SAUER v CSR LIMITED

SUPREME COURT OF QUEENSLAND

File No S1719 of 2002

BETWEEN:

SAUER

Applicant

AND:

CSR LIMITED

Respondent

MOYNIHAN J – REASONS FOR JUDGMENT

CITATION:	*Sauer v CSR Limited* [2003] QSC 047
PARTIES:	**Raymond Thomas Mark Sauer** (plaintiff/applicant) **v** **CSR Limited** (defendant/respondent)
FILE NO/S:	SC No 1791 of 2002
DIVISION:	Trial Division
PROCEEDING:	Claim for damages for personal injury
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	Thursday 6th March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	12 June 2002 – 14 June 2002, 30 August 2003
JUDGE:	Moynihan J
ORDER:	**The defendant to pay the plaintiff damages in the amount of $166,489.43.**
CATCHWORDS:	DAMAGES – general principles - measure and remoteness of damages in actions for tort TORTS - NEGLIGENCE – where economic or financial loss - apportionment of responsibility and damages

COUNSEL: Mr R.J. Oliver for the plaintiff

Mr G.W. Diehm for the defendant

SOLICITORS: Walker Pender for the Plaintiff

Ebsworth & Ebsworth for the defendant

[1] The plaintiff was employed as a shift worker at the defendants Bundamba factory where he was injured on 17 December 1995. He was jammed between a wagon and a metal girder. He sues to recover damages for the injuries he allegedly suffered in the accident. Liability is not in issue but damages are contentious.

[2] The plaintiff was born on 16 July 1962 and left school in year 10. He did not acquire any formal trade qualification but appears to have had no difficulty in obtaining employment in various occupations involving the use of manual skills. He worked in the building industry and heavy steel fabrication. For four years he was involved in seismic work in Western Queensland in a responsible position.

[3] The plaintiff was originally engaged by the defendant as a temporary employee through an agency. He applied for permanency and passed through an interview process and medical examination to become a permanent employee in the defendant's Bundamba factory. There he worked in various aspects of the defendant's enterprise on a seven day rotating three shifts roster. He saw his long term employment future as being with the defendant.

[4] On 24 November 1990 the plaintiff, he had been drinking, dived into an aboveground swimming pool and hit the bottom of the pool or some hard object with his head. I will return to this incident, one of the principal issues at the trial was the extent to which the plaintiff's current complaints flow from that incident rather than the events of 17 December 1995.

[5] During a 2:30am break in the night shift he was working on 17 December 1995 the plaintiff went to speak to a friend working in a different part of the factory. The plaintiff was standing beside a wall and adjacent to an exterior opening closed by a roller door. He was beside a steel girder which ran from floor to ceiling apparently as part of the frame of the opening. He was adjacent to rail tracks set in the factory floor. The plaintiff was struck by a heavy wagon carrying stacked sheets of building board manufactured by the defendant so they could pass through heat and humidifying processes. The wagon was coupled with other wagons and was propelled by a driver operated pusher along the rails mentioned earlier.

[6] The plaintiff was standing as I have just described when something, probably movement or a sound, caused him to turn around and look. As he did he realised that wagons were being propelled along the rail track beside him. Before he could to react he was struck by the lead wagon. The initial impact was a "slow impact" on the plaintiff's right shoulder and he was pinned between the girder and the side of

the wagon. He called out, the wagon appeared to stop but there was then a second "shunt". When this movement ceased the plaintiff was crushed in an upright position between the side of the wagon and the girder with his shoulders at right angles to it and the wagon. He struggled vigorously to extricate himself and remembers, "just getting past" the girder when he lost consciousness. When he regained consciousness a short time later he was lying on the floor near where he had been trapped.

[7] It is not clear how long the plaintiff was jammed or struggled to free himself. Nor is it clear how he was extricated from his predicament to be lying on the floor. It is not clear whether he was rendered unconscious by a blow to the head or whether he fainted as he struggled to free himself. Either, or, a combination of each is a question open as the evidence.

[8] When the ambulance arrived shortly after 3:00am the plaintiff was sitting on the floor complaining of severe pain to his upper interior thorax, cervical region and the right shoulder. He was examined, given painkillers, placed in a cervical collar and taken to the Ipswich hospital. It appears his complaints when he was examined there were along the same lines as those to the ambulance attendants. X-ray examination revealed no bony injury. The plaintiff was discharged after 4 or 5 hours and continued on pain medication.

[9] The plaintiff awoke later on the 17th in severe pain and unable to breathe properly. An ambulance was called and he was re-admitted to the Ipswich hospital. His pain and breathing difficulties were attributed to soft tissue injury to his thorax. He was treated conservatively, given pain medication and commenced on physiotherapy. He was discharged from hospital on 19 December. Both the medication and the physiotherapy continued after his discharge.

[10] The plaintiff's condition improved and by 19 January 1996 he had commenced a graduated return to work. He started on light duties and progressed to being able to return to his previous job on a seven day three shift roster some time in February.

[11] On 5 March 1996, Dr Morgan, an orthopaedic specialist, reported to the Workers Compensation Board that the plaintiff was complaining of pain over his left shoulder localised to the acromicolavicar joint with pain radiating towards the sternum and up the side of the neck. There were no neurological symptoms and x-ray results were normal. Dr Morgan "suspected" that the plaintiff had sustained a crush injury to his left shoulder girdle and that the symptoms were resolving.

[12] Later in 1996 the plaintiff moved to a job which was physically more demanding to that which he had previously been engaged in but offered the prospect of more money and of advancement. The plaintiff started to suffer pain in his neck and chest and developed pins and needles down his right arm. He consulted his general practitioner, Dr Braun, who referred him to Dr Morgan.

[13] In a report to the Workers' Compensation Board of 27 October 1997 Dr Morgan noted that the plaintiff's condition had dramatically deteriorated presumably by comparison with what he had reported on 5 March 1996. He went on that the plaintiff's main areas of concern were in the lower segments of the cervical spine with x-rays indicating some loss of disc height at C5/6 and C6/7. He thought that the nature of the pain was non-mechanical and could not be absolutely sure that it was related to the December 1995 injury or to degenerative discs. Dr Morgan ordered scans and referred the plaintiff to Dr Atkinson a neurosurgeon.

[14] Dr Atkinson first saw the plaintiff on 8 September 1997. He concluded, on the basis of the plaintiff's account, that the plaintiff had been rendered unconscious in the 17th December 1995 incident but suffered brain injury. He plaintiff had also suffered soft tissue injury to the left shoulder and bruising to the right side of his chest but had made an uneventful recovery from these injuries.

[15] Dr Atkinson went on to conclude that the plaintiff had age-related degenerative changes in his cervical spine particularly at C5/6 which had been asymptomatic up to the time of the December 1995 incident. He had developed a cervical disc protrusion with right brachialgia involving the C6 dermatome and nerve root. Dr Atkinson considered that this outcome was consistent with the description the plaintiff had given of the mechanism of the 17 December 1995 injury.

[16] As a consequence of this diagnosis on 7 November 1997 Dr Atkinson carried out a discectomy and fusion at the C 5/6 level. The plaintiff recovered from the injury and commenced a graduated return in March 1998. By the middle of the year he was back working a full roster in his previous job.

[17] In August 1999 the plaintiff's neck became painful following an incident at work, this soft tissue injury was unrelated to the events of 17 December 1995. The plaintiff was put on lighter duties. By early 2001 he was working in the warehouse. He came under the supervision of Michael John Sugden who had been at school at the same time as the plaintiff.

[18] Put shortly tension developed between the plaintiff and Sugden. Sugden took issue with a number of aspects of the plaintiff's behaviour. This involved issues (for example) of the plaintiff smoking particularly in prohibited areas, being absent from his place of employment or in locations where he ought not have been and the plaintiff's use of a mobile phone in circumstances where Sugden did not think it appropriate.

[19] The relationship between the two men became strained to the extent that the plaintiff initiated a grievance process. In the course of the process it was concluded that Sugden ought to have offered a more conciliatory approach to the plaintiff. The process did not however resolve tensions between the plaintiff and his employer.

[20] For reasons which are not clear from the evidence animosity was either present from the beginning of Sugden and the plaintiff's working relationship or developed

between them. I am inclined to think that Sugden's issues with the plaintiff's conduct were not unfounded but, as the reference to a more consolatory approach suggests, Sugden overreacted to them. Their attitudes became more fraught and, on my observation, they remained so at the trial.

[21] The evidence is not particularly forthcoming as to the course of events which following. In October 1999 the defendant was required to provide an adequate explanation and justification for non-attendance. A file note of 13 October speaks of the plaintiff's reasons for non-attendance and that he had "agreed to review his circumstances, position and work commitment". There was to be a further review within four weeks time and other steps were to be taken to address what appears to have become a deteriorating relationship.

[22] The plaintiff acknowledged that around the end of 1999 he was having time off work for a variety of reasons. He suffered from neck pain, presumably as a consequence of the August incident. Some of the time lost was apparently attributable to appointments with lawyers and health care practitioners relating to the 17 December 1995 incident. In 1999 a pedestrian died as a result of being struck by a vehicle driven by the plaintiff. He was exonerated at a coronial inquiry but he was understandably considerably distressed over a length of time by the incident and its aftermath.

[23] These considerations reflected on the plaintiff's work and work attendance in circumstances which were already agitated because of his relationship with Sugden. Ultimately a deed of 12 September 2001 was executed by the plaintiff and the defendant terminating the plaintiff's employment by the acceptance of the plaintiff's written resignation and the making of specified payments to him.

[24] As I indicated earlier the plaintiff's case was that had the incident of 17 December 1995 not occurred his long-term employment future was in working for the defendant. He would have completed a boiler attendant course, been employed in that capacity and paid at a higher rate. On the view I take of the evidence however, although the plaintiff had prospects of completing the course and of being employed as a boilermaker that was not assured. Nor was his long term employment by the defendant assured.

[25] The injury of 17 December 1995 had a limited role if any in the deterioration of the plaintiff's relations with Sugden, their mutual employer and the termination of the plaintiff's employment. It may for example explain some of the pain and stress from which the plaintiff suffered, some of his attendance on legal advisors and health care providers occasionally have been reflected in absences. Other factors, such as the ongoing tensions between the plaintiff and Sugden, the August 1999 injury and the fatal accident played a greater role in the deteriorating relationship. There is a distinct probability the termination would have occurred in any event without the December 1995 incident.

[26] Following the 12 September 2001 termination of his employment the plaintiff found a job through an employment agency as a forklift driver in a busy high volume

operation which he did not continue after April 2002. The plaintiff's evidence was he could not cope with the stress of the work because of his work injury. He has not been offered any further employment opportunities by the agency.

[27] I return to the incident of 24 November 1990, where the plaintiff dived into a swimming pool and struck his head. Initially he did not appear to have any adverse reaction but subsequently he complained of headaches and feeling drowsy. His partner kept him awake and at about 8:00am on the 24th he presented at the Ipswich Hospital.

[28] When he presented the plaintiff was fully conscious. On examination it was noted that there was tenderness in his skull, down his spine to the T3 level but x-rays showed no evidence of any abnormality. The plaintiff was discharged in a cervical collar and advised to take analgesics. He re-presented later on 27 November complaining of headaches and pain down his right arm. X-rays again indicated no abnormality, the plaintiff was given analgesics and physiotherapy was recommended.

[29] The plaintiff stated that he did not recollect this second attendance until it was drawn to his attention in the course of preparation for the trial. Apparently he did not mention the incident to any of the healthcare professionals who examined him for the purpose of this case. The plaintiff's explanation was that his condition soon resolved and he had resumed his usual activities; moreover he was not asked about any previous incident and saw no occasion to mention it.

[30] It may be accepted that the 1990 incident was of a kind likely to cause cervical disk injury. On the other hand, the evidence does not admit of any conclusion as to the precise mechanism of the 1995 incident and had any effect it may have had on the plaintiff's cervical spine. The broad features of the event are however clear enough and are as I have described. There is evidence from Doctors Gillett, Atkinson, White and Morgan capable of sustaining a conclusion that the known events of the 1995 accident were capable of subjecting the plaintiff's cervical spine to insult or injury by the application of force leading to his being trapped and while he struggled to extricate himself.

[31] The plaintiff's evidence is that following the 1990 incident he was soon able to resume his active lifestyle, playing competitive squash, recreational golf, engaging in deep sea fishing and being active in the garden and for home maintenance and improvement work and that he continued to pursue those activities until the December 1995 incident.

[32] The plaintiff's evidence to this effect had support from his partner of the time Debra Jane Farrington. They separated in 1999, as I understand it, because of the stress the plaintiff's complaints of pain and disability placed on the relationship, but apparently remain on good terms.

[33] Ms Farrington, who I should mention impressed me as a witness, gave evidence on the first day of the trial. Her evidence in respect of the plaintiff's activities was not directly challenged but the plaintiff's was in circumstances to which I will now turn. Before I do so I should say I have reservations about aspects of the plaintiff's evidence but not such that I would reject it. He is however not a reliable historian in terms of the elapse of time and details of activities and respect of some matters, for example the circumstances and relations with Sauer and the termination of his employment he seems less than frank.

[34] Immediately prior to Ms Farrington being called to give evidence on 12 June 2002, the first day of the trial, counsel for the defendant indicated that "the issues concerning specific details regarding the plaintiff's involvement in sporting clubs and activities" had only just emerged as a consequence of his (counsel) seeing some medical notes. I was informed that the defendant was pursuing inquiries in respect of those activities and that there may be an application for the plaintiff to be recalled for further cross-examination. The matter was left at that until the outcome of the inquiries were known. I must say that, as I indicated at the time, in my view the issues referred to were squarely on the table before the trial commenced.

[35] On 14 June 2002 the plaintiff was recalled and cross-examined about the resumption of his competitive squash playing activities following the 1990 incident. The defendant tendered records of the Ipswich Squash Association; the teams for which the plaintiff said he played competed in a competition controlled by that association.

[36] The records were related to before and after the 1990 incident. It is difficult to form a concluded view as to how comprehensive and reliable they are. The records are of player registrations, competition results and averages. The defendant points to the fact that the plaintiff's name does not appear with the regularity or consistency to be expected if he had continued to play with the regularity for which he contends after the 1990 incident.

[37] After this evidence the trial was adjourned to 30 August to permit the parties to further investigate this aspect of the case. When the trial resumed the plaintiff had filed a number of affidavits from person who deposed to playing squash fixtures with the plaintiff before and after 1990 and in one case of having employed the plaintiff to construct a slab for a two-car garage in 1994 which the plaintiff did without apparent difficulty.

[38] The evidence of these deponents, who were cross-examined, generally supports the plaintiff's case although it is impossible to be confident, given the lapse of time, that they reliably distinguished between events prior to and after the 1990 accident but before that in 1995.

[39] In my view the plaintiff has overstated his squash playing prior to the 1990 incident, he probably did not resume them to the same extent after it. The aftermath of the incident may have contributed to this initially. On the other hand his work capacity, he obtained a permanent position with the plaintiff was not inhibited. Nor was he

prevented from engaging in other physical activities around the house and for recreational purposes.

[40] The position I have just canvassed is in stark contrast with the deterioration remarked on by Dr Morgan in his report of 27 August 1997. The deterioration is explained by Dr Atkinson's findings. Given the lapse of time from the 1990 incident and the extent to which the plaintiff worked and pursued other physical activities after it, it is unlikely the 1990 incident caused the abnormality Dr Atkinson found.

[41] There is evidence from a number of orthopaedic surgeons, a neurosurgeon a physiotherapist and an occupational therapist which affords a basis for a wide range of views as to the relationship between the 1995 incident and the plaintiff's subsequent complaints. Much of this evidence arises from reports for medico legal purposes and from comments on views expressed by others. In the course of cross-examination witnesses were inveigled into speculating about considerations bearing on the relationship between the plaintiff's condition, the 1990 and the 1995 incidents.

[42] I do not propose to canvass these matters in detail. Much of the evidence is of little value; there are variations the product of different accounts of events or of the particular interpretation different witnesses had placed on accounts. Other differences reflect reconstructions and differences in professional judgment.

[43] In my view the position which emerges from the evidence is as follows. On 17 December 1995 the plaintiff had existing degenerative changes at the C5/6 level but no symptoms. By 8 September 1997 it emerged that he had a cervical disk protrusion at that level. This caused the plaintiff to consult his GP who referred him to Dr Morgan. Dr Morgan on 27 August 1997 noted deterioration and referred the plaintiff to Dr Atkinson's operation of 9 November 1997. I am inclined to give weight to Dr Atkinson's evidence because of his role in the diagnosis of and surgical intervention to deal with the condition. The operation successfully stabilised the joint and diminished its debilitating effect.

[44] On the balance of probability the 1995 incident caused a significant disruption or insult which led to the development of the cervical disk protrusion. The degenerative state of the disk, the nature of the plaintiff's work and other activities which imposed strains on it may well have had the consequence that the degenerative disk may in any event have become symptomatic at some stage. The evidence does not allow that prospect to be quantified with anything approaching precision. Nor does it allow the quantification of the risk of the fusion affecting the adjoining joints.

[45] In summary prior to 17 December 1995 the plaintiff had been involved in an incident in 1990 which involved him diving into a swimming pool and striking his head. The effect was transient. The plaintiff had pre-existing age related degenerative changes in the cervical spine particularly at C5/6 and to a lesser extent at C7/T1 which were asymptomatic. He suffered a specific injury at the C5/6 level

as a consequence of the incident of 17 December 1995. This was the cause of pain and disability. It was the reason for the operation of 9 November 1997. In the 17 December 1995 incident the plaintiff also suffered injuries to his thorax and right shoulder which caused him pain, initially quite severe, and disabling for a time but leaving no permanent impairment of any consequence.

[46] There is no claim that the plaintiff suffered ongoing psychological or psychiatric damage as a consequence of the 1995 incident and, although there is mention of an adjustment disorder in some reports, the evidence does not sustain a conclusion that the plaintiff has suffered any such disorder on account of that incident.

[47] As a consequence of the injury to his cervical spine the plaintiff is restricted in activities which involve his neck remaining in a static position for example, sustained sitting. He is also restricted in activities involving repetitive rotation of his head, repetitive medium to heavy manual lifting or the forceful use of his upper limb in repetitive reaching above the shoulder. This constitutes a 10% permanent impairment of the whole person. It is likely that the particular forklift-driving job the plaintiff finished in April 2002 was beyond his level of tolerance. He nevertheless has a residual earning capacity including as a forklift driver.

[48] Exceeding these restrictions results in the onset of disabling pain. This is probably what occurred in the last job the plaintiff had as a forklift driver in a particularly demanding environment.

[49] I am not satisfied however that all of the disability of which the plaintiff complained at trial is a consequence of the incident of 17 December 1995.

[50] I turn to the assessment of the plaintiff's damages in the light of these findings in terms of the applicable conventional heads of damage.

PAIN, SUFFERING & LOSS OF AMENITIES

[51] This component reflects the pain and suffering as a consequence upon the initial injuries to the plaintiff's thorax and right shoulder and his cervical region. It also reflects the pain and suffering associated with the onset of the disc protrusion as a consequence of the operation to treat it and the outcome of the operation. The initial pain although short term was intense and disabling. The onset of pain due to the disc protrusion extended over some months and became disabling. There was pain associated with the operation and recovery from it. The plaintiff still suffers pain if the tolerances referred to early are exceeded. The pain restricted and to some extent restricts his enjoyment of the amenities of life.

Pain suffering and loss of amenities	$25,000.00
I apportion the $18,000 to the pre-trial period and allow interest on it at 4% for five years.	$3,600.00

ECONOMIC LOSS PAST & FUTURE

[52] The evidence does not permit precise calculation of damages under those heads.

[53] The plaintiff was born on 9 July 1962 and therefore was 40 years of age at the date of the trial. His optimum employment prior to 17 December 1995 was as a Level 3 operator on a seven day three shift arrangement. The plaintiff's case was conducted on the basis that he would have become qualified and employed as a boiler attendant and the rates of pay for a person said to be a comparable employee were put in evidence. As I have said that outcome was a prospect but not assured.

[54] As a consequence of the 17 December 1995 incident the plaintiff spent time on lower paying duties prior to the August 1999 incident. After the incident he commenced a graduated return to work in January before returning to his previous job in February 1996.

[55] By August 1997 he was troubled by the cervical injury to an extent which led to him being referred to Dr Morgan and then to Dr Atkinson. The plaintiff returned to work in January 1998 and by June 1998 had worked his way back to the three shift seven day roster. He went back to lighter duties as a consequence of the August 1999 incident; that and the termination of his employment in September 2001 were not a result of the 1995 incident. Had that event not occurred the plaintiff probably would have worked on the shift roster subject to contingencies exemplified by the August 1999 incident and the termination of his employment in 2001. Following that event and without the 17 December injury he would have obtained comparable employment to the shift and roster sooner rather than later.

(a) Past Economic Loss

[56] The plaintiff claimed $60,803 on the following basis; it provides a convenient approach for assessing his damages under this heading.

The period from 1 July 1997 (a fairly arbitrary attribution for the onset of pain from the disc protrusion) to 30 June 2002 was broken into three categories.

1. 1.7.97-30.6.00 - 7 day roster adopting the nett weekly wage as at the 30.6.97 of $648 x 52 x 3 = $101,088
2. 1.7.00-30.8.02 - boiler attendant and adopting a comparable employee average wage of $780 x 112 weeks = $87,360
   Total potential earnings = $188,448.

The plaintiff's actual earning, $127,645, have to be deducted leaving $60,803

[57] This figure has to be discounted to considerations:

- The plaintiff's payment at the higher rate as a boiler attendant was not assured.

- The plaintiff's earnings were affected by the August 1999 incident, the deteriorating relations with his employer the incident involving the pedestrian and the termination of his employment.

[58]	It is not possible to quantify the effect of these considerations, doing the best I can I allow	$30,000.00
[59]	Interest on $10,000 (reflecting WorkCover Payments) for five years	$3,000.00
	Superannuation loss 6%	$1,800.00

FUTURE ECONOMIC LOSS

[60] I have made a number of findings relevant to this head which I will not repeat.

[61] The plaintiff was 40 at trial. His nett weekly earnings at the termination of his employment by the defendant was $463that was $210 per week less than his earning as a shift worker and $365 a week less than the earnings of a comparable boiler attendant. As a matter of calculation over 25 years on a 5% table $210 per week is $156,316 and $375 per week is $271,692. These figures provide a useful basis for approaching the assessment of damages under this head. There are too many interactive uncertainties and variables for this to be a matter of calculation.

[62] The injury of 17 December 1995 limits the plaintiff's earning capacity because of the restrictions I mentioned earlier but by no means preclude him from working at a range of occupations within the range of the restrictions I have indicated.

[63] The plaintiffs earning at termination may reflect the effects of his relations with Sauer, the August 1999 injury and the total of the accident. These effects were probably transient and are not in any event commensurable in this action.

[64] Had he not been injured in December 1995 the plaintiffs earning capacity was probably at about the shift worker rate and unlikely that he will earn at higher rates. The disability as a consequence of the 1995 accident contributes substantially to this.

[65] I award $100,000 and $8,000 for superannuation loss.

GRATUITOUS CARE

[66] There is no doubt the plaintiff needed assistance in the period immediately following the accident, as his neck deteriorated and following the operation. I am not persuaded he needed assistance longer than some months after those events. Indeed that he did, as ***distinct*** from how much was attributable to the 1995 accident was not contentious. That care was provided by Ms Farrington.

I allow $2,000.00

SUMMARY OF DAMAGES

General damages (pain suffering and loss of amenities)	$ 25,000.00
Interest on pre-trial component $1800 x 2% x 6	$2,160.00
Post economic loss	$ 30,000.00
Interest on $10,000 at 5% x 56	$3,000.00
Past superannuation Loss @ 6%	$1,800.00
Future economic loss	$100,000.00
Future superannuation loss @ 8%	$8,000.00
Gratuitous care	$2,000.00
Special damages (agreed)	$12,810.00
Fox v Wood (agreed)	$2,219.55
Total	$186,989.55
Less WorkCover refund	$20,500.12
Judgment sum total	**$166,489.43**