

"If the plaintiff, as she said she had intended, continued her demanding business career after marriage, and after the birth of her child or children, she and her husband would necessarily have been faced with the necessity of engaging a full time nanny for the children and substantial household help during the week. The Judge's assessments made no allowance for these costs which must have been substantial and under current tax law have to be paid out of taxed income."

Having considered the claim for economic loss, Handley J.A. (with whom Clarke and Sheller JJA agreed) went on at page 13 to state the following:

"A fair allowance must also be made for the cost of domestic help for any children and for other household duties. There was no evidence of the probable cost of such domestic help, but it cannot be ignored, and the Court must do the best it can. In my opinion a fair deduction for these costs would be \$250.00 a week, with the plaintiff and her husband bearing half each."

This deduction for the cost of domestic help resulted in a reduction, prior to any assessment of vicissitudes, of \$91,700.00 from the damages awarded to the plaintiff by the trial judge for future economic loss.

The decision is curious because it is not often that one encounters, at least in the case of male plaintiffs (whether or not they have working wives) a deduction from awards for lost earning capacity in the future of an amount to cover at least part of the cost of care for any future children or other household duties. Despite the fact that the trial judge had found that the plaintiff's husband was "extraordinarily supportive" the Court of Appeal found it necessary to offset against the large damages award for lost earning capacity for this female executive an amount to cover the cost of looking after any future children she might have and the household in general.

The decision is unusual in the light of the High Court's decision in Sharman v Evans (1977) 138 CLR 563. This case referred to the well established principles that when awarding damages for loss of earning capacity no reduction is to be made for the cost of maintaining oneself and one's dependants

unless an element of double compensation would otherwise intrude, and also that courts, in assessing compensation for loss, are not concerned with the manner in which the plaintiff expends her income. The latter proposition was re-affirmed in the more recent High Court decision of Todorovic v Waller (1981) 150 CLR 402. There it was said (at 412) that "Certain principles are so well established that it is unnecessary to cite authorities in support of them". The third of those principles was that "the court has no concern with the manner in which the plaintiff uses the sum awarded to him".

An application for special leave to appeal to the High Court has been filed.

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## Passenger Sues Cruise Line Over Passive Smoking

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The Tourism and Travel Review has previously warned of the liability those in the travel and tourism industry face from allowing exposure to the harmful effects of passive smoking: Tourism and Travel review Volume 1, No. 4, February 1993. A case recently commenced against P & O Holidays focuses attention on the need not only to implement a smoke-free policy but to ensure that any such policy is enforced.

Herbert John Beasley is a 58 year old retired taxi driver living in Sydney's South Western Suburbs. He has been retired for some years because of ischemic heart disease, chronic asthma, emphysema and vascular blockage. Mr Beasley is aware of the dangers of passive smoking having been a taxi driver for most of his working life. He remembers the "old days" when he smoked heavily and of course so did most of his passengers.

He was advised by his doctor to take a holiday but was warned not to fly because of the state of his health. He decided on a cruise and proceeded to make enquiries as to the terms and conditions of various cruise liners with a special interest in

those conditions relevant to his state of health. He decided to cruise on the P & O Fairstar as he was impressed with the entries in one of its brochures as follows:-

**"Smoking: in the interest of the general health and well being of passengers and crew members, smoking is not permitted in any of the public areas of the ship except the Upper Zodiac Lounge (except during shows) the Sharp End Bar, the Aquarius Night Club and on deck".**

**"Smoking is not permitted in share accommodation".**

**"A certificate of fitness is required of all passengers with a known medical condition and from passengers over 75 years old. To aid in on board medical care those passengers are requested to bring with them a recent medical history from their own doctors. Passengers must bring sufficient quantities of any prescribed medicine to last the duration of the cruise".**

He requested a cabin near a lift and near the ships hospital and although he applied for health insurance he was refused as not suitable for acceptance for any travel insurance. Mr Beasley was concerned about the promised non-smoking areas and advised his travel agent that he could not be exposed to smoke. He was assured that the best information available was that contained in the brochure. Mr Beasley was particularly concerned with passive smoking risks because he knew that his asthma would be provoked by cigarette smoke or acetate.

After embarking on 10 April 1994 it was not long before he was exposed to smoking in non-smoking areas. A boat drill took place and smokers were present. Smoking was also discovered in the foyers. He observed and complained about the presence of ashtrays in areas which were designated non-smoking areas.

Later investigation of the ship showed that there were in fact no non-smoking signs. He soon found out that he was unable to engage in much of the ships life at all unless he exposed himself to cigarette smoke. He decided to make the best of a bad situation, avoid cigarette smoke where possible and where he could not avoid it he simply increased the use of his medication. Whenever it all got too much, he rested. He decided that as he paid his money he was going to do his best to enjoy the cruise.

When he returned home he was placed on antibiotics because of a lung infection that had developed during the cruise. This infection became so serious that he was hospitalised for a week.

After this emergency medical treatment he sought advice and has recently commenced proceedings in the Liverpool Court claiming damages for breach of contract and breach of implied warranty as well as contraventions of the prohibition of misleading or deceptive and unconscionable conduct under the Trade Practices Act and Fair Trading Act. In addition to seeking a refund of his fare, he is seeking damages for his medical treatment, hospitalisation and distress, disappointment and loss of enjoyment of his holiday: see "Damages for Disappointment a Warning to Operators" Tourism and Travel Review Volume 1, No. 5, 5 March 1993.

The case raises not only the question of the duty of all carriers to passengers in respect to passive smoking but also presents this shipping line with a challenge to address policy positions as regards enforcement. The difficulty a cruise line operator faces is that once passengers embark there is little opportunity for them to disembark if they object to not being permitted to smoke or because they are unable to avoid exposure to passive smoking. Although Mr Beasley was bluntly advised by one of the ship's authorities **"We can't tell them to put it out"** the presence of ashtrays in designated non-smoking areas and the absences of any non-smoking signs raises a question of the commitment of the cruise line to enforcement of its non-smoking policy. Mr Beasley's case is due to be heard in the Liverpool Local Court sometime within the next six months and many will be interested in the outcome.

