CASE NOTES

BARRELL INSURANCES PTY LTD v. PENNANT HILLS RESTAURANTS PTY LTD[1]

Damages — Lump sum award — Whether inflation to be taken into account — Effect of real and nominal interest rates — Whether taxation on income from award to be considered.

There is no question that the courts face a difficult task in assessing damages for future outgoings or loss of future earnings when faced with unpredictable changes in the value of money. Their guiding principle is that the compensation awarded 'should as nearly as possible put the party who has suffered in the same position he would have been in if he had not sustained the wrong'.[2] The possibility of future changes in the circumstances of the injured party entails notorious difficulties in satisfying that principle which are exemplified by the need to discount for 'contingencies' or 'the vicissitudes of life'. But a more insidious problem is the fact that the value of an award may change dramatically over time because of changes in the purchasing power of money. The significance of the attitude taken by the courts to this problem is demonstrated by the history of Pennant Hills Restaurants' claim against Barrell Insurances. The assessment of damages for an item of loss involving future payments by the plaintiff ranged from $88,000 by the trial judge to $406,551 by the New South Wales Court of Appeal. In the High Court it was held by a majority that the correct assessment was $118,000. However, three members of the Court put the figure at about $162,000.[3] The substantial variation between each of these sums was referable almost entirely to differences of opinion relating to the way the courts should deal with the effects of inflation in calculating damages awards.

In essence the problem to which changes in the value of money gives rise is one of uncertainty, and the reasoning in *Barrell* represents an intelligent consideration of the issues involved, although no single, satisfactory solution emerges as subsequent developments in the State Supreme Courts have shown.[4] These developments will be noted in the course of examining the principal case. However, it is already clear that the judgments in *Barrell* do not represent the High Court's final word, even in the near future, on the matters with which the case deals. Accordingly, the present note is intended more to identify briefly the alternatives which the Court has posed for itself than to examine the current law in any detail.

[1] (1981) 34 A.L.R. 162.

[2] *Lim Poh Choo v. Camden and Islington Area Health Authority* [1980] A.C. 174, 187 *per* Lord Scarman.

[3] (1981) 34 A.L.R. 162. These figures refer to one item of loss only, not the whole of the award. The second figure is based on the judgment of Stephen J. but excludes allowance for one particular item of loss, nursing expenses, which he alone would have allowed.

[4] See *Barker v. Nielsen* (Supreme Court of Victoria, unreported; judgment delivered 31 March 1981); *Hankin v. Jetson* (Supreme Court of Victoria, unreported; judgment delivered 22 June 1981); *Tadorovic v. Waller* (Court of Appeal of New South Wales, unreported; judgment delivered 13 March 1981); *Brazel v. Annis Brown* (Court of Appeal of New South Wales, unreported; judgment delivered 13 March 1981).

THE FACTS

The facts of the case can be stated shortly. The plaintiff, in the business of conducting several restaurants, employed the defendant as its insurance broker. The defendant negligently and in breach of contract failed to secure for the plaintiff indemnity against liability for workers compensation payments which might be incurred. An employee of the plaintiff was injured in compensable circumstances, becoming a paraplegic. As the plaintiff was uninsured the employee was entitled to payment from the Workers Compensation Commission of New South Wales under the Uninsured Liability Scheme.[5] However, pursuant to the terms of that scheme the plaintiff became liable to reimburse the Commission for the sums paid by it to the injured employee. It was agreed by the parties that these payments would continue for the entire life of the employee and that the employee's life was properly estimated to have about thirty-four years remaining. The level of payment was fixed according to a statutory formula and it was significant that, pursuant to section 9A of the relevant legislation,[6] payments were to be adjusted twice yearly in accordance with an index of changes in average minimum weekly earnings over all industry groups. Thus, it was clearly to be expected that the indexed payments would rise over time in accordance with general wage movements in the economy. In these circumstances an award of damages calculated on the basis of existing compensation payments would, unless special provision was made, quickly become inappropriate because of movements in the index. In fact, between the date of the original trial and the hearing in the Court of Appeal the index had already caused payments to rise from $64 per-week to $83 per-week. The principal issue before the High Court was whether the likelihood of future changes in wage rates (and therefore, through the index, in compensation payments) should be taken into account in assessing the defendant's liability. Although their reasoning differed, each member of the Court held that future wage movements should not directly be considered in determining the quantum of damages, but that in selecting a discount rate for present payment they should be influenced by the presence of such wage movements.

SCOPE OF THE DECISION

It should be noted at the outset that the decision is not limited in its reasoning to cases where changes in wage rates are involved. The courts have typically treated changes in wages and prices as equivalent problems, apparently on the assumption that the two move in tandem. Such a conception of the problems is evident in personal injuries cases where loss of earning capacity is in issue. The valuation of that loss clearly must be informed by what the plaintiff could have been expected to earn if his capacity to work had not been impaired.[7] This naturally requires reference to (but is not exclusively determined by[8]) the value of the wages or other remuneration he has been forced by his injury to forgo. The possibility of changes in wage rates over time may, on the view taken by the courts, be separated into changes which are purely nominal, that is, reflecting no more than changes in the general price level, and changes which are real, reflecting productivity gains or advancement and promotion.[9] Nominal changes are spoken of as changes due to variation in the purchasing power of money and are treated as part of the problem of accounting in damages awards for the effects of inflation. This is so even though, strictly speaking, the impact of changing prices affects the value of the award only through its presumed effect on wage rates.

[5] Workers Compensation Act 1926 (N.S.W.).
[6] *Ibid.*
[7] *O'Brien v. McKean* (1968) 118 C.L.R. 540, 546 *per* Barwick C.J.
[8] *Ibid.*
[9] *Ibid.*

The point may be clarified by reference to the other major head of damages in personal injuries cases — liability for future expenditure. Where the plaintiff's injury will involve him in making particular payments in the future (for example, medical expenses), the court is faced with a straightforward problem of giving an award which will provide for the necessary expected payments. In doing so it necessarily has regard to the prices of the goods or services required. The possibility of inflation affects the problem directly because it means that the prices may have changed by the time the plaintiff comes to make the payments. By contrast, where loss of earning capacity is concerned the effect of inflation is indirect since it requires the presumption that price changes will be translated into wage changes and thereby render any calculation based on existing wage rates inappropriate.

In *Barrell's* case these issues were combined in a peculiar way. The damage suffered by the plaintiff was its liability to make future payments to the Workers Compensation Commission. Hence, it raised issues like those which arise under the second head of damages just mentioned. However, the payments for which it was liable, being workers compensation benefits, were in their nature something very much like the future wages of its injured employee, and so raised issues like those relevant to damages for loss of earning capacity. Bearing this in mind, it is apparent that the problem which arose in *Barrell* and the manner in which the Court chose to deal with it ought to be relevant to the assessment of damages in personal injuries cases generally. While the Court recognized the wide import of the issue raised at least two judges sought to limit their reasoning on the basis that the case involved special facts.[10]

DIRECT ACCOUNTING FOR INFLATION

It was noted earlier that the Court unanimously held there should be no direct accounting for inflation in valuing the plaintiff's entitlement to damages. In doing so it reached a conclusion contrary to that drawn by the Court of Appeal. The approach there had been to seek expert evidence on likely wage movements over the ensuing thirty years. In the re-trial ordered by the Court of Appeal, evidence was given by an economist that the average annual increase in the wage rate index to which payments were tied would be about ten per cent. On this basis, Yeldham J. computed the sum given by a ten per cent annual accretion to the existing rate over thirty-four years. This sum was discounted for present payment using five per cent tables in the way then current in New South Wales. The resulting figure of $329,600 was added to the award exclusively to provide for future increases in the payments. Such an approach conflicted with several earlier personal injuries cases, including the High Court decision in *O'Brien v. McKean*.[11] It had been held there that inflationary wage increases should be disregarded in assessing damages, whether for loss of earning capacity or future expenditure. The Court of Appeal felt justified in distinguishing the case before it on the basis that it involved a statutory requirement, contained in section 9A, that future wage increases be taken into account in setting the compensation payments. In the Court's view it followed from this requirement that they should similarly be accounted for in the assessment of damages.[12]

In the High Court Mason J. (with whom Gibbs and Wilson JJ. agreed, Barwick C.J. agreeing in part) did not accept that the legislative background to the case could affect the general principle stated in *O'Brien*. The cases were said to raise problems

[10] (1981) 34 A.L.R. 162; see Gibbs J., 168-9 and Wilson J., 207. Mason J. discusses the case in the context of legal principles relevant to personal injuries cases; see pp. 197-201. However, he does indicate that the case involves some special features, 202.

[11] (1968) 118 C.L.R. 540.

[12] [1977] 2 N.S.W.L.R. 827, 849 *per* Hutley J.A., 863 *per* Mahoney J.A.

of essentially the same type and his Honour regarded the reasoning behind the decision in *O'Brien* as equally applicable to the circumstances of the present case. Moreover, his Honour adopted the reasoning in *O'Brien* and repeated the two principal reasons which had been given in that case for refusing to directly account for the effects of inflation; firstly, that the attempted prediction of the inflation rate was an uncertain and speculative exercise which could not properly form the subject matter of evidence, and secondly, that the reception of such evidence would unduly complicate the trial of damages actions.[13] Gibbs J. expressed the same point in this way:

> Prediction as to the economic future in thirty years time may perhaps be made by a soothsayer but expert evidence cannot rationally be given on such a subject. Testimony as to the rate of inflation at times many years in the future would prolong trials and render more difficult the assessment of damages without providing any real assistance to the Court.[14]

Gibbs J. further stated that the evidence given on this matter at the re-trial was valueless and should have been rejected.[15]

Stephen J. (with whom Aickin and Murphy JJ. agreed) did not regard *O'Brien* as concluding the issue, but for reasons other than those given by the Court of Appeal. In his view the rule stated in *O'Brien* was no more than a rule of practice designed to achieve the guiding or dominant principle of complete compensation. Where the effect of such a rule of practice is to subvert rather than advance its objective, then there can be no bar to modifying it.[16] His Honour was clearly of the view that such circumstances existed in the case before him. After citing the words of Lord Scarman in *Lim Poh Choo v. Camden and Islington Area Health Authority*[17] set out in the first paragraph above, his Honour said:

> In an era of endemic inflation, to assess the plaintiff's damages on the assumption that current award rates will remain unchanged for the next thirty-four years disregards that principle of law.[18]

In Stephen J.'s view, then, the Court was not fettered by authority in deciding whether or not, and if so in what manner, to allow for the effects of inflation. Nevertheless, like Mason J., he saw good reasons for rejecting direct inclusion based on expert evidence of future price and wage movements. He further elucidated the difficulty created by the uncertain nature of the evidence by pointing out that if such evidence could be given in every case, it might well lead to substantial disparities in awards simply because the trier of fact reached a different conclusion on the evidence given as to the likely economic future. Prediction of awards and settlement negotiations would inevitably become more difficult.[19] Furthermore, he demonstrated the practical difficulty in using such evidence. To be of use, it is not enough that the evidence show the average rate of inflation over the relevant period as was done in the Court of Appeal; it must also show the distribution over the period of the actual rates. This is because a given average rate which results from low rates in the early years of the period and high rates in the later years will produce a substantially lower figure than one which results from high rates early in the period followed by low rates later.[20]

RATE OF DISCOUNT FOR PRESENT PAYMENT

Having discarded the possibility of direct inclusion of inflationary wage changes, the Court next turned its attention to the rate of discount for present payment.

[13] (1981) 34 A.L.R. 162, 201.
[14] *Ibid.* 168.
[15] *Ibid.* 169.
[16] *Ibid.* 178.
[17] [1980] A.C. 174.
[18] (1981) 34 A.L.R. 162, 174.
[19] *Ibid.* 181-3.
[20] *Ibid.* 183.

Discounting for present payment follows logically from the guiding principle stated at the beginning — the fact that the plaintiff receives the value of his loss immediately and in a lump sum means that he has an opportunity to earn income on the award which he would not otherwise have had. As a consequence, the value of the income so earned should be deducted, leaving the final award, including the prospective income, equal to his assessed loss.[21] The discount rate, then, should be set at the rate of income which the plaintiff is likely or expected to earn. Of course the Court does not concern itself with what the plaintiff actually does with his award but acts on the assumption that it will be invested in a way which yields a rate of return consistent with the protection of capital. In the past it was thought appropriate to discount at a rate more or less equal to the rate of return obtainable on such investments, the rate of interest on Government securities being used as a convenient measure. However, the presence of high rates of inflation has led to a reconsideration of this approach stemming from a recognition that in periods of inflation the difference between real and nominal rates of interest may be substantial. With the possible exception of Barwick C.J., no member of the Court in *Barrell* considered that the decision in *O'Brien* extended to prevent adjustment of the rate of discount to account for the effects of inflation (as opposed to adjusting the damages award itself for this purpose).[22]

The distinction between real and nominal interest rates is easily drawn. The nominal rate expresses the value of the return on an investment with reference to current dollar values. The real rate expresses the value of the return with reference to future dollar values. An investment of $100 which yields $10 at the end of the loan period has a nominal interest rate of ten per cent. If the inflation rate over the same period had been eight per cent, the real rate of interest on the investment would be two per cent. Since the income earned in these circumstances is only two per cent, in principle it ought to be no more than two per cent by which the plaintiff's award is discounted. The plaintiff should retain the nominal return to the extent to which it exceeds the real return. Whether this insight touches the problem of accounting for inflation or not depends on a further important consideration, namely the relationship between the nominal rate of interest and the rate of inflation. If it could be said that nominal interest rates were always represented by the sum of some stable real rate of interest and the inflation rate, then the problem of accounting for inflation rates in damages awards would be quickly solved. It would simply be necessary to discount by the real interest rate and leave inflation totally out of account. In any subsequent year or period of years in which the inflation rate was high, the nominal interest rate would be correspondingly high and the plaintiff would, through his investments, recoup precisely the amount of his award diminished by the effects of inflation. (Although it would still be necessary to allow for any differences which might exist between increases in prices and increases in wages.)

Irrespective of the existence or non-existence of any sound theoretical explanation for a stable relationship between real and nominal interest rates and the rate of inflation, it would be sufficient for the courts if a stable relationship of the sort described could be empirically demonstrated. Stephen J. cited two academic studies which deny the existence of such a stable relationship.[23] He also conducted his own comparison of inflation and interest rates over the past twelve years and found that

[21] See Luntz H., *Assessment of Damages for Personal Injury and Death* (1974), 165, 207.
[22] (1981) 34 A.L.R. 162, *per* Mason J., 198-200 (Gibbs J. and Wilson J. agreeing); *per* Stephen J., 178 (Murphy J. and Aickin J. agreeing). Barwick C.J. appears to regard the decision in *O'Brien* as applicable to both issues.
[23] (1981) 34 A.L.R. 162, 181.

nothing like a fixed real rate of interest emerged.[24] On the basis of these findings, his Honour felt constrained to reject an approach to the problem based on real interest rates. Murphy and Aickin JJ. agreed in this view.

Mason J. also expressly rejected any reliance on a postulated real rate of interest, saying 'the statistical and other information relating to past experience which is available to me does not establish that there is a steady real rate of interest in Australia or that, if there be such a rate, what it happens to be'.[25] Yet, without drawing too sharp a distinction between the approaches of Stephen J. and Mason J., it seems that Mason J.'s approach does rely upon the existence of some such steady real rate. His Honour took the view that in general the rate of discount to be applied should be that which would be appropriate to a stable economy with low or moderate inflation. Thus, the Court would not have regard to the effects of future inflation on the damages award, but neither would it have regard to the high rates of interest which the plaintiff would earn on the award and which were referable to the effects of inflation. This approach can be traced to the judgment of Lord Diplock in *Mallett v. McMonagle*,[26] in particular a passage cited with approval by Gibbs J.:

> the only practicable course for courts to adopt in assessing damages . . . is to leave out of account the risk of further inflation, on the one hand, and the high interest rates which reflect the fear of it and capital appreciation of property and equities which are the consequence of it, on the other hand.[27]

The feature which this approach shares with the real interest rate theory is the observation that relatively high rates of inflation will generally be associated with relatively high nominal interest rates. The only distinction must be the degree to which the two approaches claim precision. In the view of the majority the solution adopted is substantially imperfect, but is the best that can be applied in the circumstances, the problem being at root one of intractable uncertainty.

In finally choosing a discount rate the majority was partly influenced by the particular circumstances of the case. Mason J. regarded the interest rate appropriate to a stable economy as being four or five per cent, but adopted a discount rate of two per cent as 'a fair approach to the problem raised by this case'.[28] He did so partly for the reason that, even in a stable economy, inflation proceeded at a rate of two or three per cent and therefore, an interest rate calculated on this basis would reflect an element of inflation. This reasoning would seem to be applicable in damages actions generally. Further, he considered such a rate to be appropriate having regard to 'the special nature of this case and the imperfect materials made available to us'.[29] The special features of the case would seem to be the statutory context in which it was set (section 9A in particular) and the fact that, although it was a case dealing with future changes in wage rates, it was concerned with damages for liability to make future payments and not loss of earning capacity. The selection of a figure of two per cent did not include any adjustment for the possible effects of taxation on the value of the award.[30]

Barwick C.J. opted for a rate of five per cent. In doing so he was not moved by a desire to find a 'real' rate of interest or the rate applicable to a stable economy. Rather, he chose to follow existing practice on the basis of a belief that the rate then used, 'when compared with the current or "going" rate of interest leaves room for the successful plaintiff to some extent to offset the effect of declining value in money'.[31]

[24] *Ibid.* 186.
[25] *Ibid.* 202.
[26] [1970] A.C. 166.
[27] *Ibid.* 176.
[28] (1981) 34 A.L.R. 162, 202.
[29] *Ibid.*
[30] *Ibid.* 203.
[31] *Ibid.* 186.

On the basis of this reasoning it would appear that, in Barwick C.J.'s view, the rate of five per cent is appropriate in personal injuries cases generally.

Like Mason J., Gibbs J. stressed the point that the case raised special problems and that in fixing a discount rate of two per cent, the Court should not be taken to have endorsed that as the rate to apply in all personal injuries cases.[32] This qualification was taken up by the Supreme Court of Victoria in *Barker v. Nielsen*.[33] Dealing with a case concerned directly with damages assessment for personal injuries, the Full Court considered itself bound by the reasoning of the majority in *Barrell* but not the conclusion on the actual discount rate to be applied. In the event, the Court decided that a rate of four per cent was appropriate to be applied in such cases and directed that this rate be applied automatically in cases of the same type in the future. The considerations which led the Court to a rate of four per cent are not fully articulated in the judgment, but it is evident that it regarded such a rate as appropriate to a stable economy with moderate inflation, and consequently within the terms of the judgment of Mason J. in *Barrell*.[34]

The conclusions drawn by the majority in relation to the discount rate are to be contrasted with those of Stephen J. After rejecting the real interest rate approach, Stephen J. considered a further possible manner of accounting for the effects of inflation. This was to abandon discounting for present payment altogether. The basis of such an approach lies in a pragmatic appeal to what can be observed in recent experience and an intention to achieve a short term solution to the economic pressures currently bearing on damages awards. Its basic premise is that under existing circumstances the advantage of receiving present payment of a damages award is likely to be fully offset by the declining value of money. Therefore, since the object of discounting is to excise from the plaintiff the advantage he gets from earning income on the award, where it is clear that no such advantage exists the rationale for the general rule falls away. Stephen J. considered this reasoning persuasive, finding that, on an examination of economic conditions presently existing in Australia, there *was* something like a cancelling out of the advantages and disadvantages of present payment.[35] He says of the 'undiscounted approach':

> [I]t does not depend upon the theoretical existence of a relatively constant real rate of interest nor upon any other economic theory of perhaps questionable validity in the Australian context. It relies instead upon recent Australian experience of movements in interest rates and rates of inflation which suggest that the advantage to a plaintiff of present payment is offset by likely future erosion of the value of his award due to the effects of inflation.[36]

And later:

> Its validity depends, of course, upon something like the existing conditions of inflation continuing on into the future. . . . Should the general climate of economic opinion as to the future change, some new approach may then be called for.[37]

Murphy and Aickin JJ. agreed with the reasoning of Stephen J.

Contrary to the position in Victoria, it is Stephen J.'s approach which has been adopted in New South Wales. In *Tadorovic v. Waller*[38] the Court of Appeal considered that *Barrell* produced no binding result, saying that the judgment of Barwick C.J. could not be regarded as supporting the reasoning of Mason J. Consequently it considered itself at liberty to choose between the competing views presented in the judgments of Stephen and Mason JJ. The Court preferred the view

[32] *Ibid.* 168-9.

[33] Supreme Court of Victoria (Unreported; judgment delivered 31 March 1981).

[34] *Ibid.* see p. 29 of the judgment.

[35] (1981) 34 A.L.R. 162, 183-4.

[36] *Ibid.* 184.

[37] *Ibid.* 185.

[38] Court of Appeal of New South Wales (Unreported; judgment delivered 13 March 1981); see also *Brazel v. Annis Brown* in which judgment was given on the same day.

of Stephen J. It is this difference of approach between the States which has created the urgent need for further direction from the High Court and it is to be hoped that the position will at least be clarified when judgment is given in the two cases currently on appeal.[39]

INCIDENCE OF TAXATION

It is worth noting that a further issue in the case was whether there should be an adjustment of the discount rate to account for the fact that income on the award was likely to be diminished by the payment of income tax. Although in *Barrell* the Court did not give much attention to the matter, this is an issue of some significance in personal injuries cases generally. Mason J. took the view that in principle it was correct to adjust the discount rate to deal with the payment of income tax. In this he accepted the reasoning of the Court's earlier decision in *Cullen v. Trappell.*[40] However, he held that on the facts of the case before him, in particular the corporate character of the plaintiff and the possibility that it would receive tax deductions in respect of the payments it was liable to make, the effect of tax liability on the award was too uncertain to affect the setting of the discount rate.[41] With the exception of Gibbs J., the other members of the Court took a similar approach. Gibbs J., who gave the principal judgment in *Cullen,* was of the view that the particular circumstances of the plaintiff were irrelevant in allowing for the effect of income tax. Accordingly, his selection of a discount rate of two per cent was intended to allow for the payment of income tax as well as for the effects of inflation.[42]

While agreeing with Mason J. that on the facts with which he had to deal it would be inappropriate to make any adjustment for the payment of income tax, Stephen J. went on to examine the effect of taxation on damages awards more generally. In doing so, he made reference to recommendations contained in the *Pearson Report*[43] and suggested that the course there proposed for dealing with notional tax liability would be both an appropriate and acceptable manner in which to treat the problem. This would involve the preparation of standard discounting tables, based on varying discount rates, which would take account of the 'tax situation' of different classes of plaintiff.[44] Thus, damages in every case would be discounted for present payment in a way which allowed for the payment of tax on income earned by the award. In making this allowance the court would not examine the tax situation of each plaintiff individually, but would apply standard tables on the assumption that each plaintiff's tax situation was the same. There would, however, be some broad differentiation between classes of plaintiff (based, for example, on income levels and marital status), so that several standard tables would exist, and that which applied to a particular plaintiff would be determined by the category into which he fell.[45]

CONCLUSION

Without having a clearer indication of the degree to which the majority view was affected in its selection of a discount rate by the 'special circumstances of the case', it is difficult to know how much difference there is in substance between the two approaches to dealing with inflation evident in the High Court. Both rely in large part on there being a reasonably close correlation between changes in the inflation

[39] See the *Australian Financial Review* (Sydney) Thursday, 6 August 1981, 13.
[40] (1980) 29 A.L.R. 1.
[41] (1981) 34 A.L.R. 162, 202.
[42] *Ibid.* 170-1.
[43] United Kingdom, *Royal Commission on Civil Liability and Compensation for Personal Injury* (1978) Cmnd. 7054-I.
[44] *Ibid.* paras 646-708.
[45] (1981) 34 A.L.R. 162, 186-8.

rate and the nominal interest rate, and while neither is very dogmatic in this respect, the approach of Stephen J. is the less so of the two, making reference as it does to considerations which have most meaning in the short term. If in the 'normal case', the majority view continued to suggest a discount rate of two per cent, there is little that can be said which would support one view above the other. Recognizing that, in consequence of the need to calculate the award on a lump sum basis, the difficulties created by future price movements cannot possibly be overcome with any degree of certainty, the issue seems to reduce to one of deciding whether to err on the side of the plaintiff or the defendant. On the other hand, it might be said that the view of Stephen J. is to be preferred on the basis that the two per cent difference can justifiably be put on the plaintiff's side in order to account for future wage increases due to productivity gains, an aspect of wage movements not otherwise accounted for in assessing damages. A figure of two per cent would probably be apt to serve this task. This reasoning would not apply to future payments cases which did not involve the payment of wages, but it is probably true that many future payments in personal injuries cases would involve the payment of wages in respect of nursing and similar services. Whether this consideration forms part of the reasoning of the undiscounted approach is not entirely clear. Stephen J. makes brief reference to the point but does not develop it.

If, as the Victorian case suggests, the majority view is consistent with a higher discount rate in the normal case, then the argument may be stronger in favour of the view of Stephen J. This is simply on the basis that it is more flexible in its application and is adequate to deal with circumstances in which the court can observe as a matter of fact the tendency under prevailing economic conditions for the income from damages awards to be substantially or completely offset by the declining value of money.

One point does appear to be clear from the case and is evident equally in other recent decisions.[46] This is that the courts do not regard the means they presently have available to them as capable of dealing in anything near a satisfactory way with the problem of changes in the value of money. Stephen J. makes the point in the following way:

> A defect inherent in common law awards of lump sum damages . . . is due to the once and for all nature of such awards. Their assessment necessarily involves some prediction of the future and, once awarded, they remain unalterable however wrong that prediction may prove to be. No existing method of assessment can overcome this; only radical legislative intervention will suffice.[47]

PAUL KENNY*

UEBERGANG AND OTHERS v. AUSTRALIAN WHEAT BOARD†

Constitutional law — Section 92 of the Constitution — Freedom of Interstate Trade, Commerce and Intercourse — Individual Right Theory — Public Character Theory — Government marketing schemes — Definition of reasonable regulation — Relevance of factual evidence.

The Australian Wheat Board is set up by complementary Commonwealth and State legislation in all States and Territories. The Board's function is to regulate the

[46] See especially *Lim Poh Choo v. Camden and Islington Area Health Authority* [1980] A.C. 174.
[47] (1981) 34 A.L.R. 162.
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† (1980) 54 A.L.J.R. 581.