12/79

No. 29 of 1978

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

BETWEEN:

CHRISTOPHER BERNARD THOMPSON (Defendant)
Appellant

- and -

KARAN FARAONIO (Plaintiff)
Respondent

RECORD OF PROCEEDINGS

MESSRS BARLOW LYDE & GILBERT
Drake House
3/5 Dowgate Hill
London
EC4R 2SJ

Solicitors for the Appellant

MESSRS. SIMONS, MUIRHEAD & ALLAN
40 Bedford Street
Covent Garden
London
WC2E 9EN

Solicitors for the Respondent

NO. 29 of 1978

IN THE PRIVY COUNCIL

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Appellant

- and -

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Defendant

RECORD OF PROCEEDINGS

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DOCUMENTS NOT INCLUDED IN THE RECORD OF PROCEEDINGS

NO.	Description of Document	Date
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1.	Appearance of Christopher Bernard Thompson.	22nd September 1975
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2.	Originating Summons to remove action to Supreme Court.	2nd September 1976
3.	Affidavit of John Ambrose Daenke	1st September 1976
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EXHIBITS

No.	Exhibit Mark	Description of Document	Date
15.	P1	Reports from Doctor James Donald Sidey	22nd July 1974 3rd October 1974 20th August 1975 26th July 1976 12th August 1976 4th May 1977 20th September 1977 4th November 1977
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17.	P3	Actuarial Certificate prepared by Campbell Cook and Stratford	11th November 1977
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No. 29 of 1978

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

BETWEEN:

CHRISTOPHER BERNARD THOMPSON (Defendant) Appellant

- and -

KARAN FARAONIO (Plaintiff) Respondent

RECORD OF PROCEEDINGS

NO. 1

ORDINARY SUMMONS

LOCAL COURT SUMMONS DATED 1ST SEPTEMBER, 1975

NO. 3 - ORDINARY SUMMONS

CLAIMS EXCEEDING $2,500

SOUTH AUSTRALIA

IN THE LOCAL COURT OF ADELAIDE

No. 31689

In the Local Court of Adelaide South Australia

No. 1

Ordinary Summons 1st September 1975

In the Local Court of Adelaide South Australia

No. 1

Ordinary Summons 1st September 1975

(Cont'd)

BETWEEN

KARAN FARAONIO Home Duties
of 28 Hallett Road, Wattle Park
Plaintiff

and

CHRISTOPHER BERNARD THOMPSON Clerk
of 17 Bennett Street Hilton
Defendant

YOU ARE HEREBY summoned to answer the plaintiff's claim, of which particulars are set out hereunder (or annexed hereto). If you admit the claim, you can pay the amount set out hereunder to the plaintiff or his solicitor (in which event you need not pay the fee for receiving and paying into and out of Court) or you may pay the Clerk of this Court (in which event the full amount must be paid). If you dispute the whole or any part of the claim which is made, or the amount of damages claimed or if you have a set off against the claim or if you have a counter-claim against the plaintiff you must file a notice of appearance in duplicate with the Clerk of this Court within six days of the service on you of this summons and also file your defence in duplicate with the Clerk of this Court within fourteen days after filing the notice of appearance. The defence shall state any of the matters of defence referred to in Rule 67 of the Local Court Rules upon which you intend to rely including any set off or counter-claim. You will not receive any further summons. If no damages are claimed by the plaintiff and you do not file a notice of appearance and also file a defence set off or counter-claim judgment may be signed and execution issued against you immediately. If damages are claimed and you do not file a notice of appearance and also file a defence you will not be allowed to deny your liability but will be heard only upon the amount of damages sustained by the plaintiff

DATED this 1st day of September 1975.

To the abovenamed Defendant.

L.S. (Sgd.)
Clerk of the Court

	$	c
Claim	20000	00
Cost of Summons and Service $6 + $1-50 Mileage.	7	50
Solicitor's Fee	130	00
Receiving and Paying into and out of Court	1	00
Total Amount of Plaintiff's Claim	20138	50

PARTICULARS OF CLAIM

(annexed hereto)

GENDERS WILSON & PARTNERS
Per: (Sgd.) J.A. Daenke
123 Waymouth Street,
Adelaide,
Solicitors for the Plaintiff.

PROOF OF SERVICE

I, of

a person employed (or appointed) by the Plaintiff for the purpose of serving this summons, make oath and say that I did on the day of , 19 , between the hours of and duly serve the within-named defendant with this summons -

(a) by delivering a copy thereof to him/her personally at

or

(b) by delivering a copy thereof at his/her dwellinghouse/place of business at with some person there apparently above the age of fourteen years:

or

(c) by delivering a copy thereof at

In the Local Court of Adelaide South Australia

No. 1

Ordinary Summons 1st September 1975

(Cont'd)

(address)
. , the principal place within South Australia of the business of the partnership being a firm upon a person having apparently, at the time of service, the control or management of the partnership business there;

or

(d) (where the defendant is a company) by leaving a copy thereof at the registered office of the defendant at .

and that I necessarily made trips and travelled kilometres in all for the purpose of effecting such service.

.....

SWORN before me at
the day of , 19 .

.....J.P.

WE accept service of this Summons on behalf of the Defendant and undertake to appear in accordance with the exigencies thereof.

Baker, McEwin, & Co.
per: (Sgd.)

16/9/1975

Solicitors for the Defendant.

APPEARANCE TO SUMMONS

A defendant desirous of contesting a plaintiff's claim shall file an appearance in duplicate with the Clerk of the Court and shall pay the prescribed fee of $1.50. This fee must be forwarded with the appearance.

PARTICULARS OF CLAIM

1. On or about Saturday the 11th day of May 1974 at approximately 11-15 a.m. the plaintiff was travelling as a passenger in a Mercedes Benz sedan registered number S.A. RTZ-184 driven by Michael Faraonio in a westerly direction along Henley Beach Road approaching the intersection of Henley Beach Road and Haywood Road Torrensville in the State of South Australia.

2. At the same time the defendant was driving a Toyota motor car registered number S.A. 594-506 in a westerly direction along Henley Beach Road to the rear of the car in which the Plaintiff was a passenger approaching the said intersection.

3. The vehicle driven by the defendant collided with the vehicle in which the plaintiff was a passenger.

PARTICULARS OF NEGLIGENCE OF THE DEFENDANT

The defendant was negligent in that he:

(a) drove at an excessive speed in the circumstances.

(b) failed to keep any or any proper lookout.

(c) drove without due care or attention or reasonable consideration for other persons using the road contrary to the provisions of the Road Traffic Act 1961 as amended.

(d) failed to have his said vehicle fitted with proper or sufficient brakes or alternatively failed to apply such brakes.

(e) failed to stop slow down swerve or otherwise manoeuvre his said vehicle so as to avoid the collision.

In the Local Court of Adelaide South Australia

No. 1

Ordinary Summons 1st September 1975

(Cont'd)

(f) travelled too close to the vehicle in front.

The plaintiff will rely on all such other negligent acts or omissions on the part of the defendant as are at present unknown to her but which may be discovered by her at or before the trial.

4. As a result of the said collision the plaintiff suffered personal injury loss and damage.

PARTICULARS OF PERSONAL INJURY LOSS AND DAMAGE

The plaintiff suffered personal injury including a whiplash type injury of the cervical spine and pain in her legs. X-rays of her neck were taken. The plaintiff was given a neck collar at the Royal Adelaide Hospital and was sent home to return a fortnight later for another x-ray and further outpatient treatment.

The plaintiff continues to suffer from disabilities including pain in the neck, weakness, and pain in the arms particularly when lifting or carrying objects.

As a result of her injuries the plaintiff had difficulties in carrying out her duties as a housewife, as an Honours student at the Adelaide University, and in helping her husband with his business.

The plaintiff suffers and will continue to suffer from pain and restriction of movement in her neck and pain and stiffness in that area. She will require treatment from time to time.

The Plaintiff has suffered and will continue to suffer a loss of enjoyment of life. The plaintiff has suffered a loss of earning capacity.

SPECIAL DAMAGES (to date)

Dr. J.D. Sidey	$ 60.00
Royal Adelaide Hospital	11.50
Domestic Assistance	760.00
Physiotherapist	74.10

Dr. Verco	$	20.00
Blood test		14.50
Chemist (estimated)		25.00
Travelling expenses (estimated)		75.00
	$	1040.10

AND the plaintiff claims damages.

In the Local Court of Adelaide South Australia

No. 1

Ordinary Summons 1st September 1975

(Cont'd)

NO. 2

ORDER OF THE HONOURABLE MR. JUSTICE WALTERS DATED THE 17TH DAY OF SEPTEMBER, 1976.

In the Supreme Court of South Australia

No. 2

Order of the Honourable Mr. Justice Walters

17th September 1976

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 1397 of 1976

IN THE MATTER of an Action in the Local Court of Adelaide No. 31689 of 1975 wherein KARAN FARAONIO was Plaintiff and CHRISTOPHER BERNARD THOMPSON was Defendant

and

IN THE MATTER of the Local and District Criminal Courts Act 1926 as amended

Between

KARAN FARAONIO Applicant

and

CHRISTOPHER BERNARD THOMPSON Respondent

In the Supreme Court of South Australia

No. 2

Order of the Honourable Mr. Justice Walters

17th September 1976

(Cont'd)

BEFORE THE HONOURABLE MR. JUSTICE WALTERS IN CHAMBERS
FRIDAY THE 17TH DAY OF SEPTEMBER 1976

UPON THE APPLICATION of the abovenamed Karan Faraonio of 28 Hallett Road, Wattle Park in the State of South Australia by Originating Summons dated the 2nd day of September 1976

UPON READING the affidavit of JOHN AMBROSE DAENKE filed herein on the 2nd day of September 1976

AND UPON HEARING Mr. Gray of Counsel for the applicant and Mrs. Lawson of counsel for the respondent

AND counsel for the respondent not opposing the said application

AND pursuant to Section 54 of the Local and District Criminal Courts Act 1926 as amended

IT IS ORDERED

1. That the action in the Local Court of Adelaide No. 31689 of 1975 wherein the abovenamed Karan Faraonio was plaintiff and the abovenamed Christopher Bernard Thompson was defendant be removed from the said Local Court into this Court to be tried as an action in this Court in the same manner as if it had been originally commenced therein.

2. That the applicant do forthwith serve an office copy of this order upon the Clerk of the said Local Court and that the Clerk of the said Local Court do forthwith upon such service send to this Court the said action with all things touching the same as fully and entirely as it now remains in the said Local Court.

AND the following directions are hereby given

AND IT IS FURTHER ORDERED

3. That the particulars of claim indorsed on the Local Court Summons do stand as the statement of claim in this Court.

4. That interlocutory judgment be entered in the action for the plaintiff for damages to be assessed.

5. That the plaintiff be at liberty to enter this action for assessment of damages.

6. That the question of costs be reserved for the trial Judge.

AND the parties may be at liberty to apply as they may be advised.

FIT for Counsel

(Sgd) M. Teesdale Smith
DEPUTY MASTER

THIS ORDER is filed by GENDERS, WILSON AND PARTNERS, of 123 Waymouth Street, Adelaide. Solicitors for the applicant.

In the Supreme Court of South Australia

No. 2

Order of the Honourable Mr. Justice Walters

17th September 1976

(Cont'd)

No. 3

REASONS FOR JUDGMENT OF HOGARTH J.

In the Supreme Court of South Australia

No. 3

Reasons for Judgment of the Honourable Mr. Justice Hogarth

7th December 1977

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 1397 of 1976

BETWEEN

KARAN FARAONIO Plaintiff

and

CHRISTOPHER BERNARD THOMPSON Defendant

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE HOGARTH DATED THE 7TH DECEMBER, 1977.

On the 11th May 1974 the plaintiff was travelling as a passenger in a motor car driven by her husband along Henley Beach Road.

The car became stationary at an intersection, and was struck from behind by a car driven by the defendant; and it was pushed forward and collided with a stationary car in front of it. The plaintiff suffered injuries for which she claims damages. The defendant admits liability, and interlocutory judgment was entered in favour of the plaintiff on the 17th September 1976. The action has now come on for assessment of damages.

The plaintiff was born in Hamburg, Germany on the 30th November 1933, and is therefore just 44 years old. She came to Australia in January 1953. She was married shortly afterwards, but her husband was killed in a road traffic accident. In 1956 she married her present husband, by whom she has had two children, both girls. The first child was born spastic, and is now in an institution, blind and deaf. The other child is aged about 13.

The plaintiff passed her matriculation examination in Germany before coming to Australia. After coming here she worked for a time with Elder Smith & Co. Ltd. as a secretary. Later she nursed at the Queen Victoria Hospital and the Royal Adelaide Hospital and the Yorketown Hospital. While doing this she sat for some examinations, for what course is not clear; but whatever it was she did not complete it. She gave up nursing when she remarried. After the birth of the spastic baby she was fully engaged looking after it for about 4 years. She then again took on work as a secretary and also as a nurse in country hospitals until she became pregnant on the second occasion. Her second daughter was born in 1964, and following this she again did not work for about a year. At about this time her husband began his own building construction business, and she did secretarial work for him. She then became employed as a part-time teacher in the Education Department, teaching German and some English at the Enfield High School. She realised that she needed better qualifications in order to progress in this walk of life, and she started to study part time in the Faculty of Arts at the University of Adelaide. Eventually, in 1974 (the year of the accident) she decided to complete her Honours B.A. degree, and gave up teaching for that year in

order to study full time. The accident, as I have said, occurred in May, and in spite of it she was able to complete her degree at the end of the year. In the following year she obtained part-time employment as a teacher at Thornton High School (working six tenths of full time) and has continued to be employed in that capacity ever since. She now works three days on mornings only; she has the whole of Thursday free; and she does a full day's work on Friday. The work involves the movement of some heavy equipment which the plaintiff finds difficult so that, on occasions when it is practicable, she seeks assistance from the Students. She intends to continue teaching to the best of her ability. She complains, however, that the effects of the accident have continued, with the result that she is unable to work full time as she would like to do. She has pain more in cold weather than when the weather is warm. She complains that she is limited in her social and sporting activities, and that she suffers from headaches and has to rest after doing her morning's work at the school. She is unable to participate in after-school staff conferences, or in attending camps organised by the school. She gets depressed, especially in the winter when the pain is worse.

The motor car in which the plaintiff was travelling at the time of the accident was not fitted with head rests. The plaintiff was thrown forward, and hit her head on the windscreen; and she was (in her own words) "swivelled" to the left. After the accident she got out of the car, feeling very shocked, and she vomited. She said that she was shaking and shivering and quite incoherent for a while. Later in the day her neck became very painful, and she was taken to the Outpatients Department of the Royal Adelaide Hospital. She was there given a cervical collar, and told to rest, which she did. Two weeks later she returned to the hospital and was seen by Mr. Cabrera, an orthopaedic surgeon. He told her that she should remove

the collar, and rest, which she did, until she received contrary advice from Mr. Sidey in July, after which she wore it again until the end of 1974. After then she did not wear it in public. She was told at the Outpatients Department that the neck might take up to a year to settle down, and she assumed that she would have to put up with the existing pain during that time. She suffered pain in the neck, radiating towards her face; and in both arms. She suffered also from headaches. The pains in the neck, the headaches still persist, though to a less degree. It appears that she did not at any time consult her general practitioner in relation to her neck. At any rate, he was not called. There is, however, a medical centre at the University where she saw a Dr. Heddle (who also was not called) and, it would seem, acted on his advice from time to time. She also had physiotherapy during 1974 when she felt particularly bad.

The first detailed evidence I have of her condition followed an examination at the instance of her solicitors, carried out by Mr. Sidey, a general surgeon, on the 10th July 1974. He conducted the examination on the basis that it was for a report, and he did not regard himself as involved in recommending treatment. Nevertheless, when she returned to him as she did on several later occasions, it seems that he gradually took to advising her as to the best course of action.

When Mr. Sidey first examined her in July 1974, he detected tenderness over the spines of the 6th and 7th cervical vertebrae and also over the spine of the 4th thoracic vertebra. There was no associated muscle spasm, no deformity and no evidence of any abnormality of movement. The neck was not stiff at all and there was a free range of painless movement. Examination of the arms, however, showed that she was suffering from pain from shoulder to elbow, and to a less extent, to her hands. Mr. Sidey was and remains, of the view that she should have persisted with the wearing of the cervical collar, and thought that if she had continued to do so, her symptoms would largely

have disappeared by the time he first saw her. He thought that she should have regular physiotherapy two or three times a week, and that she should persist with exercises to strengthen her neck, even at the expense of taking up time which she wanted to devote to her studies. This report was sent to her solicitors and Mr. Sidey did not give this advice direct to the plaintiff. It was following this examination that she started having physiotherapy.

In August 1975, Mr. Sidey found that neck movement was still restricted, particularly in rotation in either direction, both rotation movements appearing to be equally restricted. Arm reflexes were normal and equal, and there was no evidence of muscular wasting or sensation loss, but there was tenderness over the posterior triangles in the region of the neural foramina on both sides. At that time Mr. Sidey expressed the opinion that, as is often the case following this sort of accident, the plaintiff had been left with some permanent residual disability. Although he thought she had improved to a considerable extent, the improvement was partial only. In February 1976, he found her neck movements still restricted, especially in rotation, and found some tenderness over the posterior aspect of her neck low down, with associated muscle spasm. He felt that most of the neck stiffness was due to adhesions consequent on her long period of relative inactivity.

In September 1977, Mr. Sidey found no real abnormality apart from some tenderness over the spines of the 7th cervical and the 4th thoracic vertebrae. By this time he did not think that there was any residual stiffness in the neck. The plaintiff's condition had substantially stabilized. He thinks that for the foreseeable future, that is for the next year or eighteen months or perhaps two years, the plaintiff will only be able to continue doing six tenths time; but with the gradual passage of time he thinks that she may be able to find that she can work to a greater extent.

He said that it is doubtful whether she will ever be able to get back to full time work again. As against this, he does not expect there to be any deterioration in her condition.

The plaintiff also called evidence from an orthopaedic surgeon, Mr. M. R. Hone. He saw the plaintiff on two occasions; the first at the request of the defendant's solicitors, and the second at the request of her own solicitors. The first occasion was on the 12th March 1975, and the second, on the 20th October 1977. On his first examination he found that there was gross restriction of movement in the cervical spine, with at least 50% loss of movement. He detected tenderness over the 5th and 6th cervical spines. He found no abnormalities in the arms. He concluded that the plaintiff was suffering a ligamentous injury to her cervical spine. The fact that she had had no further treatment other than the collar had resulted in the neck becoming very stiff which he thought had resulted in a perpetuation of her symptoms of pain in her neck and possibly even the symptoms that she experienced at one time in her arms. He recommended physiotherapy, and thought at that time that the condition would continue for at least two to three years.

When Mr. Hone saw her on the second occasion, in October 1977, he found that she was tender over the 5th cervical spinous process, and that movements of her cervical spine were limited on lateral flexion and rotation to the left. He thought that the plaintiff had remained much as she was when he first saw her in 1975. He now considered it obvious that the plaintiff's disabilities would continue longer than the 2 or 3 years he had originally estimated. He thought that the condition might settle after a number of years. He concluded however, "Her condition is now stable and although she is unlikely to improve she is unlikely to deteriorate". Mr. Hone is of the opinion that although she could literally carry out full time teaching, she would suffer pain if she did; as she would also if she did work such as carrying heavy

equipment, or doing work involving raising her arms over her head. He thinks that there is nothing to stop her doing household chores, taken in isolation. But in combination with her teaching work he thinks that the accumulation would cause her difficulty and pain, and even might incapacitate her.

Both Mr. Sidey and Mr. Hone accept the genuineness of the plaintiff's complaints and clearly regard them as having an organic basis.

The defendant, called two doctors; Mr. Cabrera, the Orthopaedic surgeon who first saw the plaintiff at the Outpatients Department soon after the accident, and a psychiatrist, Dr. Jagermann. Mr. Cabrera made no reference to his having seen the plaintiff in the Outpatients Department, but in his evidence referred to examinations which he had carried out in August and November 1977. He found mild tenderness in the cervical region of the spine and also in the region of the 3rd and 4th thoracic vertebrae. He found only slight restriction of spinal movement without evidence of any muscle spasm, and found no injury or damage to any of the spinal nerves. By the time of the August examination he concluded that the plaintiff's condition had reached a stable state, and he expected no change in the near future. He thought that there was a distinct possibility of intermittent or gradual improvement over a long period. As against this, he did not expect any significant complications or deterioration in her condition. He expected that she would continue to have some annoying symptoms, especially with physical activity, which might make it difficult for her to cope with full time work. He thought however that it would not be impossible for her to undertake full time work. He said that he based his opinion, to a great extent, upon the information given to him by the plaintiff. When Mr. Hone's opinion was put to him, as to her ability to carry out full time teaching,

but suffering pain if she were to do so, Mr. Cabrera said that he would not disagree. In general, therefore, I accept the evidence of Mr. Cabrera as being consistent with that of Mr. Sidey and Mr. Hone.

Dr. Jagermann examined the plaintiff once only, on the 6th October 1977, at the request of the plaintiff's solicitors. He came to the conclusion that the plaintiff has probably suffered from hysterical elaboration and prolongation of whiplash injury complaints. He thought that she had a tendency towards hysterical behaviour which had probably existed before the time of the injury, and that the injury at most promoted an aggravation of this condition. He thought that the plaintiff had emotional shallowness which had been established earlier; and commented that a complaint of pain is frequently maintained by hysterical behaviour that may be the main agent for its continuation. He commented further, with reference to Mr. Sidey's prediction that it was quite possible that the unpleasant symptoms may never disappear completely that the plaintiff's nature rather than the accident might be basically at fault. Venturing into the difficult legal sphere of causation, he said, "This diminishes the strength of the claim for compensation". He estimated that the potential period for the disappearance of residuary symptoms would be less than the 5 years predicted by Mr. Sidey.

The plaintiff said in evidence that she did not realise that she was being interviewed by Dr. Jagermann as a psychiatrist. She arrived late for her appointment, and felt the doctor was put out by this. From the contents of a report which the doctor prepared and which was tendered in evidence, I feel that the plaintiff's belief was a reasonable reaction, since in his report Dr. Jagermann continually comes back to the fact of her being late and of her reaction (or lack of appropriate reaction) to it. She said that she was afraid of him and that she did not always tell him the truth.

I think that her interview with Dr. Jagermann was unsatisfactory both from his and from her point of view. In the circumstances of her reaction to the doctor, which would probably be unknown to him, the reactions which he observed on her part would not necessarily be her normal reactions; and consequently, any opinions which he based upon them would tend to be distorted.

I have had a much longer opportunity of observing the plaintiff as she gave evidence, both in examination in chief and under cross examination. Although I am not a trained psychiatrist, I feel competent to say that she did not display any of the shallowness of emotion which seemed to impress itself upon the doctor; and I observe that Mr. Sidey, who has seen her on a number of occasions, in effect accepts her complaints as being factual.

In short, in spite of Dr. Jagermann's opinion, I am satisfied on the evidence of the orthopaedic specialists that the pain and disability which the plaintiff is now suffering is of organic origin caused by the injuries which she sustained in the accident. From her conduct in going back to work so soon, and in continuing to work, and from her demeanour, I am satisfied that she is doing her best to return to her former way of life. Indeed, she has displayed a much greater determination to continue her career, than is to be seen in most victims of accidents who are still suffering from substantial disabilities. No doubt she finds her present restrictions distressing; and I accept her evidence to the effect that, being unable to participate in sport such as tennis, she has lost contact with people whose company she enjoyed when their mutual bond was playing tennis, even though only in a social way. I do not put much weight in her complaint that she no longer plays hockey. I would not expect her to continue to play that most strenuous game long after the age of 40. I think that her present disabilities would interfere with her water

skiing; but I am not satisfied that she would not be able to undertake snow skiing, from a physical point of view, although she may be afraid that an accident would cause further damage and further pain.

I think that the greatest disruption to the plaintiff's way of life arises from her becoming exhausted after half a day's work. I accept the evidence of the orthopaedic specialists to the effect that physically she would be able to do a full day's work, but at the cost of pain; and I think it fair to assume that, if she worked to this extent, the pain which she would suffer would interfere substantially with her efficiency in teaching, so that both she and her pupils would suffer. I think it reasonable that she should confine herself for the present to six tenths time teaching as she does, and do it well, rather than try to prolong it and do it badly, with the possibility of rendering herself unable to work at all.

I do not overlook the fact, of course, that she still helps her husband in some of the book work associated with his business. I accept his evidence, however, that she now does less, and in particular does not want to have the interference of business telephone calls, so that he has arranged for his name and telephone number not to be published in the telephone directory.

The defendant made four principal submissions: first that the plaintiff did not mitigate her damage, and that had she done so she would have been able to teach full time long ago; secondly, that in any event, she is now, and has for some time, been fit to work full time; thirdly, that if she is not, then it is due to her pre-existent hysterical personality; and fourthly, that certainly she will be able to work full time in the fairly near future.

The first of these four submissions was based upon the fact that the plaintiff did not continue to wear her cervical collar continuously.

I find, however, that she was not unreasonable in doing what she did, as, on her evidence, when she removed it on occasions, she did so with the approval of Mr. Cabrera whom she had seen at the Outpatients Department. Although Mr. Cabrera gave evidence, he was not asked any questions on this topic, and I assume that the defence does not challenge the accuracy of the plaintiff's evidence on this aspect. Acting, as she did, on a doctor's advice, I do not think it can be said with fairness that she was unreasonable, or that her action in removing the cervical collar meant that she was not doing her best to mitigate her damage.

For the reasons which I have already given, I do not accept the defendant's second and third submissions. This leaves the most difficult question of all, whether the plaintiff will be able to work full time in the fairly near future, or indeed at all.

I find that the work at present being done by the plaintiff, namely, six tenths time at teaching and some clerical aid to her husband (which is less than she performed before the accident) together with some household chores are from a practical point of view as much as she can do properly. Since the accident she has been having household help, and a claim has been advanced on her behalf for the cost of that help. But I think that if she were working full time, and also helping her husband in his secretarial work, she would still require household help; and for me to allow damages under the heading of household help now, in addition to damages for inability to work full time, would amount to duplication. I therefore do not propose to make any allowance for the household help which she has employed after the immediate results of the accident had passed. Before the accident she had no household help, and was coping with her University work, in addition to doing the household chores. I make an allowance for the cost of household help from the time of the accident until February 1975. I think that the household help employed during

that time was employed because of her incapacity. From that time, as I have said, had she been able to work full time, I am satisfied that she would have employed household help in any event. I realise that there have been school holidays since that time when she has not been working at school, and when she nevertheless has had household help; but I think that, having engaged household help, had she been engaged in full time work, it is unlikely that she would have interrupted the employment of the household help during those periods in any event.

The plaintiff did not lose any wages or salary during 1974, while she was a student at the University. I am satisfied on the balance of probabilities that had she been physically able to do so she would have been able to obtain full time employment with the Department of Education at the beginning of the school year in 1975, and that she would have continued as a permanent member of the staff of that department doing full time work. It follows that she has lost the difference between her salary as a full time employee of the department, and her actual salary, from the beginning of February 1975, to the present time. I accept the evidence of Mr. Sidey that this state of affairs will continue for at least another eighteen months or two years, after his examination of the plaintiff in September 1977, and make allowance for that accordingly. In the ordinary course, I think it probable that the plaintiff would have continued to teach full time until the age of 60, or perhaps after that age. The onus is upon the plaintiff to prove the extent of her loss; and I think that I must assume that after about the middle of 1979 she will probably be able to work eight tenths time instead of six tenths time; but that she will never be able to work full time.

I was provided with evidence from the Education Department, in the form of a letter which was admitted by consent, as to the earnings of the plaintiff since she re-commenced employment with the department at the beginning of 1975, up to the 1st September 1977. The figures are set out in detail in exhibit P1. During that time she actually received (net

after tax) $11,916.64. Had she been earning full time, she would have earned (net after tax) $18,946.65. The difference is $7,030.01. There would also be a recreation leave loading included in her salary for the present year, which has not been fully included in the department's calculations as it is calculated on salary earned up to the 31st December. The result of the foregoing is that the plaintiff has lost approximately $7,030 in salary, without taking the current year's recreation leave loading into account, during 1975, 1976 and up to the 1st September 1977. I use the present year's figures as a rough guide to her future loss of income. Doing the best I can with the available figures, I assess the plaintiff's current net loss at approximately $53 per week, bringing her net economic loss to the 14th November 1977 to about $7,580. I have evidence of the present value of a weekly payment of $1 on various contingencies, based on the working life of a woman of the plaintiff's age, calculated from the 14th November 1977. On the basis that during 1978 and to the 30th June 1979 the Plaintiff will work six tenths time, and thereafter eight tenths time until the age of 60, or prior death. I think that the possibility of the plaintiff's retiring or becoming incapacitated before that age are about balanced by the probability of future salary increases and the possibility that she may work up to 65, or even to 70. My calculations are based upon net income receivable after payment of income tax, which, particularly at the present time, must be even more a matter of speculation than usual. In the result I have arrived at a figure of $21,500 for economic loss after the 14th November 1977; that is, a total of $29,080 for economic loss arising from the plaintiff's decreased earning capacity.

I allow $325 for household help. Other special damages have been agreed at $293.80.

I make an allowance for the pain and suffering which the plaintiff sustained immediately following the accident when the pain was more acute; and for the prolonged

In the Supreme Court of South Australia

No. 3

Reasons for Judgment of the Honourable Mr. Justice Hogarth

7th December 1977

(Cont'd)

periods of less acute pain which she has suffered since and which she will continue tc suffer, in, it is to be hoped a gradually diminishing degree as the years go by. I make allowance for the periods of depression which this has caused her, and for the disruption which it has caused to her social life and her way of life generally. Under this head I assess the plaintiff's damages at $35,000.

I assess the plaintiff's damages at $64,698.80. I make an allowance of $3750 for interest (calculated at 10%). There will be a judgment for the plaintiff for $68,448.80.

In the Supreme Court of South Australia

No. 4

Judgment of the Honourable Mr. Justice Hogarth

7th December 1977

NO. 4

JUDGMENT OF HOGARTH J.

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 1397 of 1976

BETWEEN

KARAN FARAONIO Plaintiff

- and -

CHRISTOPHER BERNARD THOMPSON
Defendant

BEFORE THE HONOURABLE MR. JUSTICE HOGARTH
WEDNESDAY THE 7TH DAY OF DECEMBER 1977.

THIS ACTION coming on for trial before the Honourable Mr. Justice Hogarth on the 14th and 15th days of November 1977 in the presence of Mr. T. A. Gray of counsel for the plaintiff and Mr. E. W. Mills of counsel for the defendant AND the Judge having this day assessed the plaintiff's general damages at the sum of $64,405.00 plus

agreed special damages in the sum of $293.80 together with interest in the lump sum of $3,750.00 and having ordered that judgment be entered for the plaintiff accordingly with costs to be taxed

IT IS THIS DAY ADJUDGED

that the plaintiff recover from the defendant the sum of $68,448.80 and costs to be taxed. The above costs have been taxed and allowed at $ as appears by the Taxing Officer's certificate dated the day of 1977.

BY THE COURT
MASTER p.p.

(Sgd)
CHIEF CLERK

THIS JUDGMENT was obtained by GENDERS, WILSON AND PARTNERS, of 123 Waymouth Street, Adelaide.
Solicitors for the Plaintiff.

In the Supreme Court of South Australia

No. 4

Judgment of the Honourable Mr. Justice Hogarth

7th December 1977

(Cont'd)

NO. 5

NOTICE OF APPEAL

In the Supreme Court of South Australia

No. 5

Notice of Motion for Appeal to the Full Court by Defendant

16th December 1977

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 1397 of 1976

IN THE MATTER of an action in the Local Court of Adelaide No. 31689 of 1975 wherein KARAN FARAONIO was Plaintiff and CHRISTOPHER BERNARD THOMPSON was Defendant

and

IN THE MATTER of the Local and

In the Supreme Court of South Australia

No. 5

Notice of Motion for Appeal to the Full Court by Defendant

16th December 1977

(Cont'd)

District Criminal Courts Act 1936 as amended

BETWEEN

KARAN FARAONIO Plaintiff

and

CHRISTOPHER BERNARD THOMPSON Defendant

NOTICE OF APPEAL

TAKE NOTICE that the Full Court will be moved by way of appeal at the first sittings of the Full Court to be held after the expiration of fourteen (14) days from the service of this notice upon you exclusive of the day of such service or so soon thereafter as counsel may be heard by counsel on behalf of the appellant for an order that the judgment of the Honourable Mr. Justice Hogarth given and pronounced in this action on the 7th day of December 1977 wherein the appellant was defendant and the respondent was plaintiff be varied by reducing the amount of damages thereby awarded and that judgment for the respondent for such lesser amount as to the Full Court seems just be substituted therefor

AND FURTHER TAKE NOTICE that the Appellant complains of the whole of the judgment.

The grounds of such appeal are :

1. That the said award of damages is manifestly excessive.

DATED the 16th day of December 1977

(Sgd) Baker McEwin & Co.

National Mutual Centre,
80 King William Street,
ADELAIDE

Solicitors for the Defendant

THIS NOTICE OF APPEAL is given by BAKER McEWIN & CO. of National Mutual Centre, 80 King William Street, Adelaide.
Solicitors for the Defendant.

NO. 6

In the Supreme Court of South Australia

No. 6

Notice of Motion for Cross Appeal to the Full Court by Plaintiff

28th February 1978

NOTICE OF MOTION FOR CROSS APPEAL

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 1397 of 1976

IN THE MATTER of an action in the Local Court of Adelaide No. 31689 of 1975 wherein KARAN FARAONIO was Plaintiff and CHRISTOPHER BERNARD THOMPSON was Defendant

and

IN THE MATTER of the Local and District Criminal Courts Act 1936 as amended

BETWEEN

KARAN FARAONIO Plaintiff

and

CHRISTOPHER BERNARD THOMPSON Defendant

NOTICE OF CROSS APPEAL

TAKE NOTICE that the Full Court will be moved by way of cross appeal for an order that the Judgment herein of The Honourable Mr. Justice Hogarth given and pronounced in this action on the 7th day of December 1977 wherein the appellant was defendant and the respondent cross appellant was plaintiff whereby it was ordered that judgment be entered for the plaintiff be varied in favour of the plaintiff in such manner as to the Court may seem just and expedient.

The grounds of this cross appeal are :-

In the Supreme Court of South Australia

No. 6

Notice of Motion for Cross Appeal to the Full Court by Plaintiff

28th February 1978

(Cont'd)

That the Learned Trial Judge erred in the exercise of his discretion in regard to the award of interest.

2. That the Learned Trial Judge exercised his discretion in regard to the award of interest upon an incorrect basis.

DATED this 28th day of February 1978.

TO: The Master,
Supreme Court House,
Victoria Square,
Adelaide.

AND TO: The appellant by his solicitors:-
Messrs. Baker McEwin and Company,
80 King William Street,
Adelaide.

THIS NOTICE OF CROSS APPEAL is filed by GENDERS WILSON AND PARTNERS of 123 Waymouth Street, Adelaide.

Solicitors for the respondent.

NO. 7

REASONS FOR JUDGMENT OF THE HONOURABLE THE CHIEF JUSTICE ON THE APPEAL

DELIVERED 4TH MAY 1978

THOMPSON

v.

FARAONIO

No. 1397 of 1976

Date of Hearing: 12th April 1978

IN THE FULL COURT

Coram: Bray C.J., Zelling and Jacobs JJ.

JUDGMENT of the Honourable the Chief Justice

(On appeal from the Honourable Mr. Justice Hogarth)

Counsel for the Appellant:	Mr. B.T. Lander with Mr. C.A. Johansen
Solicitors for the Appellant:	Baker, McEwin & Co.
Counsel for the Respondent:	Mr. T. A. Gray
Solicitors for the Respondent:	Genders, Wilson & Partners

Judgment No. 3775.

In the Supreme Court of South Australia

No. 7

Reasons for Judgment of the Honourable the Chief Justice on the Appeal

4th May 1978

(Cont'd)

THOMPSON

v.

FARAONIO

FULL COURT

Bray C.J.

I have had the advantage of reading the reasons for judgment of Zelling J. in this matter. With regard to the appeal I concur, with respect, with his reasoning and his conclusions. I regret the necessity to reduce the amount of the damages awarded to the respondent for non-economic loss, but I think this is a case in which what I said in Joyce v. Pioneer Tourist Coaches Pty. Ltd. and Parker 1969 S.A.S.R. 501 at p. 503 is applicable:

> "..... I agree with Mitchell J. that the assessment of the learned Judge is so far outside the normal range of awards for the non-economic aspect of injuries of this type in this State as to justify and therefore to compel (cf. Arthur Robinson (Grafton) Pty. Ltd. V. Carter 1968 41 A.L.J.R. 327, per Barwick C.J. at p. 329) the interference of this Court. In saying this I think that the learned Judge may be the pioneer and that time may justify him rather than us. But that time is not yet."

Nor is it yet, in my view, in a case of injuries like these.

As to the cross appeal, I agree with the suggestion that a court of five judges should be convened to consider the question to which Zelling J. refers.

NO. 8

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE ZELLING

DELIVERED 4TH MAY 1978

THOMPSON

v.

FARAONIO

No. 138 of 1976

Date of Hearing: 12th April, 1978.

IN THE FULL COURT

Coram: Bray, C.J., Zelling and Jacobs JJ.

JUDGMENT of the Honourable Mr. Justice Zelling

(The Honourable Mr. Justice Jacobs concurring)
(on appeal from the Honourable Mr. Justice Hogarth)

Counsel for the Appellant: Mr. B.T. Lander and Mr. C.A. Johansen

Solicitors for the Appellant: Baker, McEwin & Co.

Counsel for the Respondent: Mr. T. A. Gray

Solicitors for the Respondent: Genders, Wilson & Partners

Judgment No. 3776.

In the Supreme Court of South Australia

No. 8

Reasons for Judgment of the Honourable Mr. Justice Zelling

4th May 1978

(Cont'd)

THOMPSON

v.

FARAONIO

FULL COURT

Judgment of Zelling J.:

On 11th May, 1974, the appellant Thompson was driving a Toyota motor Car in a westerly direction along Henley Beach Road. His car was travelling in the same direction and to the rear of a car in which the plaintiff was a passenger, and collided with the rear of the car carrying the plaintiff. The plaintiff was injured in the accident.

Negligence was admitted and the only question is that of assessment of damage. The plaintiff sustained a whiplash injury and other sequels in the accident and the trial Judge assessed her damages at $64,698.80.

An appeal has been brought to this Court by the defendant on the ground that the assessment of damages was excessive. A cross appeal has been lodged by the respondent plaintiff, claiming that the Judge's award of interest in the sum of $3,750 was insufficient.

This action commenced as a summons in the Local Court of Adelaide, claiming $20,000, which was issued on 1st September, 1975. The matter was removed into this Court by order of Walters J. dated 17th September, 1976 and interlocutory judgment was signed for damages to be assessed. The action came to trial on 14th and 15th November, 1977 when judgment was reserved. The reserved judgment was delivered on 7th December, 1977.

The award of damages in favour of the plaintiff divides into five items:-

Loss of wages until judgment	$7,580.00
Loss of earning capacity after judgment	21,500.00
	$29,080.00

Carried Forward

Brought Forward	$29,080.00
Household help	325.00
Other special damages agreed at	293.80
General damages for pain and suffering and loss of amenities	35,000.00
	$64,698.80

Mr. Lander, who appeared for the appellant, challenged only two of these five items:- the award for loss of earning capacity in the sum of $21,500 and that for general damages: $35,000. He accepted the trial Judge's findings of fact and claimed that on those findings the amount awarded under each of these two heads of damage was manifestly excessive.

The following statement of facts is taken from the judgment of the trial Judge. The plaintiff was born in Hamburg in West Germany on 30th November, 1933. She is now forty-four years of age. She came to Australia in January 1953 and was married shortly afterwards. Her first husband was killed in a road traffic accident. In 1956 she married her present husband by whom she has had two children, both girls. The older child was born spastic and is now in an institution and is blind and deaf. The other child is aged about thirteen years. The plaintiff passed her matriculation examination in Germany before coming to Australia. In Australia she worked first with Elder Smith & Company Limited as a secretary and later as a nurse at the Queen Victoria Hospital, the Royal Adelaide Hospital and the Yorketown Hospital. During this period she sat for some examinations, the purpose of which is not clear, but in any case whatever it was the course was not completed. She gave up nursing when she

remarried. After the birth of the spastic child the respondent was fully engaged to looking after it for about four years. She then took on work as a secretary and as a nurse in country hospitals until she became pregnant the second time. The second daughter was born in 1964 and following the birth of this child she again did not work for about a year. Then the second husband began a building construction business and the respondent did secretarial work for her husband. Following this she became employed as a part-time teacher with the Education Department teaching German and some English at the Enfield High School. In order to progress as a teacher she needed better qualifications. She commenced study part-time in the Faculty of Arts at the University of Adelaide. Eventually in the year of the accident 1974, she decided to complete an Honours B.A. Degree and gave up teaching for that year in order to study full time. Notwithstanding the accident which occurred in May, she was able to complete her Honours Degree at the end of the year, with honours in class 2A. In the following year she obtained part-time employment as a teacher at the Thornton High School. She was only able to work six-tenths of full time. She has continued to be employed in that capacity ever since. She teaches three days of the week in the mornings only. She has the whole of Thursday free and she does a full day's work each Friday. The work involves the movement of heavy equipment which the plaintiff finds difficult to achieve. On occasions when it is practicable she seeks assistance from students. She intends to continue teaching. She is still unable to work full-time but from the middle of 1979 she will be able to work eight-tenths of full-time. She suffers from pain, more so in cold weather than in warm weather. She is limited in her social and sporting activities. She has headaches and has to rest after doing a morning's work at school. She cannot participate in after-school staff conferences, in student activities or in attending camps organized by the school. As a result of all the foregoing she gets depressed, particularly in winter

when the pain is worse. Two specialists were called on behalf of the respondent: Dr. Sidey and Dr. Hone, and two on behalf of the appellant: Dr. Cabrera and Dr. Jagermann. The Judge accepted the evidence of Drs. Sidey, Hone and Cabrera, which was very similar in its result, and did not accept the evidence of Dr. Jagermann who thought the respondent's condition was subject to hysterical elaboration. The Judge was satisfied that the pain and disability which the plaintiff is now suffering is of organic origin caused by the injury which she sustained in the accident. The most serious of those injuries is, as I have said, a whiplash injury to the neck. She had to wear a cervical collar for that injury for some time. In fact she wore it until the end of 1974, except for a short period when Mr. Cabrera told her to remove the collar and rest. She suffered pain in the neck radiating towards her face and in both arms and from headaches. The pains in the neck and the headaches still persist, though to a less degree than formerly. Mr. Sidey thought that if the respondent had persisted with the wearing of the cervical collar her symptoms would largely have disappeared by the time he first saw her on 10th July, 1974, but the Judge found that she was not unreasonable in doing what she did in this respect. The Plaintiff has limitation of movement in the neck and the cervical spine with some tenderness. The Judge accepted that the pain and disability which the plaintiff now suffers is of organic origin caused by the injuries. He was further satisfied that, from her conduct in going back to work as soon as she did and continuing to work and from her demeanour, the respondent was doing her best to return to her former way of life and had indeed displayed a much greater determination to continue her career than is seen in many other victims of accidents suffering from similar substantial disabilities. The Judge found that during 1978 and to 30th June, 1979

the plaintiff will work six-tenths of full-time. Thereafter until the age of sixty or prior death she can work eight-tenths of full-time. He thought that the possibility of the plaintiff retiring or becoming incapacitated before that age were about offset by the probability of future salary increases and the possibility that she might work up to sixty-five or even to seventy. It is obvious from the Judge's comments on income tax that he realized that the rates would change, as indeed they have, from 1st February, 1978. The Judge accepted that because of her inability to participate in sport she had lost contact with people whose company she enjoyed and that her disabilities would affect her ability to undertake snow skiing but not water skiing. He also accepted that great disruption to the plaintiff's way of life arose from her becoming exhausted after half a day's work. He further accepted the evidence of the orthaepedic specialists to the effect that physically she would be able to do a full day's work but only at the cost of pain and if she did so the pain would interfere substantially with her efficiency in teaching so that both she and her pupils would be the worse for it.

On the first of the two heads of damage which Mr. Lander challenged, he submitted that the respondent's loss to mid-1979 was just under $50 per week and, thereafter taking into account recreation leave loading, it would be approximately $32 per week. He then drew attention to the actuarial certificate, exhibit P3, and said that, allowing a discount figure of something between six and a half and seven per cent, the utmost figure which the plaintiff could obtain having regard to the ordinary contingencies of life, was $18,500, and that the Judge should have discounted this further for contingencies not comprehended in the actuary's calculations. But, as has been said many times, actuarial figures are only a check where needed on the amount which the Judge thinks it proper to award. The total loss of income to age sixty on those figures amounts to $24,128 and we do not know exactly how and for what the Judge discounted that figure.

In addition the plaintiff was entitled to an allowance for loss of long service leave loading, for loss of the opportunity to participate in superannuation, and for loss of the change of promotion which would otherwise, on the information supplied to us from the bar, have given her automatic promotion for some four grades above her present level. There is another but less likely, but still a possible loss, which the Judge may well have taken into account, and that is, that with a good honours degree such as this woman had, she had the chance, if it were not for her injuries, of obtaining a tutorship at the University or at one of the Colleges of Advanced Education. All of these were matters which the Judge could properly have taken into account in coming to his figure. When all of these matters are considered the sum of $21,500 which was awarded appears to be a very proper assessment of the plaintiff's loss under this head of damages.

Turning now to the award of $35,000 damages for pain and suffering and loss of amenities, this woman had without doubt severe pain to commence with. She has disabling pain even now. She has the disappointment of not being able to progress as far in her chosen field of education as she might well have done given her desire to succeed, if there had been no accident. She is unable to participate in sports to the extent that she would like, nor in activities which these days are regarded as part of teaching but are carried out outside ordinary hours: weekend camps, other student activities, teachers' meetings, and she has lost some other amenities of life. She has a very proper sense of deprivation in relation to these matters. Nevertheless giving full weight to all these things for which she must properly be compensated and bearing in mind the warning of Lord Wright in Davies v. The Powell Duffryn Associated

Collieries Ltd. (1942) A.C. 601 at 617, that "the scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excessive or insufficiency", I still think that $35,000 is too much by way of award for pain and suffering and loss of amenities. I know of no award of general damages for a whiplash injury which approaches anywhere near this figure and when one compares it with the types of awards that are common in the case of quadraplegia and other similar injuries, the size of the figure does arouse misgivings. In the last resort however, I fear that it must be a subjective assessment akin to but perhaps not quite equated with Lord Denning's "as much as that" or "as little as that". In my opinion the award of $35,000 by way of general damages was so much too high that this Court ought to interfere. Giving full weight, as the trial Judge did, to all this woman's disabilities, to her determined attempt to rehabilitate herself and to her very real loss, I think that the highest figure that could possibly be awarded for pain and suffering and loss of amenities is $25,000 and in my opinion the appeal succeeds to that extent.

Turning now to the cross-appeal, when the question of interest came to be argued, Mr. Lander informed us that he intended to argue that the cases in this Court, all judgments of the Full Court, on which the law as to awards of interest has been considered - Sagar v. Morton and Morrison (1972) 5 S.A.S.R. 143; Honey v. Keogh (1973) 6 S.A.S.R. 466 and Heaven v. The State of South Australia (unreported) judgment delivered 17th January, 1978 - could not stand with the judgments of Gibbs J. and Stephen J. in the High Court of Australia in Ruby v. Marsh (1975) 132 C.L.R. 642. In order that that argument might be fully considered we felt that it was necessary that the cross appeal should be referred to a Full Court of this Court consisting of five Judges, and an order was made accordingly.

The appeal therefore succeeds and

judgment should be entered for the respondent in the sum of $54,698.80, in lieu of the sum awarded by the trial Judge.

I should like to hear the parties as to costs.

Jacobs J.:

I concur.

In the Supreme Court of South Australia

No. 8

Reasons for Judgment of the Honourable Mr. Justice Zelling

4th May 1978

(Cont'd)

NO. 9

ORDER OF THE FULL COURT ALLOWING APPEAL

In the Supreme Court of South Australia

No. 9

Order allowing Appeal

4th May 1978

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 1397 of 1976

IN THE MATTER of an action in the Local Court of Adelaide No. 31689 of 1975 removed into the Supreme Court of South Australia pursuant to order dated the 17th day of September 1976

BETWEEN:

KARAN FARAONIO Plaintiff (Respondent)

and

CHRISTOPHER BERNARD THOMPSON Defendant (Appellant)

BEFORE THE HONOURABLE THE CHIEF JUSTICE THE HONOURABLE MR. JUSTICE ZELLING AND THE HONOURABLE MR. JUSTICE JACOBS. THURSDAY THE 4TH DAY OF MAY 1978.

THIS APPEAL by the abovenamed defendant from the judgment of the Honourable Mr. Justice Hogarth given and pronounced on the 7th day

In the Supreme Court of South Australia

No. 9

Order allowing appeal

4th May 1978

(Cont'd)

of December 1977 coming on for hearing on the 12th day of April 1978

UPON READING the notice of appeal dated the 16th day of December 1977 and the notice of cross appeal dated the 28th day of February 1978

AND UPON HEARING Mr. Lander and Mr. Johansen of counsel for the appellant and Mr. T. A. Gray of counsel for the respondent

THE COURT DID RESERVE JUDGMENT and the same standing for judgment this day

THE COURT DID ORDER that the appeal be allowed and that the said judgment of the Honourable Mr. Justice Hogarth whereby it was adjudged that the plaintiff recover from the defendant the sum of $68,448.80 (being as to the sum of $64,698.80 for damages and as to the sum of $3750 for interest) and costs to be taxed be varied and that in lieu of the said sum of $64,698.80 the plaintiff recover from the defendant the sum of $54,698.80 for damages

AND DID ADJUDGE the same accordingly

AND THE COURT DID FURTHER ORDER -

(1) That the questions arising on the cross appeal as to the award of interest upon the damages recoverable by the plaintiff be referred for hearing and determination by a Full Court of five Judges.

(2) That further consideration of the question of costs be adjourned.

AND the said appeal coming on for further consideration of the question of costs on the 19th day of May 1978

UPON HEARING Mr. T. A. Gray of Counsel for the respondent and Mr. Lander and Mr. Johansen of counsel for the appellant

THE COURT DID FURTHER ORDER that there

be no order as to the costs of either the said appeal or the said cross appeal.

BY THE COURT

(Sgd.) R. G. Ferret

ACTING DEPUTY MASTER

(R.G. Ferret)

THIS ORDER is filed by BAKER McEWIN & CO. of National Mutual Centre, 80 King William Street, Adelaide.
Solicitors for the Defendant.

In the Supreme Court of South Australia

No. 9

Order allowing Appeal

4th May 1978

(Cont'd)

NO. 10

MEMORANDUM OF COUNSEL RELATING TO THE CROSS APPEAL HANDED UP TO THE FULL COURT

In the Supreme Court of South Australia

No. 10

Memorandum of Counsel relating to Cross-Appeal

1st May 1978

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 1397 of 1978

IN THE MATTER of an action in the Local Court of Adelaide No. 31689 of 1995 (sic) wherein KARAN FARAONIO was Plaintiff and CHRISTOPHER BERNARD THOMPSON was Defendant

- and -

IN THE MATTER of the Local and District Criminal Courts Act 1938 as amended

BETWEEN:

KARAN FARAONIO Plaintiff

- and -

CHRISTOPHER BERNARD THOMPSON Defendant

1. His Honour Mr. Justice Hogarth assessed damages in the manner following :

(1) Loss of past earning capacity $7580

(2) Loss of future earning capacity $21,500

(3) Household help $325

(4) Special Damages $293.80

(5) Damages for pain and suffering etc. $35,000.

TOTAL - $64,698.80

2. His Honour allowed for interest $3,750 His Honour said at page 214 of the transcript "I make an allowance of $3,750 for interest (calculated at 10%)."

No other mention is made in the judgment about interest.

3. It is agreed :

(a) Proceedings were instituted in the Local Court of Adelaide on 1st September 1975.

(b) The defendant appeared on 22nd September 1975.

(c) By summons dated the 2nd September 1976 the plaintiff applied to have the action tried as an action in the Supreme Court.

(d) An appearance to that summons was entered by the defendant on 6th September 1976.

(e) On the 17th September 1976 His Honour Mr. Justice Walters ordered inter alia

(1) That the action be tried in the Supreme Court as if the matter were commenced in the

Supreme Court.

(2) That interlocutory judgment be entered for the plaintiff.

(3) That the plaintiff be at liberty to enter the action for assessment of damages.

(f) Interlocutory judgment was entered on the 17th September 1976.

(g) The action was heard on the 14th and 15th November 1977.

(h) Judgment was delivered on the 7th December 1977.

It is further agreed for the purposes of assessment of interest pursuant to Section 30C of the Supreme Courts Act.

(1) That interest runs from either the date of issue of the summons being 1st September 1975 or the date of service of proceedings that date agreed as 16th September 1975.

(2) That interest runs on items 1(1) 1(3) and 1(5) namely:

Loss of past earning capacity	$7,580
Household help	$325
Pain and Suffering	$35,000

(3) That the rate of interest would be at the date of assessment of damages 10%.

(4) That if the full Court should reduce His Honour's award for pain and suffering that interest should

run on the lesser amount.

5. (a) It is submitted by counsel for the defendant to which counsel for the plaintiff demurs that no interest should run on the sum awarded for future effects of loss of earning capacity.

(b) It is submitted by counsel for the defendant to which counsel for the plaintiff demurs that interest runs from the date of service of proceedings rather than the date of issue of proceedings.

DATED this 1st day of May 1978.

(Sgd.) T. A. GRAY

Counsel for the plaintiff and appellant by cross appeal

(Sgd.) B. T. LANDER

Counsel for the defendant and respondent by cross appeal

NO. 11

REASONS FOR JUDGMENT OF THE HONOURABLE THE CHIEF JUSTICE ON THE CROSS APPEAL

In the Supreme Court of South Australia

No. 11

Reasons for Judgment of the Chief Justice on the Cross Appeal

19th May 1978

DELIVERED 19th May 1978

THOMPSON v. FARAONIO (No.2)

No. 1397 of 1976

Date of Hearing : 4th May 1978

IN THE FULL COURT

Coram: Bray C.J., Bright, Zelling, Jacobs and King JJ.

JUDGMENT of the Honourable the Chief Justice

(On appeal from the Honourable Mr. Justice Hogarth)

(Interest - S.30C Supreme Court Act 1935 as amended - availability of interest on award of damages for future effects of loss of earning capacity - date from which interest runs.)

Counsel for the Appellant:	Mr. B. T. Lander with Mr. C.A. Johansen
Solicitors for the Appellant:	Baker, McEwin & Co.
Counsel for the Respondent:	Mr. T.A. Gray
Solicitors for the Respondent:	Genders, Wilson & Partners

Judgment No. 3812

In the Supreme Court of South Australia

No. 11

Reasons for Judgment of the Chief Justice on the Cross Appeal

19th May 1978

(Cont'd)

THOMPSON v. FARAONIO (No.2)

FULL COURT

Bray C.J.

The facts in this case are fully set out in the reasons for judgment of Zelling J. on the appeal. The cross-appeal was referred to a Full Court of five judges to consider how far, if at all, the opinions expressed by this court in Sager v. Morten and Morrison (1973) 5 S.A.S.R. 143 and Honey v. Keyhoe (1973) 6 S.A.S.R. 466 need modification in the light of the decision of the High Court in Ruby v. Marsh 132 C.L.R. 642 and generally to clarify the law and the practice of the court with regard to certain problems arising out of the provisions of sec. 30C of the Supreme Court Act 1935 as amended with regard to the allowance of interest on judgments for damages in accident cases.

The learned judge in this case made an allowance for interest in the following words:

> "I make an allowance of $3750 for interest (calculated at 10%)."

He did not say for what period or on what portion of the amount of his award of $64,698.80 (now reduced by the judgment of this court on the appeal to $54,698.80) interest was allowed.

The parties have conveniently formulated the issues on the cross-appeal in the following words:

> "(a) It is submitted by counsel for the defendant to which counsel for the plaintiff demurs that no interest should run on the sum awarded for future effects of loss of earning capacity.
>
> (b) It is submitted by counsel for the defendant to which counsel for the plaintiff demurs that interest runs from the date of service of

proceedings rather than the date of issue of proceedings."

It is for us, I think, to consider those questions in the abstract. The practical consequences of our answers can be worked out by selecting the appropriate figures from a set of alternative agreed figures supplied to us by counsel.

This is a cross-appeal and to avoid confusion I will refer to the parties simply as the plaintiff and the defendant.

The section with which we are concerned has been the subject of substantial amendment. It is necessary to consider both its original words and its present form.

When sec. 30C was introduced into the Act in 1972 it read for relevant purposes as follows:

"(1) Unless good cause is shown to the contrary, the court shall, upon the application of a party in favour of whom a judgment for the payment of damages, compensation or any other pecuniary amount has been, or is to be, pronounced, include in the judgment an award of interest in favour of the judgment creditor in accordance with the provisions of this section.

(2) The interest -

(a) shall be at the rate of seven per centum per annum or such lower rate as may be fixed by the court;

(b) shall be calculated -

(i) where the judgment is given upon an unliquidated claim - from the

date of commencement of the proceedings to the date of judgment;

. . . . . .

or in respect of such other period as may be fixed by the court;

and

(c) shall be payable in respect of the whole or any part of the amount for which judgment is given in accordance with the determination of the court.

(3) No interest shall be awarded in respect of -

(a) damages or compensation in respect of loss or injury to be incurred or suffered after the date of the judgment;

(b) exemplary or punitive damages.

(4) This section does not -

(here follows several exclusions not relevant to the present case)."

In 1974 the section was amended. Subsection (1) remained unaltered. There is a new subsection (2)(a) in place of the old. This provides that the interest should be at such rate as may be fixed by the court. The old subsection (3) was repealed and a new subsection (3) substituted in the following words:

"(3) Where a party to any proceedings before the court is entitled to an award of interest under this section, the court may, in the exercise of its discretion, and without proceeding to calculate the interest to which that party may be entitled in accordance with sub-section (2) of this section, award a lump sum in lieu of that interest."

Subsection (4) was amended so as to include amongst the matters on which interest was not authorised exemplary or punitive damages. The practical effect of the amendment for present purposes is that the prohibition against the award of interest on damages in respect of loss or injury to be incurred or suffered after the date of the judgment contained in the old subsection (3)(a) has gone.

In Sager v. Morten and Morrison above we had to construe the original section and it was necessary for us to decide whether the future effects of loss of earning capacity and future pain and suffering and loss of amenities after the date of the judgment were excluded as interest-bearing components as being loss or injury incurred or suffered after the date of the judgment. We held that they were not so excluded. In Ruby v. Marsh above the High Court in a fatal accident case had to consider a similar problem in relation to Section 79A of the Victorian Supreme Court Act 1958 as amended. That section contained a similar provision to our old subsection (3)(a), except that the Victorian section referred to "loss or damage" instead of "loss or injury". The learned judges expressed various opinions to which more particular reference will have to be made. But a salient matter, to my mind, is that the old subsection (3)(a) has gone and we are no longer under any statutory compulsion to dissect the amount of the award into damages in respect of loss or injury to be incurred or suffered after the date of the judgment and damages in respect of such loss or injury incurred or suffered before it.

Ruby v. Marsh was an appeal by the defendant in a fatal accident case against an allowance of interest on the full amount of the jury's verdict. It was contended that interest should only be allowed on so much of that amount as represented the loss of the support of the deceased between the date of his death and the date of the verdict.

In that case Barwick C.J., with whose judgment McTiernan J. concurred, held that the loss which the dependents suffer in a fatal accident claim is wholly suffered at the date of death and that the loss which the plaintiff suffers in a personal injuries claim is wholly suffered at the date of the accident (p.650) with, in the latter case, a possible exception in the case of some earning capacity retained in full at the date of judgment potentially liable to be lost thereafter (see at p.649). He said that he saw no relevant distinction between fatal accident claims and personal injury claims for the present purpose (see at p.650).

Gibbs J. agreed with regard to fatal accident cases. He thought that in such cases the loss occurred at the moment of death (see at p.658), but he thought that the case was different with regard to claims for damages for personal injuries. Such damages in the opinion of the learned judge might include damages for loss or damage to be suffered in the future within the meaning of the Victorian statute (see at pp.659-660).

Stephen J. thought that fatal accident claims were not to be distinguished from personal injury claims for the present purpose (p.664). He thought that in the instant case there must have been some component which answered the description of loss or damage to be incurred or suffered after the date of the accident (p.661). With regard to other matters he said that he agreed with the judgment of Jacobs J. (p.662).

Jacobs J. acknowledged that the general theory of the law was that the right to damages accrued "when the act is done or event occurs which occasions liability" (p.667). But he thought that concept of loss or damage was not the one envisaged by the words of the excluding subsection. "The paragraph", he said,

> "refers not to the juristic concept of damages but to the practical concept that

> a plaintiff receives damages by way of compensation in respect of loss of damage incurred or suffered up to the date of trial and verdict and in respect of loss or damage (if any) which he will incur or suffer in the future. When the consequence of the compensable infringement of his legal rights is actually felt by him materially or physically he incurs or suffers the loss or damage to which the paragraph refers. As I have said, in relation to a claim for damages for personal injuries, the distinction is not a difficult one to apply. Pain and suffering before verdict can be separated from pain and suffering likely to exist after verdict, however difficult the actual qualification may be. Though earning capacity in whole or in part may be lost uno ictu at the time of injury, the consequential pecuniary loss or damage before verdict may be separated from that likely to exist after verdict." (pp.667-668)

And he held that the difference between the nature of an action under the fatal accident legislation and the nature of an action for damages for personal injuries at common law could not of itself provide a necessary distinction on the question before the court. He said at p.668:

> "But since, strictly, damages must always be assessed as at the moment of the act or event which occasions liability in the offending party, this feature does not provide a satisfactory basis for distinguishing the cause of action under Part III of the Wrongs Act from other causes of action."

Thus it will be seen that four judges (Barwick C.J., McTiernan, Stephen and Jacobs JJ.) held that for the purpose of construing the interest legislation in its application

to claims for the future effects of death or of bodily injury there was no distinction between fatal accident claims and personal injury claims. Three judges (Barwick C.J., McTiernan J. and Gibbs J.) held that the loss of the defendant in a fatal accident claim occurred once and for all at the moment of death and that no part of it was loss or damage to be suffered or incurred after judgment within the meaning of that legislation. On the other hand it will also be seen that three judges (Gibbs J., Stephen J. and Jacobs J.) held that in the case of the ordinary assessment for damages for personal injuries there would be some component of the award that answered the description of loss or damage to be incurred or suffered after judgment. Strictly speaking this opinion was an obiter dictum.

In Sager v. Morten and Morrison and Honey v. Keyhoe, which were both decided before Ruby v. Marsh, we held that in a personal injuries claim damages for the future effect of lost earning capacity and for the future pain, suffering and loss of amenities after the date of the judgment were not damages in respect of loss or injury to be incurred or suffered after the date of the judgment within the meaning of the old subsection (3)(a), with some possible exception with regard to potential loss in the future of any earning capacity which was still fully retained at the date of judgment. That exception is not relevant here. We held, in short, that the earning capacity was lost and the physical or psychological harm productive of the pain and suffering and loss of amenities and enjoyment of life was incurred at the date of the accident.

If the old subsection (3)(a) had remained in force, it would have been a difficult task to decide how far Ruby v. Marsh was an authority as to its interpretation and just what it was to be taken as having decided on the point. The variation in language between the South Australian and Victorian legislation might have been of great importance.

But the old subsection (3)(a) has gone and, as I have said, there is no statutory compulsion on us to divide the award into one interest-bearing component in respect of the past effects

and another in respect of future effects of the accident as at the date of judgment. The questions before us, as I see it, are, first, whether Ruby v. Marsh compels us to make any such dissection notwithstanding the disappearance of the old subsection (3)(a) and, secondly, whether, if it does not, we would nevertheless undertake it on general principles.

I think that the views expressed on this point by Stephen J. and Jacobs J. in Ruby v. Marsh were strictly conditioned on the provisions of the Victorian analogue of our old subsection (3)(a). I think this is clear from the references by Jacobs J. at pp. 667 and 668 to the construction of the Victorian subsection. I have already cited the passage at p.667. At p.668 he says:

> "The real question in this case, as I see it, is whether in the application of section 79A(3)(b) a claim for compensation under Part III of the Wrongs Act 1958 (Vict.) is necessarily different or to be treated differently from a claim for damages in other action . . ."

Stephen J. says at p.662:

> "First, as to the construction of sub-s. (3)(b); that it is concerned not with the juristic concept of damages but with the practical concept explained by Jacobs J. is, in my view, supported by a variety of considerations."

I am not sure that Gibbs J. placed so much weight on the words of the exclusionary legislation, though he refers to the sub-section at pp.657 and 659, but at any rate I am satisfied that there is certainly no majority opinion to be found in Ruby v. Marsh which would compel us to decide that in the present case the first question should be answered by saying that the court ought not to award interest on any sum awarded for the future effects of loss of earning capacity.

The section's present form now bears more resemblance to the English and New South Wales sections than to the Victorian section. Nevertheless there are significant differences. The English section (Administration of Justice Act 1969 sec.1A) makes the award of interest mandatory in personal injury cases on the damages or on such part of them as the court considers appropriate, unless the court is satisfied that there are special reasons why no interest should be awarded. An earlier Act (the Law Reform (Miscellaneous Provisions) Act of 1934 section 3(1)) had given the power to award interest for the whole or any part of the period between the date when the cause of action arose and the date of the judgment. It is that discretionary power which was made mandatory in 1969, subject to the existence of special reasons.

The New South Wales section (Section 94 of the Supreme Court Act 1970) is discretionary. It says that the court may in any proceedings for the recovery of any money include in the judgment interest at such rate as it thinks fit on the whole or any part of the money for the whole or any part of the period between the date when the cause of action arose and the date when the judgment takes effect.

It will be noted that our Act makes the commencing date the date of commencement of the proceedings, while the English and New South Wales Acts make the commencing date the date when the cause of action arose, subject in each case to certain discretionary powers to fix other periods.

The English legislation arose for consideration in Jefford and Another v. Gee (1970) 1 All E.R. 1202 and in Cookson v. Knowles (1977) 2 All E.R. 820. The New South Wales legislation was considered in Pheeney v. Doolan (No.2) (1977) 1 N.S.W.L.R. 601. These cases deserve careful consideration.

In Jefford v. Gee Lord Denning M.R., who delivered the judgment of the Court of Appeal, referred to the historical origin of the power

to award interest. He then enunciated the following governing principle at p.1208:

> "Interest should not be awarded as compensation for the damage done. It should only be awarded to a plaintiff for being kept out of money which ought to have been paid to him." (The italics appear in the original)

We adopted that in Sager's case. With respect I adhere to it. Lord Denning then laid down certain principles. He said that no interest should in principle be given for the loss of future earnings, but that it should be given in respect of the full amount awarded for pain, suffering and loss of amenities, whether suffered or sustained before or after the judgment (p.1209). He further said that in fatal accident cases, unlike personal injury cases, interest should be allowed on the total amount of the award (p.1209-1210). In Sager's case we followed Jefford v. Gee with regard to the second of these propositions, but not with regard to the first. In Cookson v. Knowles, however, the Court of Appeal reversed its steps. Because of the progress of inflation it decided that no interest should be given on the lump sum ordered for pain and suffering and loss of amenities or in fatal accident cases on pecuniary loss to be suffered after judgment (pp.823-4). The position now in England, therefore, would appear to be that a dissection must be made in all cases as to the effects of the injury, both pecuniary and personal, sustained before the date of judgment and those to be sustained after it.

In Pheeney v. Doolan above the Court of Appeal of New South Wales held that it was proper for a court in an appropriate case to dissect the award into those components which relate to past and those which relate to future material or physical effects, those experienced before and those experienced after the accident, and to award interest only on the former component. As I read the

judgments however, the learned judges thought that much would depend on what system of discount was adopted with regard to future elements and as from what date, the date of the trial or some earlier date.

With all respect to the learned judges who decided these cases, I am not in agreement with their reasoning.

I mention in limine what appears to me to be an important consideration. The section clearly contemplates that interest may be awarded on the whole of the amount of the judgment. If what are called in Pheeney v. Doolan "future elements" have always to be excluded as interest-bearing components, then it will be very rarely that interest can be given on the whole of the damages in a personal injuries claim, since such damages nearly always include some future elements. The whole of the damages could never carry interest in personal injury cases except in the rare case of the plaintiff having made a complete recovery before judgment. I do not think that this is what Parliament contemplated.

I stress the traditional theory of the law, the "conceptual approach" as it is called by Reynolds J.A. in Pheeney v. Doolan above at p.615, that the loss of earning capacity and the detrimental personal consequences of physical or psychological harm are suffered once and for all on the happening of the event which causes the injury. This is admitted on almost all hands, see Ruby v. Marsh above per Barwick C.J. at pp. 648 and 658, per Stephen J. at p.662 where he distinguishes between the juristic concept of damages and the practical concept of damages imported by the Victorian legislation, per Jacobs J. at p. 667, Pheeney v. Doolan above per Moffit P. at p.607, per Reynolds J.A. at p.614 and per Mahoney J.A. at pp. 618-9.

Nevertheless in Pheeney v. Doolan Reynolds J.A. at p. 615 thought that it was possible to discern in Ruby v. Marsh "a prevailing view against a doctrine that the conceptual approach, that the loss which a plaintiff suffers is exchanged for a notional investment fund at the moment of

its initial infliction, is of controlling effect in determining what is a proper allowance of interest. That case decides that the conceptual approach should not be driven to unacceptable conclusions".

With respect, however, I think the "prevailing view", by which the learned judge must have meant the views of Gibbs J., Stephen J. and Jacobs J., was, as I have said, at least in the case of Stephen J. and Jacobs J., conditioned by their construction of the language of the Victorian legislation. They regarded, I think, that language as constraining them to distinguish between the juristic concept and the practical concept to which they refer. When that constraint is absent I do not, with respect, see why the ordinary juristic concept should not be applied.

Next, I do not, with respect to those who hold the contrary view, see why inflation makes it necessarily unjust that interest should be allowed on the amount of the award. True it is that that amount is normally much higher in terms of money than would have been the amount of an assessment on the day of commencement of the proceedings (a phrase which I use without prejudice to the determination of the second of the questions before us). True it is also that the rationale for the allowance of interest is that the plaintiff, driven to resort to legal proceedings to recover what is due to him, (see Jefford v. Gee above per Lord Denning M.R. at p.1205 citing Lord Herschell LC in London, Chatham and Dover Ry. Co. v. South Eastern Ry. Co. (1893) A.C. 429 at p.437) should be put in as good a position as if he had been paid what was due to him at the latest on the day when the writ is served. As Barwick C.J. said in Ruby v. Marsh above at p.652:

"In the first place, the successful

> plaintiff, who by the verdict has been turned into an investor by the award of a capital sum, and whose claim in the writ has been justified to the extent of the verdict returned, ought in justice to be placed in the position in which he would have been had the amount of the verdict been paid to him at the date of the commencement of the action."

If he had been paid what was due to him on that day valued in the terms of the money of that day, notionally at least he could have invested it to advantage and presumably the money value of the investment would have increased with inflation. It may well be that it would take the higher sum of money he is awarded at the date of the judgment to buy the same investment as could have been bought for the lower sum of money he would have received at the commencement of the proceedings.

In short, where the difference in amount between an award on the day of commencement and an award on the day of judgment is due solely to inflation, there is only a difference in money terms, not a difference in money values. I see no reason why it should make an award of interest on the amount of the judgment unjust, particularly since the defendant has had the use of the money in the meantime. I agree, with respect, with the conclusions on this topic reached by King J. in Solomon v. Irving (judgment delivered 3rd May 1977) and by Bright J. in Clearihan v. Allen (judgment delivered 25th January 1978).

I would add that I see no reason to distinguish between damages for loss of earning capacity and damages for pain and suffering in this connection. I agree, with respect, with the Court of Appeal in Cookson v. Knowles in thinking that they should be treated in the same way, but, with equal respect, I disagree with the way in which they were treated in that case. Nor do I see any reason to distinguish between fatal accident claims and personal injury claims. Indeed, I think that the views of four of the learned judges who decided Ruby v. Marsh compel us to hold that there is no such distinction.

I would make two additional observations.

The first is that Section 30C confers on the court a number of wide discretions. There may be all sorts of reasons why in a particular case it would be unjust to allow interest on the full amount of the award for the full period from the commencement of proceedings or at the same rate throughout. The method of discounting employed, the nature of the loss, the hypothetical nature of future expenditure, the conduct of the parties, are all matters which could effect the exercise of the discretion. All I am concerned to do is to hold that there is no prima facie reason why interest should not be allowed on the whole award, of general damages at least, for the whole period since the commencement of the proceedings. Earlier than that I agree the court should not go in view of the language of the statute, at least in the absence of very special circumstances and if the phrase "in respect of such other period as may be fixed by the court" includes a period before the issue of the writ. I see no reason why it should not, but I do not hold that it does.

The other is that, in my view, any disallowance or reduction of interest will normally more readily be forthcoming in the case of pre-trial loss than in the case of post-trial loss. For if the plaintiff had been paid out on the day of the issue or service of the writ, his damages for loss of earning capacity would have been largely assessed on his rate of earning at that day, which in the normal course would be less in money terms than the equivalent rate of earning on the day of judgment. In addition, any sum so awarded on the day of commencement would normally be discounted for present value and for contingencies. The amount allowed for pre-trial loss at the date of judgment should, I think, normally also be discounted for contengencies, but it would not

be discounted for present value. Thirdly, any interest on that amount on the day of judgment over the period between commencement and judgment at the same rate would be interest at a rate which would probably be higher than the interest rate at the date of commencement and would take no account of the fact that if there had been no accident the whole amount would have not been received at the date of commencement but would only have come in in weekly or monthly instalments over the period. I referred to some of these matters in Irving v. Pilczyk (1975) 12 S.A.S.R. 11 at pp.18-19.

Various methods of dealing with these problems have been suggested. Apparently in England the practice is to allow interest at half rate only over the pre-trial period, Jefford v. Gee above at p.1208, Cookson v. Knowles above at p. 824. Another way was suggested by Reynolds J.A. in Pheeney v. Doolan (No. 2) above at p.617. The learned judge said:

> "In the present case it is sufficient to say that, having regard to the way the assessment was arrived at, to allow interest on the whole award from the date of the institution of proceedings is not to be supported, for, whilst in strict legal theory it could be said that the widow had been without her judgment moneys, she had in fact only been deprived of that support which, but for the death she would have received week by week. She should on this basis, be treated as if she had a bank overdraft upon which, by reason of the inevitable delays, she had to draw from week to week for her support and maintenance and pay to her banker the appropriate interest. On any other basis, having regard to the method of computation, she would have received over-compensation."

A calculation along these lines is no doubt ideally preferable, but I think it would impose an intolerable burden on the calculator.

The question of an appropriate adjustment of interest for pre-trial loss is one which should

be considered by the judge in the exercise of his discretion and so as to avoid over-compensation of the plaintiff. I do not think that anything more than a rough and ready assessment is called for. I draw attention to the power to award a lump sum in lieu of interest in the present subsection (3).

This particular point, however, is not one which has to be decided for the purpose of answering the first question before us and I mention it merely so that it may not be overlooked in the future. I refrain from expressing any opinion on the question of how far what I have said about damages for loss of earning capacity between the commencement of the proceedings and judgment is applicable to damages for pain, suffering and loss of amenities over the same period.

I am impressed by the remarks of Zelling J. on the application of Gourley's case (1956 A.C. 185) to Australian conditions. The question is well worth consideration on an appropriate occasion.

In my opinion the first question before us should be answered by saying that interest should normally, and subject to the discretion of the court, run on the sum awarded for the future effects of loss of earning capacity.

The second question admits of a much shorter answer. The statute directs that, unless good cause is shown to the contrary, interest should run from the date of the commencement of the proceedings to the date of judgment or in respect of such other period as may be fixed by the court. In Sager's case and in Honey v. Keyhoe above I took the view that ideally the day of service of the writ was preferable to the day of its issue, because the defendant ought not to be penalised with interest for not paying promptly a claim of which he had no notice. It cannot in theory be said that the plaintiff has been unjustly

kept out of his money until the defendant knows that he ought to pay it. In Jefford v. Gee interest was awarded as from the date of service on those parts of the general damages on which interest was allowed as from the date of service of the writ, see at p.1212, though the Act allowed interest as from the date the cause of action arose. However, in Honey v. Keyhoe above I said at p.469:

> "It is true that the statute refers to the date of the commencement of the proceedings or such other period as may be fixed by the Court. But I adhere to what I said in Sager's case with regard to the choice of the date of the service of the writ as ideally preferable . . . In many cases the interval between the issue of the writ and its service will be too small to bother about. In other cases the defendant may have known well in advance of the issue of the writ what the claim was and how it had been quantified. In these cases the interest may well run from the commencement of the proceedings. In other cases, when there is a substantial interval between the issue and the service of the writ and the defendant has not had previous adequate notice of the claim and its amount, the interest should not begin to run before the date of service."

I still think that that is correct. Prima facie, no doubt, the interest should run from the date of commencement but if there has been a significant delay between issue and service and if the defendant had no adequate notice of the claim before service, then I think he should not have to pay interest over the period of the interval.

I would answer the second question submitted to us as follows: in the normal case, and subject to the discretion of the court, interest should run from the date of issue of the proceedings unless there is a significant interval between issue and service and the defendant has had no adequate notice of the claim prior to service, in which case it should run

from the date of service.

That means that, in my view, the two questions should be answered as follows:

(a) Interest should normally, and subject to the discretion of the court, run on the sum awarded for the future effects of loss of earning capacity.

(b) In the normal case, and subject to the discretion of the court, interest should run from the date of issue of the proceedings unless there is a significant interval between issue and service and the defendant has had no adequate notice of the claim prior to service, in which case it should run from the date of service.

The figures submitted to us show that the appropriate amount of interest on the general damages of $54,405 from the 1st September 1975 to the 4th May 1978, the date of the hearing before us, would be $14,547.74.

In the Supreme Court of South Australia

No. 12

Reasons for Judgment of the Honourable Mr. Justice Bright on the Cross Appeal

19th May 1978

REASONS FOR JUDGMENT OF THE HONCURABLE MR. JUSTICE BRIGHT ON THE CROSS APPEAL

DELIVERED Friday 19th May, 1978

THOMPSON v FARAONIO (No. 2)

No. 1397 of 1976

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IN THE FULL COURT

Coram: Bray C.J., Bright, Zelling, Jacobs & King JJ.

JUDGMENT of the Honourable Mr. Justice Bright

(On appeal from the Honourable Mr. Justice Hogarth)

interest on award from pain and suffering and loss of economic capacity

Counsel for the Appellant:	Mr. B.T. Lander with Mr. C.A. Johansen
Solicitors for the Appellant:	Baker, McEwin & Co.
Counsel for the Respondent:	Mr. T.A. Gray
Solicitors for the Respondent:	Genders, Wilson & Partners.

Judgment No. 3813

FULL COURT

Bright J.

I need not repeat the summary contained in the reasons for judgment of the learned Chief Justice.

First question

On the question relating to interest on a sum awarded for loss of earning capacity I adhere, with one exception, to what I said in Clearihan v Allen (No. 473 of 1974). The exception is that I would correct an error which crept into page 26 by omitting from lines 2 - 4 a passage reading "from a point of time about half way through the period of wage loss". The effect of the excision of this passage is that, in my view, where there is a temporary disability, from which the plaintiff has recovered at the date of the trial, so that loss of wages attributable to the accident has then ceased, it will usually be sufficient to allow the actual wages lost and to apply a standard rate of interest to half the aggregate wages lost from the date of commencement of the action. No doubt some other methods of computation of interest will sometime be appropriate.

I shall not repeat my discussion of authority contained in Clearihan v Allen (sup.) and, in particular, of Ruby v Marsh (1975) 132 C.L.R. 642. I accept that, because of differences between the respective Victorian and New South Wales sections on the one hand and the South Australian section on the other hand, decision on the two first named sections cannot be decisive of the point at issue in the present case. I accept this view the more readily because:

(a) "Unless good cause is shown to the contrary" the Court is directed to allow interest

(b) Previously section 30C of the South Australian Supreme Court Act contained a subsection 3(a) which read:

> "No interest shall be awarded in respect of - damages or compensation in respect of loss or injury to be incurred or suffered after the date of the judgment;"

Section 30C(3) has now been repealed and has not been replaced by any similar subsection.

So, in summary, the position in South Australia in a case of permanent loss of economic capacity is in my view that

> "The plaintiff is to be compensated in respect of permanent loss of economic capacity by an award of general damages, notionally accruing at the date of the accident but measured in money values of the date of the judgment. Arthur Robinson (Crafton) Pty. Ltd., v Carter 122 C.L.R. 649; Sager v Marten & Morrison 5 S.A.S.R. 143; and subsequent cases. The practice of treating actual wages lost between accident and trial as special damages has, in such a case, been held to be wrong and it is said to be unwise to ascribe a separate figure for this period even by way of general damages. If the actual wages lost are used as a guide they ought to be discounted back to the date of the accident. (Honey v Keyhoe (sup.) at p.471). That does not mean, of course that they must be calculated in terms of actual wages payable at the date of the accident. Inflation between the date of the accident and the date of the hearing, and rises in wages attributable to that or other causes can properly be brought into consideration. Unless that discount is made there is a probability that, when interest is added to the capital sum, the plaintiff will be excessively compensated."

(Clearihan v Allen (sup.))

If economic loss and pain and suffering are discounted back to the date of the accident in the

manner suggested, then interest is allowable on both sums from the date of commencement of the proceedings.

Second question

As to whether the relevant commencement date for calculation of interest should be the date of issue of the proceedings or the date of service thereof, I believe that the Court should regard issue of the writ as being the commencement of the proceedings and should follow Section 30C(2)(b)(i) unless in its discretion it finds good reason to substitute some other date as permitted by the concluding phrase in subsection (2)(b).

In the Supreme Court of South Australia

No. 13

Reasons for Judgment of the Honourable Mr. Justice Zelling on the Cross Appeal

19th May 1978

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE ZELLING ON THE CROSS APPEAL

DELIVERED 19th May 1978

FARAONIO v. THOMPSON (No. 2)

No. 1397 of 1976

Date of Hearing:- 4th May, 1978

IN THE FULL COURT

Coram:- Bray, C.J., Bright, Zelling, Jacobs & King JJ.

JUDGMENT of the Honourable Mr. Justice Zelling

(on appeal from the Honourable Mr. Justice Hogarth)

Counsel for the Appellant:	Mr. T.A. Gray
Solicitors for the Appellant:	Genders, Wilson & Partners
Counsel for the Respondent:	Mr. B.T. Lander with Mr. C.A. Johansen
Solicitors for the Respondent:	Baker, McEwin & Co.

Judgment No. 3814

FARAONIO v. THOMPSON (No. 2)

FULL COURT

Judgment of Zelling J.:

This was an appeal by the defendant Thompson against an award of damages made in favour of the Plaintiff Faraonio on the ground that the damages were manifestly excessive and a cross appeal by the plaintiff on the ground that she should have been awarded a larger amount for interest than was awarded by the trial Judge. We have already dealt with the appeal, upon which the appellant Thompson was successful in having the general damages reduced by $10,000.

At the commencement of the hearing of the cross appeal, it became obvious from Mr. Lander's argument on behalf of the respondent to the cross appeal that the correctness of prior judgments of this Full Court would be called in question and accordingly a larger Full Court of five Judges was assembled to hear the cross appeal.

The cross appeal arises out of the following facts:- The plaintiff obtained judgment at trial for $64,698.80, and an award of interest of $3,250 was made in her favour by the trial Judge. The plaintiff's total judgment has since been reduced, as I have said, to $54,698.80. There are five components in that award: namely loss of earning capacity up until trial $7,580, loss of future earning capacity $21,500, household help $325, special damages $293.80 and damages for pain and suffering and loss of amenities $25,000. It is agreed by both parties that the small amount of special damages does not carry interest. Mr. Lander, for the respondent on the cross appeal, did not argue that the loss of earning capacity to trial, the household help, and the damages for pain and suffering and loss of amenities should not carry

interest. He was rather inclined to argue that the damages for pain and suffering or some of them should not carry interest but felt that he was precluded by the judgment of the High Court of Australia in Ruby v. Marsh (1975) 132 C.L.R. 642 from doing so and did not in the event make any submissions to the Court along those lines.

Accordingly the matter falling for decision on the cross appeal is whether interest should have been awarded upon the loss of future earning capacity. There is a small subsidiary question as to whether the computation of interest should be made from the date of the issue of the writ, 1st September 1975, to the date of judgment on the appeal, or whether interest should be given from the date of acceptance of service of the writ, namely 16th September 1975 to the same latter date.

I shall address myself first to the principal question, namely whether the award of $21,500 for loss of future earning capacity should bear interest.

This Court held in Sager v. Morten and Morrison (1973) 5 S.A.S.R. 143 and Honey v. Keough (1973) 6 S.A.S.R. 466 that in general future losses of earning capacity, having been incurred at the time of the accident, bore interest from the commencement of the action in the same way as other damages, unless at some time in the future the injured plaintiff was likely to suffer some loss of capacity unrelated to the loss of earning capacity which happened at the time that the injury was sustained by the plaintiff. Those decisions were given before the coming into force of the Supreme Court Act Amendment Act 1974, No. 12 of 1974, which was proclaimed to commence on June 20, 1974: see the South Australian Government Gazette of that date page 2450. The principles laid down in Sager's case and Honey's case have however been followed in other Full Court decisions since 1974, such as State of South Australia v. Heaven (unreported, judgment delivered 17th January, 1978).

Mr. Lander's basic arguments were:-

1. That Sagar's case and Honey's case and the cases which followed them could not stand with the decision of the High Court of Australia in Ruby v. Marsh (supra) to which I have referred.

2. Alternatively if his submission 1 was not correct, and there was a discretion vested in this Court by Section 30C of the Supreme Court Act 1935 wider than that given by the relevant Victorian Acts to courts in Victoria then we ought to follow the decision of the Court of Appeal of New South Wales in Pheeney v. Doolan (No. 2) (1977) 1 N.S.W.L.R. 601.

Before dealing with those contentions, it may be convenient to say something about the legislation in South Australia. Section 30C of the South Australian Supreme Court Act was inserted by the Supreme Court Act Amendment Act No. 40 of 1972. In its original form it was very close to, but not identical with, the Victorian legislation considered by the Supreme Court of Victoria in East v. Breen (1975) V.R. 19 and by the High Court of Australia, on appeal from the Supreme Court of Victoria, in Ruby v. Marsh (supra). In particular it then had similar words to those which were the subject of debate in Ruby v. Marsh, that no interest should be awarded in respect of damages or compensation in respect of loss or injury to be incurred or suffered after the date of the judgment. Subsection (3) of Section 30C containing the words to which I have just referred was repealed by the Act No. 12 of 1974 and no similar subsection was inserted in its place. The new subsection provided that where a party was entitled to an award of interest, the Court might, in the exercise of its discretion and without proceeding to calculate the interest, award a lump sum in lieu of that interest.

Accordingly as the section now stands

in South Australia unless good cause is shown to the contrary, a court shall include an award of interest in a judgment in favour of the judgment creditor, so that the position in South Australia, unlike the position in New South Wales, is that there is a mandatory duty cast on the court in such cases. The interest is to be calculated at such rate of interest as is fixed by the court (and in the present case that rate of interest is ten per centum and neither party disputes the correctness of the rate) and interest is to be payable in respect of the whole or any part of the judgment for which judgment is given, in accordance with the determination of the Court.

I should say immediately that I do not think, with all respect, that the judgment in Ruby v. Marsh (supra) governs the case now before us. It turned, as I have said, on words which were in our 1972 Act but are not in our 1974 Act. I agree with respect with the remarks of Gibbs J. at page 660 of the report of Ruby v. Marsh that the statutory provisions in force in South Australia are distinguishable in material respects from the Victorian provision under consideration in Ruby v. Marsh.

I turn then to the consideration of interest as a component in a judgment pursuant to the South Australian amending Act of 1974.

In my opinion the basis of the right to interest is the same as it has been since the section came into force originally in 1972 and that is that interest is to be awarded to a plaintiff for being kept out of money which ought to have been paid to him earlier: see the judgment of Lord Denning M.R. in Jefford v. Gee (1970) 2 Q.B. 130 at 150. The real question here is: has Mrs. Faraonio been kept out of money which she ought to have received earlier and therefore should interest be paid to her thereon. In my opinion she has. She suffered the loss of earning capacity when she sustained the injury on 11th May, 1974. There is no question in this case of an

emergence later of an unrelated loss of earning capacity due to supervening causes.

Mr. Lander argued that because she would have received her salary as a teacher week by week as it accrued, she was being over compensated if she received interest on the capital sum which was calculated as taking the place of the weekly loss of earnings and which would be paid to her at judgment and not week by week thereafter as she would otherwise have received it. It is quite true that she would have received the weekly payments later but the fact is that she lost the earning capacity on the date of the accident. She ought to be compensated once for all for the loss of earning capacity. Notionally she should have been paid out either at the date of issue of the writ or at latest, and I will deal with this later, at the date of acceptance of service of the writ. She was not paid then and she has been kept out of her money from that date. That short point should in my view, as a matter of legal theory, be sufficient to dispose of the argument. However some of the Judges of the High Court of Australia in Ruby v. Marsh and the Judges of the Court of Appeal of New South Wales in Pheeney v. Doolan (No. 2) thought that one could go behind the capital sum and consider the payments as they would have accrued week by week at a series of later dates. With all respect to those who think so, I consider this to be a fallacy. The plaintiff on the date of the accident ceased to be a wage earner qua her loss of earning capacity, and she became an investor as Barwick C.J. pointed out in Ruby v. Marsh (supra) at page 652. If you treat her as an investor for the purpose of calculating the capital sum, but as a wage earner for the purpose of depriving her of interest thereon you do her a grave injustice. Either she is an investor throughout or a wage earner throughout. The practice of the court is to treat her as an investor

provided with a capital sum which, if properly and safely invested, will over the period of her remaining working life give her the equivalent of the money lost, but of course this is not so. By turning her into an investor the law provides her with substantial disadvantages as well as giving her the one advantage of having a capital sum which she may use. The most important of her disadvantages may be summarised as follows:-

1. She would in fact get a much larger sum in total if the money were paid week by week or month by month as the wages or salary accrued due and she might well by her saving habits or by being a successful even if a somewhat adventurous investor, do much better than the sum which is now being given to her.

2. Because of what I, with all respect, regard as the misapplication of British Transport Commission v. Gourley (1956) A.C. 185 to Australian conditions, she does not even get the capital equivalent of the net weekly wage she would have received. Gourley's case may be correct under the tax laws of England, a matter on which I express no comment; it certainly is not correct in relation to compensating plaintiffs in this country. Let me give an example: an injured workman is earning $200 per week gross immediately prior to his accident. He is that unusual man these days, a man who has a wife who stays home and looks after the house and the children, so that there is only one wage packet coming into the house. His employer as required by law deducts from his $200 a week standard rates of tax for a man with a dependent wife, namely $37.20 a week, so he takes home every week to his wife $162.80 in the pay packet. He is injured in an accident and recovers judgment against the tort feasor. The amount on which the annuity is calculated is on present views in Australia and applying Gourley's case, a capital sum sufficient to produce $162.80 per week over the lost years of the working life. He receives this capital sum and proceeds to invest it, as he must, in order to acquire the income which the capital sum is given to produce. So he gets each week or each period of interest payment, the equivalent of $162.80 per week.

The tax man cometh and the $162.80 is taxed either as interest or as an annuity, it matters not which for this purpose, and so he once more pays standard rate tax $24.25 per week on the income produced from the capital sum and instead of getting $162.80 he in fact gets $138.55 as his net amount per week. I would be very interested to see any Full Court, even a Full Court of five Judges, trying to persuade that man's wife that she is as well off running a home now that her husband's annuity provides a net amount every week of $138.55 as she was when her man was working and he brought her home a pay packet every week of $162.80. I rather suspect that her views on the asininity of the law would bear great resemblance to those of Mr. Bumble. The mistaken use of Gourley's case in Australia clearly stems from the fact that the Courts have not followed through the change of status of a plaintiff at the date of injury from a member of the working community to an investor.

3. The law at present makes an astounding assumption about future inflation, namely that there will not be any. We say it would be quite wrong to take future inflation into account because we cannot predict the future and the award is assessed in terms of present money values. That the award is expressed in terms of present money values is perfectly true, but we have constantly to reduce future figures to present money values for the purpose of any judgment and it can be done just as easily for wages which inflate in the future as for wages at a constant rate. It only means different arithmetic. As far as predicting the future is concerned, we habitually in cases of this kind predict the future about the prospective life span of the plaintiff, his prospective working life, his broken bones mending, the jobs which might or might not have come his way but for the injury, the promotions which might or might not have occurred if he had continued in his job, the remarriage of widows and many other things, but never, no never, must we make a prediction about future inflation.

That is so even though inflation has been with us continuously, sometimes fast and sometimes slow, but always with us, since at least the end of World War II. Even the law might reasonably be expected to catch up with the known facts of life in thirty-two years.

4. A plaintiff may, and usually will, lose tax advantages by being turned into an investor who simply pays standard rate tax with no special deductions. He will lose heavily in tax advantages if he was immediately prior to the accident in business of any kind, but even as an ordinary working man he loses some tax deductions on being turned into an investor. In addition to the loss of the tax deductions which are appropriate to the type of work previously done by the injured plaintiff, it must also be realised that the law uses interest rates for the purpose of computing his capital sum based on those appertaining to completely safe investments, and not on the more risky ones which an individual of an adventurous or speculative nature might choose for himself if he had a completely unfettered choice which latter investments might, if successful, produce tax advantages or non-taxable capital gains.

5. The injured plaintiff has no hope of bettering himself by changing jobs from time to time as many men do, or by getting better qualifications or added experience. All he has is a grey future on an annuity at a fixed sum for the term of his working life. We do in fact compensate plaintiffs for losses of job promotion, or the like which we can see are inherent in their position or in the qualifications which they hold (and this plaintiff was no exception in that respect) but we do not compensate plaintiffs for the fact that an adventurous person, simply by changing jobs, or getting experience in a variety of jobs or better trade qualifications, thereby quite frequently betters himself in ways which do not require degrees, diplomas or the other indicia which we frequently look at in deciding whether or not we ought to add something on to the verdict for the loss of a chance of promotion.

All these things and some others which I could mention at the cost of making this judgment longer, suggest to me that justice does require that the investor concept be carried rigorously through the whole of the award making process. These matters do not seem to have been adverted to in Pheeney v. Doolan (No. 2) (supra). I make no comment on that because it may well be that under the different discretion given by Statute in New South Wales a different answer ought to be given. As to that I say nothing; that is a matter for the courts in New South Wales.

As far as South Australia is concerned, both on principle, as to the proper way in which one considers loss of earning capacity and when it occurs, and on ordinary justice if one looks at it weighing the fact that the plaintiff is getting money now and not later as against the disadvantages that I have detailed and others, the award ought to be both in law and in justice an award of interest from the date of commencement of the action on the future economic loss as well as on other components of the judgment.

Turning to the lesser point, it is true that in Sagar's case and in Honey's case we said as a Full Court that interest should run from the date of acceptance of the writ.

I felt that Ruby v. Marsh (supra) so far impinged on South Australian practice that this point ought to be altered and I gave reasons for that view in Bonney v. Hartman (No. 3) (unreported, judgment delivered 16th March, 1977). After hearing argument on the point in the instant case, I am confirmed in the views I expressed in Bonney v. Hartman (supra). In my opinion the section says that interest runs in the case of an unliquidated claim from the date of the commencement of the proceedings to the date of judgment or in respect of such other period as may be fixed by the Court. That means that you

start from a prima facie assumption that it runs from the date of commencement of proceedings which must be the date of the issue of the writ. The Court may of course fix some other date. It may be that the plaintiff did not serve his writ for months after it happened. It may be that the defendant had no prior knowledge whatsoever of the claim and might reasonably be expected to spend a little while finding out what sum it was he had to pay, which is information not normally included in a writ of summons. These, however, are the unusual cases. Normally a plaintiff serves his writ as soon as possible or within a short time after issue. Insurance companies normally know the injuries sustained by people concerned in motor accidents within twenty-four or fourty-eight hours after the accident has happened and by using their statutory powers to have the plaintiff examined from time to time by a doctor of their own nominating, have a very good idea of what the plaintiff's claim is going to amount to. They need to do that in any event for the purpose of raising estimates to inform their head office and quite frequently for the purposes of reinsurance also. It was agreed on both sides that there were no circumstances in the present case which required the exercise by the Court of any discretion to fix a date other than the commencement date, namely the date of issue of the writ, 1st September, 1975 for the computation of interest. In my judgment, therefore, the plaintiff should have interest from 1st September, 1975 on the whole of the verdict, except the small amount of special damages, at the rate of ten per centum per annum. That then raises one point on the construction of Section 30c. The trial Judge clearly used his powers to award a lump sum in lieu of interest. That sum was $3,250. If he had given interest, as I think he should have, for the full period on $54,405 at ten per centum per annum, the agreed amount of interest, taken from the paper supplied to us by counsel, and calculated to May 4, 1978 is $14,547.74. I have hesitated as to whether we can at all, and if so within what bounds, interfere with the action of a trial Judge

who gives a lump sum award in lieu of interest. However I think his discretion to award a lump sum in lieu of interest must be bounded by the normal rules covering all discretions, and that whilst this particular discretion is more difficult to challenge than others because of its being an award of a lump sum, nevertheless if the discrepancy is as wide as exists here, it is within the power of the Court to intervene and substitue another sum for the lump sum given by the trial Judge. Accordingly in my view the cross appeal succeeds and the amount of $3,250 given by the trial Judge as interest in judgment should be increased.

I do not think it necessary in this judgment to deal with the special problems which arise in cases where payments have been received by a plaintiff as and for workmen's compensation. They do not arise on this appeal and it is as well to leave them until a case comes before us which raises the exact point for decision.

I should like to hear the parties as to costs.

In the Supreme Court of South Australia

No. 14

Reasons for Judgment of the Honourable Mr. Justice Jacobs on the Cross Appeal

19th May 1978

NO. 14

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE JACOBS ON THE CROSS APPEAL

DELIVERED 19th May 1978

THOMPSON v. FARAONIO (NO. 2)

No. 1397 of 1976

Date of Hearing : 4th May 1978

IN THE FULL COURT

Coram: Bray C.J., Bright, Zelling, Jacobs and King JJ.

JUDGMENT of the Honourable Mr. Justice Jacobs

(On appeal from the Honourable Mr. Justice Hogarth)

Counsel for the Appellant:	Mr. B.T. Lander with Mr. C.A. Johansen
Solicitors for the Appellant:	Baker, McEwin & Co.
Counsel for the Respondent:	Mr. T.A. Gray
Solicitors for the Respondent:	Genders, Wilson & Partners

Judgment No. 3815

FULL COURT

Jacobs J.

In my opinion the first question should be answered by holding that the sum awarded for the future effects of loss of earning capacity should be brought into account for the purpose of calculating interest to be awarded pursuant to s. 30c. of the Supreme Court Act, 1935, as amended. I prefer to express my conclusion in this form, rather than by saying that interest should run on "the sum awarded" for future effects of loss of earning capacity, for I agree with Bright J. that this sum may need to be adjusted for the purpose of calculating interest if the plaintiff is not to be excessively compensated.

As to the principle which underlies the conclusion that the sum awarded for the future effects of loss of earning capacity should be brought into account, there is little I wish to add to the reasons advanced by other members of the Court. Whether the decision of this Court in Sager v. Morten and Morrison (1973) 5 S.A.S.R. 143 could stand with Ruby v. Marsh 132 C.L.R. 642 had s. 30c. of the Supreme Court Act not been amended in the manner described in the judgment of the Chief Justice it is not now necessary to decide. The fact remains that Ruby v. Marsh (supra) was decided on legislation which is significantly different from s. 30c., in its present form, and the same may be said of Pheeney v. Doolan (No. 2) (1977) 1 N.S.W.R. 601. In the absence of authority which compels us to take a different view, I do not think this Court should now depart from the principle, which is firmly entrenched in its judgments, that the juristic concept

of damages suffered once and for all on the happening of the event which causes the injury is the proper concept of damages for the purpose of awarding statutory interest. The argument that has been advanced by reference to the 'practical concept' adopted in Pheeney v. Doolan (supra) persuasive as it may be, overlooks the legislative history of s. 30c., as well as the fact that the statutory authority supporting that decision is less imperative than s. 30c.

In working out this principle, however, there appears to me to be no formula that reconciles in a logical way all the principles upon which damages are assessed and interest awarded. If the true basis upon which interest is awarded is to compensate the plaintiff for being kept out of his money it would seem logical, for the purpose of calculating interest, to discount the damages assessed back to the accrual of the cause of the action, or at least to the commencement of the action, for that is prima facie the amount the use of which has been denied to the plaintiff. That would mean, however, that interest could never be awarded on the whole of the amount of the judgment, which flies in the face of the statute. Moreover, there may well be some distinction between economic loss to the date of trial and economic loss thereafter, depending upon the method of assessment, and upon that I agree with the observations of Bright J. and King J., which I have had the advantage of reading. But it must be remembered that the statute, although imperative, unless good cause is shown to the contrary, nevertheless confers a discretion including a discretion to award a lump sum by way of interest, which ought not to be fettered by formulae or rigidity: the duty of the Court is to arrive at an apparently fair and reasonable result in circumstances which may be infinitely various.

In this case, I cannot, with all respect, reach the conclusion that the lump-sum amount of interest awarded is fair and reasonable, but in substituting the figures agreed upon by counsel, as appropriate in the light of our

decision, it is not to be assumed that the same calculation is necessarily appropriate in another case, an observation which applies particularly to the concession that in this case the component of the judgment said to represent economic loss to date of trial, carries interest without any judgment.

As to the second question, I agree with the answer proposed by Bright J. and have nothing to add.

In the Supreme Court of South Australia

No. 15

Reasons for Judgment of the Honourable Mr. Justice King on the Cross Appeal

19th May 1978

NO. 15

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE KING ON THE CROSS APPEAL

DELIVERED 19th May 1978

THOMPSON v. FARAONIO (No. 2)

No. 1397 of 1976

Date of Hearing : 4th May 1978

IN THE FULL COURT

Coram: Bray C.J., Bright, Zelling, Jacobs and King JJ.

JUDGMENT of the Honourable Mr. Justice King

(On appeal from the Honourable Mr. Justice Hogarth)

(Interest - S.30C Supreme Court Act 1935 as amended - availability of interest on award of damages for future effects of loss of earning capacity - date from which interest runs).

Counsel for the Appellant:	Mr. B.T. Lander with Mr. C.A. Johansen
Solicitors for the Appellant:	Baker, McEwin & Co.
Counsel for the Respondent:	Mr. T.A. Gray
Solicitors for the Respondent:	Genders, Wilson & Partners

Judgment No. 3816

FULL COURT

King J.

I agree with the Chief Justice that the first question should be answered by saying that the interest included in a judgment for damages for personal injury should normally, and subject to the discretion of the Court, run on the sum awarded for the future effects of loss of earning capacity. I subscribe to the reasons given by the Chief Justice for this view subject only to some reservation concerning his view that any disallowance or reduction of interest will normally more readily be forthcoming in the case of pre-trial loss than in the case of post-trial loss. It is unnecessary to canvass this aspect of the matter in order to decide this case and much may depend upon the method used to compute the damages for destruction or impairment of earning capacity.

As to the method of computation of damages, I agree with the summary of the position in South Australia contained in the judgment of Bright J. I also agree with Bright J.'s conclusions in Clearihan v. Allen as corrected in his judgment in this case. If, however, damages for lost earning capacity are computed, as they ought to be, as at the date of the accident, three considerations should be emphasised. The first consideration is that a Court is not required to attempt a precise mathematical calculation either in discounting back or in any other part of the process. The assessment of the damages for lost earning capacity is necessarily an inexact process and the Court will normally make allowance for the various factors along broad lines. The second consideration is that the damages are to be assessed in the money

of the day of the judgment. In many cases, it may be sufficient to compute pre-trial loss simply by totalling the actual wages lost to date of trial, allowing the need to discount back to offset the depreciation in the value of money. In other cases some adjustment will be necessary so that the plaintiff will be neither overcompensated or undercompensated. If the Court acts upon an actuarial calculation as to the present value as at the date of the accident the loss flowing from the destroyed or impaired earning capacity, the point that the damages must be assessed in the money of the day of judgment is crucial. A practical approach in most cases will be to capitalize the loss on the basis of the plaintiff's weekly earnings at the date of trial. This assumes, of course, that those weekly earnings are the money equivalent of the weekly earnings lost over the period since the accident. An appropriate adjustment would have to be made for any proved alteration in the level of his real earnings over the period. The third consideration is that in exercising the discretion as to interest, it should be borne in mind that if interest runs from the commencement of the proceedings, or some later date, the loss has been borne by the plaintiff without interest from the date of the accident.

As to the second question, the alternatives which we are asked to consider is whether interest included in the judgment runs from the date of the issue or the date of service of the proceedings. In my opinion, the effect of the section is that prima facie the date of the commencement of the proceedings is the commencing date of the period during which interest runs. But the Court has a discretion to fix a different period and hence a different commencing date for sufficient reason. A variety of considerations may influence a Court to fix a different period. The twofold purpose for which the power to award interest is given must be borne in mind; Ruby v. Marsh 132 C.L.R. 642 per Barwick C.J. at 652-3. One aspect is that the plaintiff has not had the use of the money to which he

is entitled. The other aspect is the discouragement of defendants from delaying settlement in order to have the use of the money. Where there has been little delay in the service of the proceedings or the delay has not been the fault of the plaintiff or his representatives, the first aspect is paramount and the interest, in my view, should run from the issue of the writ. Where there has been culpable delay, the second aspect assumes importance and the inability of the defendant to settle, especially if he has had insufficient prior information to enable him to assess the damages, would indicate the date of service of the writ as the appropriate commencement of the interest period. We are not required on this appeal to consider whether the power to fix the interest period includes a period before the issue of the writ. Like the Chief Justice, I see no reason why it should not. I am content to answer the second question in the manner proposed by Bright J.

In the Supreme Court of South Australia

No. 16

Order of the Full Court allowing the Cross Appeal

19th May 1978

NO. 16

ORDER OF THE FULL COURT ALLOWING CROSS APPEAL

SOUTH AUSTRALIA

IN THE SUPREME COURT

NO. 1397 of 1976

IN THE MATTER of an action in the Local Court of Adelaide No. 31689 of 1975 removed into the Supreme Court of South Australia pursuant to Order dated the 17th day of September 1976

BETWEEN:

KARAN FARAONIO Plaintiff (Respondent)

- and -

CHRISTOPHER BERNARD THOMPSON Defendant (Respondent)

BEFORE THE HONOURABLE THE CHIEF JUSTICE
THE HONOURABLE MR. JUSTICE BRIGHT
THE HONOURABLE MR. JUSTICE ZELLING
THE HONOURABLE MR. JUSTICE JACOBS and
THE HONOURABLE MR. JUSTICE KING

FRIDAY THE 19TH DAY OF MAY 1978

THE CROSS APPEAL of the abovenamed plaintiff from the judgment of the Honourable Mr. Justice Hogarth given and pronounced on the 7th day of December 1977 coming on for hearing on the 4th day of May 1978 pursuant to the order of the Full Court dated the 4th day of May 1978

UPON READING the notice of cross appeal herein dated the 28th day of February 1978 and the said order dated the 4th day of May 1978

AND UPON HEARING Mr. T. A. Gray of counsel for the respondent and Mr. Lander and Mr. Johansen

of counsel for the appellant

THE COURT DID RESERVE JUDGMENT

and the same standing for judgment this day

THIS COURT DOTH ORDER

that the cross appeal be allowed and that the said judgment of the Honourable Mr. Justice Hogarth in so far as it adjudged that the plaintiff be awarded the sum of $3750 for interest be varied and that in lieu of such award there be substituted an award of $14,547.74 for interest (being the interest on general damages of $54,405 at 10 per centum per annum calculated from the 1st day of September 1975 down to the 4th day of May 1978)

AND IT IS ADJUDGED accordingly

AND THIS COURT DOTH FURTHER ORDER

that the question of the costs of the said cross appeal be remitted to the quorum constituting the Full Court on the hearing and determination of the appeal herein for further consideration

BY THE COURT

(Sgd.)

ACTING DEPUTY MASTER

THIS ORDER is filed by BAKER McEWIN & Co. of National Mutual Centre, 80 King William Street, Adelaide.
Solicitors for the Defendant.

In the Supreme Court of South Australia

No. 17

Notice of Motion for leave to appeal to Her Majesty in Council

8th June 1978

NO. 17

NOTICE OF MOTION FOR LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 1397 of 1976

BETWEEN:

CHRISTOPHER BERNARD THOMPSON
Applicant

- and -

KARAN FARAONIO Respondent

TAKE NOTICE that the Full Court will be moved on the day of 1978 at 10.30 o'clock in the fore-noon or so soon thereafter as counsel can be heard by counsel on behalf of the abovenamed plaintiff for an Order :

1. That pursuant to Rule 2 of the Order in Council made on the 15th day of February 1909 the plaintiff be granted leave to appeal on such conditions as the Court shall impose to Her Majesty in Council from the judgment of the Full Court comprising the Honourable the Chief Justice, the Honourable Mr. Justice Bright, the Honourable Mr. Justice Zelling, the Honourable Mr. Justice Jacobs and the Honourable Mr. Justice King given and pronounced on the cross appeal to the Full Court in this matter on the 19th day of May 1978 whereby the Full Court entered judgment for the respondent on the cross appeal and substituted for the sum of $3,750.00 ordered by the learned trial judge the Honourable Mr. Justice Hogarth the sum of $14,547.74 and made certain Orders as to costs.

2. That upon proof of the compliance by the plaintiff with such conditions as the Court shall impose the applicant be granted final leave to appeal to Her Majesty in Council from the aforesaid judgment.

3. For such further order as the Court may seem just.

DATED the 8th day of June 1978

(Sgd) Baker McEwin & Co.,
National Mutual Centre,
80 King William Street,
ADELAIDE.

Solicitors for the Applicant

TO: The Respondent,
Karan Faraonio,
C/O Genders Wilson & Partners,
123 Waymouth Street,
ADELAIDE.

THIS NOTICE OF MOTION is given by BAKER McEWIN & CO. of National Mutual Centre, 80 King William Street, Adelaide.

Solicitors for the Applicant.

In the Supreme Court of South Australia

No. 18

Order granting conditional leave to appeal

12th June 1978

NO. 18

ORDER GRANTING CONDITIONAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 1397 of 1976

IN THE MATTER of an action in the Local Court of Adelaide No. 31689 of 1975 removed into the Supreme Court of South Australia pursuant to order dated the 17th day of September 1976

BETWEEN:

KARAN FARAONIO Plaintiff (Respondent)

- and -

CHRISTOPHER BERNARD THOMPSON Defendant (Appellant)

BEFORE THE HONOURABLE THE ACTING CHIEF JUSTICE
THE HONOURABLE MR. JUSTICE WALTERS AND
THE HONOURABLE MR. JUSTICE JACOBS
MONDAY THE 12TH DAY OF JUNE 1978

UPON MOTION made unto this Court this day on behalf of the abovenamed appellant for leave to appeal to Her Majesty in Council from the judgment herein of the Full Court of this Court dated the 19th day of May 1978 pursuant to notice of motion dated the 8th day of June 1978

UPON READING the said notice of motion the affidavit of Clynton Allan Johansen filed herein on the 8th day of June 1978 and the affidavit of Suzanne Maree Colley filed herein this day and the exhibit thereto

AND UPON HEARING Mr. Lander of counsel for the appellant and Mr. T. A. Gray of counsel for

the respondent

THIS COURT DOTH ORDER -

1. That the appellant be and he is hereby granted conditional leave to appeal to Her Majesty in Council from the said judgment of the Full Court upon condition that the appellant do within 21 days from this date enter into good and sufficient security to the satisfaction of the Court in the sum of £500 (Sterling) for the due prosecution of the appeal and the payment of all such costs as may become payable to the respondent in the event of the appellant not obtaining an order granting him final leave to appeal or of the appeal being dismissed for non-prosecution or of Her Majesty in Council ordering the appellant to pay the costs of the appeal (as the case may be).

2. That within 3 months from this date the appellant do take all necessary steps to procure the preparation of the record for the purpose of the intended appeal and do transmit the same to the Registrar of the Privy Council.

3. That the application on behalf of the appellant for a stay of execution be adjourned to a date to be fixed.

4. That further consideration the question of final leave to appeal be adjourned to the 13th day of June 1978.

BY THE COURT

(Sgd.) R.G. FERRET

ACTING DEPUTY MASTER

(R.G. Ferret)

THIS ORDER is filed by BAKER McEWIN & CO. of National Mutual Centre, 80 King William Street, Adelaide.

Solicitors for the Appellant.

In the Supreme Court of South Australia

No. 19

Order granting final leave to appeal to H.M. in Council

13th June 1978

NO. 19

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 1397 of 1976

IN THE MATTER of an action in the Local Court of Adelaide No. 31689 of 1975 removed into the Supreme Court of South Australia pursuant to order dated the 17th day of September 1976

BETWEEN:

KARAN FARAONIO Plaintiff (Respondent)

- and -

CHRISTOPHER BERNARD THOMPSON Defendant (Appellant)

BEFORE THE HONOURABLE THE ACTING CHIEF JUSTICE
THE HONOURABLE MR. JUSTICE WALTERS AND
THE HONOURABLE MR. JUSTICE JACOBS
TUESDAY THE 13TH DAY OF JUNE 1978

UPON MOTION made unto this Court this day on behalf of the abovenamed appellant for final leave to appeal to Her Majesty in Council from the judgment herein of the Full Court of this Court dated the 19th day of May 1978 pursuant to notice of motion dated the 8th day of June 1978

UPON HEARING Mr. Lander of counsel for the appellant and Mr. T. A. Gray of counsel for the respondent

AND this Court being satisfied that the condition upon which conditional leave to appeal was granted by order dated the 12th day of June 1978 has been complied with

THIS COURT DOTH ORDER

that the appellant be and he is hereby granted final leave to appeal to Her Majesty in Council.

BY THE COURT

(Sgd.) R.G. FERRET

ACTING DEPUTY MASTER

(R. G. Ferret)

THIS ORDER was filed by BAKER McEWIN & CO. of National Mutual Centre, 80 King William Street, Adelaide.

Solicitors for the Appellant.

No. 29 of 1978

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

BETWEEN:

CHRISTOPHER BERNARD THOMPSON (Defendant)
Appellant

- and -

KARAN FARAONIO (Plaintiff)
Respondent

RECORD OF PROCEEDINGS

MESSRS BARLOW LYDE & GILBERT
Drake House
3/5 Dowgate Hill
London
EC4R 2SJ

Solicitors for the Appellant

MESSRS. SIMONS, MUIRHEAD & ALLAN
40 B edford Street
Covent Garden
London
WC2E 9EN

Solicitors for the Respondent