised at 3 per cent over nine years an amount of $244,411.44 is thrown up. It seems to me that that figure properly makes allowance for the destruction of the plaintiff's earning capacity by his illness and impending death.

46. By way of a check, if the alternate approach had been followed, that is to say that the calculations were made by reference to a cost of 57,000 per annum, deductions for tax, the cost of support of the plaintiff and vicissitudes of 25 per cent, an amount of $210,371.95 would have been thrown up so that the increment allowed on account of the plaintiff's managerial input is one of $34,039.49.

47. Turning then to the other heads of damage which need to be addressed, as regards general damages I have recounted the way in which the plaintiff has been affected by his illness, by its treatment and by the emotional impact that all of this has had upon him. It is the duty of the tribunal from time to time to hear of the last months of people who suffer from this disease. There is no need to expatiate on those matters except to say that the death associated with it is often unpleasant. In light of the available evidence it seems to me that the proper allowance for general damages is one of $160,000. Interest on half that sum at 2 per cent per annum for six months, $800.

48. As regards loss of expectation of life the plaintiff is entitled to damages on that account. The amount generally allowed is a conservative amount intended to compensate the plaintiff for the loss of prospective happiness. This man is 61. He worked very hard to set up his home and vineyard which gave him pleasure. He had a stable family and a loyal and supportive wife. The prospect of happiness thrown away for him is a significant one. The proper allowance on that account for damages, it seems to me, is one of $20,000.

49. He has modified his home, as I mentioned. The cost of the modifications has been agreed at $10,000; that should be allowed.

50. There has been replacement labour obtained in the vineyard up to the date of trial made necessary because of the plaintiff's sickness and the effects of medical treatment upon him. That figure has been agreed at $6,991.61.

51. As regards the cost of care, a report has been obtained from Heather Tchan, occupational therapist, and no exception is taken to the rates which she provides. In submissions the plaintiff's counsel has submitted a schedule calculated from the plaintiff's evidence about his needs, which evidence was uncontradicted, but which differed from and was greater than the projections offered by Heather Tchan when she prepared her report. As I say, the rates are not contested. In the light of the evidence which was not attacked in any way it seems reasonable to adopt the calculations set out in the schedule, with two minor exceptions. The last two entries related to the last four weeks of the plaintiff's life. During that period provision is already made for care for 24 hours a day. I suspect that the inclusion of further amounts involves a misreading of the report of Heather Tchan. In any event once the stage is reached where for that month provision is being made for 24 hours a day care I do not see that there is any scope for further allowance, at least on the facts disclosed by the evidence in this case. For that reason I think that from the schedule submitted the last two items ought to come off and that will leave a balance of $85,364.

52. The next item the subject of claim is a claim for damages because of the services the plaintiff could no longer provide around his house. He did outdoor maintenance, gardening, mowing of a lengthy drive, and maintaining the swimming pool. The claim is for an hour a day. The rate is obtained from Heather Tchan's report. The submission allows 15 per cent deduction for contingencies but the calculation is made until age 75. While it may be contemplated that the plaintiff would continue to do such things until 75 it must, it seems to me, be subject to a higher discount than that allowed in the submission because of the ages under consideration during the relevant period, that is from age 61 to age 75. Once again I think the proper discount is 25 per cent for vicissitudes. That will reduce the amount to be allowed under that head of claim to $87,950.10.

53. The last matter to be considered is the provision of past services, those same things around the house up to the date of trial. The figure for that is $10,584. Once the nature of the claim was explained it attracted no particular complaint from the defendant and that sum might properly be allowed.

54. By way of summary therefore, the damages to be allowed are as follows:

General damages, $160,000

Interest on half at 2 per cent for six months, $800

Loss of expectation of life, $20,000

Home modifications agreed, $10,000.

Cost of replacement labour for the plaintiff in the vineyard to the date of trial, $6,991.61

Cost of care, past and future, $85,364

Loss of services provided by the plaintiff around the home, $87,950.10

Loss of earning capacity, $244,411.44

Cost of past services around the home, $10,584

55. There will be verdict and judgment for the plaintiff for $626,101.15. I order defendant to pay plaintiff's costs.

56. I grant leave to defendant to issue cross-claims within 56 days against Rolls Royce Australia Limited, Power Technologies Pty Limited, Amaca Pty Limited, Wallaby Grip Limited and Wallaby Grip (BAE) Pty Limited.

Mr D Letcher QC instructed by Turner Freeman appeared for the plaintiff.
Mr J Burn instructed by Goldrick Farrell Mullan appeared for the defendant.