

AUSTRALIA / JUDGMENT

Ginich, M. v. Johnston, T. [1987] FCA 793

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ON APPEAL FROM THE SUPREME COURT OF THE
AUSTRALIAN CAPITAL

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CATCHWORDS

Damages ~ Assessment — Whether adequate - No new question of
principle involved.

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ON APPEAL FROM THE SUPREME COURT OF THE AUSTRALIAN CAPITAL
TERRITORY

MARGARET GINICH v. TONY JOHNSTON

No. ACT G30 of 1986

Kelly, Neaves and Spender JJ

11 June 1987

Canberra, A.C.T.

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IN THE FEDERAL COURT OF AUSTRALIA

AUSTRALIAN CAPITAL TERRITORY

DISTRICT REGISTRY

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) No. ACT G30 of 1986

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GENERAL DIVISION)

ON APPEAL FROM THE SUPREME COURT

OF THE AUSTRALIAN CAPITAL TERRITORY

BETWEEN: MARGARET GINICH

Appellant

AND: TONY JOHNSTON

Respondent

MINUTE OF ORDER

Judges Making Order: Kelly, Neaves and Spender JJ

Date of Order: 11 June 1987

Where Order Made: Canberra, A.C.T.

THE COURT ORDERS

THAT:

1. The appeal be dismissed with costs.

NOTE: Settlement and entry of orders is dealt with in Order
36 of the Federal Court Rules.

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IN THE FEDERAL COURT OF AUSTRALIA

AUSTRALIAN CAPITAL TERRITORY

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GENERAL DIVISION

ON APPEAL FROM THE SUPREME COURT

OF THE AUSTRALIAN CAPITAL TERRITORY

BETWEEN: MARGARET GINICH

Appellant

AND: TONY JOHNSTON

Respondent

CORAM: Kelly, Neaves and Spender JJ

DATE: 11 June 1987

REASONS FOR JUDGMENT

THE COURT:

This is an appeal from a judgment of the Supreme Court of the Australian Capital Territory whereby the appellant was awarded damages of \$42,929.31 for personal injury sustained in an accident which occurred in June 1978.

At the time of the accident she was a nurses' aide, having begun training for that occupation in October 1972 when she ceased secretarial work which she had taken up after leaving High School in 1970 when she was in fifth form. She married in 1973, apparently in or about July or August. Late in 1973 she began to work at Morling Lodge, a geriatric home, She was working there for about three months when she found that she was pregnant and had to

leave. After she had her first child she went back to work

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in November 1974 at the Woden Valley Hospital geriatric centre. She preferred night duty and usually worked the 11 p.m. to 7.30 a.m. shift, four nights on and four nights off on a rotating roster. She worked until the end of 1977 when she left about six weeks before the birth of her second child on 15 February 1978. She planned to go back to work in September 1978. At the time of the accident her health was good.

When the accident happened she was stopped in Hindmarsh Drive behind another car when she was struck from behind by a "great big car". Immediately after the accident she felt pain in her head. She was taken to the Woden Valley Hospital where she was provided with a cervical collar. She went home about three hours after the accident.

Thereafter her treatment and complaints of pain and disability are set out in the reports of Dr Newcombe, a neurosurgeon under whose care she came after the accident.

Dr Newcombe was not called to give evidence, Counsel for the respondent said that there would be no objection to his reports going in without the need for cross-examination and the trial proceeded on that basis. Mr Mann, a specialist surgeon, was called to give evidence on behalf of the appellant as was Dr A.G. Cumpston, an occupational health physician. The latter did not examine her at all but relied on an interview with her and on Dr Newcombe's reports. The former examined her twice, once on 23 April 1982 and again on 28 April 1986. He had the

assistance of a "large number of reports that were sent to

{him]"

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including three from Dr Cassar who examined the appellant on behalf of the respondent three times, the last some time before, and no doubt shortly before, 10 July 1984.

Dr Newcombe's reports covered a period of nearly eight years. Their effect may be summarised as follows:~

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The appellant suffered a whiplash injury with transient dislocation at the C4-5 level of the cervical spine. There was a good chance that neurological signs which were apparent would resolve conservatively. (29 June 1978)

On 5 September 1978 she was still having considerable neck pain, constant but of varying levels, and difficulty in driving, lifting her four year old child without aggravation of pain, bathing her baby, ironing and lifting clothes out of the washing machine. She was then unable to return to work.

By 5 December 1978 there was considerable improvement in the pain although it continued on both sides of the back of the neck.

On 16 January 1979 there was pain down the medial side of the arm, the neck pain continuing by and large unchanged. Despite the level of pain Dr Newcombe thought she was fit to try to return to work as a nurses aide on night duty, having physiotherapy on afternoons off. There was no definite bony injury seen on x-ray and he thought

her whiplash symptoms would gradually subside over

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the next six months. He did not expect any long term sequelae but said that any injury such as the appellant had suffered might lead to cervical spondylosis which might in turn require operative treatment. He did not attempt to fix a time when that condition might become apparent. He said it would be very difficult to estimate the risk but he would put it at around 30%.

On 8 May 1979 her situation remained largely unchanged except that her right arm pain seemed to have been getting worse with associated weakness. X-rays taken on 17 April 1979 showed no fracture or other abnormality. Disc spaces were intact but there were minor degrees of movement between the 4th, 5th and 6th cervical vertebrae.

on 14 August 1979 the appellant was working in a premature nursery, still having some neck pain at times but able to manage all the work except heavy lifting of wash baskets. She had a full range of neck movement.

On 16 November 1979 she had deteriorated to some extent. She had left occipital headaches and some subjective weakness of the right arm. She had a degree of neck stiffness with tenderness on the left sub-occipital areas.

On 5 September 1980 she had numbness in the left hand, especially the ulnar two fingers and cramps

in the neck. She had a vague sensory loss in the

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area supplied by C8 dermatomes but neck movements had become almost full in range.

Following the birth of her child at the end of November 1980 she presented on 24 February 1981 with more neck problems. She had headaches every couple of weeks. She complained of fairly constant neck ache and weakness of the right arm with pain down the medial side of the right upper limb. Dr Newcombe found little in the way of neck restriction but considerable weakness of diffuse distribution in the upper limb with no definite reflex change. He then considered it unlikely that she would be able to return to nursing.

On 19 May 1981 she was still complaining of weakness in the right hand, loss of facility with finger movements, ache in the right forearm and occipital headaches radiating towards the frontal region. Mild neck stiffness and some crepitus of the neck were present together with persistent sensory loss in the right forearm and thumb area. Writing and typing aggravated her pain. Dr Newcombe felt that overall she was managing quite well at home. Her continuing symptoms were not severe enough to warrant myelography or operation. Cervical spine films of 24 November 1981 were within normal limits but cervical discography on 10 February 1982 revealed degenerative changes at

C4-5, C5-6 and C6-7 intervertebral disc levels.

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Reproduction of pain occurred at the C5-6 level and this was severe. She was continuing to complain of neck pain with headache especially on the left side and also of right hand cramps. Dr Newcombe thought it probable that her injury had resulted in intervertebral disc change at all three levels but especially at the C5-6 level, that which appeared to be responsible for her continuing symptoms. He thought that she might require surgery within 5 years with a resulting likely diminution of symptoms although some remaining symptomatology might be anticipated. Whatever the outcome he would not recommend return to nursing.

On 24 December 1982 her condition remained essentially unchanged, stable and unlikely to change.

On 9 November 1983 the appellant "had continued migraine aggravated by her cervical lesions at C4-5, C5-6 and C6-7 levels with one severe headache every eight or nine days". Six weeks later severe headache, particularly in the left occipital region, was again noted as also were cramps in the neck,

On 24 January 1985 she had continued neck pain and pain at the left side of the head,

On 16 May 1985 headaches were continuing with

varying intensity. She had neck pain with

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stiffness but overall was managing. Physiotherapy

was helping. Her general condition following her

injury appeared stable and no further medical care was arranged.

At his first examination on 23 April 1982, the appellant complained to Mr Mann of headaches from the back of her neck on to the top of her head (in her own words to him, her worst symptom), neck stiffness associated with pain, weakness of the right arm with inability to grip firmly, diminution of feeling in the little and ring fingers of the right hand and pains in the right wrist radiating up the forearm. She was unable to iron for long periods or to do heavy housework. On examination he found her to have reduction of neck movements by about 20% in all directions with diminution of sensation in the little and ring fingers of the right hand, the grip of which was poor. All other movements in the right arm were performed reasonably powerfully. He thought she had quite marked disability due to residual pain and stiffness of the neck following the injury, headaches probably due to compression of the nerves supplying the back of the head and weakness of the right arm and loss of feeling in the ring and little fingers due in all probability to injury of the roots of brachial plexus. He thought it too early to make an assessment of residual disability but that it was very likely that she would come to surgery. In cross-examination he was asked whether the appellant's headaches could be described as migraine type

headaches. He did not really think that conclusion could be

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drawn. He described migraine headaches as classically unilateral although they could be bilateral. He thought the fact that the headaches were bilaterally symmetrical at the back of the head following whiplash injury of the cervical spine would make one believe that there was some irritation impingement on the nerves that came out of the spinal canal at that level. He would not have described the headaches of which the appellant complained to him as of a migraine nature.

Mr Mann's opinion did not change following his examination of the appellant in April 1986. His conclusion was that her complaints that she could not do heavy housework were consistent with the nature of his findings. On the basis of the history and the evidence presented to him he thought her complaints were due to the accident. He doubted whether she could go back to nursing. He thought that she seemed to be coping and would be well advised not to undergo surgery unless some aggravating episode should dictate it.. He would not forbid her return to work but would have reservations about her going back to heavy activity such as lifting geriatrics and had doubts about work involving a lot of lifting of children or a lot of stooping. He thought she could work as a doctor's receptionist.

On the basis of the history furnished him by the appellant and the reports of Dr Newcombe, Dr Cumpston concluded that the appellant was suffering from cervical

radiculopathy caused by degeneration and protrusion of

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cervical discs at C4-5, C5-6 and C6-7 levels. He did not consider her fit to return to nursing or to any alternative work involving repetitive use of the right arm.

Dr Cassar examined the appellant on behalf of the respondent. In his first report of 13 October 1980 he stated that x-rays taken on 23 June 1978 of the skull and cervical spine were completely normal. On examination he found completely normal movements of the cervical spine and of the upper and lower limbs without any evidence of spinal nerve root entrapment. He said that the appellant's complaints of disabilities were not supported by his findings on examination. He concluded by saying that on the basis of the history whiplash symptoms continued for twelve months after the accident but they had completely resolved with no indication of permanent neck damage and specifically no degenerative changes in bones, discs or nerve root outlets. In his report of 1 February 1983 he said:-

"I have previously made mention of the

[appellant's] past medical history of

migraine, the latter being around time of

menstrual blood loss and of the aggravation

of the same following her involvement in the

accident of 1978. It would appear that the

headaches, as described, of 1981 were purely

a continuation of this migraine. On February

10 1982 Dr Ray Newcombe, neurosurgeon, and Dr

Ken Goard, radiologist, performed cervical

discogram on [the appellant], examining

levels C4-5, C5-6 and C6-7 where degenerative changes were evident and they found pain only

at the C5-6 level, both on contacting the anterior cervical structures as well as on injection of contrast - the latter being associated with pain radiating into the head and neck and shoulders. There was no

radiation of pain at other levels. Physical examination of [the appellant] at her most recent visit showed normal extent of movement in the cervical spine, no clinical evidence of cervical nerve root irritation and

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specifically no localisation of problems at the C5-6 level - the level localised on discogram as being suspicious of disc degeneration." He considered that the appellant's continuing disabilities were loss of control of migraine and permanent partial disability of C5-6 disc degeneration resulting in periodic aching and weakness of the right arm but not requiring any

surgical decompression and not of a severity to be

interfering with normal domestic, recreational and working

needs.

After again examining the appellant on 10 July

1984, he said:-

"In relation to claim for aggravation of previous migraine, that particular disability persists. »+» Again it is my opinion that the headaches are of a true migraine nature being accompanied by visual disturbance and altered sensation in the right arm, the frequency of serious attacks being no more than one a year, the last being July 1983. The descriptions of other headaches which occur I suggest are tension headaches, mild migraine and muscle contraction pain in the left occipital area, possibly related to the

whiplash injury and disc compression in the

cervical spine previously mentioned." He found some physical signs present in respect of the disabled neck. He did not think there was any appreciable change in the injuries and disabilities as they had been detailed in his report of 1 February 1983.

The evidence supported the trial Judge's finding that before the accident the appellant had absences from

work due to migraine headaches for 164 working days out of

182 in 1975, for 283 days in 1976 and for 223 days in 1977.

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His Honour accepted Dr Cassar's evidence and proceeded to assess damages accordingly. It should be noted that Dr Cassar said in evidence;-

"I am not doubting that this woman possibly has a disc lesion. What I am doubting is the severity of that lesion."

The first specific ground of appeal (the third) was that the learned trial Judge erred in accepting Dr Cassar's evidence to the exclusion of the other medical evidence. Much criticism was levelled at his acceptance of Dr Cassar's evidence against that of Dr Newcombe, the appellant's treating neurosurgeon, and that of Mr Mann and Dr Cumpston. The criticism was based on three grounds. First it was said that because Dr Cassar's special fields of interest were cardiology and rheumatology and not neurology, his opinion ought not to have prevailed over those of the treating specialist and the other specialists in relevant fields, surgery and occupational health. Secondly, it was said that by merely accepting Dr Cassar's evidence he failed to make up his own mind. Such acceptance, it was said, related to all Dr Cassar's evidence - medical issues, disability, extent of pain and any other matters touched on by the doctor. Thirdly it was put, and this was the gravamen of the sixth ground of appeal as well, that his Honour failed to consider that the question of the appellant's pre-accident headaches had not been put to the appellant's doctors when they gave evidence.

To take those matters in turn, there is no warrant for the submission that the evidence of a consultant

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physician, no matter what the fields of his primary interest, ought not to be accepted over that of the consultant treating specialist in the particular field. As a consultant physician, Dr Cassar was plainly qualified to give evidence on the appellant's condition. No judge is bound to accept the evidence of any expert or, indeed, of any witness against that of another. This is so even though one would expect that when medical reports are tendered without objection and no application is made to have the doctor cross-examined, opposing counsel may be taken to have conceded the accuracy of those reports. This seems to

follow from *Browne v. Dunn* (1894) 6 R. 67 (HL). See also

Reid v. Kerr (1974) 9 S.A.S.R. 367 at pp.373-4, *Thomas v. van den Yssel* (1976) 14 S.A.S.R. 205 at p.207 and *Allied*

Pastoral Holdings Pty Ltd v. Commissioner of Taxation [1983]

1 N.S.W.L.R. 1 at pp.16, 22-3.

But the accuracy of the reports is one thing, their interpretation another. To assist him in interpreting the reports and in particular in assessing the level of the appellant's disability, the trial Judge had a number of aids, There was evidence of the appellant herself that she engaged in work caring for children. As a result she was able to earn \$75 per week. Admittedly she said that her arm and neck had got much worse so that she could not, at the time of giving evidence, cope with more than she had at the moment, having just had to relinquish the care of one little girl whom she had looked after for a year. A comparison of

the report made by Dr Newcombe following review of the

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appellant on 9 March 1982, a report which is summarised in sub-paragraph (k) above, with that of Mr Mann following examination on 23 April 1982 shows that their views basically coincided.

After he examined the appellant on 28 April 1986, Mr Mann's view remained unchanged. He gave evidence four days later. Significantly there was no reference in it to a worsening of the appellant's condition although on the same day he deposed to such a worsening. His was the latest medical evidence and he was the only doctor who actually examined her after 16 May 1985.

It is also obvious that Dr Cassar's views expressed in his reports were known to the appellant's legal advisers because Mr Mann had been furnished with copies of those reports before he or Dr Cassar gave evidence. Counsel for the respondent did cross-examine Mr Mann about the appellant's headaches. It is plain from the cross-examination that Mr Mann did not consider the headaches to be "of migraine nature" although he conceded that others might describe them that way. Dr Cumpston was not cross-examined on the subject. There was therefore available to the learned trial Judge the choice of two opinions - one tendered on behalf of the appellant that the headaches from which she suffered were due, at least principally, to the injury which she had sustained, the other, tendered on behalf of the respondent, that' the headaches were

"of a true migraine nature being accompanied

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last being July 1983. The descriptions of other headaches ... were suggestive of tension headaches, mild migraine and muscle contraction pain in the left occipital area, possibly related to the whiplash injury and disc compression of the cervical spine previously mentioned".

It cannot be said, therefore, that the opposing views were not clearly put. There is thus no room for the

application of the rule in *Browne v. Dunn* (supra).

Perusal of Dr Newcombe's reports gives the impression that his view was that the appellant had suffered a cervical disc lesion at three levels centering on the C5-6 level which aggravated her migraine headaches and left her with neck difficulties and right arm weakness. He did not give any indication of the extent of the aggravation nor do the reports indicate when it might be that surgery could become necessary, the extent of the pain which would bring about the need for that surgery or the possible or probable sequelae of the surgery. He would not, it would appear, have recommended her return to nursing, surgery or no. Mr Mann's views on her possible return to nursing are set out above as is the effect of Dr Cumpston's report.

In these circumstances, it was open to the learned trial Judge to attribute to the pre-accident migraine a greater share of the appellant's disability than is now contended for. It is not, as one sees the evidence, a case where the learned trial Judge rejected completely the evidence brought on behalf of the appellant. Rather it is a case where he accepted the emphasis placed on aspects of the

appellant's condition by Dr Cassar. Coupled with this must necessarily have been his view of the appellant although he

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did not say so specifically in his reasons for judgment. It was open to him on the evidence to accept that the severity of the migraine headaches from which the appellant suffered before the accident was much greater than she had indicated in her evidence before him. This he plainly did.

The fifth ground alleged that his Honour erred in failing to find that the appellant's headaches had been significantly aggravated by the accident. Dr Andrews, a neurologist who examined the appellant on behalf of the respondent, was not called to give evidence. It was submitted, therefore, that it might reasonably be inferred that his evidence would not have favoured the respondent's

case. We do not think the rule in *Jones v. Dunkel* (1959)

101 C.L.R. 298 compels such a conclusion. See the discussion of the rule in *Cross on Evidence*, 3rd Australian edn. at pp.35-7. The ground is inextricably bound up with the third and sixth grounds and all three, we think, fail.

The fourth ground alleged that his Honour erred in finding that the appellant was not incapacitated for work after 31 December 1982. His Honour based his finding in this regard on the evidence of Dr Cassar and that evidence, accepted as it was, was sufficient to support the finding. We think the ground fails.

The seventh ground alleged that his Honour erred in failing to conclude that the appellant's medical condition had deteriorated due to the accident, it being alleged that a conclusion to that effect was inescapable.

But in accepting Dr Cassar's view, his Honour necessarily

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accepted that she had problems other than her pre-accident migraine after the accident and that acceptance could only have been on the basis that her medical condition had deteriorated due to the accident. The extent of that deterioration was a matter of dispute. We think the ground fails.

Grounds 8, 9 and 10 may be considered together, They alleged that his Honour erred in finding that the appellant had a substantial capacity for work, that in particular she had the capacity to work and obtain work as a doctor's receptionist and that vacancies in that field occurred regularly in the Australian Capital Territory. These findings were said to be either not open on the evidence or contrary to the evidence. We refer to Dr Cassar's opinion already expressed upon which the learned trial Judge relied and refer again to Mr Mann who expressed in his evidence that she could try work as a doctor's receptionist, He did place one restriction on that. He said it was distinctly possible that if she had to keep her arms up all the time in front of a typewriter she might have trouble. He also considered that she might be able to work as a kindergarten assistant although if there were a lot of lifting children and stooping involved she might find it Gifficult. Dr Newcombe's reports referred to her incapacity for work in relation only to her previous work as a nurse.

A personnel consultant with approximately nine years experience of recruitment of staff from junior

clerical officer level to senior managerial level gave

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evidence that there were a number of positions as doctor's receptionist available in Canberra from time to time, that there would be every possibility that a person with the appellant's experience could locate such work on a full time basis and that it would be possible for such a person working full time to earn about \$15,500 per year as a minimum. He agreed that in his experience in Canberra which had stopped three months before he gave evidence, positions as doctor's receptionist came up quite regularly. He agreed un cross-examination that a person with a disability in the right arm which made typing very difficult would find it counting very much against her in applying for such a job as would headaches which would keep her off work for a couple of days every couple of weeks or so.

Since his Honour accepted Dr Cassar's view of the appellant's condition, it follows that he was entitled to accept that she could obtain work as a doctor's receptionist and that such positions became available quite regularly.

The eleventh ground alleged that the award of \$20,000 for -past loss of wages was unreasonably inadequate and that the "rounding off" to allow for past vicissitudes, a process which involved a reduction in the amount of loss found of \$985, was not based on any reasonable view of the evidence, Of course, not all future contingencies are unfavourable and an allowance upward may properly be made in respect of favourable contingencies. But where a person working approximately 1823 days a year has over a period of

three years an average of 223 working days off because of a

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medical condition, it is not unreasonable to expect that there might have been some unfavourable contingency to be taken into account in respect of past loss of earnings. It is true that some of this would no doubt have been taken up by sick leave credits but the contingency remained. However, even if the reduction was totally incorrect, it would amount to an error of less than 5% of the total finding for past loss and such an error would not, in our opinion, support the upholding of the appeal.

The amount found in respect of past loss depended upon the learned trial Judge's view of the evidence and his assessment of the date when the appellant would have been able to return to work. On those findings the amount awarded in respect of past loss could not be said to be unreasonably inadequate nor could his Honour's award in respect of general damages be held to be excessively low as was alleged in ground 12.

Ground 13 alleged that his Honour's finding that the appellant would not have returned to work because she had children was contrary to all the evidence and was not reasonably open to be seen in context. In giving his reasons for judgment his Honour said:-

"It must be borne in mind that the
[appellant] is a married woman with four
children and her youngest child is only 16
months old. My impression is that the reason
that she is no longer working as a nurse is
because of the demands of her family and the
fact that the child minding which she is
doing is a suitable alternative activity in
all the circumstances, It brings in the
extra money which the family requires. It is further my impression that if it was
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necessary for the plaintiff to engage in more extensive work and longer hours she would be able to summon the motivation to do so and would have the physical capacity to do so, That is not to say that she does not have periods of incapacity due to headaches.

With regard to loss of earning capacity, I am satisfied on the evidence that the [appellant] enjoyed nursing and had some sort of a vague desire to do her general nursing certificate and become a registered nurse. I do not accept, however, that the accident has thwarted that desire. She had been overcome by the natural increase in her family. For the reasons which I have mentioned earlier, it is unrealistic to contemplate that a married woman with four children, the youngest of which is only 16 months old, would be able to return to nursing to do night duty four nights on and four nights off for a considerable time. She has roughly the same earning capacity now as she had prior to the accident, although that capacity might have to be redirected into receptionist nurse duties rather than general nursing duties."

In our view, it cannot be said that the view which the learned trial Judge took of the appellant's continuing earning capacity was intuitive or idiosyncratic. He plainly accepted that she had a continuing earning capacity of approximately the same level as that which she would have had except for the accident. That being the case it was inappropriate to award damages in respect of loss of future earning capacity.

Ground 14, that the learned trial Judge failed to allow for the appellant's future pharmaceutical needs, was dependent upon the acceptance of the appellant's treating doctor. In view of his Honour's findings this ground also

fails.

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The last ground, having to do with costs, does not fall to be considered.

It was submitted on behalf of the appellant that, in view of the way in which Dr Newcombe's reports came to be admitted into evidence, they should be accepted and that, therefore, this Court was in just as good a position as was

the trial Judge to assess their effect. *Warren v. Coombes*

(1979) 142 CLR 531. But the rule in that case applies when inferences are drawn from undisputed facts, not when, as here, there is, as his Honour found, we think rightly, a conflict of evidence. There was a conflict between Mr Mann's and Dr Cassar's evidence, Dr Newcombe's reports were not necessarily to be accepted and his Honour obviously took account of his impressions of the appellant whom, of course, this Court did not see. We are unable to accept the rule as of assistance in this case.

The appeal should be dismissed with costs.

I certify that this and the foregoing pages are a true copy of the Reasons for Judgment herein of his Honour

Mr. Justice Wilson @

VAS f Assocat Dated: // f-tnn /GF y 7E7

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