

AUSTRALIA / JUDGMENT

Gaffney v Ward [2014] NSWDC 20

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District Court

New South Wales

Medium Neutral Citation: Gaffney v Ward [2014] NSWDC 20

Hearing dates: 10 & 20/03/2014

Decision date: 28 March 2014

Jurisdiction: Civil

Before: Levy SC DCJ

Decision: 1.Verdict and judgment for the plaintiff in the sum of \$670,494.90;

2.The defendant is to pay the plaintiff's costs on the ordinary basis unless either party can show an entitlement to some other order for costs;

3.The exhibits may be returned;

4.Liberty to apply on 7 days notice if further orders are required.

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

Catchwords: TORTS - motor vehicle accident - nervous shock claim - plaintiff's children injured and placed in peril - breach of duty of care admitted; DAMAGES - assessment of damages for nervous shock - plaintiff unable to pursue her career as an opera singer

Legislation Cited: Civil Liability Act 2002, s 31

Evidence Act 1995, s 60

Motor Accidents Compensation Act 1999, s 126, s 131

Cases Cited: Allianz Australia Insurance Ltd v Kerr [2012] NSWCA 13

Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1

Callaghan v Wm C Lynch Pty Ltd [1962] NSW 871

Dasreef Pty Ltd v Hawchar [2011] HCA 21

Daw v Toyworld (NSW) Pty Ltd [2001] NSWCA 25

Foster v Tyne and Wear County Council [1986] 1 All ER 567

Graham v Baker [1961] HCA 48; (1961) 106 CLR 340

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

Luxton v Vines [1952] HCA 19; (1952) 85 CLR 352

Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305; (2001) 52 NSWLR 705;

Malec v JC Hutton Pty Ltd [1990] HCA 20; (1990) 169 CLR 638

Medlin v State Government Insurance Commission [1995] HCA 5; (1995) 182 CLR 1

Mt Isa Mines Ltd v Pusey [1970] HCA 60; (1970) 125 CLR 383

Paff v Speed [1961] HCA 14; (1961) 105 CLR 549

Penrith City Council v Parks [2004] NSWCA 201

Purkess v Crittenden [1965] HCA 34; (1965) 114 CLR 164

State of NSW v Moss [2000] NSWCA 133, (2000) 54 NSWLR 536

Watts v Rake [1960] HCA 58; (1960) 108 CLR 158

Wynn v NSW Ministerial Corporation [1995] HCA 53; (1995) 184 CLR 485

Category: Principal judgment

Parties: Meagan Gaffney (Plaintiff)

David Ward (Defendant)

Representation: On 10 March 2014

Mr G Hickey (Plaintiff)

Mr S Torrington (Defendant)

On 20 March 2014

Ms M Griffiths (Solicitor for the plaintiff)

Ms T Smart (Solicitor for the defendant)

Slater & Gordon (Plaintiff)

Sparke Helmore (Defendant)

File Number(s): 2012/336431

Publication restriction: None

Judgment

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Nature of case and factual background

1The plaintiff, Meagan Gaffney, has brought these proceedings to claim damages for nervous shock which she suffered on learning that her sons Montgomery Ward, aged 10 years, and Archie Ward, aged 6 years, had been injured in a motor vehicle accident.

2At about 5.15pm on Tuesday 11 August 2009, those two sons of the plaintiff were passengers in a 4-wheel drive vehicle driven by the defendant, David Ward, the plaintiff's former husband, on the Kosciuszko Road at Cooma, NSW. The accident occurred when the vehicle lost traction, crossed over onto the incorrect side of the roadway, and into the path of an oncoming vehicle. A major collision then ensued, resulting in the deaths of the other driver and of a passenger in that vehicle.

3The psychological effect on the plaintiff of her learning of those events, in which two of her three children were injured and placed in peril, was severe shock, which has had a profound and lasting impact upon her, including on her ability to work in her profession as an operatic singer.

4Soon after those events the plaintiff reported symptoms of nightmares, stress, fear for the safety of her children, anxiety, flashbacks, bouts of tearfulness and crying, mood swings, tension headaches, and pain and discomfort with associated limitation in some neck and back movements: Exhibit "A", Bundle 2, p 27. The accident has caused the plaintiff to suffer from post-traumatic stress disorder, anxiety, depressed mood, and related psychological symptoms more fully described by various diagnostic labels in the reports of the medical experts tendered in the proceedings.

5The defendant's CTP insurer has admitted that he was at fault in respect of that accident. The proceedings are governed by the provisions of the Motor Accidents Compensation Act 1999 ["the MAC Act"].

6At the commencement of the hearing, counsel for the defendant applied for and was granted leave to withdraw a pleaded defence that sought to invoke the provisions s 31 of the Civil Liability Act 2002 which concerns limitations on the recovery of damages for mental harm.

Evidence overview and credit

7The plaintiff was the only witness to give oral evidence. The remainder of the evidence comprised documents consisting of unchallenged medical and allied reports, and documents relevant to the claim for financial loss.

8The plaintiff was an impressive witness who gave her evidence in a dignified, restrained and understated manner on matters that clearly were emotionally very upsetting and distressing to her.

9There were no challenges to the credibility or to the reliability of the evidence of the plaintiff. I accept her evidence in its entirety as it was not improbable in any respect, and there was no inherent reason to doubt the content of her evidence.

Issues

10The issues that call for decision in this case primarily concern the quantification of the plaintiff's entitlement to damages for economic loss and loss of earning capacity. Those matters of assessment will be addressed after I have set out my findings of fact.

Facts

11The facts of the accident have already been adequately described in paragraphs [1] and [2] above. Unless otherwise qualified, my findings of fact on the initial effect on the plaintiff on learning of the accident, the plaintiff's pre-accident circumstances, and the longer-term effects that those matters have had on the plaintiff, are set out as follows.

Plaintiff's pre-accident personal circumstances

12The plaintiff is presently aged almost 43 years. She had married the defendant in 1993. Together they had three sons, Montgomery born in 1999, Oliver born in 2001 and Archie born in 2003. The defendant left the marriage in 2007 in circumstances that caused the plaintiff to suffer great emotional upheaval, loss and grief, for which she received counselling which helped her to come to terms with those events. The plaintiff and the defendant divorced in 2008. I shall return to relevant aspects of those matters in due course after outlining something of the plaintiff's musical background as those matters are relevant to the assessment of her claim for damages.

Plaintiff's pre-accident professional career

13The plaintiff showed a musical aptitude from an early age. She came from a musical family. At age 4 years she started playing the violin. At age 8 years she started playing the piano. At age 16 years she commenced developing her voice and its range for singing. This was to be the beginning of her journey on the pathway to a professional singing career focussed upon operatic performance.

14After completing her high school education in Melbourne to Year 12 standard in 1988, the plaintiff secured a position in the Victorian College of the Arts. Between 1989 and 1992 she pursued and completed the degree of Bachelor of Education majoring in Music. She later extended those studies obtaining a Master's degree in Music from the University of Melbourne.

15From the time of her graduation, until the time of the accident, the plaintiff's artistic career as a singer progressively developed according to her clear-sighted ambition that she wanted to pursue a career as an operatic soprano. In that regard, she had hoped to ultimately pursue a full-time career in opera, although she understood that achieving the full extent of that goal involved some uncertainty.

16The chronology of the plaintiff's operatic singing career sets out some of her impressive achievements in that endeavour. Her career is also documented by the many clippings and extracts from promotional materials that were tendered: Exhibit "A", Bundle 3, pages 1 - 71; Exhibit "C". A shortened summary of those matters follows.

17Along the timeline of her undisputed chronology, in 1992 the plaintiff started performing in public with a Sydney singing group. In 1995 she took some training from an international conductor who at that time held a post in Sydney. In that year she was the winner of the Lyric Soprano Award. In 1996 she undertook her first principal role for the Rockdale Municipal Opera Company. Shortly after her marriage in 1993, the plaintiff commenced teaching music in secondary schools.

18Between 1997 and 1999, before the birth of her first son, Montgomery, in 1999, she performed as principal in a number of operatic productions with the Rockdale Opera Company in Sydney. Her roles in the productions of that company included Juliet, in *Romeo and Juliet*, Amira, in *La Sonnambula*, and Lucia, in *Lucia di Lammermoor*. In 1998 she took part in a production of *Kiss me Kate*. In the same year she was part of a gala performance on the ship the QEII. In 1999 she also recorded for the Young Artists Programme, and was engaged as a freelance principal artist with Opera Australia, an achievement of some significance for someone wanting to pursue a career in opera.

19In 2000, which was the year following the birth of her first son, the plaintiff made her debut with the Australian Opera Company. In 2000/2001 the plaintiff obtained a contract that placed her on the staff of the Australian Opera Company. Her role in that position was to participate in performances by that company, including concert engagements and to be the understudy in a number of major operatic roles. In that capacity her designation was that of one of several principal artists.

20In that year she performed in Mozart's *The Abduction from the Seraglio* where she took over from the designated principal artist who became ill. She also performed as principal in Britten's *A Midsummer Nights Dream*. She was also a featured soloist at Gala Concerts at the Sydney Opera House, as well as performing at various corporate functions for Opera Australia.

21In those events, she came under the notice of a number of well known and influential musical mentors, including some prominent Australian and overseas conductors of renown and professional influence.

22Before the birth of her second son, Oliver, at the end of 2001, the plaintiff had travelled to Dusseldorf in Germany to perform with local musical societies affiliated with the Dusseldorf Opera Company. She gave about 6 or 8 performances for that company in a period of 12 months. There, she was mentored by one such conductor, an Australian who had seen her perform in Sydney, and who was also a one-time conductor of Opera Australia, and who, in Germany, was the artistic director of the Hamburg Opera.

23In 2002, the plaintiff found it necessary to return to Australia to attend to the emergent and pressing medical needs of her second son, who at that time required open heart surgery. In that year, she also commenced a Master's degree in Music at the University of Melbourne. Her Master's degree thesis, which had an operatic topic, is impressive and insightful: Exhibit "B". In the meantime, her third son, Archie, was born in 2003.

24In 2004, the plaintiff moved to the Central Coast of NSW where she commenced working as a vocal teacher in Opera Studies at the Central Coast Conservatorium. During that time she continued working as a freelance operatic artist and she was a principal artist with the Central Coast Symphony Orchestra. In 2005, the plaintiff was substantially occupied with the significant medical needs of her second son, who had by then been diagnosed with a severe form of autism, and epilepsy.

25Notwithstanding those problems, and notwithstanding the flow-on effects this had for the plaintiff in having to set aside time to be the principal carer for her son with special needs, she nevertheless managed to continue to develop her professional career. In that time, she continued to perform and to teach in addition to attending to her childcare responsibilities.

26In 2005, she worked as a principal artist with Opera Hunter, in Newcastle, NSW. In that capacity she performed the role of Susanna in Mozart's Marriage of Figaro. In 2006, she continued with Opera Hunter and performed the role of Donna Anna in Mozart's Don Giovanni. These were demanding and exciting roles for the plaintiff. In that same year, the plaintiff also featured as a soloist with Central Coast Symphony Orchestra. In that year she also received First Class Honours in the degree Master of Music.

27Until that time, the plaintiff's then husband, the defendant in these proceedings, had accommodated the demands of the plaintiff's operatic and musical career ambitions whilst at the same time pursuing his own work in the field of medical education. This remained the case until the defendant decided to change his career path in order to study medicine.

28In that regard, in January 2007, the plaintiff and her family moved to live in Wollongong to enable her husband to fulfil his ambition of obtaining a degree in the graduate medical programme. He was successful in that regard, and he later went on to qualify as a psychiatrist.

29In 2007, whilst the defendant was pursuing his medical studies, the plaintiff obtained full-time employment as a lecturer with the Wollongong Conservatorium, where she worked as a vocal teacher and co-ordinator of the childhood music programme. In that time, she also occasionally performed with the Wollongong Symphony Orchestra as a guest artist, and she gave about 10 to 12 performances in that capacity.

30In that time the plaintiff also supplemented her income by giving private singing lessons, for which she was well qualified. She managed these activities as well as managing her childcare responsibilities. Her plan was that she hoped to return to a career as an opera singer on a full-time basis once the children were older. She considered that she could have continued with her career opportunities with opera companies in either Sydney or Melbourne once her husband had

finished his medical studies. I consider that her described plan was one which could be realistically achieved.

31At that point in her career, in late 2007, the plaintiff encountered a devastating personal and emotional setback when her husband revealed to her that he was leaving their marriage of 14 years. He then re-partnered with another person, as is more fully described in the evidence.

32In 2008, in the aftermath of those events, the plaintiff remained in Wollongong with her children. Later that year the couple divorced. The plaintiff then found herself involved in custody disputes.

33In 2009, the plaintiff found it necessary to move back to Victoria where she found personal support from her parents whilst she dealt with a number of ensuing personal difficulties. These included dealing with the psychological blow and associated grief from the unexpected ending of her marriage, her difficulties in working in her profession because of those psychological issues, and having to deal with vexing litigation in the Family Court brought by her ex-husband, by which he sought custody of the three children of the marriage, and the fact of her separation from her children as a result of orders of the Family Court.

34The plaintiff found the Family Court proceedings took much of her time and energy, and it also depleted her financial resources. In that context, the court orders initially obtained by the defendant prevented the children from being removed from Wollongong. As a result, the children remained with their father and his new partner in Wollongong.

35That arrangement necessarily changed after the accident, although not without some further difficulty for the plaintiff, and following further vexing litigation in the Family Court.

36Those events are chronicled in more detail in the 10 December 2009 report of Ms Christine Bendall, a counsellor who had been appointed by the Family Court to interview the plaintiff, the defendant, both sets of grandparents, two of the three children, and to review the content of the Family Court files: Exhibit "1", pages 27 - 43.

37After the marriage had ended, and before the accident, the plaintiff had re-settled in Victoria. In late 2008 and in 2009 she had obtained counselling through regular sessions with a psychologist, Ms Salli Trathen. That counselling had assisted the plaintiff greatly in coming to terms with the earlier described problems. In that time the plaintiff was successful in obtaining part-time employment teaching music at a secondary school 3 days per week. Her plan was to fill the rest of the week and her available time, singing and getting back into operatic performance. She then proceeded to take steps to implement that plan and did so in an intelligent and focussed manner.

38The plaintiff began rebuilding her professional contact base in Melbourne, auditioning and meeting relevant people, teaching, all aimed at trying to rebuild her career. In that regard, she became friendly with a number of influential people with Opera Australia, including a known repetiteur and coach with whom she did some work.

39In those events, the plaintiff found she had increasingly regained her stability and confidence. This was to the extent that she accepted a prestigious offer from the Melbourne City Opera Company to perform in the lead role in the production of the opera Luisa Miller. This occurred after she had been invited by a well-placed contact in her profession to audition for that role. She was selected for that role on merit in competition with 5 other suitable operatic sopranos who had also been asked to audition for that role.

40Thereafter, the plaintiff participated in the early rehearsals that were required for that production. Those rehearsals were scheduled to take place between June and September 2009. The performances were due to start in October 2009. The plaintiff successfully progressed her way through those rehearsals without problems until 11 August 2009, which was when the accident, the subject of these proceedings, intervened.

41As a result of the emotionally shocking consequences of that accident to the plaintiff, she found it necessary to withdraw from and relinquish her role in the production she was rehearsing. She did so on medical advice given to her at the time. That advice was not challenged. She has not been able to perform in public since that time.

Pre-accident medical evidence

42The defendant tendered the clinical notes of the plaintiff's general practitioner, Dr Elizabeth Banks: Exhibit "1", pages 11 - 21. Those notes reveal that there had been only two relevant pre-accident consultations with the plaintiff, namely on 27 and 28 December 2006. Those consultations were for treatment of a chest infection. On the first of those visits, her general practitioner recorded, understandably, that the plaintiff had been stressed at having moved from the Central Coast to Wollongong as her husband was undertaking post-graduate studies in medicine, and it was noted that she was taking up a position as a lecturer at the conservatorium.

Plaintiff's pre-accident psychological baseline

43In assessing the plaintiff's claim for damages, it is important to have regard to the plaintiff's pre-accident psychological or emotional baseline, and to also have due regard to the progress the plaintiff had made in moving that baseline towards greater stability after the breakdown of her marriage, and also having due regard to the steps she had taken towards re-establishing her professional career to the point where the accident had intervened and deflected those efforts and ambitions.

44In that regard, on 28 November 2008, the plaintiff had commenced a series of six pre-accident counselling sessions with a psychologist, Ms Trathen, as already mentioned. She did so in order to obtain professional assistance to help her cope with her changed marital status, the vexing legal issues that were the focus of the Family Court proceedings, and with the overall difficulty she had in dealing with the issues which had emerged for her following her former husband's actions in unexpectedly ending their marriage in the manner described in the evidence.

45The plaintiff found the counselling sessions with Ms Trathen very helpful in assisting her in coming to terms with her marriage ending as it did. The early phase of Ms Trathen's involvement in the assessment and treatment of the plaintiff was documented before the accident, in the following terms:

"Meagan is receiving ongoing treatment for symptoms of grief, depression and anxiety reactive to a complex and difficult separation from her husband approximately 2 years ago in which she has suffered from significant emotional, psychological and financial abuse and social isolation for a protracted period of time. She has 3 children aged between 5 and 9 years and her middle son, aged 6 years has been diagnosed with severe autism and a rare degenerative form of epilepsy.

Meagan has recently decided to return to her home state of Victoria (from NSW), where she has the support of her extended family. However the move has required Meagan to leave her 3 young children, creating profound grief for both herself and the children. This has been compounded by the ongoing damaging hostilities in her negotiations with her ex-husband regarding regular contact, residential and financial arrangements with respect to her 3 young children. These major stressors have acted as significant constraints in Meagan's efforts to re-settle herself and gain a sense of stability in her life (ie locating suitable accommodation, gaining part time employment, re-establishing her career and building a support network etc).

Meagan has worked hard to re-establish herself, to maintain a loving connection and regular communication with her boys and to create a stable environment in which she hopes to maintain regular future contact with them. However she continues to suffer from clinically significant symptoms of anxiety, grief and depression which I believe would make it difficult for her to maintain full time employment at this time. She is continuing to receive psychological treatment for these symptoms."

46The treatment that Ms Trathen provided to the plaintiff had proven to be incrementally successful for the plaintiff. I accept the plaintiff's description that by November 2008, she was stable and that the emotional turmoil relating to her marriage breakdown had largely resolved: Exhibit "A", Bundle 1, p 3.

47In 2009, Ms Trathen's treatment had enabled the plaintiff to position herself to obtain the lead role in the Melbourne City Opera production of Luisa Miller, which from her perspective, was very significant as it represented the re-starting of her professional career after the personal setbacks and difficulties already described. It is plain from those events that the plaintiff was in a very different and much improved position than was the case when she first started the counselling with Ms Trathen. On the evidence, I consider the plaintiff's perception in that regard was entirely realistic.

Circumstances of the plaintiff's nervous shock

48It is relevant to identify the circumstances in which the plaintiff's nervous shock was incurred.

49On the night of the accident the plaintiff received a telephone call from a friend who had been travelling in the vehicle following the one driven by the defendant at the time of the accident.

50That friend told her there had been an accident and that her son, Montgomery had been injured and probably had a broken leg, but that her son Archie was alright.

51Being concerned about the news of those events, the plaintiff then drove to her parent's home and from there rang Cooma Hospital and was told her son Montgomery had been airlifted from that hospital to Canberra Hospital whilst in a coma. She was initially told that Montgomery had suffered a severe fracture of a leg. It was "quite shocking" for the plaintiff to find out that Montgomery had sustained a head injury and that he needed a brain scan to determine the nature of the injury to his brain: T16.43 to T17.33. When giving her evidence, the plaintiff lost her composure whilst relating those events. Those events are obviously still very raw for her.

52The plaintiff also stated she went into complete shock on learning that the accident had been head on and had involved fatalities: T17.46.

53When the plaintiff arrived at Canberra Hospital she saw that her son Archie had been released from Cooma Hospital although he had suffered a whiplash injury and seatbelt burns. After being reunited with Archie, she then learned of the more serious injuries to her son Montgomery. Her evidence in that regard (at T18.6 to T18.21) was in the following graphic terms:

"So I was reunited with him immediately but then I was told that Monty was in ICU. So I was led in to see him and I just saw him there unconscious. He had glass in his face. He was puffed out like a big balloon. He was on life support. He just looked an absolute mess and he was in traction and he had a neck brace on, and his leg was in a splint and they had told me that the leg was completely - the femur bone was completely smashed, shattered, and not just a clean break. It was - he had been jammed against the windscreen and the chair, the car seat, and the windscreen, so his leg had been squashed and smashed and he had hit his head on the side."

54Those events were profoundly shocking to the plaintiff, as a person and as a parent, a matter to which I shall return on my review of the expert medical evidence. In that regard, Dr Walton referred to the plaintiff having described the shock as being "horrendous": Exhibit "A", Bundle 1, p 1. That description is entirely apt.

55The plaintiff remained at Canberra Hospital to be with Montgomery for 3 weeks, sleeping next to his bed every night. Her evidence of the shocking effect of these events upon her was expanded upon (at T18.45 to T19.30) in the following terms:

"...

A. As I said, it was the shock of - perhaps the thought that he was going to be permanently impaired mentally and have the brain injury, and just the devastation and the feeling and the knowledge that he was going to need this intensive care to rehabilitate, and I had no idea how well he was going to be at the end of it all. So it was grief, just so overwhelming grief, to see your child lying there like that and, you know, not knowing what the recovery was going to be and not knowing how much I was going to be able to help him.

HICKEY

Q. How long did Monty remain in a coma for?

A. He was in a coma for about five days. He started to come out - they started to bring him out, tried to bring him out, on the fourth day and it was a very slow process and then he was transferred up into the high-dependency unit after that. He has no memory of that period at all prior to the accident. He remembers leaving the snowfields but he doesn't remember anything for about two and a half, three weeks after that. So he was conscious after five days but not functioning very well at all, and so that continued to really upset me because no one could tell me if he was going to regain that faculty or not.

Q. When you say faculty, you're referring to consciousness, are you?

A. Yes. Just proper speech and - he was able to speak but he was shouting and he was shouting at me and he was throwing things and he was behaving like - he was behaving like Oliver who is my boy with autism, and just having meltdowns and completely unreasonable and so it was just a waiting game to find out how he was going to be.

Q. The feelings that you described to his Honour earlier on initially upon seeing Monty, how long did those feelings continue?

A. It was pretty intensive the first six months or so. It was always there. It was just always in my head, that flashback, and I was always - it was just very - I was always very close to tears when I thought about it and then as time went on it became more of an occasional flashback or in dreams or nightmares or that sort of thing. It was just that picture, that image of having seen him there in the ICU and being so badly, so smashed up. It was really traumatising."

56The end result of Montgomery's leg injury was that it was treated by traction without surgery as he could not be operated upon due to his head injury, but it eventually healed. He has been left with a 2.5cm to 3cm shortening of that leg and he walks with a limp. She sees this in him every day since she took over the care of her children. This represents a recurring emotional trigger for her. She was demonstrably upset when she related that evidence.

57The results of Montgomery's head injury did not feature large in the evidence, but I infer from the evidence that it was a significant one, comprising an injury to the frontal lobes of the brain, with lasting adverse behavioural consequences, including aggressiveness and temper control problems: Exhibit "A", Bundle 1, p4.

Plaintiff's post-accident history

58 Shortly after Montgomery's discharge from hospital on 22 September 2009, the plaintiff took over as the principal carer of all of her children, but not without the struggle of further litigation in the Family Court. At present, and following her ex-husband's move to Melbourne, she now has a regime whereby he provides what is required of him in the way of financial support, as well as taking the boys from time to time, which gives her some respite.

59 However, the antecedent events have been very difficult for the plaintiff, and have had a very significant adverse effect on her career, as appears in the following summary.

60 Immediately after the accident the plaintiff felt compelled to pull out of her commitment to the Melbourne City Opera production of Luisa Miller. That caused some understandable disgruntlement on the part of the person responsible, and the performances went ahead without her. She stated "That was the end of it. It was just gone": T20.42. The plaintiff was still obviously emotionally affected by the injuries to her children. She felt unable to continue with the Luisa Miller production as she knew she could not leave Montgomery's needs and his situation would require a long-term recovery.

61 Contemporaneously with those events, on 16 September 2009, the plaintiff's general practitioner, Dr Elizabeth Banks, certified the plaintiff as being unable to work: Exhibit "1", p 8. Dr Banks wrote to the CTP insurer to provide the reasons for this, in the following terms:

"Meagan herself was as you could imagine, emotionally shocked over the accident ..."

[Emphasis added]

62 I have referred to the emphasised portion of the above quotation from the report of Dr Banks in order to demonstrate the artificiality of the argument made on behalf of the defendant concerning the plaintiff's most likely circumstances but for the injury sustained: s 126(1) of the MAC Act. That argument was to the effect that the plaintiff's likely circumstances would have been that she would have left her work to look after her injured children in any event, irrespective of the shock she sustained. That argument will be addressed when assessing the plaintiff's claim for future loss of earning capacity.

63 Dr Banks also went on to refer to the plaintiff's subsequent state of upset over the post-accident Family Court proceedings by which her ex-husband attempted to wrest the children from her.

64 The end result of those events has been that the shock sustained by the plaintiff has completely disrupted her plans for her career in opera. In that regard, at T21.9 to T22.39, she said:

"A. I was a great way back in for me because I had come home to Melbourne and this is where I had done a lot of my training and where my contacts were. I was so happy to get this role because I was at the prime age to sing it and I hoped that that would be a springboard then to do other things. I had made some contact with the Victoria Opera with Richard Gill and I'm sure that they would have come to see those performances, had I done them at the BMW Edge Theatre. I just knew that would be a springboard to other things. It was a really good entry back into the level

that I wanted to be at. It would give people an opportunity to hear me again and to engage me for other things.

HICKEY

Q. Since the time of the accident have you done any singing at all?

A. No, I haven't.

Q. Have you done any teaching at all?

A. No. I thought about trying to do that but it's not something that I can do anymore.

Q. When you say you can't do it anymore what do you mean?

A. I think when I open my mouth to sing I feel things well up in me and I can't seem to stop the emotion from coming through. Even if I'm practicing or singing or doing some exercises I find it really emotional. I can't get the breath support that I need. I can't physically support the sound like I used to be able to do and I don't think I would be any good in trying to teach anyone else either because it just overwhelms me too much.

HIS HONOUR

Q. What do you need to overcome such problems?

A. I'm not sure, your Honour. I think it's perhaps a time thing as well, to emotionally recover from what I have been through. I have, on my own, in my own lounge room, tried to just get the voice back and get it agile again. I thought that it might be a good therapy for me but it has just not been like that. I think I'm best to put it aside and perhaps I can come back to it at a later stage. Perhaps I will feel that it is right. I haven't got the confidence now or the energy to get up in front of people and sing or to put myself forward again to do auditions. As your Honour would know, it's a very rigorous process. You have to put yourself out there and you are under scrutiny. You have to take criticism. I'm not up to it. I just can't put myself out there emotionally for that sort of thing.

Q. What do you attribute that change to?

A. What changed?

Q. What do you attribute that change to?

A. I think it's the emotional toll of caring for mostly Monty, because he was the one obviously that was badly injured. I think physically. I mean I ended up with bad neck problems and back problems with caring for him in and out of the wheelchair. He was in a full body cast when he came home so physically I feel depleted because of that. I think having to help me through his recovery emotionally because once he had recovered from his physical injuries he had depression and he had anxiety. I think I had to put so much of my own energy into helping him through that, that that's just exhausted my resources as well.

Q. You are the principal care giver for your son and he is obviously injured and carries the effects of it, to what extent, if any, does his daily presence in your life with that condition operate as a trigger for you emotionally?

A. It still is a quite powerful trigger. Last week we went into the children's hospital for his check up. I always get emotional when we go back there to have his check ups. His surgeon, who has been known to us since the accident, obviously knows him personally now and, I don't know, I think, you know, I see him having his examination, I see the surgeon talking to him about his options in the future and how it has limited him now with his sport and all the things that he loves to do.

He's nearly 15 so of course he wants to be able to do all the stuff that 15 year old boys do, but he is limited. So I think it still has the capacity to affect me emotionally. You know, we go shopping for shoes or we go shopping for clothes and I see that that has impacted him now for life and it still feels quite raw.

Q. What feelings does that generate?

A. Still grief. I think feelings of grief and feelings of sadness that I can't get on and do what I had planned to do with my life, and a sense of loss really for him but as well as for me because singing is something I have been doing since I was 16 and it's - I get angry. If we're talking about how does it make me feel, I get angry because I have invested so much of myself into my career and I think having to then put so much of myself into Monty's recovery and ensuring that he is able to carry on and get the best out of his life, doing that has taken away from - it has taken from me as well."

65By those events, the plaintiff's singing career, which she envisaged would ultimately be her sole source of income, had ended. She does not see herself pursuing that career again. In respect of that evidence, and the medical opinions to which I shall shortly refer, I consider that her view in that regard is a realistic one that has been forced upon her by the shocking effects the accident has had upon her.

66Finding herself unable to pursue her singing career and being unable to sustain her teaching despite attempts to do so in 2011, in 2013 the plaintiff commenced studying for a Juris Doctorate degree at the University of Melbourne. She initially thought that she might be able to find a career as a family lawyer, however, through clearer insights she has acquired over time concerning that idea, she no longer holds that view, and she is now much less inclined to pursue a career in the law.

67I accept that she has pursued those studies for intellectual stimulation because she enjoys studying and she needed to apply her mind to something. She regards those studies as representing something of a refuge for herself to focus on something other than the needs of her children. Those studies have served to help her focus her mind and find some respite from some of her debilitating emotions: T45.45.

68Those emotions include irritability and anger, and are influenced by broken sleep and appear to have some significant part to play in her fluctuating and erratic appetite, as was noted by Dr Walton: Exhibit "A", Bundle 1, p 4.

69The plaintiff is due to complete her law degree in 2015. She described the competitive environment in which she is studying law, and as a mature aged student, she has realistic concerns about her ability to successfully advance in such a career.

70The plaintiff has ongoing problems maintaining concentration and she has forgetfulness contrasting with flashbacks and intrusive imagery of descriptions of the accident scene. She has become hypervigilant about the possibility of a transport accident occurring. She is very anxious and depressed, and estimates two or three bad days a week of low mood: Exhibit "A", Bundle 1, pages 3 - 4, 6.

71The plaintiff feels she does not have sufficient concentration to continue working as a teacher: Exhibit "A", Bundle 1, p 28. Her concentration for reading books and music is for up to 20 mins at a time: Exhibit "A", Bundle 1, p 40. Elsewhere, her concentration was described as being "erratic": Exhibit "1", p 4. She also experiences slowed thinking: Exhibit "1", pages 19 and 26. Those items of the plaintiff's summarised history were not the subject of challenge.

72Contrary to a submission made on behalf of the defendant, the fact that the plaintiff has managed to pursue a course of study does not necessarily mean that she does not have the concentration difficulties outlined above. That was not a matter on which the plaintiff's evidence was the subject of challenge.

73She does not see herself getting back into the opera scene after such a long absence and she is in any event, emotionally and physically unable to resume singing, having lost her form for this for so long. She explained those problems (at T26.9 to T26.48) in the following terms:

"Q. The medical report from Dr Lester Walton, who is a psychiatrist whom you consulted, he wrote this of you: "She is able to sing a little with a restricted vocal range and some loss of breath control, but what is most problematic is injecting the appropriate emotion accompanying the words as a performing soprano." Does that accurately record what you said?

A. Yes, your Honour.

Q. Can you just elaborate, if you are able, as to what is problematic in injecting the appropriate emotion in that context?

A. Because it's one thing to sing notes and to sing your scales and be technical and proficient with executing the notes, but it's another thing to just open yourself up physically and to inhabit a character and to interpret the words of the text. It's just not something you can do as a robot. You have to be imbued with character and colour and interpretation. It's what audiences want to hear. If they want to hear a technical exercise they can put on a, you know, a CD of grade 2 and 3 voice exams, but I think in terms of being a performer, and even when you're not performing, even when you're in your lounge room and you're practising, you've got to practise performing. So you

have to - you don't just step into the character once you're on the stage. It's a matter of being in your lounge room practising and being in your mind on the stage and having - projecting yourself out there all the time and I just can't do that anymore.

Q. I'm sorry if my questions upset you, but I need to follow it up so I can understand it. What effect do you see the accident as having had on your ability to make those projections and to carry out performance?

A. I can't say what it - exactly what has happened within me but it's just a shift. I think - and I think it comes from witnessing that shocking trauma, knowing that other people's lives were affected, having to help my son emotionally through his own things, his own problems and his own limitations and having that - having the flashbacks. I think emotionally it's just taken my reserves, probably those reserves that I would have needed for my performing.

Q. When you refer to flashbacks, what do you mean?

A. Mostly of when I saw Monty in ICU and the memories of those weeks immediately following when he was just not with me, yeah, mentally, when he was having episodes and sometimes it's a flashback of him actually being in bed and having those injuries. Other times it's just images of him, you know, limping up the stairs or him, you know, crying because he didn't get into the football team, or that sort of thing. It's - I think it's a myriad of things."

74I accept entirely the reasonableness of the plaintiff's explanatory evidence along the lines I have cited above.

75In addition to the plaintiff's psychological reaction to the accident and the injuries sustained by two of her three sons, she has been told that the events in question have resulted in her experiencing early menopause. She is further upset that this has occurred to her at such a young age. Whilst in this case, that of itself does not sound in damages for loss of amenity of life, because of the terms of the MAS assessment, it tends to confirm the severe nature of the emotional shock suffered by the plaintiff.

76On the issue of the plaintiff's most likely circumstances before the events in question, the plaintiff was asked to reflect on how she saw her future. In addition to looking to perform with the Victoria Opera, the Melbourne City Opera and Opera Australia, she also saw a future in singing overseas. In that regard, at T29.19 to T29.36, she stated:

"Q. Does that mean that your future in opera as you saw it before the accident was limited to Australia or not?

A. No, I always wanted to go back to Germany because I speak German, and I also have a great love of lieder and German song and French song, and so I had envisaged that not only Melbourne but also going back to Sydney so as the children got older I had hoped that I'd be able to travel to Sydney for special events and concerts or performances and then ultimately be able to go back and base myself during the opera season in Germany as well because I just really enjoyed being there when I had my time in Dusseldorf and having the language makes a big difference so

definitely that was part of my long term plan.

Q. And so was Germany the only overseas location you had in mind?

A. No. I would have liked - have also visited Italy and France and whilst I hadn't done a lot of performing there I had a couple of contacts that I would have nurtured and I was also supported by Simone Young at the time and she was helping me with my endeavours in Germany and clearly she has contacts all over Europe so - -"

77I accept the evidence of the plaintiff that her involvement in the scheduled Luisa Miller production with the Melbourne City Opera was something of a springboard, and it was a significant and very positive way for her to step back into the performing arena for opera. It was also, on her unchallenged assessment, a very suitable and excellent role for her voice.

78The plaintiff said she saw her involvement in the Luisa Miller production dovetailing with other work with the Melbourne City Opera and also the Victoria Opera, providing her with contacts to other organisations and orchestras.

79As a performing artist, she was prepared for the unpredictability of the future of such a career. She was excited at the prospect of returning to opera. She did not see an inconsistency between that career and teaching as the operatic career required time to develop. The evidence discloses that the potential for a career in opera could have extended into the age groups of the 60's and 70's: T46.31. Her ambitions in that regard have effectively been thwarted by the shock she has received, and by her reactions to the injuries sustained by her two sons, principally to Montgomery.

80But for the injury that career need not have been interrupted by the care or other needs of her children. The plaintiff presently has carers that come to her house to assist and help her in the evenings, especially with her son Oliver. Whilst the care regime may at times involve difficulties with organisation, I consider that those difficulties would not have necessarily precluded or substantially interfered with the plaintiff pursuing her work and her career.

81In that regard the plaintiff now receives domestic respite help from time to time by way of assistance from her ex-husband, occasionally from her parents, and through occasional formal overnight and weekend respite: T40.15; T43.27 to T27.32. In the future, there is also the prospect that when Oliver is a young adult, in about 3 to 4 years time, he will go into a supported separate accommodation facility commensurate with his needs: T44.10 to T44.15.

Post-accident assessments of psychological injury

82Given my acceptance of the plaintiff's credit as a witness, and my acceptance of her evidence generally, in the absence of any challenge on matters of history, I propose to treat the plaintiff's history summarised in the medical evidence and referred to in the paragraphs that follow as evidence of the plaintiff's early post-injury difficulties: *Daw v Toyworld (NSW) Pty Ltd* [2001] NSWCA 25, per Heydon JA at [70]; s 60 of the Evidence Act 1995.

83On 16 September 2009, Dr Banks prepared a report addressed to the defendant's CTP insurer that confirmed the nature of, and the basis for, the plaintiff's emotional shock over the accident.

84At that time, Dr Banks confirmed that the plaintiff was unable to work, until at least until 11 October 2009. In those circumstances, the plaintiff felt, reasonably in the circumstances, that she could not responsibly continue further in her scheduled operatic role in the Luisa Miller production that she had accepted, and which she had been working upon in the rehearsals phase.

85There is no evidence to suggest that the plaintiff's adverse emotional response to the injury to her two children, especially to Montgomery, had abated in the months that followed. I infer from her evidence and the medical evidence that it had not abated.

86On 22 July 2010, at the request of her solicitors, the plaintiff was assessed for medico-legal purposes by Professor Lorraine Dennerstein, a consultant psychiatrist: Exhibit "A", Bundle, 1, pages 9 - 20.

87On that occasion, Professor Dennerstein's assessment of the plaintiff's pre-accident circumstances was that the former husband's conduct in 2007 had led to the breakdown of the marriage and had caused the plaintiff to suffer from an adjustment disorder with depressed mood.

88In Professor Dennerstein's assessment, which I accept, the plaintiff's symptoms in that regard had improved with counselling over time. That was also the view expressed by the plaintiff, as was later recorded by Dr Walton.

89Professor Dennerstein noted that by the time the accident occurred in 2009, the plaintiff had already been asymptomatic for many months. I interpolate here that this view is entirely consistent with the plaintiff having secured her role in the Luisa Miller production. That role obviously required the plaintiff to have a level of emotional wellness and robustness, and there is no evidence to contradict the plaintiff's own assessment of her circumstances at that time. She was successfully proceeding with the rehearsals required for that role.

90Professor Dennerstein's analysis of the events was that as a result of the accident and the stress to the plaintiff, caused by the injuries to her two sons, and the consequential family restructure necessitated by her resuming care for her children in the difficult post-accident circumstances, including the defendant's related actions through initiating some vexing post-accident litigation in the Family Court, the plaintiff had gone on to develop an adjustment disorder with mixed anxiety and depressed mood.

91Professor Dennerstein described the features of that condition in the plaintiff as comprising middle insomnia, flashbacks to the accident, sad and tearful mood, psychic and somatic anxiety, and feelings of slowed thought. At that time, Professor Dennerstein considered the plaintiff's symptoms to be at the mild end of the spectrum. However, she identified the fact that the symptoms did cause the plaintiff distress, and that they had impacted on her functioning.

92When assessing the focus of that adjustment disorder, it seems to me that Professor Dennerstein's notation of flashbacks to the accident indicates the plaintiff's disabling emotional problems were principally due to the accident. I am reinforced in that view by an aspect of Dr Walton's evidence to which I shall shortly refer in relation to how an injury to a child should be seen in terms of representing a powerful stressor for a parent.

93On 27 September 2012, the plaintiff was reassessed by Professor Dennerstein. In her report of that assessment, Professor Dennerstein reviewed the plaintiff's intervening history, and she reiterated her previously stated diagnosis as outlined above, although she noted that after the plaintiff had taken medication, she no longer experienced insomnia and no longer described flashbacks.

94Nevertheless, the improvements in the plaintiff's condition as noted by Professor Dennerstein did not alter her earlier stated diagnosis. She noted that the plaintiff still continued to have periods of lowered mood and anxiety, slowed thoughts, lowered motivation, energy and concentration. Professor Dennerstein noted those symptoms caused the plaintiff to suffer distress, and this impacted on her functioning. That opinion is uncontradicted by any other expert evidence. The economic implications of those matters for the plaintiff's professional life will be the subject of separate consideration.

95On 22 April 2013, at the request of the defendant's CTP insurer, the plaintiff was assessed by Dr Alan Jager, a consultant psychiatrist: Exhibit "1", pages 1 - 7.

96Dr Jager reviewed relevant aspects of the plaintiff's history as he recorded in his report of that assessment. Based on that history, he identified his diagnosis of the plaintiff to be that of a post-traumatic stress disorder in partial remission, and a pre-existing adjustment disorder with anxiety.

97Dr Jager explained that he considered the post-traumatic stress disorder component of his diagnosis had been caused by the plaintiff learning of the accident, and then witnessing the effects of the accident on two of her three children. He therefore considered the plaintiff's condition of post-traumatic stress disorder was caused by the shock of the accident and the aftermath of her sons being injured.

98Dr Jager's view that the plaintiff's "pre-existing adjustment disorder with anxiety has been aggravated by the ongoing family law dispute" stands to be analysed and evaluated in conjunction with an analysis of the facts, the other medical and allied opinions, and the accepted legal principles concerning the assessment of damages, including the principle that the tortfeasor must accept his victim as found, including any underlying vulnerabilities.

99Standing out in that context is that the family law proceedings appear to have concluded, with stable custody and access arrangements, and a workable relationship between the plaintiff and her ex-husband. Accordingly, I infer that the family law proceedings as a factor of aggravation as described by Dr Jager is no longer a relevant consideration.

100On 25 June 2013, at the request of the Motor Accidents Authority of NSW, the plaintiff underwent a MAS assessment by Dr Norman Rose, a consultant psychiatrist: Exhibit "A", Bundle Tab 1, pages 30 - 41.

101On the causation issue, Dr Rose was of the opinion that it was clear to him that the subject accident had traumatised the plaintiff, especially when she had seen her seriously injured son Montgomery in the intensive care unit at the Canberra Hospital, noting that for the plaintiff, those events had been followed by nightmares and flashbacks.

102In applying the diagnostic criteria required of him under the MAC Act framework, Dr Rose certified that the plaintiff's accident-related permanent psychiatric injury should be re-defined as an adjustment disorder with mixed anxiety and depressed mood. Dr Rose considered that the plaintiff's condition had become static, well stabilised, and that the resulting impairment could be considered to be permanent.

103On 30 September 2013, at the request of her solicitors, the plaintiff was assessed for medico-legal purposes by Dr Lester Walton, a consultant psychiatrist. Dr Walton's report, which followed that assessment, was dated 7 October 2013: Exhibit "A", Bundle 1, pages 1 - 8.

104After reviewing the plaintiff's history as summarised in his report, as a generality, and in the context of the plaintiff's case, Dr Walton identified the known fact that physical injuries and psychological / behavioural disturbances sustained by children are amongst the most powerful stressors for a parent to endure. In my view, that statement aptly applied to the plaintiff's situation as described at paragraphs [51] to [56] above.

105Dr Walton also noted that in the plaintiff's situation, she had learnt, progressively, that one of her sons was seriously injured with brain injury, and that the occupants of the other vehicle had lost their lives in the accident. Learning progressively of the injuries sustained by Montgomery, and to a lesser extent the injuries suffered by Archie, were significant psychological stressors for the plaintiff.

106Those injuries, and the plaintiff's reaction to them, have already been outlined in paragraphs [3] to [4] and [48] to [57] above, and they are not in contention.

107Dr Walton expressed the opinion that those circumstances amounted to very significant psychological trauma for the plaintiff and this had triggered the development in the plaintiff of what he described as a post-traumatic psychiatric condition, with specifically identifiable post-traumatic symptoms such as incident specific anxiety, persisting motor vehicle hypervigilance, nightmares, and intrusive accident-related imagery.

108On balance, although Dr Walton considered that a diagnosis of post-traumatic stress disorder may well have been appropriate, he nevertheless inclined towards agreeing with Professor Dennerstein and Dr Rose that the most apt diagnosis at the time of his examination was that the plaintiff was experiencing an increasingly less chronic adjustment [disorder] with mixed anxiety and depression.

109Dr Walton considered that the plaintiff's condition had stabilised, and that the scope for the plaintiff to undergo further improvement was modest. This led Dr Walton to the view that there must be some uncertainty about the plaintiff's long-term prognosis. I accept his unchallenged view in that regard.

110Dr Walton also considered that the plaintiff was now totally and permanently incapacitated for her work as an opera singer because of her continuing mood disturbance, which seriously compromised her vocal performance, although he felt that she was capable of undertaking duties as a music teacher on a part-time basis if she were free to do so. This latter aspect of Dr Walton's opinion will be taken up in my consideration of the medical opinions in connection with my findings concerning the assessment of the plaintiff's claim for loss of earning capacity.

Conclusions on medical opinions

111On behalf of the defendant it was submitted that a pragmatic approach must be taken in viewing the plaintiff's pre-accident psychological history in assessing the plaintiff's claim for loss of earning capacity: T54.33 to T54.40. As I understand the submission, it centred around the premise that the plaintiff had pre-accident psychological issues relating to the pre-accident fact of, and the pre-accident aftermath of, the breakdown of her marriage to the defendant.

112The defendant made that submission in the context of acknowledging that "this is a most complex case" to assess: T55.11 to T55.13.

113In my view the submissions made on behalf of the defendant overlooks a fundamental principle that underpins the assessment of damages in personal injuries cases, namely that a tortfeasor, the defendant in this case, must take the plaintiff as she is found, including any reasonably foreseeable pre-injury vulnerabilities: *Mt Isa Mines Ltd v Pusey* [1970] HCA 60; (1970) 125 CLR 383, per Windeyer J, at [18], p 406.

114The medical assessment of the plaintiff as outlined in the preceding sections of these reasons must be read in the light of the legal principle summarised in the immediately preceding paragraph.

115In that regard, it is of little relevance for the defendant to argue that in this case the psychological sequelae of the accident for the plaintiff were superimposed on a previous adjustment disorder created by the defendant's actions in leaving the marriage and the resultant pre-accident family law litigation.

116Several things need to be stated in answer to such a proposition. First, as stated in *Mt Isa Mines Ltd v Pusey*, the defendant must take the plaintiff as she is found. If the effects of the accident compounded or aggravated a pre-existing diagnosis, that must be seen as a material aggravation of that condition representing an additional source of mental harm that of itself adversely affects the plaintiff's ability to function and to work as she otherwise would.

117Secondly, where a defendant seeks to avoid liability for an aggravation to an underlying condition, it is incumbent upon that defendant to show, through acceptably reasoned evidence, that the ongoing complaints experienced by the plaintiff continue as a result of the underlying condition, and not due to an aggravation of asserted temporary duration: *Watts v Rake* [1960] HCA 58; (1960) 108 CLR 158; *Purkess v Crittenden* [1965] HCA 34; (1965) 114 CLR 164.

118In this case, the defendant has not discharged the onus of establishing the argued proposition, and therefore cannot avoid the consequences of the material aggravation caused to the plaintiff's underlying adjustment disorder from which she was recovering when the accident occurred. The accident resulted in the superimposition of a much more severe and psychologically disabling post-traumatic stress-related condition, whereas the plaintiff had achieved stability and had come to terms with the marital breakdown and her distress related to that event.

119Thirdly, when properly analysed, the plaintiff's marital situation, precipitated by the actions of her ex-husband, and which was the cause of her pre-accident psychological problems, was something she was well on the way to adjusting through counselling before the accident. This was to the extent that the plaintiff was able to function and work. It was the psychological effects of the accident on the plaintiff that tipped the balance for the plaintiff and changed the future course of those positive pre-accident gains which were enabling the plaintiff to incrementally pursue the re-establishment of her career.

120In the result, by whatever diagnostic label is ascribed to her condition, she continues to suffer from the psychological trauma caused by the shock from the accident, and this causes her inability to fully function and to work in her profession. On the evidence, that position is unlikely to ameliorate to the extent of reviving the plaintiff's capacity to fully resume her work, especially her operatic career which has effectively ended as a result of her psychological injury.

Mitigation

121The plaintiff has a duty to mitigate her damages: s136 of the MAC Act. Counsel for the defendant specifically resiled from any suggestion of a submission to the effect that the plaintiff had not taken reasonable steps to seek to mitigate the effects of her injuries: T47.31. Accordingly, the plaintiff's entitlement to an assessment of her damages should not be discounted with regard to any suggestion of a failure of mitigation.

Assessment of damages

122Notwithstanding the serious psychological injury and sequelae suffered by the plaintiff, according to the applicable statutory MAC Act assessment criteria and guidelines, her whole person impairment, a statistical notion, has been assessed at a level which is insufficient to entitle her to an award of damages for non-economic loss in respect of her pain, suffering and the loss of the amenity of her life: s 131 of the MAC Act.

123Accordingly, in the paragraphs that follow, after identifying the plaintiff's probable statistical life span, I set out my assessment of the plaintiff's entitlement to damages on the remaining heads of damage that she is entitled to claim.

Plaintiff's probable life span

124In approaching the assessment of the plaintiff's entitlement to damages, there is nothing that reasonably arises from the evidence to suggest that the usual statistical median life span would not apply to the plaintiff's circumstances. At the age of about 43 years, the plaintiff has a rounded down probable median statistical life span of a remaining 45 years, well into her eighties.

Past economic loss

125The legal principles for assessment of a claim for economic loss are well settled. The plaintiff must show that there has been a diminution of her earning capacity which was likely to cause her to suffer a financial loss: *Husher v Husher* [1999] HCA 47; (1999) 197 CLR 138, at [7] following *Graham v Baker* [1961] HCA 48; (1961) 106 CLR 340, at [10], p 347; *Medlin v State Government Insurance Commission* [1995] HCA 5; (1995) 182 CLR 1, at [2].

126On behalf of the plaintiff, it was initially submitted that her claim for past economic loss should be assessed in the amount of \$84,618. When analysed, that submission proved to be unreliable, and it required some mathematical adjustment to relate the calculation back to the date of trial, and to reflect net rather than gross figures that were submitted. When recalculated to accommodate those factors, that monetary submission is adjusted to the amount of \$74,612.

127The defendant made no monetary submission on this head of damage but simply argued that the plaintiff's role as a primary care giver for her son Oliver who had special needs, represented an interference with her ability to work full-time. The unchallenged evidence was to the contrary. The plaintiff had been successfully working around Oliver's needs, and had been doing so for some time: T43.50.

128Whilst there may have been some degree of underlying interference with the plaintiff's capacity to work full time due to the care needs of her son Oliver, it is not established on the evidence, that any such interference would have been substantial, or inimical with the plaintiff exercising her earning capacity. It is noteworthy that the defendant, as the plaintiff's ex-husband had some financial and other responsibilities to assist in this regard.

129Furthermore, there is evidence of the fact of a current regime of carers coming to the plaintiff's home, on most days, to care for her son Oliver: T40.13; T42.47. Although there have been occasional issues over the reliability of that regime, I do not consider that the defendant's submission ought to materially detract from an assessment of the plaintiff's claim for economic loss because there are times of the week where the plaintiff can rely upon carers coming: T43.4.

130The argument on behalf of the defendant in that regard was developed to assert that the fact of the plaintiff being a care giver had been a significant factor that "interplayed with the economic capacity" of the plaintiff. On behalf of the defendant it was suggested that when a pragmatic view is taken of the plaintiff's pre-accident circumstances, particularly the family law issues, this should operate to detract from the claim for economic loss: T52.45 to T53.3.

131For reasons that I shall refer to in greater detail in my reasons for assessment of the claim for future treatment expenses at paragraphs [256] to [259] of these reasons, I do not consider that the pre-accident family law issues represented a significant factor that detracted from the overall claim for economic loss, although those issues might have been a pre-accident factor for a time, and may have been for a time exacerbated by the post-accident custody disputes.

132In my assessment, those issues seemed to have diminished as a source of disruption to the plaintiff after she had obtained the benefit of professional counselling from Ms Trathen and once she took custody of her children and instituted a stable regime for their needs and care.

133In order to assess the plaintiff's claim for loss of earning capacity, both to the date of the trial and into the future, it is helpful to identify, insofar as is possible on the evidence, the most likely circumstances of the plaintiff that would have prevailed but for the injury: s 126(1) of the MAC Act.

134In support of the claim for economic loss, in addition to the previously identified chronology of the plaintiff's academic and performance career, a significant volume of documentary material was tendered comprising copies of her income tax returns and records: Exhibit "A", pages 78 - 311.

135That material spanned the financial years 30 June 2002 to 30 June 2012. Those records show that the high point of the plaintiff's earnings in that period comprised a taxable income of \$75,738 in the tax year ended 30 June 2004.

136It should also be borne in mind that the fluctuating levels of the plaintiff's earnings in the ensuing pre-accident years must be considered in conjunction with the plaintiff's family and childcare responsibilities that prevailed between 2004 and 2007, and which were also affected by the flow-on consequences to the plaintiff of the marital separation in 2007 and the psychological consequences to her of the subsequent divorce in 2008.

137These latter considerations lead me to the view that the financial records for the financial years 30 June 2005 to 30 June 2012 are not necessarily definitive or reliably indicative of the extent of the plaintiff's earning capacity from the time of the accident to date. I take that view for the three reasons that follow.

138First, it is plain from the unchallenged evidence that the plaintiff's pre-divorce earnings had been structured through the involvement of a company that received her earnings and those of her former husband, with only limited drawings showing up in her income tax returns: T35.7 to T35.25.

139Secondly, in the wake of the divorce, and before the accident had intervened in 2009, there was a real financial imperative for the plaintiff to pursue her earning capacity. This was because her financial resources had been considerably depleted by the cost of multiple tranches of family law litigation that had been initiated by her former husband, and to which she felt compelled to respond.

140Thirdly, I consider that due regard must be had to the intangible but nonetheless important factors associated with the ways in which artistic careers achieve ascendancy and financial success through subtle means.

141Those matters are not capable of being defined by evidence expressed in precise or concrete terms. In that regard, the plaintiff's unchallenged evidence was that in connection with her singing career, she felt well placed with connections, professional mentors and friendships. She also had a passion and motivation for continuing to develop her singing career. She indisputably had the experience and talent for doing so. The significant imponderable in that range of matters is how those considerations were to be translated into income. The fact that such matters represent imponderables not capable of precise assessment, does not mean that an attempt at assessment of the ensuing loss should not be undertaken: *State of NSW v Moss* [2000] NSWCA 133, (2000) 54 NSWLR 536, at [71].

142The evidence disclosed a range of potential gross payments for operatic performances of between \$1000 and \$4000, together with other contractual possibilities. This evidence does present some assessment challenges, as was acknowledged by counsel for the defendant. That said, at the plaintiff's stage of career development in the early days at least, her performance fees were more likely to be towards the bottom end of that range, and that is an available guide to assessing a component of the claim for past economic loss. However, owing to the nature of the professional singing engagements, the number of performances per year was not a matter that could be reasonably predicted.

143It is clear that the plaintiff was fully intending to pursue her earning capacity in both branches of her chosen profession before the accident intervened. This is plainly evident from her involvement in teaching activities on her return to Melbourne in the 2007/2008 financial year and in pursuing the operatic engagement for the Luisa Miller production. It is also evident from the fact that in that period she had received the benefit and assistance of psychological counselling to help her to regain her self-confidence in the wake of her husband leaving the marriage in the circumstances described in the evidence.

144In the wake of those circumstances, the psychological counselling provided by Ms Trathen had proved very helpful to the plaintiff. I therefore consider that before her injury, the plaintiff had sufficiently regained her self-confidence to enable her to resume her teaching activities.

145Furthermore, with the benefit of the counselling provided by Ms Trathen, the plaintiff had also regained sufficient self-confidence to take up the offer of an important role in the production of Luisa Miller with the Melbourne City Opera. She not only secured the part after competitive auditions, but she also participated in the rehearsals for that endeavour up until the time the accident intervened.

146These developments indicate that the most likely circumstances of the plaintiff prior to her injury were that she was earnestly seeking to re-establish her earning capacity and she was poised to exploit that capacity with sufficient self-confidence to move her career forward. One should not lose sight of the truism that confidence has the potential to build confidence.

147Therefore, in my assessment, the matters described in the preceding paragraphs indicate that the plaintiff's most likely economic circumstances but for her injury were that she was in the process of actively pursuing her passion for operatic performance as well as the scope for pursuing her teaching. She was clearly doing so for the purposes of gaining an income from these activities. Both of these artistic fields of endeavour were personally satisfying to the plaintiff. She was eminently qualified to pursue both avenues of work as she had successfully done in the past, and by the time of the accident, she also had strong financial motivation for continuing to pursue and to develop that course.

148In light of those circumstances, I consider that the initial claim advanced on behalf of the plaintiff for past economic loss has been presented within relatively modest parameters based on lost earning capacity from her teaching activities alone, without any additional allowances made for income she could have derived from pursuing operatic roles, including the role she relinquished in the production of Luisa Miller. Those additional allowances for losses from the Luisa Miller production were later included in revised oral submissions made on behalf of the plaintiff on 20 March 2014.

149The parties approached the question of the rates for quantification of the claim for past economic loss on the submitted pre-accident baseline earnings of \$23,400 less actual net earnings as reflected in the plaintiff's damages submissions: MFI "3"; T51.42 to T52.10.

150The figure of \$23,400 was arrived at as a projection of an albeit narrow period of the plaintiff's pre-injury teaching earnings. I nevertheless consider that approach to be a reasonable one on the evidence.

151However, the subsequently developed detail of that approach turned out to be mathematically erroneous in part, as was established when the proceedings were re-listed for further argument on 20 March 2014.

152In that regard it became apparent that incorporated in that approach were errors concerning the non-allowance for the impact of taxation and the period over which the calculation should be made. For those reasons, and because of the omission of any claim for the loss of earnings from the Luisa Miller production, I considered those submissions made on behalf of the plaintiff to be unreliable.

153When the matter was re-listed for further argument on 20 March 2014, it also became apparent that the figure of \$23,400 gross also had to be reduced by \$1824 on account of receipt of Government benefits, to yield \$21,576. After deducting \$2336 for the impact of taxation calculated at 15 per cent on earnings between \$6000 and \$34,000, and also allowing \$223 for the 1.5 per cent Medicare Levy on the taxable portion, the base rate for earnings from teaching is revealed to be \$384 net per week, not the gross amount of \$450 per week as originally assumed. The annual equivalent of \$384 per week net is \$19,968.

154The revised claim for past economic loss made on behalf of the plaintiff, as adjusted along the preceding lines, has five component elements, each of them founded upon the comparator of the plaintiff's pre-accident baseline annual earnings from teaching, namely \$19,968 net, less any net mitigatory earnings the plaintiff had derived in the period from the time of the accident until the date of the hearing.

155The first element of the claim is for the period 11 August 2009 to 20 June 2010. In that period, the plaintiff derived earnings of \$3150 which would not attract tax. When those earnings are set-off from the baseline figure of \$19,968, this yields a claimed loss of \$16,818 net for that period.

156The second element of the claim is for the period 1 July 2010 to 30 June 2011. In that period, the plaintiff derived earnings of \$11,479 net, which attracts tax on earnings over \$6000 at 15 per cent, namely, \$821 or an offset of \$10,658 net. When those earnings are set-off from the baseline figure of \$19,968, this yields a claimed loss of \$9310 net for that period.

157The third element of the claim is for the period 1 July 2011 to 30 June 2012. In that period, the plaintiff derived earnings of \$4253 which would not attract tax. When those earnings are set-off from the baseline figure of \$19,968, this yields a claimed loss of \$15,715 net for that period.

158The fourth element of the claim is for the period 1 July 2012 to 30 June 2013. In that period, the plaintiff derived no mitigatory earnings for set-off. This yields a claimed loss of \$19,968 for that period.

159The fifth element of the claim is for the period 1 July 2013 adjusted to 10 March 2014, being 36.14 weeks to the date of the hearing. In that period, the plaintiff has derived no mitigatory earnings for set-off. The baseline earnings of \$19,968 per annum net are the equivalent of \$384 per week. This yields a claimed loss of \$13,877 for that period.

160Those five elements of claim aggregate in the total amount of \$75,688. I consider that sum to be a very modest estimation of loss from teaching because it does not include any allowance for increments in rates over the 5 calendar years that have passed since 2009.

161In my view, that claimed amount is both modest and is reasonably based. It does not include an amount for the probable earnings the plaintiff would most probably have derived from her scheduled engagement in the production of Luisa Miller, which would have been the gross amount of about \$5000.

162Those earnings would have attracted tax of 15 per cent or \$750 as the \$6000 tax free threshold would have already been exceeded in that tax year. The net value of the lost Luisa Miller earnings is therefore \$4250.

163On behalf of the defendant, on 20 March 2014, it was argued that no loss from the Luisa Miller production would have arisen because the plaintiff would have left that role to care for her children in any event, irrespective of whether she had suffered nervous shock: T177.8.

164I do not accept that submission as it is artificial and fails to recognise the connected causative continuum of the events from the time the accident occurred, the natural and probable consequence of the plaintiff being informed of the fact of the accident, followed upon by her foreseeable attendance at the hospital, and the evolving shock that ensued, as is plain from the facts set out at paragraphs [48] to [56] above.

165I therefore allow the additional amount of \$4250 net as representing the plaintiff's loss from the Luisa Miller production.

166That amount makes no allowance for the probability that the plaintiff's role in the production of Luisa Miller may have led to her being favourably noticed, and possibly being selected for other remunerative professional engagements in the ensuing years 2010, 2011, 2012, 2013 and 2014: *Malec v JC Hutton Pty Ltd* [1990] HCA 20; (1990) 169 CLR 638.

167Combining the two sums identified from the evidence as analysed above, the total of the estimated lost earnings from teaching, namely \$75,688, and the lost Luisa Miller earnings namely \$4250, amounts to \$79,938 net.

168I therefore assess the plaintiff's damages for past economic loss in the amount of \$79,938.

Future economic loss

169On behalf of the plaintiff, it was submitted that the plaintiff's damages for future economic loss should be assessed on a two-fold basis, namely loss of earning capacity from her teaching activities, and loss of income from potential engagement in operatic roles. Those submissions, after discounting for vicissitudes, were in the respective amounts of \$275,820 and \$117,872, totalling \$393,692.

170The teaching component of that submission proceeded upon the basis of a claimed loss of \$450 per week net projected at 5 per cent over 23 years to age 67 (x 721.2) and discounted by 15 per cent for vicissitudes to yield \$275,820.

171As has been analysed with regard to the claim for past economic loss, that approach has also been proven to be unreliable and requiring adjustment after the further evidence and argument on 20 March 2013. As was identified at that time, the figure of \$450 per week was revealed to be a gross figure. After adjustment for tax, on analysis, the revised rounded figure is revealed to be \$384 net per week. On that correctly adjusted premise, the projected component for loss of earning capacity from teaching on that methodology, becomes \$235,399.

172The additional submission made on behalf of the plaintiff relating to her future operative career proceeded on the basis of a claimed loss of a lump sum buffer of \$10,000 per annum net (which is the equivalent of \$192.30 per week) projected at 5 per cent over 23 years to age 67 (x 721.2) and discounted by 15 per cent for vicissitudes to yield \$117,872.

173After adjusting the total future economic loss submission made on behalf of the plaintiff, it should be read as being in the amount of \$353,271 rather than \$393,692.

174When the proceedings were re-listed for further argument on 20 March 2014, the representatives of the parties were informed of the post-submissions view I had formed that the submission made on behalf of the plaintiff, if accepted, represented significant under-compensation in respect of the claim for future loss of earning capacity. Both parties then took time to enable them to make considered submissions on that matter.

175The defendant maintained the position of making no monetary submission on the plaintiff's claim for future loss of earning capacity. In taking that position, it was acknowledged by counsel for the defendant that this is a most complex and difficult case to assess from the perspective of determining the extent of the plaintiff's future loss of earning capacity.

176Nevertheless, it must also be recognised that questions of complexity and difficulty are not to be treated as insurmountable barriers to undertaking such an assessment, difficult as it may be, and on the albeit limited quantification information available: *Penrith City Council v Parks* [2004] NSWCA 201, at [58]; *State of NSW v Moss* [2000] NSWCA 133, at [71], (2000) 54 NSWLR 536, at [7]; *Allianz Australia Insurance Ltd v Kerr* [2012] NSWCA 13, at [7] - [9].

177The guiding principle for the task at hand is helpfully stated in *State of NSW v Moss*, at [71], as follows:

"...

[71] ... [S]trictly the issue does not turn on a comparison between what money the plaintiff would have earned apart from the injury and what money the plaintiff will earn after the injury. The compensable loss is not a loss of income but the loss of capacity to earn income in a manner productive of financial loss: *Graham v Baker* [1961] HCA 48; (1961) 106 CLR 340 at 347. The income earned before the injury is relevant, but only as an evidentiary aid in assessing damages for the loss of capacity to earn income: *Paff v Speed* [1961] HCA 14; (1961) 105 CLR 549 at 566 per Windeyer J. Evaluation of the worth of a loss of capacity to earn - of a lost chance to earn - is of its nature a more imprecise inquiry than calculation of a lost income. It rests on the hypothesis - that the plaintiff will have undiminished capacity - which has been rendered false by events. It does not depend on calculating the income from a particular career which is no longer possible, but in calculating the damage to a capacity to carry on various careers. It is an exercise in estimation of possibilities, not proof of probabilities. Luntz, *Assessment of Damages for Personal Injury and Death*, 3rd ed, para [1.9.18], said:

'it is not necessary for the plaintiff to establish the future loss with the same degree of precision as the present and past loss ... The court is really being asked to estimate as best it can the future effect of the injuries from which the plaintiff has been proved to be suffering as a result of the defendant's wrongful act.'

In *Malec v J C Hutton Pty Ltd* [1990] HCA 20; (1990) 169 CLR 638 at 639 Brennan and Dawson JJ said: 'the ascertainment of earning capacity involves an evaluation of possibilities, not establishing a fact as a matter of history.' ... The majority (Deane, Gaudron and McHugh JJ) in *Malec v J C Hutton Pty Ltd* said at 643 that when the law takes account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring in a range from just above the speculative to just below the certain. The inquiry - the process of estimation of possibilities - is thus an imprecise and indeterminate one to be carried out within very broad parameters. The trier of fact may have to form conclusions on 'slender materials': *Callaghan v Wm C Lynch Pty Ltd* [1962] NSWLR 871 at 877 ..."

178In *State of NSW v Moss*, at paragraph [71], reference was also made to the UK position as follows:

"The English position was summarised thus by Lloyd LJ in *Foster v Tyne and Wear County Council* [1986] 1 All ER 567 at 570:

'when it comes to estimating loss of earning capacity, there is no such thing as a conventional approach; there is no rule of thumb which can be applied. It would be so much easier if there were. But there is not. In each case the trial judge has to do his best to assess the plaintiff's handicap, as an existing disability, by reference to what may happen in the future. As has been said so often, that is necessarily a matter of speculation; it is necessarily a matter of weighing up risks and chances in all the circumstances of a particular case. The very fact that the approach must necessarily be so speculative means, of course, that the occasions on which this court will feel justified in interfering with a judge's assessment will be few and far between, for there is no established range or standard against which to measure the judge's award.' "

179In *State of NSW v Moss*, at [87], the following statement was also made:

"...

[87] In short, where earning capacity has unquestionably been reduced but its extent is difficult to assess, even though no precise evidence of relevant earning rates is tendered, it is not open to the court to abandon the task and the want of evidence does not necessarily result in non-recovery of damages. ... The task of the trier of fact is to form a discretionary judgment by reference to not wholly determinate criteria within fairly wide parameters. Though the trier of fact in arriving at the discretionary judgment must achieve satisfaction that a fair award is being made, since what is involved is not the finding of historical facts on a balance of probabilities, but the assessment of the value of a chance, it is appropriate to take into account a range of possible outcomes even though the likelihood of any particular outcome being achieved may be no more than a real possibility. ..."

180In *Allianz v Kerr*, in the context of citing structural difficulties with regard to the drafting and interpretation of s 126 of the MAC Act, Basten JA cited the passage from *State of NSW v Moss*, at [7], highlighting the impressionistic nature of the exercise:

"The award of a buffer for future economic loss in circumstances 'where earning capacity has unquestionably been reduced but its extent is difficult to assess' reflects the proposition that, to paraphrase, the want of precise evidence 'does not necessarily result in non-recovery of damages': *State of New South Wales v Moss* [2000] NSWCA 133; (2000) 54 NSWLR 536 (at [87]) per Heydon JA. ..."

181In undertaking the required task of assessing the plaintiff's entitlement to damages for future economic loss I have taken guidance from the principles referred to in the preceding paragraphs.

182In undertaking that exercise, it is relevant to first examine the evidence of the plaintiff and the evidence generally on the issue of what her likely circumstances would have been but for her injury: s 126 of the MAC Act. It is then necessary to identify what it is that impairs the plaintiff from exercising her full earning capacity, together with the causal relationship of those matters to the plaintiff's injury, and to then examine the acceptably reasoned portions of the medical opinions on the issue of earning capacity to determine whether a loss of capacity exists, followed by an assessment of whether that loss of capacity is likely to represent a cause of financial loss to the plaintiff. It is then necessary to examine the evidence that either identifies or tends to identify the relevant economic yardsticks by which the plaintiff's loss of capacity could, if possible, be measured in the particular case. Finally, a consideration of discounting and mitigation factors is required. Those matters are examined sequentially in the paragraphs that follow.

183In respect of the first line of inquiry, I assess the plaintiff's most likely circumstances but for her injury to be as follows: s 126(1) of the MAC Act.

184The plaintiff would most probably have continued to build on the psychological gains she was making from the counselling she obtained from Ms Trathen. She had adjusted to living in Victoria and had resumed teaching, which would most probably have continued, on a part-time basis at the very least in the short term. At the same time, she would most likely have fully exploited the opportunity to re-engage in the pursuit of her operatic career ambitions. In the short term, this was by means of her engagement for the Luisa Miller production.

185The plaintiff clearly had the motivation, the ability and the confidence to fulfil that role. Based on those considerations she would most likely have successfully completed her involvement in that production, and in the process, consistent with her other historical performance achievements, it is very likely that she would have come under favourable notice which was likely to lead to other engagements of that kind.

186I accept and infer from the plaintiff's evidence that on the occasions of such performance opportunities, she would have been performing in front of people who could have been instrumental in furthering her career opportunities in the world of opera, as had occurred in connection with her past performances. She saw that, and similar opportunities, as a career springboard to other things because at that time she was at a prime age to advance her singing career: T21.15.

187When one takes into consideration those matters, although they involved unpredictable and imponderable future events, I consider that on the balance of probabilities, it is more probable than not, that the plaintiff would have been very well placed to further engage with and develop her career as an operatic soprano, with teaching and coaching being the more predictable backstop financial supports to her career and to her earning capacity: *Malec v JC Hutton Pty Ltd* [1990] HCA 20; (1990) 169 CLR 638, at [1].

188Whilst those likely circumstances must also be viewed in the context of the possible impact of adverse vicissitudes, as with all careers and future predictions, on balance, but for her injury intervening, I consider that the plaintiff would have had a productive, satisfying and financially rewarding optimistic career to look forward to and to exploit, in accordance with her stated passion for doing so, with tuition and coaching activities as financial fallback positions.

189In respect of the second line of inquiry, the evidence of the plaintiff and my findings as to the impairments that prevent her from pursuing her career path along those lines, can be summarised as follows.

190The plaintiff now becomes emotional when she tries to sing. She cannot get sufficient breath to support the sound that she needs, and that she used to be able to make. She finds that she becomes overwhelmed by such emotions, and this relates not only to practice and performance, but also extends to the teaching situation where to be effective, she is required to convincingly demonstrate vocal technique: T21.28 to T21.34.

191The plaintiff described the process as a rigorous one, that requires confidence and energy that she no longer has to place herself under performance scrutiny. She said she can "no longer put [herself] out there emotionally for that sort of thing": T21.44 to T21.50. She has, for a long time now, lost vocal form, and she can no longer produce a High C: T46.11. There is no reasonable basis on the evidence to assume that such a loss of form could be successfully overcome with months of practice and coaching that she referred to as the potential remedial pathway: T48.9.

192The plaintiff considers that the effect of her injury has meant that her career has been taken away from her: T22.39. I consider that her view in that regard is a realistic one in her circumstances. In my view, that represents a very significant loss because it was always her intention to make operatic performance her sole source of income with teaching being a source of supplemental income: T23.20 to T23.23. That evidence was unchallenged.

193In my view, the matters outlined in the immediately preceding series of paragraphs on this sub-topic should form the foundation of the assessment of the plaintiff's claim for future loss of earning capacity.

194In respect of the third line of inquiry, the expert medical evidence on the issue of the plaintiff's loss of earning capacity is examined in the paragraphs that follow.

195The starting point is the opinion of Dr Banks who certified the plaintiff as being unfit to continue to work in the period immediately following the accident. At the time, no firm cut-off period of incapacity was identified by Dr Banks: Exhibit "1", p 8.

196Nine months later, on 22 July 2010, Professor Dennerstein noted that whilst the plaintiff's inability to return to three days a week of teaching was because she had responsibility to take her sons to and from school, that factual statement must be seen as being qualified by two factors.

197The first of those factors was that the plaintiff did not have the money to pay for after school child care. It seems that this was so because she had depleted her financial resources in responding to the family law litigation initiated by the defendant in his post-accident state. Subsequent to those events, that factor has apparently been overcome with the implementation of a regime of carers that come to her home on most days: T42.47. I accept the evidence of the plaintiff that it is her emotional state, and not the needs of her children getting in the way, that prevents her from pursuing work: T49.40.

198The second of those factors was that the plaintiff's ability to work longer hours teaching was adversely affected by the connected factor of her psychological condition and emotional state, which affected her mood and concentration.

199In that latter context, at the time of writing her 2010 report, Professor Dennerstein also noted that the plaintiff may in the future be able to return to more hours of teaching when her children were older and the psychological conditions of the children have settled further: Exhibit "A", Bundle 1, p 20.

200This latter consideration was taken up again in Professor Dennerstein's second report, which will be considered shortly. In that latter regard, it is also noteworthy that the plaintiff envisaged that her domestic and parental responsibilities would have lessened when her son Oliver reached the age of 18 years he would go into separate and supported accommodation suited to his needs: T44.10. This would almost certainly enable the plaintiff to devote even more time to the pursuit of her operatic career if she was otherwise able to do so.

201In my view, the proper interpretation to be placed on Professor Dennerstein's 2010 opinion is that at that point in time it necessarily represents an incomplete analysis of the plaintiff's loss of earning capacity. This is because that cited opinion did not at all include any discussion or consideration of the plaintiff's inability to pursue the activities required for operatic singing performance.

202 There could be a number of reasons why that matter was not taken into account at that time, but it is not necessary to resolve that issue in this consideration. In coming to that analysis, my reasons in this regard should not be interpreted as representing any form of criticism of Professor Dennerstein's report. It was early days in the assessment of the plaintiff's problems.

203 In my view, the second report of Professor Dennerstein, which was dated 27 September 2012, is of greater significance to an analysis for the assessment of the plaintiff's loss of earning capacity. This is because, amongst other things, it dealt with the plaintiff's subsequent attempts to pursue work as a music teacher, an historical matter that was not available to Professor Dennerstein for her consideration at the previous assessment, and therefore it provides a more reliable insight into the issue.

204 Furthermore, Professor Dennerstein's 2012 opinion took into consideration the plaintiff's tearful account when relating her feelings concerning the loss of her singing career: Exhibit "A", Bundle 1, p 23. The history she obtained in that regard included the plaintiff's description of having had to give up her involvement in opera: Exhibit "A", Bundle 1, p 24.

205 In my view, those are most significant additional matters for consideration. Therefore, by 2012, Professor Dennerstein had a more complete picture of the problems confronting the plaintiff and which were impeding her ability to pursue her professional career.

206 Accordingly, in 2012, Professor Dennerstein's updated opinion revised her earlier views on the plaintiff's capacity to teach. She recorded an updated history of the plaintiff having worked for 2 days per week in teaching in 2011, which was different to the history recorded in 2010. In that regard she recorded that the plaintiff was not able to continue teaching as she felt she was not able to meet the requirements of teaching as she had poor concentration. She also recorded that the plaintiff was occupied with the needs of her children. In my view, the issue of the plaintiff's difficulty with concentration is a critical one, and that problem has continued from the time Professor Dennerstein first saw the plaintiff in 2010.

207 On behalf of the defendant, it was argued that Professor Dennerstein should be rejected because on the concentration issue, she did not have a history of the plaintiff's pursuit of university studies, which commenced in 2013 aimed at obtaining a law degree. In my view, that submission should not be accepted because it appears that the plaintiff is pursuing the discipline of her legal studies in order to distract her mind from her disquieting emotions, and because she needs the intellectual stimulation of study, which she enjoys: T23.50; T45.45.

208 The concentration issue that the defendant's submissions focus upon has to be considered in tandem with the factor of the plaintiff's emotional state and the plaintiff's difficult in maintaining concentration and limitations on concentrating on reading for more than 20 mins at a time: Exhibit "A", Bundle 1, pages 4, 6; Exhibit "1", p 40.

209 Given the plaintiff's described problem with concentration, it seems clear that emotional factors were making a significant and material contribution to her inability to concentrate and work as a teacher, and not just the needs of her children: T49.38.

210In any event, although it only features briefly in the reports, it seems that the children themselves had post-accident psychological problems that needed the plaintiff's ongoing attention: Exhibit "A", Bundle 1, pages 17, 20, 23 and 25. In that regard, her son Montgomery had frontal lobe brain damage: Exhibit "1", p 3. He is aggressive and short tempered: Exhibit "1", p 4.

211Those psychological problems should also be recognised as a natural and probable consequence of the accident. Therefore it is an oversimplification to assert that the plaintiff's inability to fully pursue her teaching activities was simply related to the needs of her children rather than being an accident-related problem for which the defendant must be held responsible in these proceedings.

212On 25 June 2013, in the context of a MAS assessment, Dr Rose's consideration of the plaintiff's situation was not focussed on the issue of loss of earning capacity. Instead, his report was concerned with the threshold question he was required to address as a MAS Assessor, namely whether the plaintiff's psychological impairments had exceeded the 10 per cent threshold of the whole person impairment guidelines so as to enable her to claim damages for non-economic loss. That exercise has no significant bearing on the assessment of economic loss damages.

213In my view, the ensuing report of Dr Rose is therefore not relevantly detailed or sufficiently focussed on the issue of loss of earning capacity, and given the limited and regulatory focus of his report, I do not consider that his briefly stated views on the earning capacity issue should be taken to be probative.

214Nevertheless, Dr Rose's notations are of some historical relevance as it recorded the historical summary that the plaintiff was "not working, mainly because of her need to look after her children": Exhibit "A", Bundle 1, p 32. That reference also has to be read in light of the analysis of Professor Dennerstein's comments as to the care needs of the children. Dr Rose also recorded that in relation to the plaintiff's operatic singing, "she cannot get the sound out when she tries to sing": Exhibit "A", Bundle 1, p 34. Relevantly, Dr Rose expressed the conclusion that he was "impressed by the fact that she finds it difficult to sing" and he "attribute[d] this to the effects of the accident": Exhibit "A", Bundle 1, p 38.

215On 30 September 2013, Dr Walton considered that from the perspective of an operatic career, the plaintiff's now restricted vocal range, loss of breath control, and most problematically for her, the difficulty she experienced in attempting to inject the appropriate emotion to accompany the words to be sung as a performing soprano, noting that when she attempts to sing, she "chokes up": Exhibit "A", Bundle 1, p 4. He also explained that on this account, the plaintiff was "now seemingly totally and permanently incapacitated as an opera singer because of continuing mood disturbance seriously compromising her vocal performance": Exhibit "A", Bundle 1, p 7.

216In my view the circumstances so described by Dr Walton, none of which were challenged or contested, represent a devastating personal loss to the plaintiff. In my view that loss represents a considerable loss of earning capacity that is difficult to quantify but nevertheless calls for the assessment of substantial damages for future loss of earning capacity.

217In his report, Dr Walton also considered that the plaintiff's cessation of teaching music in secondary schools was due to her decision to become a full-time parent: Exhibit "A", Bundle 1, p 4. I consider that aspect of Dr Walton's opinion should be given diminished weight and not accepted because it necessarily represents an incomplete analysis. This is for a number of reasons, as follows.

218First, it proceeds upon an incomplete, and therefore incorrect factual foundation in that it does not deal with the plaintiff's described inability to teach singing to students because of difficulty in demonstrating required vocal techniques as a consequence of her psychological condition.

219Secondly, to the extent that Dr Walton proffered a factual opinion on the cause of the plaintiff not working as a secondary school music teacher, the Court is in a better position than Dr Walton to assess the whole of the evidence on that factual matter.

220Thirdly, teaching music to secondary students was not the only avenue of teaching that was open to the plaintiff. Her history was not only secondary school teaching, but also more advanced teaching at conservatoria, giving private lessons, and also singing coaching.

221Furthermore, the brief analysis by Dr Walton based on the perceived needs of the plaintiff's children is necessarily an incomplete one because it does not deal with issues concerning their post-accident psychological issues which only featured in passing in the evidence in these proceedings, and to which I have made reference at paragraphs [210] to [211] above.

222On 22 April 2013, standing against the case sought to be made on behalf of the plaintiff is the opinion of Dr Jager, who considered that the plaintiff's "work ability is not reduced by the accident due to the psychiatric injury which is now in part remission": Exhibit "1", p 7.

223I do not accept Dr Jager's opinion in that regard. It is a conflated view that is not sufficiently or persuasively supported or explained by cogent reasons as is required by the Expert Witness Code: UCPR Sch 7, cl 5(1)(c): *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705; *Dasreef Pty Ltd v Hawchar* [2011] HCA 21.

224In respect of the fourth inquiry, the evidence, albeit sparse, as to quantification of loss of the plaintiff's earning capacity, can be summarised as follows.

225First, for the reasons already outlined in examining the claim for past economic loss, the plaintiff's income tax returns and financial records provide little assistance for quantification purposes.

226Secondly, the adjusted figure of \$19,968 net for earnings from teaching is in my view an artificially low baseline because it is founded upon a narrow analytical window of pre-injury earnings from teaching. Whilst that was a reasonable approach available for the assessment of past losses, it should not be considered to be relevantly representative or a reasonable yardstick by which to measure future losses over the more extended period of the plaintiff's remaining working life, but for her injury.

227Thirdly, the potential earnings as an operatic singer on contract, have not been identified, understandably so because of individual and idiosyncratic factors.

228Fourthly, the evidence of possible operatic and recital performance fees in the range \$1000 to \$4000 gross has to be considered in the light of a progressively developing career. As the plaintiff matured as a singer, it was more likely that her historical repertoire would be extended, or become specialised, and potentially command performance and contractual fees at the higher end of the spectrum, if not beyond. A more detailed analysis of those factors could only be speculative.

229Fifthly, recognising that the plaintiff's professional passion was operatic singing, and her history was one of achievement in that endeavour, it was quite possible that she would have gone on to levels of success and demand to the extent that her teaching activities would take second place to performance opportunities.

230Sixthly, with an income to support her, and to pay for external childcare assistance in the short term, and her ex-husband contributing both financially and time-wise to the needs of the children, it is reasonable to assume, that like many single women in the workforce who have children in their care, the plaintiff would have achieved a workable balance in managing a professional career and tending to the physical and emotional needs of her children, including a child with autism who was otherwise provided with carers, and in due course in the not too distant future, would be likely to be in supported accommodation commensurate with his needs.

231In surveying those matters it is of course important to recognise that unwarranted speculation should be avoided: *Luxton v Vines* [1952] HCA 19; (1952) 85 CLR 352 per Dixon, Fullagar and Kitto JJ at 358, citing the decision of the High Court in *Bradshaw v McEwans Pty Ltd*, now reported at (1951) 217 ALR 1.

232Whilst relevant, in my view, those two latter authorities are more relevant to the analytical pathway of reaching findings on the balance of probabilities. The analytical pathway with which I am presently concerned is the different and the more imprecise and impressionistic survey of future possibilities, such as the ones referred to in the authorities: *Allianz v Kerr*, at [7], and which I have outlined at paragraphs [176] and [182] above, when assessing the plaintiff's most likely circumstances but for her injury.

233This is so especially in the present context where the plaintiff's earning capacity has been "unquestionably been reduced, but its extent is difficult to assess": *Allianz v Kerr*; *State of NSW v Moss*.

234In drawing the foregoing matters together, I consider that the plaintiff is entitled to substantial damages for future loss of earning capacity for the impairment to, if not, the loss of her operatic singing future, and impairment of her teaching capacity and its scope.

235I consider the assessment should be on the basis of an economic buffer sum rather than upon the basis of a precise projected calculation.

236In coming to that view I am mindful of the caution against the indiscriminate awarding of a buffer for future loss of earning capacity: *Allianz v Kerr*, at [9]. I am also mindful of the necessarily imprecise multi-factorial nature of the consideration, and the fact that in such an exercise, there is scope for reasonable minds, properly directed, to arrive at different views on the matter. The overriding consideration must be fairness to the interests of both parties.

237Before giving consideration to the most appropriate monetary amount to be assessed as an appropriate buffer of the loss of future earning capacity, it is appropriate to beforehand have due regard to an array of potential discounting factors that should be appropriately taken into account when making an assessment.

238In my view, those discounting factors can be conveniently but not exhaustively summarised as follows.

239There are the ordinary or conventional discounting vicissitudes that need to be considered. To some extent, some of these had already crystallised for the plaintiff in that she has a child with autism and special needs who was going to be at least partly dependent upon her availability as a carer except when he was in respite care, or when he was old enough to be placed in the special accommodation referred to in the plaintiff's evidence.

240Also to be considered against that factor is the prospect of external care being provided by private and/or public funding. Another already crystallised vicissitude in this case was the ending of the plaintiff's marriage, and the psychological vulnerability that this had created in the plaintiff. Against that, the evidence discloses that the plaintiff was well on the way to recovering her confidence from that blow by the time she had secured the Luisa Miller role, which was well before the accident occurred.

241Other relevant imponderables include the reality of limited or fluctuating funding for the arts, competition for the available roles, limited seasonal work, possible limitations on the number of available roles, and the possible prospect of professional failure for whatever reason. It is not possible to set out an exhaustive list of such matters. Against such factors are the possibilities of high rewards for artistic success, not excluding some scope for overseas work possibilities, and the possibility that other teaching and coaching opportunities could also provide supplementary income during the quiet times between singing roles.

242Having regard to those matters, I consider that the application of a slightly higher than the usual or conventional vicissitudes of 15 per cent adequately pays due regard to those discounting considerations: *Wynn v NSW Ministerial Corporation* [1995] HCA 53; (1995) 184 CLR 485.

243Another discounting factor is the likely impact on the plaintiff's loss of earning capacity of potential mitigatory earnings from other areas of reasonable endeavour within her capacity, subject to her emotional ability to carry out alternative work.

244In that regard, accepting the plaintiff's evidence, I consider that mitigatory earnings from singing are unlikely to arise. Likewise, notwithstanding the medical opinions that the plaintiff can work part-time in teaching, such views must be tempered by the plaintiff's issues with

confidence and concentration and her reduced ability to teach in the classroom setting. Then there is the possibility of the plaintiff pursuing other work, either with the law degree she seems likely to obtain, or in some other area of endeavour. Those matters must be qualified by the plaintiff's difficulties with concentration for sustained periods: Exhibit "A", Bundle 1, pages 4, 6; Exhibit "1", p 40. Although all of those matters involve a considerable degree of speculation, they must still be taken into account.

245 Having considered the range of evidence and the identified discounting factors summarised in the preceding paragraphs, I am persuaded that the plaintiff has suffered a significant and ongoing impairment in her earning capacity.

246 I am also persuaded that this loss will more probably than not result in the plaintiff suffering a significant and permanent financial loss in the remaining years of her potential future earning capacity both in respect of her teaching activities and from her operatic singing career: *Husher v Husher*; *Graham v Baker*; *Medlin v State Government Insurance Commission*.

247 In those circumstances, I consider the dual stranded approach to the monetary assessment of the claim for future loss of earning capacity as advanced on behalf of the plaintiff to be flawed in its mix of component parts in that it appears artificial, although it does seek to incorporate two of the substantive components of the plaintiff's potential pre-injury income streams representing the different strands of the plaintiff's earning capacity, had the accident, and her resultant psychological difficulties, not occurred.

248 In reality, the two submitted strands of the claim for future loss of earning capacity are part of the one unified entity that was the plaintiff's undamaged pre-accident earning capacity. In my view, it is artificial to seek to separate those strands or streams of the plaintiff's professional activities. Furthermore, the two conceptual strands within the submission on behalf of the plaintiff are not capable of being delineated by the fixed proportions that are necessarily implicit in the assessment approach submitted on behalf of the plaintiff.

249 In addition, the approach submitted on the plaintiff's behalf pays insufficient regard to the element of what I consider to be the plaintiff's realistically based overriding ambition of having a fulfilling and rewarding future as an operatic soprano, having had the training, background, connections and experience for such an endeavour. Finally, the submission made on behalf of the plaintiff does not take into account the prospect that the plaintiff may have been able to ultimately develop her career options so as to be able to command a contractual relationship with an opera company wherever located, or to gain higher individual performance fees as she matured as a singer.

250 Instead of projecting and aggregating the two suggested weekly amounts, I consider that a unified global monetary buffer amount is the more appropriate method by which to compensate the plaintiff for her future loss of earning capacity: *Penrith City Council v Parks*; *State of NSW v Moss*; *Allianz Australia Insurance Ltd v Kerr*.

251 In undertaking that assessment, recognising the competing interests of the parties and the need to achieve a just balance, I consider that the appropriate net lump sum that takes into account both the positive and the negative factors, imponderables, vicissitudes and possible mitigatory earnings that I have referred to, is the amount of \$500,000.

252 I therefore assess the plaintiff's damages for future economic loss in the buffer amount of \$500,000.

Past loss of superannuation

253 On behalf of the plaintiff it was submitted that past superannuation should be assessed on the conventional basis of 11 per cent of \$78,862. I accept that submission and I therefore assess the plaintiff's damages for past loss of superannuation in the amount of \$8793.

Future loss of superannuation

254 There is no dispute that the appropriate assessment percentage for identifying the amount of future loss of superannuation is 14.39 per cent of \$500,000. I therefore assess the plaintiff's damages for future loss of superannuation in the amount of \$71,950.

Future treatment expenses

255 On behalf of the plaintiff, it was submitted that damages to allow for the plaintiff's future treatment expenses should be assessed in the buffer amount of \$5000. This was submitted to be an appropriate amount to cover the cost of future counselling as well as guidance from her general practitioner when required. The defendant made no monetary submission concerning this head of damage.

256 The medical reports tendered by the parties support a claim for the plaintiff pursuing future treatment to seek to ameliorate the impact of her ongoing psychological symptoms: Dr Walton, Exhibit "A", Bundle 1, p 7; Professor Dennerstein, Exhibit "A", Bundle 1, p 20.

257 I do not accept that part of the opinion of Dr Jager to the effect that the plaintiff's need for treatment relates to "ongoing issues regarding the care of her autistic child and the ongoing family law dispute": Dr Jager, Exhibit "1", p 7.

258 That opinion is contrary to the evidence of the plaintiff, which I accept, to the effect that there is no longer any family law dispute. In that regard, the evidence is that the defendant pays what is required for the maintenance of the children, he has access to the children, and shares their care regularly and on school holidays having moved to Melbourne, apparently for that purpose. That arrangement appears to be properly described as a stable arrangement for custody and access. Accordingly, the evidence does not disclose an ongoing family law dispute. The representatives of the defendant may be assumed to have been in a position to call contrary evidence on that issue if it was the case, and no such evidence was called.

259Furthermore, the plaintiff's care arrangements for her autistic son also appear to be stable. In that regard, it seems to me that the plaintiff has come to terms with the difficulties entailed with caring for her son with autism. Before the accident the pursuit of her art also gave her some distraction from such tasks. Likewise, it seems to me that the plaintiff's pursuit of her legal studies provides her with intellectual stimulation and similar distraction from those tasks, along with the benefits provided by a care and respite regime. It therefore seems to me that the defendant's submission under present consideration does not accurately reflect the plaintiff's circumstances and I therefore do not accept that submission.

260In my view, the claimed allowance for future treatment expenses is reasonable as the plaintiff still experiences "raw" symptoms of "grief" concerning the distressing triggering events, and as principal care giver for her injured son, she is regularly exposed to further emotional triggers which serve as reminders which have the effect of interfering with what she has planned for her life and this generates anger within her: T22.25 to T22.35.

261Dr Walton's unchallenged opinion is that a short term cost of \$3000 for counselling treatment is justified.

262The other evidence does not suggest a ready basis for calculating a particular amount for future treatment expenses beyond that estimated by Dr Walton. However, given the nature of the plaintiff's symptoms and the effect they have on the plaintiff, on the evidence to which I have referred, I consider that it would be reasonable and appropriate to allow for a buffer to cover the plaintiff's likely costs in, from time to time, seeking assistance from a general practitioner and a psychologist or a psychiatrist, including the cost of possible medication.

263In those circumstances I consider that the claimed buffer sum of \$5000 is a reasonable amount to cover all such eventualities.

264When that sum is comparatively analysed as a sum projected over the plaintiff's remaining life span, (x 950.4), it is the equivalent of an allowance of a little over \$5 per week. Although that is not the assessment method that I have adopted, however, that cross-check confirms to me the reasonableness of the claimed sum of \$5000.

265I therefore assess the plaintiff's damages for future treatment expenses in the amount of \$5000.

Past out-of-pocket expenses

266The plaintiff's out-of-pocket expenses have been agreed in the amount of \$4813.90. I therefore award the plaintiff damages for past out-of-pocket expenses in the sum of \$4813.90.

Summary of damages assessment

267My assessment of the Plaintiff's damages is summarised as follows:

- (a) Past economic loss \$79,938

- (b) Future economic loss \$500,000
- (c) Past loss of superannuation \$8,793
- (d) Future loss of superannuation \$71,950
- (e) Future out-of-pocket expenses \$5,000
- (f) Past out-of-pocket expenses \$4,813.90

Total \$670,494.90

Disposition

268The plaintiff is entitled to a verdict and judgment in the assessed amount of \$670,494.90.

Costs

269The plaintiff is entitled to have her costs of the proceedings paid by the defendant unless a party can show an entitlement to some other costs order.

Orders

270I make the following orders:

- (1)Verdict and judgment for the plaintiff in the sum of \$670,494.90;
- (2)The defendant is to pay the plaintiff's costs on the ordinary basis unless either party can show an entitlement to some other order for costs;
- (3)The exhibits may be returned;
- (4)Liberty to apply on 7 days notice if further orders are required.

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