

# COMMENTS

John F Keeler\*

## THREE COMMENTS ON DAMAGES FOR PERSONAL INJURY

### (1) COLLATERAL BENEFITS: COMMON LAW DAMAGES AND PENSIONS AND BENEFITS UNDER THE SOCIAL SECURITY ACT

The common law provides for the award of damages for loss of earning capacity suffered by the victim of a tort; with the assistance of Fatal Accidents Act legislation it provides damages for loss of dependency to the widow of a man who dies as the result of the commission of a tort against him. The Social Security Act provides sickness benefit to a person temporarily incapacitated for work by reason of sickness or accident who thereby suffers a loss of salary, wages or other income; invalid pensions to a person permanently incapacitated for work or permanently blind; unemployment benefit for persons who are unemployed although capable of undertaking and willing to undertake paid work of a suitable nature and who have taken reasonable steps to find it; and a widow's pension to a woman following the death of her husband. It follows that any individual may meet the broad qualifying criteria for these pensions and benefits in circumstances which will also support a claim for damages in tort. The Social Security Act provides that a recipient of sickness benefit who is awarded damages or compensation in respect of the same incapacity may be directed to repay the amount of sickness benefits received to the Commonwealth; it makes no similar provision with respect to any other of the pensions and benefits available to those who have suffered an incapacity for work.

In *National Insurance Co of New Zealand v Espagne* (1961) 105 CLR 569 the High Court decided that an invalid pension awarded to a person blinded in the accident giving rise to his successful claim in tort should not reduce the damages payable to him at common law. Dixon CJ reasoned that there was no need to set off against the damages awardable sums received by the plaintiff that possessed a "distinguishing characteristic, namely that they are conferred on him not only independently of the existence in him of a right of redress against others but so that they may be enjoyed by him although he may enforce that right: they are the product of a disposition in his favour intended for his enjoyment and not in relief of liability in others fully to compensate him". Windeyer J put the point as being that the plaintiff need not bring into account sums "given or promised to him by way of bounty, to the intent that he should enjoy them in addition to and not in diminution of any claim for damages"; and that the test of whether sums received by the plaintiff should so reduce his damages is "by purpose rather than by cause". Fullagar J agreed with both statements of principle, which have since been adopted as the authoritative account of the principles governing the treatment of benefits received by plaintiffs from other

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\* MA, BCL (Oxon), Reader in Law, University of Adelaide. The writer is grateful to Christine Swift, of the Department of Law, University of Adelaide, for research assistance with the second part of this comment.

sources in the award of damages. Although generally welcomed as being a more intelligible test than those based on the cause of the other payment that the courts had previously employed it has been no easier to apply, for the predictable reason that in many cases the donor has not considered the matter, with the result that the intention ultimately found to exist is one constructed by the courts as the most probable (or preferred) intention in the particular circumstances. Even in the context of the Social Security Act the test is largely an attempt to discern the intention of the legislature carrying all the conviction of the cognate task of determining whether a silent statute offers an action in tort to a person injured by its breach. Since the decision in *Espagne* Australian courts have consistently held that invalid pensions granted on the basis of permanent incapacity for work as well as on that of permanent blindness should not go to reduce damages for the accident bringing about the incapacity. Unemployment benefits received by the plaintiff before the assessment of damages, on the other hand, were offset against pre-trial loss of earnings by some courts on the ground that they were intended to meet the same loss as the award of damages, and thereby possessed the character of a substitute or partial substitute for wages; but were disregarded by others on the technical ground that they could not affect the loss of earning capacity for which damages were intended to compensate and the ingenious one that benefits reducible because of the income of a spouse could not be regarded as a substitute for the losses of the plaintiff. The Fatal Accidents Act legislation in all States provides that in the assessment of damages any sums paid or payable by way of widow's pension are to be disregarded. Where eligibility for the pension has arisen on a ground other than that of the death of a spouse courts have refused to allow it to be taken into account in reducing damages, either because it is granted on the basis of status rather than any particular head of financial loss (*Glover v Evans* (1980) 49 FLR 445) or because the legislation framed in similar terms to that of the invalid pension falls within the principle of *Espagne* (*Vaughan v Olver* (1977) Qd R 1).

It will be apparent that the purposes of the Social Security Act had been found to be (1) in the case of sickness benefits, that common law damages should not be reduced following their receipt, since the plaintiff might be required to reimburse the Commonwealth for them out of the damages; (2) in the case of invalid pensions and widow's pensions, that the plaintiff should receive full common law damages and keep the amount of pension received; and (3) in the case of unemployment benefits, that a plaintiff might have damages reduced by the amount of benefit received. In *Redding v Lee* (1983) 47 ALR 241, 57 ALJR 393 the High Court reviewed the law as it related to invalid pensions and in *Evans v Muller*, heard at the same time, the law as it related to unemployment benefits and confirmed that this was indeed the position. All members of the Court accepted the statements of principle in *Espagne*, and — with varying degrees of willingness — six members accepted that the decision itself should stand with respect to invalid pensions for the blind and be extended to the effect of receipt of invalid pensions on damages generally. Moreover, such amendments as had been made to the provisions of the Social Security Act since 1961 did not affect the reasoning or decision of the Court in *Espagne*. In *Redding v Lee* it was not argued that *Espagne* had been wrongly decided, but rather that subsequent changes to the Act and its administration should

lead to a different result today. The grant of a pension had become less a matter of discretion and more a matter of right since the deletion of the power of the Director-General of Social Security to disqualify a claimant considered "undeserving of a pension" and the introduction of the discipline imposed on the exercise of his discretion by the Administrative Appeals Tribunal; and the abandonment of a property test for receipt of pensions other than those for the permanently blind was advanced as a further point of distinction. The former argument was rejected on various grounds: by Gibbs CJ and Brennan J on the basis that the issue of whether or not the fact that the pension was discretionary was not decisive of the issue of the intention of the legislature and by Mason and Dawson JJ on the basis that the crucial section of the Act is s28(1) which, in stating the rate of pension as "a rate determined by the Director-General as being reasonable and sufficient, having regard to all the circumstances of the case" leaves it open to the Director-General to have regard to the existence of a damages claim in fixing that rate. The latter argument was even more briefly dismissed. Since the invalid pension for the permanently blind has always been free of both income and property tests the abolition of the property test for pensioners otherwise permanently incapacitated made their position more, not less, similar to that directly under review in *Espagne*. Murphy and Deane JJ noted that no attempt had been made to change the decision in *Espagne* directly although there had been more than forty amendments to the Social Security Act since it had been decided; Mason and Dawson JJ pointed more directly to the fact that there had been no change to s25(1)(d), which provides that an invalid pension should not be granted to a person "if he has an enforceable claim against any person, under any law or contract for adequate compensation in respect of his permanent incapacity", despite the fact that the view expressed in *Espagne* that it did not cover a common law claim for damages led of necessity to the conclusion that the claim to an invalid pension and the common law claim might thereby co-exist. Wilson J alone accepted that the changes in the Act, especially those which reduced the strength of the Director-General's discretion to disqualify a claimant from a pension, had so changed the Act that it had become legitimate to re-examine the position, and he found that both the pension and damages are awarded because of an incapacity for work resulting in an inability to earn and that the Act shows no intention to provide those payments as an act of bounty to be enjoyed by the respondent in addition to the damages awarded.

The Court was much more divided with respect to whether unemployment benefits received should be deducted from damages for loss of earning capacity. Gibbs CJ demonstrated (which is easy enough) that any right to a payment of unemployment benefit is conferred independently of the existence of any common law claim and asserted that, in the light of the fact that the payment of the benefits does not depend on the loss of prior employment or earnings, it was the intention of Parliament that any benefits paid should be enjoyed wholly by the recipient and should not relieve from liability any other person who may be liable to pay damages to him. Neither he nor Murphy J could see any valid point of distinction to be drawn between the effect of an invalid pension and that of unemployment benefits. Brennan J pointed out that all the pensions and benefits available to a person who has lost earning capacity in an accident overlap with damages paid for the same purpose

and that it was unlikely that a scheme which provided for claimants to transfer from one benefit to another or to a pension would allow for the payment of each to have a different impact on any award of damages. Moreover, if damages were reduced a plaintiff would have a smaller capital sum to invest, and this in turn might give rise to a lower income to go in reduction of any future pension awarded. It was improbable that such a consequence was intended by the Act. But these were minority views. Wilson J, too, could see no reason for treating invalid pensions and unemployment benefits differently, but in his case that merely led to the conclusion that both should be deducted from the award of damages. Mason and Dawson JJ (with whose joint judgment Deane J agreed on this issue) identified unemployment benefits as having the character of a partial substitute for wages and noted the absence of any general discretion in the Director-General of Social Security requiring him to consider the general circumstances of the claimant in granting and determining the rate of benefit. The absence of any equivalent of s28(1) was an adequate reason for determining that, in fixing the rate of benefit there is no element of bounty, or evidence of an intention that the benefit is to be enjoyed in addition to damages. Any unemployment benefit received should, therefore, be deducted from them.

It is noteworthy that if, as it appears to be, the existence or otherwise of a discretion in the Director-General to consider the general circumstances of the plaintiff in assessing the rate of pension is the crucial distinction between the effect of an invalid pension and the effect of unemployment benefit on an award of damages, then the grant of a widow's pension will not go to reduce the amount of claims outside the Fatal Accidents Acts, since s63(1) confers a discretion precisely similar to that in s28(1) on the Director-General when considering the rate of pension to be awarded by way of a widow's pension. That should certainly lead Mason and Dawson JJ to agree in the result with Gibbs CJ who would be swayed by the facts that the claim of the widow to a pension is independent of any common law claim and does not require proof of actual dependency, and with Murphy and Brennan JJ. One might also note that if the husband of a woman rendered an invalid in need of constant care and attention by an accident could claim for his provision of such services either through the action *per quod consortium amisit* or, indirectly, through the wife's action, relying on the principle of *Griffiths v Kerkemeyer* (1977) 139 CLR 161, there would be no need to ignore the recent spouse carer's pension, since its rate is set at the maximum single rate less the income test. The same would hold good for a woman entitled to a wife's pension because her husband is permanently incapacitated for work by an accident. All this follows from the weight placed on s28(1) by those judges who supported the decision in *Espagne* while finding that unemployment benefits are deductible from pre-trial loss of earnings. It may be argued (as Wilson J did) that the existence of the discretion is irrelevant after it has been exercised. That point cannot be accepted, since it is the exercise of the discretion not to reduce the amount of the invalid pension that is held to confer the requisite element of bounty on the award of the pension. It is submitted, however, both that s28(1) is not strong enough to bear the weight placed on it and that the fact that it has been relied on provides additional reasons to those that already exist for repealing the section independently of any issue of collateral benefits altogether. It is the invariable practice of the Department of Social Security to calculate the amount of the pension as

the maximum permitted less the reductions necessitated by the income test. Quite possibly this involves a failure to consider each case on its individual merits, and the High Court might legitimately feel reluctant to decide a case on the basis that the Director-General neglects a discretion. But in any event the practice of the Department is right, for there could be little to commend an exercise of discretion that would reduce the pension payable to a pensioner with no present income but the hope of an award of damages at some time in the future. The delays of the common law system compel the Director-General to exercise the discretion in favour of the pensioner; it is ironical that its own institutional inefficiency is used in such a way as to lead the common law to the conclusion that the pensioner should keep the full proceeds of the pension granted to effect a temporary rectification of its deficiency. The award of a pension at the ordinary rate is incapable of indicating any element of an intention to confer any additional bounty on the claimant.

This is not to defend the continued existence of s28(1) of the Act. Indeed, the reasoning in *Redding v Lee* merely emphasises the need for the repeal of that section, which has a purely pernicious effect. The Director-General rightly does not use it. The Act prescribes the terms on which a pension is to be reduced in the light of the income (and the assets) of a pensioner and the effects of attempts to dispose of income to obtain or increase a pension. The overwhelming probability is that its inclusion in the Act was primarily an attempt to exclude judicial review of the decisions of the Department, since there was sound authority in 1947 for the proposition that that would be the effect of a discretion drafted in the terms it uses. This view was exploded even before the coming of the new administrative law, which now emphasises its lack of continuing purpose. Its existence now does no more than furnish an excuse for wrong-headed decision making and speculation by courts and tribunals. *Redding v Lee* provides an outstanding example; another is supplied by the speculation of the Administrative Appeals Tribunal in *Re A* (1982) 8 SSR 79 that where married pensioners are living separately though under one roof so as to be exempt from the provision of s29(2) that would otherwise deem the income of each to be half the total income of both the Director-General might reduce the pension of the non-earning pensioner, presumably to take into account the advantages of "living in the one house though not as husband and wife". The Director-General has very sensibly not taken up this suggestion, which seems to view the equitable treatment of the whole class of pensioners as requiring that whenever one is receiving free or subsidised accommodation the pension paid should be reduced. This reasoning would evidently apply to many cases where parties living under one roof are not married, though one lives rent-free and does not contribute to any mortgage payments, and might well substitute a simpler (and harsher) test for the cohabitation rule in the case of widows. Even if free accommodation is to be taken into account, there would be no warrant for using s28(1) to override the specific provisions of s29(1)(a), which both authorise such a procedure and limit the extent to which it is to be done. Such examples indicate that the repeal of s28(1) (and s63(1)) is becoming a matter of practical importance as well as of symbolic value for welfare rights movements.

*Redding v Lee* also serves as a reminder of the increasing futility of s25(1)(d), which denies an invalid pension to a person who "has an

enforceable claim, under any law or contract, for adequate compensation in respect of his permanent incapacity or permanent blindness". The High Court in *Espagne* expressed the view that the uncertainties of common law litigation (proof of fault, possibility of contributory negligence, and so on) were such that the existence of a common law claim could not operate as a bar to the award of a pension. The Administrative Appeals Tribunal has accepted this, but otherwise has referred to the difficulties and the illogicalities produced by the section without having had to scrutinise its whole field of application. It has, however, decided that a claim ceases to be "enforceable" once it has been settled, or enforced, so that on a literal interpretation s25(1)(d) ceases to be a bar once a worker's compensation claim has been redeemed (*Markovic* (1981) 5 SSR 48). This has certainly left open the question of to whether a pending claim for worker's compensation is a bar to the award of a pension before it has been settled, and in some cases (eg *Vella* (1982) 11 SSR 113) the Tribunal has considered that it does. But doubts have been expressed as to this: in *Bermudez* (1981) 7 SSR 66 the Tribunal considered whether, in the case of the infliction of permanent incapacity, a lump sum payment under the worker's compensation legislation could ever amount to "adequate" compensation and — even if it could — how the Department could know that it would in advance of the settlement or award. In that case the final award was for \$22,500 (in 1981) and the Tribunal was certain that that sum did not amount to adequate compensation for a pensioner aged thirty-five when he suffered the accident that brought about his incapacity. But regardless of this point it could see no logic in different rules applying to common law claims and claims for lump sums under the worker's compensation legislation, nor yet between different rules applying before and after the disposal of a claim; and was ultimately driven to expressing its doubts as to the purposes of the section at all. One might add that on the approach outlined few personal accident insurance policies would provide "adequate compensation" and even those that do would become irrelevant to the award of a pension after they have been paid! The original purpose of s25(1)(d) was clearly enough to impose the primary liability for providing for a person permanently incapacitated for work on the private sector of the economy to the exclusion of the Commonwealth in at least some cases. It is now both doubtful whether it achieves anything at all and clear that it is misconceived to bar a claim during a period when the claimant may have no other income. The result is the practice referred to in *Bermudez*, of extremely doubtful legitimacy, of the Department trying to keep the claimant on sickness benefits until the other claim is settled, since the Act provides for the recovery of sickness benefits paid in respect of a period for which an award of damages or compensation for lost earnings is ultimately made. In this way the Director-General expresses his support for the views of Murphy and Deane JJ in *Redding v Lee* that the desirable stance for the law to adopt is for the Department to pay the appropriate pension or benefit and then recover it from any award ultimately made to cover loss of earnings during that period. The recent changes to s115 of the Act, providing more effective machinery for the recovery process, indicate some Parliamentary approval that this is considered the appropriate method of dealing with the overlap between at least sickness benefit and other claims. Yet s25(1)(d) survives and the Director-General left to doubtful shifts that cannot, in any event, cope with the law's delays in all cases. The case for a reassessment of Parliamentary intent with respect to any

potential overlap between invalid pensions and other compensation for lost earnings is very strong.

What the eventual policy should be is a matter of dispute. The argument in favour of a person being able to keep both social security pensions and benefits and compensation eventually awarded for lost earnings before trial are generally weak. It is obviously not the right way of coping with the general inability of the courts to award real *restitutio in integrum*, even in the case of economic losses. It is hard to see why discovering the amount to be deducted should complicate the assessment of damages or impede settlements. Murphy J's concerns as to the internalisation of costs and the deterrent effects of the defendants and their insurers meeting the losses they have caused in full can be met in other ways; it is not, in any event, a convincing argument with respect to traffic cases where the presence of other deterrent factors and, in many cases, of other causal agents such as poor vehicle or road engineering supply grounds for the acceptance of a greater public acceptance of responsibility. Most Australian cities are so designed as to be dependent on motor transport for their effective functioning and rural areas are, if anything, even more dependent on it; that fact alone might justify an extra contribution of some kind. That, together with Professor Luntz's points ((1983) 14 MULR 328) that the social security system finances pensions and benefits more equitably and less regressively than the common law coupled with insurance and that a system of recouping social security payments out of damages results in needless expense in paying for the transfer process, is also an argument in favour of simply deducting pensions and benefits received from the lump sum award of damages. The approaches of the Commonwealth Government to the manner and extent of its contributions to people who do recover damages or compensation for lost earnings are so wildly contradictory that no arguments based on consistency of policy can be advanced. Simultaneously content with the subsidies to common law claims resulting from the combination of assessing damages on post-tax earnings and the consequent need to leave the lump sum awards untaxed, and with ensuring that common law and workers' compensation insurers keep the Medicare levy down by being left with full responsibility for the medical and hospital costs of accident victims, the politics of consensus are such that it is hard to predict what they should require of the relationship between pensions and benefits on the one hand and compensation and damages on the other. One may anticipate, however, that the present vendetta against "double dipping" will ensure that the Commonwealth will not lightly see its own budgets affected by those whose lesser need has ultimately been established by an award of damages to them. Moreover, simply to set off Commonwealth benefits against damages will allow insurers who delay settlements longer to reduce their own liability at the expense of the Commonwealth. It is hard to see that being an acceptable position.

In the long run, however, the odds are heavily in favour of Professor Luntz being right in practical terms, though perhaps at the expense of pure logic. The problems that arose in *Redding v Lee* and *Evans v Muller* stem from the absence of any adequate scheme for the prompt provision of periodic payments to those accident victims who possess valid claims for damages or other compensation. Given that it is unlikely that the preference given to accident victims will be abolished or that redress for them will be taken over entirely by the social security system

the first priority for reform must be the establishing of some form of no-fault scheme for traffic victims and of adequate machinery for ensuring that payments to the victims of traffic and industrial accidents are made promptly. Although there is, of course, immense dispute as to the eventual form of such schemes there is virtually no dispute that in one guise or another they should eventuate. Once that happens the primary responsibility for maintaining the incomes of those within the scope of the schemes should rest with the schemes, which should take no account of the existence of any social security alternative. Should they come to cover all accident victims then problems will only arise if the periodic payments are for a limited period which expires. At all events the fewer cases there are in which people have to rely on social security payments and the looser the miscellany of defendants and insurers to be pursued the less worthwhile will it be to establish machinery for the recovery of any payments made. In determining the substance of and changes to the Social Security Act made desirable by *Redding v Lee* the overall direction of desirable reform should be an important factor, and that argues for the simpler solution of offsetting the pension against damages in the diminishing number of cases in which the problem will arise rather than maintaining the scope of recovery procedures of the Department.

## (2) NURSING CARE AND DOMESTIC SERVICES

People who suffer very grave injuries as a consequence of an accident sometimes require constant care and attention. This may be provided either in an institution or in their homes. The criterion for determining where it should be provided is that of what it is reasonable for the plaintiff to require, and this, according to *Sharman v Evans* (1977) 138 CLR 563, is to be determined, where possible, by a balancing of costs against the benefits to the health of the plaintiff of a particular course of action. Where costs are great and benefits to health slight or speculative, and a much cheaper alternative conferring only marginally lesser benefits is available, it will not be reasonable to demand the more expensive treatment. In *Sharman v Evans* itself this reasoning led to the conclusion that the plaintiff, who suffered from quadriplegia which left her requiring nursing, medical and physiotherapy services as well as the cost of special equipment, should spend the rest of her life in a hospital rather than be provided with the funds to have them provided in her home, since the evidence suggested that the cost of providing these services in a hospital would be about a quarter of providing them at home. It is not clear whether this conclusion stemmed from any deficiency in the presentation of the case, since no evidence of psychiatric benefit to the plaintiff if she were cared for at home rather than in an institution was given, or whether the decision represents a common result of the application of the desired legal criterion. Murphy J, in the course of a vehement and largely justified dissent, made the point that the costs of domestic care were probably a truer representation of the real social costs of the medical treatment required than the probably heavily subsidised hospital costs. The rise in the costs of hospital treatment and the removal of nearly all government subsidies for them where there is a compensable claim have, fortunately, apparently deprived the decision of any great practical effect; consequently issues arising with respect to care provided in the home have been very important in the assessment of damages.



Shortly after the decision in *Sharman v Evans* the High Court decided in *Griffiths v Kerkemeyer* (1977) 139 CLR 161 that where nursing services had been and would be voluntarily provided to an injured person in need of them by a relative the plaintiff should be able to recover the value of the services provided, defined variously as “the fair and reasonable cost of the special attention necessitated by the defendants’ wrongdoing” or “in general . . . the standard or market cost of the services.” The chief difficulty that had to be surmounted in reaching this conclusion was the view that the plaintiff who had received gratuitous services had suffered no loss and had not in fact had to incur any expense in obtaining the services. The solution, first elaborated by Megaw LJ in *Donnelly v Joyce* [1974] 1 QB 454 was that the negligence of the defendant had created a need in the plaintiff for the services, and the extent of that need is itself the loss suffered by the plaintiff which must be compensated. The gratuitous satisfaction of that need could then be viewed as a benefit voluntarily conferred on the plaintiff by a third person and, like other charitable provision, should be construed as intended to be enjoyed by the plaintiff in addition to, and not in derogation of, any claim for damages. Gibbs J, in a passage frequently cited since, saw the claim as one to be viewed in two stages.

“First, is it reasonably necessary to provide the services and would it be reasonably necessary to do so at cost? If so, the fulfilment of the need is likely to be productive of financial loss. Next, is the character of the benefit which the plaintiff receives by the gratuitous provision of the services such that it ought to be brought into account in relief of the wrongdoer? If not, the damages are recoverable.”

The plaintiff in *Griffiths v Kerkemeyer* had again suffered paraplegia in the accident the subject of the action; and the trial judge had awarded the full costs of past and future nursing and domestic care, though pre-trial care had been largely provided by the plaintiff’s fiancée and it was expected that she would provide about half the necessary future care.

The scope of the principle adopted is potentially very wide. Even within the field of personal care provided to the severely disabled Luntz notes that “it frequently happens” that such assistance is provided (*Assessment of Damages for Personal Injury and Death* (2nd edn 1983) 216), and in *Kovac v Kovac* [1982] 1 NSWLR 656, 674 Mahoney J observed that damages awarded under this head were increasing in size and constituting a high proportion of the total award made in such cases. If the principle is seen as extending to cases where plaintiffs have lost the capacity to provide domestic services not only for themselves but for others then damages may be recoverable for the cost of household services that can no longer be supplied. In *Daly v General Steam Navigation Co* [1981] 1 WLR 120 the Court of Appeal held that it did cover such a case and that the principle of *restitutio in integrum* was properly satisfied in the court using the market cost of the services that are needed and that the plaintiff can no longer provide as the basis for calculating the value of the loss. The principle itself has been attacked on doctrinal grounds: it has been considered anomalous on the ground that it enables the plaintiff to recover for “difficulties” that have not in truth been suffered by reason of the gratuitous provision of services (see Mahony JA in *Kovac v Kovac* at 676-7) or, perhaps more penetratingly, by Weir on the ground that to compensate people for the value of their needs rather than their cost is like compensating them for their loss of

earning capacity without regard to whether that capacity would have been exercised (*Compensation for Personal Injuries and Death: Recent Proposals for Reform* (1979)). One reaction to this might simply be that it fails to appreciate that the issue of compensation where services may be provided gratuitously has been removed to the domain of the effect of collateral benefits on an award of damages. Yet, as Bray CJ said, in accepting the principle as being in accord with popular conceptions of justice, it is difficult to reconcile “with the traditional legal theory that the right of a successful plaintiff in an action for tort . . . is a right to be compensated for loss, and no more.” (*Beck v Farrelly* (1975) 13 SASR 17, 21).

Since the decision in *Griffiths v Kerkemeyer* the principle it adopted has been generally applied cautiously, and sometimes grudgingly, rather than enthusiastically endorsed. The judges and the courts who have favoured applying it literally and giving it the broader field of application envisaged in *Daly v General Steam Navigation Co Ltd* have constituted a minority of those whose views have been reported. In *Kovac v Kovac* Reynolds JA was alone in thinking that an award of \$135,692 for damages under this head should be awarded to a woman aged forty-four at the date of the accident which rendered her unable to perform any domestic tasks (cleaning, shopping, laundering, cooking), to monitor her own personal needs (eating, showering, attending to toilet needs, taking prescribed tablets), or to see to her own safety about the house. Apart from details as to the calculation of the sum in the light of the evidence of the market cost of services, Samuels JA held that the defendant should have credit for four-sevenths of the services that had been and would continue to be provided by her husband (who had been receiving workers' compensation payments for four years at the date of judgment) and that the appropriate sum to award should be reduced to \$68,700. Mahoney JA (who ultimately agreed with Samuels JA so as to produce a majority verdict) would otherwise have come to “a general sum” of \$50,000, believing that the claim might extend to housekeeping assistance for two or three hours a day, plus assistance with bathing and showering, but bearing in mind that if the husband's services ceased to be available more might be necessary. Each took as relevant factors justifying their conclusions the nature and extent of the services provided, whether or not they constituted the kind of “support commonly expected and received among members of a family group” and “the overriding principle of reasonableness which must inform all assessments of damages at large in cases such as the present”; though in point of analysis they differed in that Samuels JA related these matters to the issue of what benefits should or should not be set off against the “objective” need of the plaintiff while Mahoney JA considered that they went to the definition of that need. There can be little doubt that, while the judgment of Samuels JA marks a significant restriction on the principle described in *Griffiths v Kerkemeyer*, the analysis of Mahoney JA is essentially in flat contradiction to it. Reynolds JA pointed out that Gibbs J, whose judgment was the one principally relied on by Samuels and Mahoney JJA, both specifically treated the provision of gratuitous services in the context of the impact of charitable donations on the assessment of damages and concluded that: “Where necessary services have been provided gratuitously, by a relative or a friend, it should now, as a general rule, be held that the value of the services provided should not reduce the damages payable to the victim.” The views of the majority in *Kovac v Kovac* have been formally adopted by the Full

Court of Queensland in *Carrick v Commonwealth of Australia* (1983) 2 Qd R 365, though the judgments take no note of the analytical differences between Samuels and Mahoney JJA and the plaintiff was much better able to fend for himself than the plaintiff in *Kovac v Kovac*. The other authorities which relate to this matter come from the decisions of those judges who have been prepared to extend the principle of *Griffiths v Kerkemeyer* to plaintiffs whose injuries render them unable to provide domestic services for their families. Glass JA in *Burnicle v Cutelli* (1982) 2 NSWLR 26 held that, even if damages did cover the gratuitous provision of such services, it must (consistently with *Kovac v Kovac*) still be shown that it is reasonably necessary to provide the services at a cost and that that would depend on "the need of the plaintiff, the character of the services, the level of intensity at which they are provided, the person who provides them, and such questions." In that case it was clear that the plaintiff was completely unable to perform such tasks and her claim for compensation for the three hours a day devoted by her adult daughter to seeing to her personal needs was conceded. The question in issue was the claim for similar compensation for another three hours a day spent by the daughter in housekeeping for her father, unemployed brother and school age sister. Glass JA concluded with respect to this that "her burden could be substantially lightened if her mother, father or brother gave her some assistance and . . . it is not reasonably necessary to procure the services at cost." A different view seems to have been taken by the Full Court of the Federal Court in *Hodges v Frost* (1984) 53 ALR 373, which approved an award of substantial damages with respect to fifteen hours of housework a week performed by a husband who rearranged his life, at some inconvenience, to provide them when a severe whiplash injury prevented his wife from continuing to perform them. Kirby J, speaking for the Court, pointed out that but for the intervention of the husband it would have been reasonably necessary to secure domestic services at a cost and taking their gratuitous provision into account in the reduction of damages would establish "the very inconsistency which *Griffiths v Kerkemeyer* aimed to remove from the law."

*Burnicle v Cutelli* was the first case to reject the extension of *Griffiths v Kerkemeyer* to allowing the plaintiff to claim for the value of domestic services that can no longer be provided to other members of the family following the accident giving rise to the action. Reynolds JA thought that the provision of services to a plaintiff who has personal need of them raises a different problem from the loss of capacity of the plaintiff to render services to others; *Griffiths v Kerkemeyer* did not cover the issue and in principle the damages recoverable for such a loss were restricted to an award for loss of amenity, in the assessment of which the market costs of the services that could no longer be provided are unhelpful. Mahoney JA, again emphasising the anomalous nature of the *Griffiths v Kerkemeyer* principle, stated unequivocally that to apply it to the facts of *Burnicle v Cutelli* "would be, not to apply *Griffiths v Kerkemeyer*, but significantly to extend it." These conclusions were accepted and adopted by a majority of the Full Court of Western Australia in *Maiward v Doyle* (1984) WAR 210, in which both Kennedy and Olney JJ construed *Griffiths v Kerkemeyer* as restricted to compensation for the needs of the plaintiff with respect to personal care and services. Kennedy J was prepared to adopt as a subsidiary ground of his decision that it was not reasonably necessary that the twenty hours of

domestic services found compensable by the trial judge be provided at a cost rather than by her family (her husband and four children aged 21, 19, 18 and 11 at the date of the trial). In each of these cases there was a dissenting judgment; Wickham J dissented in *Maiward v Doyle*, holding that the claim was covered by the *Griffiths v Kerkemeyer* principle and deprecating the "hair splitting" involved in distinguishing the plaintiff's inability to look after herself from her inability to look after her family, and Glass JA dissented in *Burnicle v Cutelli* on the ground that the principle, which does not depend for its application on an indemnity for a loss, but on there being a reasonable association between the services provided and the plaintiff's requirements following the injury, ought to be extended to cover the domestic services needed by her family, there being no reason in point of doctrine to distinguish a need for nursing services due to an impaired capacity to do for oneself from a need for domestic services due to an impaired capacity to do for one's family. In *Hodges v Frost* the Full Court of the Federal Court adopted the reasoning of Glass JA while considering that recovery for necessary domestic services to the family fell properly within the *Griffiths v Kerkemeyer* principle. Kirby J, with whose judgment the other members of the Court agreed, pointed out that it had decided in an earlier case (*Cummings v Canberra Theatre Trust*, unreported, 18 June 1980) that recovery should be permitted where the necessary domestic services had been paid for (as it happened, by the plaintiff's husband). That showed that where it was reasonably necessary to provide the services at a cost an award of damages should cover them, and it would be inconsistent with *Griffiths v Kerkemeyer* to allow the fact that the services had been rendered gratuitously to alter the result. The reasoning both of Kirby J and Glass JA is broadly consistent with that adopted by the Court of Appeal in *Daly v General Steam Navigation Co*, which emphasised the need of the plaintiff for domestic assistance to replace the services she would otherwise have provided herself. No dispute seems to have been raised with respect to the point in *Doyle v Burns* (1980) 24 SASR 108, where Jacobs J simply calculated damages on the basis that the plaintiff would need eighteen hours a week domiciliary help for the rest of her life, though her husband had provided it all up to the date of judgment and seemed likely to continue to do so.

The view taken by the majority of the New South Wales Court of Appeal in *Kovac v Kovac* that the damages awarded for the care of a plaintiff where it has been or may be provided gratuitously should be reduced where it is provided within the family seems clearly enough to be a deliberate restriction (or gloss, as Kirby J preferred to describe it) on the *Griffiths v Kerkemeyer* principle. The attempt of Mahoney JA to define the need of the plaintiff on the basis that the family will provide quite extensive services gratuitously is simply incompatible with the analysis of all members of the High Court that the services were to be regarded analogously to voluntary subventions in satisfaction of the need, and his suggestion that the principle ought to cover only specialist, skilled services such as nursing rather than looking after day to day needs is purely arbitrary — the crucial requirements are that the services must be reasonably necessary and, but for the provision of the services, it would have been necessary to secure them at a cost, and since badly injured people may well need, in this sense, a range of unskilled and semi-skilled services they fall naturally within the principle. The judgment of Samuels JA seems ultimately inconsistent with the letter, spirit and result of *Griffiths v Kerkemeyer*. Apart from the basic analytical method

employed by the High Court it approved an award based on the costs of provision of institutional care for the rest of the life of the plaintiff while acknowledging that for half the time all necessary care was likely to be provided gratuitously. Granted that provision had been by a fiancée, rather than a spouse or parent, this result could not conceivably have offered any warrant for taking into account four sevenths of the services required by a plaintiff almost totally unable to care for herself to offset the assessment of her basic need. The services provided to a patient in an institution must (if the point is relevant) cover day to day needs and requirements as well as specialist care, and the provision of either in the circumstances of a plaintiff unable to see to their own needs must fall equally within the principle. Where *Sharman v Evans* would commit an injured person to institutional care if it is cheaper than domestic care, *Kovac v Kovac* appears to deny most of the cost of the domestic care if it can be provided gratuitously in the cases where it is no more expensive than institutional care. Nor is the judgment of Glass JA in *Burnicle v Cutelli* any more persuasive. Once the analysis is reached that the inability of the plaintiff to provide household services creates a relevant need it is hard to see the justification for simply writing off completely the housework provided by a wife who had taken full responsibility for performing it before her accident. Indeed, viewing his decision in the light of his examples of cases where recovery would be justified — injuries to wives of low income earners with young children or rich single women with a de facto husband and young children — there seems to be no relevant distinction to be drawn between them in terms of the need of the plaintiff, the character of the services and the level of intensity with which they were provided, but only in that work could be shared between the husband and adult children (just as in *Kovac v Kovac* it could be done by the plaintiff's husband, because he was unemployed). These are obviously not cases of minor disabilities leading to "sensible rearrangements in the home", and the analysis which emphasises what may be expected from "the ordinary currency of family life" to such an extent and argues for application of overriding tests of reasonableness is, rightly or wrongly, not adopting *Griffiths v Kerkemeyer* intact, but significantly restricting its scope, apparently on the basis of inarticulated moralisms about the way households of a certain composition ought to organise themselves (cf Hutley JA in *Johnson v Kelemic* (1979) FLC 78,487). In terms of consistency with the principle expounded by the High Court the views of Reynolds JA in *Kovac v Kovac* and of the Federal Court in *Hodges v Frost* seem distinctly preferable. They seem to be largely those adopted in South Australia, where neither *Doyle v Burns* nor *Burke v Batchelor* (1980) 24 SASR 33 (the case, however, of a male plaintiff) raises the issue of what should be the incidents of family life and quite small awards (which should surely be incompatible with taking such matters into account) are not uncommon, even where the need was temporary. In *Richardson v Schultz* (1980) 25 SASR 1, 21, an award of \$350 was made purely in respect of care provided in weekends when the plaintiff was allowed to leave hospital; and in *Beck v Farrelly* (1975) 13 SASR 17 the award was only for \$500. It is hard to see anything in common between these cases and the language of the majority of the judges of the New South Wales Court of Appeal.

The point raised by the issue of the provision of domestic services to replace those that the plaintiff can no longer perform raises some extra

complications, but it is scarcely to be doubted that Glass JA is right in determining that, in principle, the case is 'so much akin to *Griffiths v Kerkemeyer* that any domestic services gratuitously provided should not necessarily go in reduction of the damages payable. But the technical analysis may be rather different. It is not quite enough to say (as did the majorities of the courts in *Burnicle v Cutelli* and *Maiward v Doyle*) that the services were provided for the benefit of someone other than the plaintiff. All that really says is that the loss was that of the people who had been deprived of the services, not that of those who had formerly provided them. As Weir pointed out (*Compensation for Injuries and Death: Recent Proposals for Reform* 18) the loss to the giver and the loss to the recipient of the services may well not be the same — a point which is all too well emphasised when the loss of the ability to provide gratuitous services is submerged in the general claim for loss of amenity. This, however, scarcely serves to distinguish the case from the provision of nursing and other caring services to the plaintiff, for the immediately measurable loss suffered in such a case is that of the giver of the services, rather than of the recipient plaintiff and — even applying *Griffiths v Kerkemeyer* fairly literally — the value of the services may not be the same for each. The difference lies in Weir's question: "If the capacity to give gratuitous services is a loss to the giver, ought one not to pay the pious spinster whose charitable works are inhibited by injury?" Indeed, Wickham J in *Maiward v Doyle* analysed the problem in these terms: ". . . the first question is whether a loss of working capacity as a housekeeper was a loss of earning capacity. . . The next question is whether the loss of earning capacity was or might be productive of financial loss." If the conceptual problem of the gratuitous provision of nursing and like services is whether to classify the services as nullifying any loss or as raising an issue of collateral benefits, that of the gratuitous provision of household services adds to the range of options the loss of a working capacity which affects only the satisfactions and amenities of the person who can no longer provide them and the loss of an earning capacity. The difficulty with identifying it as a loss of earning capacity (as Wickham J did) is that the dispute as to whether damages are awarded for the loss of earnings or of earning capacity has been resolved by the acceptance of the view that "an injured plaintiff recovers not merely because his earning capacity has been diminished but because the diminution of earning capacity is or may be productive of financial loss" (*Graham v Baker* (1961) 106 CLR 340, 347) and, despite his confident conclusion to the contrary, the almost invariable practice of the courts has been to deny that a woman running a household is engaging in an activity productive of financial gain or, conversely, to hold that a woman injured when she is running a household has simply not, thereby, suffered any diminution in a capacity that may be productive of financial loss.

The point may, perhaps, be expressed in a mildly qualified way, partly because the way in which the common law treats the working capacity of women, especially those injured while they are working at home, is beginning to show signs of incoherence, and partly because it is taken as so obvious that it is rarely mentioned. Before addressing the first point a recent (and perhaps not very good) example of the second might be offered. In *Whewell v Savings Bank of South Australia* (1983) 109 LSJS 221 the plaintiff had suffered back injuries in a work accident, which were severe enough to deprive her of about a third of the work

opportunities previously open to her, including her job as a bank teller. She was twenty-two at the time of the accident; by the date of trial four years later she was married with a young child and not intending to resume work until the youngest child reached school age. The employment precluded by her injuries included any which involved heavy lifting, repetitive bending, prolonged standing or repetitive rotation or twisting. The trial judge had awarded her \$6,500 for lost earning capacity, bearing in mind an earlier wish of the plaintiff to have four children. The Full Court increased this to \$20,000, on the basis that she might change her mind on that point. But there was no hesitation in affirming the principle that the damages to be awarded depended on the extent to which the plaintiff was likely to exercise her earning capacity and that she was not likely to seek employment while she had any children of schoolgoing age. That the injuries she had suffered were likely to make child care (especially if there *were* four children) or household tasks considerably more difficult was simply not worth mentioning; presumably it was taken into account in the trial judge's (unchallenged) assessment of \$16,000 for damages for pain and suffering. It may be, on the facts of the particular case, that all this was right and proper. But the complete absence of any concern with the point and the assumption of its irrelevance is not uncommon, and when the matter is raised it is almost invariably seen as making fairly marginal increases in general damages. Whether this is because lawyers have been deluded by orthodox economic theory into ignoring the productive qualities of the domestic economy and assuming that the commercial economy with its insistence on "exchange" theories of value correctly defines what are productive capacities (as Hugh Stretton might argue), or because their economic theories are too outdated to have caught up with Galbraith's view of the homemaker as the supervisor of consumption (a view endorsed by Posner and other members of the Chicago School of Law and Economics theory) may be a moot point. But at least part of the incipient incoherence of the common law arises from the fact that it does in fact acknowledge the value of domestic services whenever the issue arises in the context of a dependency claim, whether the action be brought under the Fatal Accidents Act or under the guise of an action for loss of *consortium*. (cf Riseley, "Sex, Housework and the Law" (1981) 7 Adel LR 421). The gift of services is readily acknowledged to be capable of valuation in the hands of the donee, and advances are being made along the road to recognising that the attention of a homemaker, as wife and mother, may be qualitatively different from those provided purely for commercial reward (*Fisher v Smithson* (1978) 17 SASR 228). It should not be beyond the imagination of the common law to incorporate, as the court in *Daly v General Steam Navigation* tried to do, within the theory of *restitutio in integrum* a method of compensating adequately for the loss or impairment of a working capacity which it already recognises has been and would in the future have been exercised in a valuable and productive way. Moreover, this does not require the wholesale acceptance of a theory of compensating for lost earning capacity; the situation is, on its face, different from those of the people who wish to spend part of their lives without full remuneration as unsuccessful prospectors or as speedway stars. Despite the element of innovation that it displays, therefore, it is to be hoped that the views of Wickham J earn acceptance over those who would value the loss of capacity to provide such services purely as a matter going to loss of amenity and to be valued, in effect, on the basis of the frustration felt in not being able to supply them.

A further inconsistency in common law practice seems to have arisen from another aspect of *Sharman v Evans*. Gibbs and Stephen JJ, in a joint judgment, acknowledged that damages for loss of earning capacity must depend on the likelihood that it would have been exercised, and that the possible withdrawal of the plaintiff from the workforce after marriage is a relevant contingency in estimating them. The pattern of a woman ceasing to earn after marriage was described as “the woman in effect exchanging the exercise of her earning capacity for such financial security as her marriage may provide.” Conceding that the measure of the one course may have nothing to do with that of the other, and that the effect of any marriage the plaintiff might have made or might make is purely speculative, they concluded that

“the only relatively certain factor will be her pre-injury possession of earning capacity and this in itself may be sufficient reason, absent any clear evidence pointing in the contrary direction, for the adoption of the expedient course of simply disregarding the prospect of marriage as a relevant factor in the assessment of such a plaintiff’s future economic loss; this course at least recognises the plaintiff’s retention of capacity, which would have been available to her for exercise, in case of need, despite her marriage” (1977) 138 CLR 563, 583-4.

The last phrase is, of course, consistent with *Carroll v Purcell* (1961) 107 CLR 73, where the High Court held that the earnings of a widow who had rejoined the workforce after the death of her husband should not be set off against her claim for loss of dependency under the Fatal Accidents Act, since she had continued to possess her earning capacity throughout her marriage and the death of her husband conferred no new benefit on her. Now *Sharman v Evans* is a very strong case in many respects. The plaintiff became engaged to be married after the accident in which she was injured to a man with whom she had had a previous “understanding”, but had subsequently decided that she could not allow him to marry a quadriplegic. In these circumstances the suggestion that the possible withdrawal of the plaintiff from the workforce simply be ignored in practical terms as a contingency affecting lost earning capacity is a very strong one. No doubt it is for this reason that Luntz analyses the issue rather differently; what the plaintiff has lost then becomes not a lost earning capacity that might or might not have been exercised, but a loss of the capacity to marry; this is then valued at the loss of the expected dependency (or “financial security”) during marriage, but the difficulties of valuing so speculative a benefit justify returning to the assumption that they should be based on the plaintiff’s own pre-accident earning capacity (*Assessment of Damages for Personal Injury and Death* para 4.1.02). That analysis, in effect, adopts the reasoning of *Moriarty v McCarthy* [1978] 2 All ER 213, where the damages for loss of earnings were reduced to take account of the possibility of withdrawal from the workforce following marriage but the general damages increased by precisely the amount of that reduction to compensate for the loss of opportunity of marriage. In effect, therefore, the facts of *Sharman v Evans* raised in its most acute form what Cooper-Stephenson and Saunders describe as a problem of the “homemaker’s lost years” (*Personal Injury Damages in Canada* (1981) ch5, s10); if the plaintiff’s damages for loss of earning capacity are reduced because of the possibility of withdrawal from the workforce after marriage, no account is taken of the fact that after the accident the support of a husband may



never come into existence, and there is no account taken of the value of the homemaking activities that would be performed during the period of assumed withdrawal from the workforce, the plaintiff loses on all counts and can clearly anticipate becoming the “charity case” that Murphy J envisaged in *Sharman v Evans*.

Much of this reasoning appears unacceptable on its face. The judgment of Gibbs and Stephen JJ manages to define the model of marriage as an exchange of earning capacity for financial security while approving a procedure that acknowledges that the earning capacity is (in law) retained at all times, and to use a hypothesis in the assessment of damages — that the value of the anticipated dependency must equal the projected earnings — that is acknowledged to be without foundation. There being no “exchange” of earning capacity it would seem that any exchange would rather be of the society and services of the woman for the cash remuneration provided by the man — a description of a common pattern of marriage found to be of unacceptable “legal and moral degradation” by Isaacs J as long ago as 1930 (*Wright v Czedich* (1930) 43 CLR 493, 506). The alternative view of the point — that the damages are really for the loss of the dependency that never existed — faces the problem that claims for lost dependencies have hitherto depended on statutory provisions such as the Fatal Accidents Act legislation and (perhaps) the South Australian legislation that makes an action for loss of *consortium* available to a woman. It is not uncommon for the injury to the plaintiff to put such stress on a marriage that a divorce takes place or becomes threatened in the future, but there appears to be no authority in favour of valuing a loss of dependency in such a case, rather than merely taking the eventuality into account in fixing the general damages, though Luntz records one unreported New South Wales decision in which the point was argued, but not adopted, for want of any authority (*Assessment of Damages* para 2.7.05). One method of dealing with such a case would be to reassess the value of the still existing earning capacity in the new circumstance of separation — a course which would, in effect, be consistent with *Sharman v Evans*, though in a case where there are young children the reality might well be that the dependency claim would be worth much more. But that is left largely to the law of maintenance, and even the incidence of recovery of maintenance from departing husbands (let alone its eventual amount) is much lower than that of the recovery of damages from insurance companies when a liability in tort is established.

One would expect, then, that in its practical application the procedure suggested by Gibbs and Stephen JJ would offer very strong advantages to single women with reduced prospects of marriage over married women in the assessment of damages. The contingency of withdrawal from the workforce is to be ignored (unless there is “clear evidence pointing in a contrary direction”) with respect to the single woman, and the opportunity cost concept of lost earning capacity therefore offered to her; while in other cases the contingency is firmly taken into account and the opportunity cost concept never contemplated. And, indeed, that does seem to be the case. Awards for single women who suffer total incapacity to earn are significantly higher than those for married women, especially those not in the paid workforce or working there part-time at the time of the accident, since extra sums are awarded under the head of lost earning capacity while damages for pain and suffering seem very similar for both the single and the married victim. The pages of the

Legal Monthly Digest now commonly show awards well in excess of \$100,000 for complete loss of future earning capacity to single women and girls who have no marriage prospects in view at the date of trial, with the \$425,000 award in *Priest v Turl* (1983) ALMD 4180, 4686 the highest recorded award under this head for any plaintiff of either sex. The contrast with the awards to married women who were not in the paid workforce at the date of the accident or would not, in any event, have been in it at the date of assessment is remarkable. I have not discovered any case where such a married woman who has suffered a total loss of future earning capacity has recovered as much as \$100,000. The closest figure *may* be the \$90,000 for all future economic losses awarded in *Yeend v Yeend* (1982) 103 LSJS 299 to a plaintiff who was about to take up work as a dental receptionist when she was injured at the age of twenty, though pregnant at the time, and had had children in the six years it took for the case to come to trial. Her intention had been to withdraw from the workforce altogether until the youngest of three intended children was five and then work part-time until the child was twelve, though she might not have been able to fulfil this plan because of emotional difficulties being suffered by her first child. But the award covered much more than lost earning capacity; it incorporated an allowance for six hours' domestic assistance a week for an unspecified time and even future medical and cosmetic treatment. Two cases affirmed on the same day by the Full Court of Queensland provide, perhaps, the starkest contrast. In *Larner v Welland* (1983) ALMD 1808 the plaintiff was thirteen when she suffered injuries rendering her tetraplegic and depriving her of all future earning capacity. She was eighteen when her damages were assessed at \$511,614, including \$150,000 for loss of future earning capacity and \$80,000 for pain and suffering, with the balance largely going to the costs of future care and building alterations. But in *Hallowell v Nominal Defendant* (1983) ALMD 1809 another plaintiff who had suffered tetraplegia and a total loss of earning capacity had her damages assessed at \$316,528, including \$22,200 for loss of future earning capacity and \$80,000 for pain and suffering, again with the balance mainly going to the costs of future care and building alterations. She was twenty four at the date of assessment, married, and had intended to return to clerical work when her children had started school. South Australian authority points also to the difference between the single plaintiff who has no intention to marry at the date of assessment and the one who does. In *Richardson v Schultz* (1980) 88 LSJS 315 the plaintiff had been totally incapacitated for work by the accident, which occurred when she was sixteen; by the date of assessment she was twenty, and intending to marry. Damages for loss of future earning capacity were reduced from \$215,000 to \$120,000, so as to take into account the contingency of withdrawal from the workforce to have and look after children. A broadly similar rate of discount for contingencies was used in *Sheridan v Christophers and Lehmann* (1981) 92 LSJS 256, where the plaintiff, injured at the age of sixteen, had been cohabiting with the same man for two years by the date of the assessment.

Disparities of this order of magnitude between awards to single and married women must give rise to doubts as to whether they can be properly justified. For the reasons already given it is submitted that they cannot be explained as representing the value of a lost capacity to marry or a lost dependency, and that the solution of treating the earning

capacity as likely to be used if no marriage is in prospect or a marriage has effectively been terminated may very well not be adequate in a case where there are children to look after. Cooper-Stephensen and Saunders regard cases such as *Richardson v Schultz* as raising another "lost years" problem; there is no award of damages for lost homemaking capacity during the years when the earning capacity will not be employed in the paid workforce. Their solution is that the damages should account for both the lost earning capacity and the lost homemaking capacity (*Personal Injury Damages* 224) and so parallel the position of the homemaker whose working capacities are impaired if the analysis and decisions in *Daly v General Steam Navigation* and *Hodges v Frost* are adopted, as it has already been submitted that they should be. Although they couch their proposal in terms of compensating for lost earning capacity until withdrawal from the paid workforce was likely to occur and for lost homemaking capacity thereafter, this seems to be an inaccurate expression of it, for they generally recognise that the two capacities are independent of each other and frequently used cumulatively rather than as alternatives. The plaintiffs in *Kovac v Kovac*, *Burnicle v Cutelli* and *Maiward v Doyle* all had paid work at the time of their injury and it is well documented that a married woman's participation in the workforce does not affect her responsibility for the homemaking role. It may be true that the proportion of time spent in the commercial and the domestic economies differs from time to time, but the amount of time devoted to them in the aggregate is not fixed and is often very much more than a standard working week in the paid workforce. The proposal, therefore, is better seen as one which will compensate for impairment of lost homemaking capacity to the extent that the capacity is impaired or removed independently of how the damages for lost earning capacity are assessed. If it is put in this way, however, it is apparent that it will generally diminish (to degrees which will vary on a case by case basis) the disparity between awards to married and single women who suffer comparable injuries, but that in the great majority of cases it will not remove them; indeed, even if the damages awardable to a single plaintiff with no prospects of marriage in view were to be assessed on this basis in a case in which the present "opportunity cost" principle might lead to a larger award, the award for lost earning capacity would almost certainly still be considerably larger than for a married woman not in the paid workforce at the time of injury, while that for lost homemaking capacity would be less, but again almost certainly not be so much less as to offset that advantage.

A preliminary question arises as to the reasons for these conclusions; should they be valid the further question is raised as to whether, granted that the earning capacity of individual women varies in the same way as that of individual men, there is any justification for adopting a set of principles the application of which entails that the amount and adequacy of the plaintiff's damages will largely depend on the stage of a common life cycle that she has reached, and whether there ought to be, or is, any technique available which will remove or further reduce that effect. The argument on which they are based has two branches: first, that the courts tend to value the lost earning capacity of a married woman who is not in the paid workforce at the date of her injury as being very low, and secondly, that they tend to put a similarly low valuation on the homemaking role, especially when it is necessary to anticipate its weight as extra burdens may appear in the future. There seems to be more than

one reason for this being the position with respect to each branch. So far as the lost earning capacity is concerned, the first difficulty is that there is no existing level of earnings on which to base a calculation, the courts generally do not contemplate how many years the plaintiff might have worked and, since they have no figure calculated from these bases from which to work, may be very conscious of the fact that it is the decision to rejoin the paid workforce, rather than to leave it, that is the important contingency and that the present receipt of money in place of earnings that might have been several years away requires a not inconsiderable measure of discounting. (Logically the discount rate should be 3% since *Todorovic v Waller* (1981) 37 ALR 481, or 5% in Queensland, but 3% and 5% tables are only usable when there are some definite figures to discount). Mohr J in *Yeend v Yeend* specifically remarked on the lack of utility of actuarial calculations in such circumstances. So, apart from cases where the plaintiff is young and studying for a particular qualification, or is training to re-enter the workforce as children have started school, the reported awards for married women not in the workforce at the time of injury are so low that the \$22,200 award for loss of future earning capacity in *Hallowell v Nominal Defendant* ranks as the highest recorded since 1980 (unless the award under this head in *Yeend v Yeend* is truly higher), and the plaintiff in *Whewell v Savings Bank of South Australia*, who eventually received \$20,000 though retaining a good deal of earning capacity, looks to have been treated with marked generosity.

So far as impairment of the homemaker role is concerned the problems seem to be more fundamental. First there is the reluctance, dealt with earlier, to hold that it is a compensable matter at all except as a component of general damages. Secondly, even in those cases and under those heads of damages where it is admitted to be so compensable, there is often a noticeable reluctance to find that it has occurred. The judgment of Glass JA in *Burnicle v Cutelli*, which deals with a woman filling the role before her accident, has already been criticised, but *Richardson v Schultz* provides a further example in the context of a case where the full burden has not yet been realised. In that case brain damage had brought about major personality changes, with loss of concentration, memory and fine motor movement, to the point of totally depriving the plaintiff of her earning capacity. One of the neurosurgeons who had treated her gave evidence that these disabilities would leave her with grave difficulties in handling her affairs and in relating to other people, that she was unlikely to achieve a successful marriage and her functioning as a mother might be severely impaired; he considered that children would add considerably to the stresses and strains she was under, and that the possibility of the stress leading to baby battering could not be excluded. A neuropsychologist described her as having difficulties in the area of short-term memory and rather lesser ones in sequencing and planning, and saw her employment prospects as severely limited by the difficulties she would face in dealing with a number of new situations arising at once and the fact that her lack of concentration might lead to a rush of customers "throwing" her if she worked in a delicatessen. Nevertheless, he thought that this would not amount to a great disability in terms of the plaintiff bringing up children, especially if the marriage was a stable one and the husband was there "on perhaps those chance occasions where something goes wrong". Another neurosurgeon gave evidence that following her personality

change the plaintiff was subject to disinhibition and prone to impulsiveness, so that any prospective husband would have to be more understanding than average, and that if any marital breakdown did occur he would be concerned that it might cause complications. But he too thought that, despite her clumsy arm, she would have the capacity to look after children. The evidence also showed that she had become engaged since the accident, and her fiancée testified that she did "a fair job" of the housework for both of them, though at times it made her tired and moody, as did other small things. On this evidence the court found that if the plaintiff were to marry and have children she would be able to cope with them adequately, and the risk of violence to any of them would be remote; that she would probably marry her fiancée but that what might happen afterwards was "impossible to predict". All this evidence seems to have been given to assist in the assessment of general damages only; and despite the reduction of the calculated damages for future lost earning capacity by nearly 54% to cover contingencies, damages for pain, suffering and loss of amenity were assessed at a relatively modest \$35,000. In effect the decision is that the homemaking role was barely impaired, if indeed it was impaired at all, and not likely to be impaired in the future; and that even if the prospects of a successful marriage were reduced that was too speculative a matter to be taken into consideration at all. It is doubtful that, even if Cooper-Stephenson and Saunders suggestion that the impairment to earning capacity and the impairment to homemaking capacity be assessed independently had been adopted the result would have been any different. The third problem, to which perhaps more attention has been paid, is how to value any impairment to homemaking capacity that might eventually be found to have been suffered. The approach given support by *Griffiths v Kerkemeyer* and *Daly v General Steam Navigation* is certainly to base any calculation on the market costs of the services required, an approach endorsed by those courts which simply describe any assistance that is or may be required and then assess a sum that will provide it. Kirby J in *Hodges v Frost* was clear, however, that the market costs were not to be automatically applied, but rather used as a guide to their proper value. Reasons for reducing those costs may be that the plaintiff should seek to mitigate damage, and that to a certain extent "minor rearrangements of domestic duties" might, in effect, come under that head and that professional services may be of a different calibre from those provided by friends and relatives, and will have an element of profit in their charges; moreover the need of the plaintiff may not be precisely measurable by services on the scale that commercial services are prepared to provide. On the other hand, friends and relatives may provide services in a more cost effective, intense and prolonged manner. Set out in this way, however, the reasons for moderating the market cost appear implausible. If it really is the need that is being measured according to the criterion of it being reasonably necessary that the services be provided at a cost, then the only appropriate valuation will be based on what services are available at a cost and the cost at which they are available. Mitigation of damage will, of course, be required, (as long as it is mitigation of damage rather than the destruction of the claim that Glass JA seems to prefer). The calibre of the services provided by the friends is as much an irrelevance as whether a workplace collection is an adequate assessment of lost earning capacity or satisfaction for some other concept of "need". The point that should be important, on the analysis here under review, is the calibre of the

services provided by the injured homemaker, and there *Fisher v Smithson* indicates a developing judicial recognition of the possibility that, in many cases, they may well have the degree of commitment that will make them available in the intense and prolonged way envisaged by Kirby J, as well as being available on a twenty four hour basis should emergencies arise.

Many of these points are not insuperable. Existing common law theory is already capable of reaching the position that loss of capacity to provide productive services in the domestic economy is a loss compensable in its own right, and existing practice already indicates that it is perfectly practicable to devise a method of valuation that will not be monstrously unfair. It is also clear that it ought to do so. Firstly, it is discreditable that the formal commitment to *restitutio in integrum* in practice continue to be subject to this existing gap in its coverage at a time when the High Court has had to reassess and modify its rules and practices in other facets of the assessment of damages to enable it to meet that commitment more effectively. Second, it is clear that it is inconsistent in principle to compensate single women on the basis that if they have not entered the paid workforce when they are injured they are likely to do, and that once in it they will not leave it until they reach normal retiring age and to compensate men for the value of lost domestic services in dependency claims, while leaving married women whose capacity to provide domestic services is impaired or destroyed with a claim for lost amenity that is, in practice, very little different in its assessment from that of anyone else with comparable injuries. The resulting pattern of fully compensating some plaintiffs (as a matter of theory, and ignoring the issues of whether discounts for contingencies generally and for investment in inflationary circumstances are adequate), compensating only one affected person out of the group of people who may be immediately dependent on the domestic services provided, and either undercompensating or not providing any compensation at all for other plaintiffs is by now sufficiently incoherent to demonstrate the need for a fresh review of general principle. The structure of doctrine argued for here is (1) that the courts award damages for loss of future earning capacity in the usual way, but making a more serious effort to deal with the contingencies that women will try to remain in the workforce according to the patterns of lifetime employment that are common in our society (better efforts can be made, as is shown by *Bagias v Smith* (1979) FLC 78,497 and, to a certain extent, by *Whewell v Savings Bank of South Australia*) and with, perhaps, some recognition of the fact that more than a quarter of marriages end in divorce; (2) that in addition the loss of capacity to work in the domestic economy be recognised as the loss of a valuable and productive capacity, and that, while accepting the results of *Hodges v Frost* and *Daly v General Steam Navigation*, the courts adopt this as the appropriate doctrinal base for them; (3) that the courts do not hesitate to adopt either the market cost of a substitute homemaker or the costs of the different forms of assistance that may be necessary to replace the services of the plaintiff; (4) that in assessing the issue of the extent to which the capacity to work in the domestic economy would be used it be borne in mind that it may well be used in conjunction with, and not as an alternative to, damages for lost earning capacity in the commercial economy; (5) that, since apart from the loss of satisfaction in being unable to provide services personally, there may often be a loss in the "intensity" and availability of the services available, this be taken into account in assessing the damages, especially in cases

where the capacity is gravely impaired, preferably by way of a conscious loading on the damages for lost productive capacity rather than by simply looking to the damages for lost amenity.

This framework would not, however, solve all the difficulties previously identified. The biggest barrier remains the question of whether or not effective evidence of the extent to which capacity to work in the domestic economy is lost or impaired can be provided and whether or not the courts would be prepared to treat it seriously. It seems inconceivable that the capacity of the plaintiff in *Richardson v Schultz* to contribute to the domestic economy was anything other than gravely affected. A person who cannot plan is not going to perform the functions of a "consumption manager" as effectively as one who can, and one who is likely to become flustered under pressure and suffers from some physical disabilities is likely to be able to contribute to many fewer productive activities than one who may remain calm and has no loss of physical function. Even on the narrow point of child care capacities one feels a sense of incredulity at the absence of any finding that the plaintiff was likely to be able to cope much less efficiently after the accident than before it. In the same way there does seem to be a strong probability that the plaintiff in *Whewell v Savings Bank of South Australia* would find child care a much greater problem after an accident that deprived her of her capacity to lift, bend and twist than before it. One possible reason for the conclusions of the courts may, perhaps, have been that, in the absence of a clearly defined head of damage for which compensation was payable, they effectively relied largely upon medical evidence to establish incapacity as well as disability. In *Richardson v Schultz*, for example, the incapacity of the plaintiff to take up her intended profession of nursing was supported by the evidence of the hospital matron who had accepted her for training before her accident and recommended that she discontinue it afterwards; but the evidence of her capacity to look after house and any children was left to her fiance and the specialist neurosurgeons. One way of combating this problem might be to attempt to bring evidence as to the ways and the extent to which the disabilities identified by the medical specialists might destroy or impair the capacity of the plaintiff to perform and contribute to tasks in the domestic sphere, and to seek such evidence from child care or domestic science experts. The problem is, in a sense, not unique, and the course of action offered here does no more than parallel the practice of calling on employment officers to give evidence in cases where invalid pensions are claimed and the proposals for calling on social workers to mediate between the report of the medical officer and the decision as to incapacity in both social security and repatriation cases.

If the framework proposed could be made effective in this way it would not follow that plaintiffs out of the paid workforce at the time of their injury would fare as well as those inside it. This basically follows from the difficulties of dealing with contingencies of the life that would have been led but for the accident; in practical terms there is likely to be something of a factual presumption of continuance of whichever state of affairs happens to exist at the date of the accident or (if it be different) of assessment of damages. Some uncertainties will then be more easily resolved for or against the plaintiff, as the case may be. But the existing disparities in awards would probably be reduced. On the other hand the scale of awards generally would increase considerably. Not only would the contributions of women to the domestic economy be formally

recognised, but this structure of rules would necessarily cover similar contributions made by men — as they, too, are beginning to be recognised in claims for loss of dependency (Luntz, para 9.3.06). The offsetting abolition of or very reduced scope for claims for loss of *consortium* would not have any great impact on the size of that increase. Even so, the developments advocated here are essentially conservative and remain based on the accepted objectives of the common law. There is no attempt in them to redress any inequalities in the treatment of men and women stemming from the generally lower remuneration received by women in the paid workforce (cf Cooper-Stephenson and Saunders, 207-213). It is, by definition, not part of the task of any system of compensation based strongly on the principle of relating benefits to earnings that it should assist in a general redistribution of resources in favour of a particular underprivileged group. This in no way denies the point, insisted on earlier, that it is equally not part of its task to bias the award and assessment of compensation systematically away from such a group.

This analysis may also have the disadvantage that it is difficult to make use of it in devising a no-fault compensation system based on a principle of compensating for lost earnings. As described here it meets many of the objections that have been expressed to “the loss of services approach” to the compensation of non-earners, but it may well be complex and potentially expensive to administer (see New South Wales Law Reform Commission, *Working Paper on A Transport Accidents Scheme for New South Wales* (1983) para 7.18). The Working Paper, while offering the approach as one option to consider in implementing its “tentative view that some compensation should be provided to non-earners in respect of loss of earning capacity caused by accident injury” (para 7.12), therefore offered three other options as well. These are to pay the injured person a flat rate benefit (para 7.13), which may be fixed at the rate of the maximum pension or benefit for a person of the age of the injured person under the Social Security Act (para 7.15) or to pay a benefit intended to replace the income the injured person could have been expected to earn but for the injury but which, for reasons of administrative simplicity, might be fixed at a set proportion of average weekly earnings depending on the age of the injured person at the date of the injury (paras 7.19-7.21). Special provisions, however, would enable an individual assessment of the likely earnings of recent school leavers or graduates of training programs who were actively seeking work at the time of injury, and of students in advanced training (paras 6.16-6.19). In the result, the principle of *Sharman v Evans*, that the contingency of withdrawal from the workforce be ignored, is applied and extended to cover such cases as *Richardson v Schultz*. On the other hand the injured girls in such cases as *Priest v Turl* and *Larner v Welland* would have their lost earning capacity assessed according to one of the three options outlined, as would the injured married woman out of the workforce at the date of injury in *Hallowell v Nominal Defendant*. If either the flat rate or the social security option is chosen then the disparities between such cases will be potentially great (though no greater than the common law still often permits); if the “standardised value” assessment of the lost opportunity principle is chosen the discrepancies will be much (and perhaps dramatically) reduced. The reduction may in fact be very great for this option, since the proposal described in the Working Paper would pay to the victims of total incapacity for paid work over the age of



twenty five 62.5% of the average weekly earnings for *all* New South Wales employees, including overtime, shift allowances and penalty rates as well as ordinary time earnings for both full-time and part-time employees (para 5.15). Bearing in mind that average weekly earnings for women in full time employment are lower than for men, the opportunities for overtime less and the incidence of part time employment higher, that represents a significantly higher proportion of the average weekly earnings for employed women than the 62.5% of the average for the whole working population (for the September 1983 quarter it would have been almost exactly 85% in New South Wales). Compensation on such a scale under this head will certainly look generous in the case of an injury to a full time homemaker that causes a temporary total incapacity. Very clearly the problems of assessing what sum to award in cases of partial incapacity, whether permanent or temporary, will cause administrative difficulties, since the award should be based on the difference between the standardised proportion of average weekly earnings and the work which the homemaker could obtain if she wished to engage in paid work given the extent of her incapacity (there is no other way of dealing with the difference between a person who can only work for 70% of a full week and a person who can only work in 70% of the jobs previously available). On the other hand, if sums similarly calculated are subtracted from a flat rate or "social services" benefit the amount receivable may well rapidly become nominal.

None of the options proposed, with the possible exception of some versions of the flat rate benefit, seems less generous than the common law as it is presently understood in New South Wales. Nevertheless, putting the three options just described as alternatives to the "lost services" option seems misconceived in principle. The Working Paper acknowledges the double burden of lost or impaired capacity where there has been participation in the commercial and the domestic economies but nevertheless makes a conscious recommendation not to compensate for loss or impairment of the capacity for work in the domestic economy (paras 6.35-6.37). It offers as its reasons administrative difficulty in assessing an award and overall cost. The letter, on its own, is no reason at all; a major part of constructing no-fault schemes is to review the priorities as to which losses should be compensated and which not; and the fact that the common law in one State does not provide for damages under a particular head does not solve the issue for a scheme which is to provide an Australia-wide model. However, once the decision has been made that such losses will not be compensated for injured persons in the commercial economy it follows that they should not be for those outside it. It is very hard to see how the "lost services" option could be applied to persons not in the paid workforce at the time of their injury but not applied to those who provide similar services while participating in it. It is not an alternative to a principle for compensating for lost earnings: but is in its nature cumulative upon it, and once it has been decided that the services themselves are not worthy of being made good it will necessarily follow, in an earnings related scheme, that homemakers are likely to be entitled to so very much less than people in the paid workforce that the result may be unacceptable and that artificial levels of deemed earnings are provided to lessen that degree of unacceptability. If it is impossible to evaluate the likelihood of an individual returning to the workforce so that a standardised formula becomes necessary the

formula chosen can presumably relate the age and sex of the injured person to the extent of labour force participation and average weekly earnings for the group to which he or she belongs, a conscious decision may be made to move towards equality of treatment between the person injured and another injured while in the full-time workforce, or a conscious decision may be made to accord the compensation of such people a low priority. If administrative difficulties and potential cost are thought to preclude choosing the first of these and compensating people for their real loss in ability to contribute to the domestic economy then the second seems to have much to commend it in order to prevent major injustice from occurring. But, in such a case, the scheme would adopt a strategy only indirectly related to the objective of proper compensation and could expect confusions and misunderstandings arising from its second best nature to follow.

### (3) POSTSCRIPT

The attempts of the courts to reassess and modify the practical operation of the principle that damages are intended to restore the injured person to pre-accident circumstances as far as money can achieve that end (of which the cases discussed in this Comment are a part) have provoked Murphy J to argue on more than one occasion (for example, in *Sharman v Evans*, *Todorovic v Waller* and *Redding v Lee*) that the damages awarded by the courts do not meet the full social costs of the accidents that have been caused, and that, in general, principles should be applied and developed so that awards of damages should come closer to meeting those social costs. It is not wholly clear what Murphy J means by the phrase "social costs", but the language and general approach have obvious parallels with the approaches of some of the earlier major contributors to the economic analysis of the law of torts. The economic goal of accident law is taken to be to minimise the sum of accident and accident prevention costs. This leads on to Posner's account of the negligence formula: the defendant is negligent if the loss caused by the accident, multiplied by the probability of its occurring, exceeds the costs of the precautions that the defendant might have taken to avoid it (*Economic Analysis of Law* (2nd edn 1977) §6.2). It follows that, if this formula is to be applied usefully so as to achieve the object of minimising the overall cost of accidents, the method of calculating the losses must be such as to further that objective. It is not proposed here to rehearse the range of criticisms of the formula and its application, but merely to state briefly that the common law theory of *restitutio in integrum* cannot achieve that object.

It must be admitted that it is very difficult to be able to identify with any precision precisely what theory of damages this version of the economic analysis of law requires. Calabresi, for example, appears to hover between the position that since the importance of awards of damages does not lie in their compensating function "individual misvaluations are not too important as long as on the average the valuations do represent the cost of (injuries brought about in a particular way) to society", and the contrary view that since the victim will adjust the cost of precautions to a perception of the loss that will be left on him it will be inefficient to miscalculate the costs of the injurer taking or refraining from a particular precaution (*The Costs of Accidents* (1970) ch 9. On the whole both Calabresi and Posner accept the view that damages for loss of earning capacity and extra expenses are calculable,

and Posner is explicit that the proper criterion to use is an opportunity cost concept (*Economic Analysis of Law* s6.13). The valuation of pain, suffering and loss of amenity is obviously much more difficult and here Posner acknowledges that the proper criterion to adopt should be based on an *ex ante* approach of assessing how much a potential victim would accept to undergo the risk of injury. It is again not proposed to discuss the issue of whether or not an *ex ante* approach is the proper one to adopt for all aspects of the law of damages, what it demands, and whether the fact that it is not adopted is in itself fatal to the thesis of the efficiency of the common law (see Veljanovski, “*Economic Myths About Common Law Realities: Economic Efficiency and the Law of Torts* (1979) 22-23). The much more limited point is that almost every issue that perplexes Australian and English courts in the assessment of damages emphasises the difference between the concept of *restitutio in integrum* and any concept of opportunity cost. An elementary checklist of such issues begins with the principle from *Graham v Baker* that “an injured plaintiff recovers not merely because his earning capacity has been diminished but because the diminution of earning capacity is or might be productive of financial loss” ((1961) 106 CLR 340, 347). To adapt Posner’s analysis: if the plaintiff in *Forsberg v Maslin* (1968) SASR 432 preferred speedway racing to his other employment it must have been worth at least as much as any other work he could have performed to him (*Economic Analysis of Law*, 145). To agonise over whether to compensate for the lost earnings of the lost years as the courts did in *Skelton v Collins* (1966) 115 CLR 94, even in a survival of cause of action claim on the part of the estate of a deceased person who had no dependants (*Fitch v Hyde-Cates* (1982) 39 ALR 581), merely indicates unnecessary doubts as to the validity of the lost opportunity principle. Damages awarded under the *Griffiths v Kerkemeyer* principle and to compensate for the loss of services of a housewife should be valued not on the basis of market costs — let alone modified market costs — but on what the provider gave up to provide the services in the former case and the value that her services would have commanded in an alternative use (the *Sharman v Evans* principle should be applied to all homemakers, not just potential homemakers who may now never assume the role). It is axiomatic that collateral benefits be disregarded in the calculation of damages, since the efficient measure of care required by those engaging in any particular activity could not be reached if the losses they help to bring about can be externalised (*Economic Analysis of Law* s6.15). On this basis the decision to use post-tax earnings as the measure of loss of earnings (*Cullen v Trappel* (1980) 146 CLR 1) is as wrong as it is to deduct unemployment benefits from the award (*Redding v Lee, Evans v Muller* (1983) 47 ALR 241) or to commit the injured person to subsidised institutional care rather than more expensive and unsubsidised domestic care (*Sharman v Evans*).

The reason for this is that the purpose of trying to put the injured person in the same position after the accident as before to the extent that money can do it is to compensate for violation of a right to personal security and that depends essentially on a comparison between what the person would have done but for the injury and the position as it is after it. Money that the person would never have seen (through possible incapacity, lack of desire to participate in the paid workforce, or the operation of the taxation system) is not, in principle, to be compensated for; hence the agony of the lost years debate. If money or

services are provided after the accident certain "difficulties" (as Mahoney JA might describe them) are not felt; that is why the area of collateral benefits is difficult and the results it reaches often criticised. Whenever the courts in Australia and England are led to compensate for potential losses, rather than for lost earnings, extra needs, pain and changes to lifestyle that will actually be experienced by the plaintiff, they show signs of discomfort. They may feel compelled into doing so, but they rarely do so cheerfully.

From this perspective Murphy J's criticisms of the law of damages for personal injury fall naturally into two main areas. First, the law simply does not achieve the goals that it sets itself. On this point his analysis has not been refuted and has increasingly been vindicated. Secondly, the goals that it sets itself are too limited and should be differently defined. Elaboration of this point would require consideration of substantive principles of tort law as well as of the law of damages — in particular, the reluctance of the common law to deal generally with "ricochet" damage (cf his judgment in *Caltex Oil v The Dredge "Willemstadt"* (1975-1976) 136 CLR 529). This obviously raises very much broader issues. For even if one is prepared to accept Posner's definition of negligence, even in its more complete form (which would run something like "in a world of incomplete information the cost of accident prevention being correctly calculated at less than the cost of the injury multiplied by the chance of its being inflicted multiplied by the chance of a completely successful claim ever being brought in a system which systematically burdens the injured person with nearly every risk in the decision-making process") the reluctance of the courts to base damages in personal injury cases on opportunity costs must support the conclusions of, for example, Calabresi and Veljanovski that in this field the common law in Australia and England simply is not efficient in Posner's sense. What is more, our collective decision-making processes over the years have, as he would expect, tended to reinforce its inefficiencies. Obviously in looking at the funding of any schemes that compensate for physical incapacities it is necessary to look to their origins in attempts to improve accident prevention and deter unnecessary risks taking; but the dragon of that particular interpretation of allocative efficiency has not hitherto prevented courts or legislatures from dealing in fairly generally defined distributional issues in determining liability rules and assessing compensation for personal injury. Nor should it deter present attempts to improve our understanding and treatment of those distributional issues.