December 1988. The parties also agreed that as at December 1996 (and continuing) the applicant suffered a 20% permanent impairment in relation to the lumbar spine. There was also agreement about a permanent impairment relating to the legs. For the sake of this paper I will confine the summary to the discussion of the back condition itself. It can be seen by the agreement reached between the parties that the factual situation could be distinguished from a situation where there was an injury prior to 1988 with no permanent impairment but subsequent permanent impairment after the commencement of the Act, and that there was argument that the situation fell, to some extent, within the comments made in the *Blackman* decision where there is a gradual deterioration of an impairment after the commencement of the Act where the impairment had in fact been present before.

The Court decided by majority of two to one that the further impairment to the back was compensible. The minority decision of Heerey J adopted the decision in *Blackman*. His Honour found that:

"The impairment of the respondent's back which commenced in 1968 has not disappeared. It still continues. It could not be said that the respondent now has two impairments in relation to his back."

The majority, O'Connor and Merkel J disagreed. Merkel J in his judgment (which was adopted by O'Connor J), summarised the authorities dealt with above in the following way:

"*The gradual worsening of a permanent impairment in accordance with its natural progress does not constitute a series of new impairments each giving rise to a separate liability to pay compensation: see *Blackman* at 14 and *Brennan* at 570-571 per Gummow J; cf *Brennan* at 558-9 per Burchett J;

*The observation in *Blackman* at 14 that a permanent impairment which worsens significantly or is such that the variation between it and the earlier permanent impairment is substantial does not result in a new permanent impairment is to be approached "with some caution": see *Brennan* ... and *Levett*.

The present case requires resolution of the question left unresolved in the current state of the authorities, that is, whether a deterioration in a permanent impairment which existed as at 1 December 1988 is capable of constituting a new permanent impairment. The caution expressed in relation to *Blackman*.... suggests a reluctance to accept that a substantial variation, or a significant deterioration, in a person's permanent impairment is incapable of constituting a permanent impairment which is different to that which existed prior to the variation or deterioration."

The Court then proceeded to consider whether a permanent impairment can occur incrementally over time. The Court noted that the Tribunal had suggested that such a construction accords with the beneficial nature of the legislation and is likely to be fairer and more consistent. Mr Justice Merkel at page 22 of the decision

IUD case results in losers all round

Chris Merritt
Law Correspondent

The weirdness of the Australian legal system may well have reached its zenith yesterday when Justice Vince Bruce handed down his judgement in the nation's biggest product liability case.

First, the judge quit. Then the official "winner" of the case – the Nutrasweet company – turned out to be the real loser.

By choosing to defend its Copper-7 Intra-Uterine Device against a massive damages claim, the Nutrasweet company has been left with a legal bill that is believed by those close to the case to be somewhere between $15 million and $20 million.

The financial position of the nine women who started – and lost – this argument is much healthier.

Their lawyer, Dr Peter Cashman, declined to discuss how much the case had cost him and how he had financed it.

But his comments indicate that he has run the case "on spec", taking on a multimillion-dollar liability in the hope of being paid from the winnings.

"Like most plaintiff firms we are not in the habit of charging our clients for the work that we do during the course of it because most of them cannot afford to pay," Dr Cashman said yesterday.

While Nutrasweet will receive some compensation for its legal costs, it won't be much and it won't be coming from Dr Cashman's clients.

Because these women were partly funded by the NSW Legal Aid Commission, Section 47 of the NSW Legal Aid Commission Act means their liability is capped at $12,500 each.

And that liability will be met not by the women, but by the commission.

So after spending at least $15 million in order to win the fight that these women started, the most that the company can expect to receive is a little more than $112,000 of taxpayers' money.

"This is a scandal," said Clayton Utz partner Mr Stuart Clark, who led the Nutrasweet legal team.

While he was "very, very happy" to have headed off a claim that could have cost the company at least $300 million in damages, Mr Clark is not happy about what he sees as the demise of the "loser pays" rule.

"What happens is that the Legal Aid Commission comes along and even though it doesn't run the case, they use the legislation to protect plaintiffs from adverse costs orders," he said.

Yet according to Dr Cashman, that is exactly the outcome that was intended by the law of NSW.

"I don't think Clayton Utz can be heard to complain, because in a sense they have been the beneficiaries of this litigation" through the massive amount of work it had generated, he said.

In his view, Nutrasweet should not complain too much as it had received the advantage of tax deductions for legal expenses.

So, according to Dr Cashman: "In many respects the defence of this claim has been subsidised by the public purse and the taxpayers."

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