SUPREME COURT OF QUEENSLAND

CITATION:	*Lewis v Strickland & Anor* [2003] QSC 395
PARTIES:	**RONALD HERBERT LEWIS** (plaintiff) **v** **CARLY STRICKLAND** (first defendant) **NOMINAL DEFENDANT** (second defendant)
FILE NO:	11384 of 2002
DIVISION:	Trial Division
PROCEEDING:	
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	21 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	3 – 6 November 2003
JUDGE:	Byrne J
ORDER:	
CATCHWORDS:	NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – Motor Vehicle Accident – Injury to back – assessment of damages.
COUNSEL:	Plaintiff in person P L Feely for the first and second defendants
SOLICITORS:	Plaintiff in person McInnes Wilson Lawyers for the first and second defendants

Incident

[1] On 3 June 1996, the plaintiff was driving on the Pacific Highway, Palm Beach when his vehicle, then stationary, was struck from behind by the first defendant's car. The force of the impact was so slight that the only immediately observable damage to the plaintiff's vehicle was to its number plate.

Issue

[2] About two hours later, the plaintiff saw his general practitioner, Dr Kelly. On examination, the back was tender in the L5/S1 area, though no external injury was visible. During this consultation, Dr Kelly recorded:[1]

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1 Ex 33.

> " ... Hit from behind 12.15 pm …
> No damage to vehicle.
> Low back injury, painful
> Had been laying bricks, sore because of that …".

[3] Dr Kelly saw the plaintiff three days later, to hear complaints of pain, mainly in the right lower back, extending into the right buttock and leg. A CT scan was ordered. It disclosed:

> "L4/5 Level: There is a prominent posterior disc protrusion present. It impinges on the anterior aspect of the thecal sac and is probably impinging on the right L5 nerve root. …"[2]

[4] This condition is the primary cause of ongoing pain and restrictions said to have adversely affected the plaintiff's enjoyment of life and earning capacity. The main contest now concerns the extent to which, if at all, the accident brought about the condition and the consequences related to it. On the plaintiff's case, the accident accounts for his predicament. The defendants contend that the disc protrusion pre-dated the accident, and that the accident occasioned no appreciable injury or loss.

Pre-accident Labours

[5] The plaintiff was born in 1957. After leaving school at age 15, he embarked upon a carpetlaying apprenticeship. This job lasted a year or two. During the next decade and a half, the plaintiff worked, occasionally it seems, in a variety of labouring capacities, commonly on constructions sites. The details of his working life are obscure. By the early 1990s, however, he was proficient in a number of building tasks. More information is available concerning the six years leading to the accident. In those years, the plaintiff mostly survived on unemployment and sickness benefits, earning little reward from infrequent gainful employment.

[6] In an application in late 1994 for a disability pension, the plaintiff mentioned that he had been employed twice in the previous five years: casually, by Mr Singh over two years as a "shop/driver" – a job that had "run out"; and as a labourer for three months – a position lost when injuries prevented "full effort". The pre-accident work record also emerges from other documents, showing that: in the 1991 financial year, earnings from employment were minimal; in the 1992 year, there was little or no paid work; in the 1993 year, the plaintiff earned less than $900; in the ensuing year, his taxable income exceeded social security receipts by about $500; in the 1995 year, his entire income was derived from social security; and in the 11 months before the accident, he had two sources of income: social security, and a few hundred dollars from labouring and other jobs performed spasmodically over a dozen days in aggregate.

[7] Two factors explain this long-term, benefit-dependent lifestyle: choice; and the effects of injuries.

[8] One choice was to pursue poetry writing – a vocation that was not financially rewarding. Another – which matters to the two years or so just before the accident – was to work at his sister's house, where he also lived. There he was engaged in building walls and other labouring tasks – work which, he claims, had the incidental advantage of "honing skills" in preparation for a return to paid employment. This

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[2] Ex 30, Report 11.

work also constituted some form of contribution towards the acquisition, using family funds, of a vehicle that he intended to use to earn income as a contractor, working in physically demanding tasks, such as labouring and landscaping. He acquired such a vehicle four weeks before the accident.[3]

[9] Old injuries, however, also influenced the low incidence of remunerative work.

Medical History

[10] In completing the disability pension application[4], the plaintiff recounted this history: a "torn scyatic (sic) nerve/disc displacement" in 1980; "badly dislocated L ankle" in "1981/91"; 1982 right wrist injury; knee injury in 1991; right elbow injury in 1992; and left shoulder problem in mid-1994. In response to an inquiry in the form about how these injuries affected his ability to work, the plaintiff said:

> "Most of my earlier injuries have always minimised activity due to arthritus (sic). But I have not been able to do a full 8 hrs work since dislocating my elbow as it has only mended to 45°. Also the last couple of years has caused much frustration & depression due to lack of healing. And now have recently damaged my left shoulder."

[11] Working around the home doing things such as gardening and housework was said to yield "a degree of pain". He answered "no" to the question "Do you expect to return to … work". And he gave as his reason for supposing that he could not undertake any work rehabilitation or training program:

> "Constant pain associated with r. elbow. Not being rightly healed. All other injuries contribute to daily arthritus (sic) pain."

[12] In February 1995, in pursuit of the pension, the plaintiff saw Dr Langley, an orthopaedic specialist, and related his work history: over the years, a variety of jobs that included concreting, carpetlaying, bricklaying, pipelaying, and delivering goods. He had last been employed eight months earlier, delivering goods. That job ceased because of a sore back. In describing his medical history to Dr Langley, the plaintiff mentioned the disc injury with sciatica in 1980 and the other injuries listed in his application.

[13] Dr Langley concluded that, despite some arthritis in the joints and an "old disc injury at his lower lumbar spine", the plaintiff was capable of working 30 hours per week "in a light unskilled work situation". So the pension application failed.

[14] The lower back worsened.

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[3] He was driving the vehicle when the accident happened. The plaintiff maintains that the major reason for his prolonged absence from the workplace was the lack of a suitable vehicle. No doubt a car would have assisted his prospects of working on construction sites. Contractors prefer to engage labourers who drive to sites in their own vehicles, and such workers can expect to be paid more. So the plaintiff had a financial incentive to get a car. Nonetheless, he did not do so until May 1996. It is not proved that he did not have access to funds to acquire a suitable, if second hand, vehicle. And if, as he claims, he "had work coming out of my ears had I had a vehicle", the absence of the vehicle looks to be more a matter of choice than necessity.

[4] See para 6.

Pre-accident Lower Back

[15] The oldest record of an attendance on Dr Kelly concerns one on 31 October 1995, when the plaintiff complained of increasing problems with his knees and right elbow. The elbow was still troubling him in December that year. More to the point, Dr Kelly's notes of a consultation on 27 March 1996 record a complaint of acute low back pain that referred into the right buttock; and that the plaintiff spoke of having suffered a "pinched nerve" in "early 1980-81". On examination, there was tenderness in the lumbo-sacral area. The plaintiff could not fully flex or extend the lumbar spine. Dr Kelly sent him for physiotherapy.

[16] On 11 April, the plaintiff saw the physiotherapist, Mr Christensen, complaining of constant, variable ache in the lower back. Right-sided pain extended into the buttock and leg. The plaintiff woke at night in pain. "Sitting to standing", coughing and sneezing were all painful. Mr Christensen recorded that the plaintiff had spoken of a 15 year history of back pain. In the previous five years, there had been an exacerbation of his lower back condition every six months. And the back was getting worse. Mr Christensen's notes record that he was told that, "in the last year", there had been an exacerbation of lower back pain "every six weeks". Examination revealed tenderness on palpation at L4/5, and pain on flexion and extension of the back. Mr Christensen recorded his impression that the source of the pain was a "discal" problem; that is, he testified, "a problem with the disc in the lumbar region".

[17] The plaintiff returned to Mr Christensen the next day with "some improvement". Four days later, Dr Kelly issued the plaintiff with a two week certificate to obtain sickness benefits. Next day, the plaintiff again saw Mr Christensen, to tell of a fall that had increased his back pain once more. Further physiotherapy was given.

[18] The plaintiff returned on 23 April with his back considerably improved. Symptoms had returned to the "baseline" level of chronic ache from which the plaintiff had suffered for many years, according to the physiotherapist's notes.

[19] The plaintiff had another fall on 29 April. This too increased back pain. When the plaintiff saw Mr Christensen next day, he complained of difficulty getting out of bed in the morning, that movement was restricted, and that "sitting to lying leads to pain". Mr Christensen treated the plaintiff, who was requested to buy a magnetic field therapy machine in the hope that it might assist healing. Dr Kelly was told of the aggravation of back pain from the fall when, on 2 May, the plaintiff asked him for a certificate to support a two week extension of sickness benefits.

[20] On the plaintiff's visit on 3 May, Mr Christensen recorded that, although there was still intermittent sharp pain, the back was "much settled". By 29 May, after more treatment from a different physiotherapist, Mr Ey, the pain was, Mr Ey noted, "back to its normal level". Mr Ey arranged for the plaintiff to return in four weeks "to monitor his progress", as he described things in a letter to Dr Kelly dated 4 June 1996. In this letter, Mr Ey suggested that it may be beneficial to have a CT scan "to give a more definitive diagnosis". The accident happened the day before Mr Ey despatched the letter.

Back Post-accident

[21] Mention has already been made of the consultations with Dr Kelly on 3 and 6 June.[5]

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[5] See paras 2 & 3.

[22] On 12 June, Mr Ey elicited a complaint of severe pain on palpation of L5. The plaintiff also spoke of a constant, variable pain, increased by sitting, which was waking him at night.[6]

[23] On 13 June, Dr Kelly recorded a complaint of increased pain in the upper lumbar region, continuing into the right buttock. His next note is of a review on 24 July, by which time the back had improved: "buttock pain" was "almost negligible" although the plaintiff was "still having physio twice a week".

[24] Within a fortnight of the accident, the plaintiff had retained solicitors to act in his damages claim. The solicitors sent him to Dr Parkington, an orthopaedic surgeon, on 29 July, who promptly reported that the disc prolapse had preceded the accident, and that, "if" the plaintiff "did have minor lumbar discomfort" after the accident, "the effects of the accident were temporary" and had ceased by the time of his examination.

[25] Complaints of pain and restrictions continued to be made to Dr Kelly who, by 5 September, had seen the plaintiff on four occasions since 24 July. His note of the 5 September consultation records, "No real progress. Still constant low back pain". In early October, however, Dr Kelly wrote of "good progress," decreased spasm, "still pain in the right buttock area. walking well … physio completed". A week later, Dr Kelly told the solicitors that he expected the plaintiff to recover fully. The course of events in the near term looked to justify the prognosis. Not for another five months did Dr Kelly record a complaint about the back.

[26] The plaintiff saw Dr Kelly on 19 October, after injuring his left ankle in a fall. The injury put him on crutches. In November, the plaintiff mentioned a sore hip and obtained a sickness benefit certificate. He next returned on 3 March 1997, to complain of referred pain to the right lower leg and feet. Two weeks later, at the final consultation, Dr Kelly noted that the plaintiff had been granted a pension: no doubt the disability support pension which the psychiatrist, Dr Nothling, was later to record had been granted in January.

[27] In the meantime, on 17 December, the plaintiff had consulted Dr Wyton, a physician and barrister. His report of September 1997 reveals that he prescribed Naprosyn "to help … physical discomfort and Prozac to overcome the depression that had plagued" the plaintiff "since the accident".[7] Dr Wyton remains the treating practitioner. Despite this, little emerged of the details of the plaintiff's condition or treatment in the more than five years since Dr Wyton's supplementary report in July 1998.

[28] A list[8] of Health Insurance Commission outlays provides some insight into the extent of resort to medical practitioners. It shows scores of attendances on Dr Wyton. They usually involved complaints of back pain. Since at least 1998, the plaintiff has received regular, typically weekly, "microwave" treatment for pain relief from Dr Wyton or a physiotherapist. There have also been attendances concerned with arms, legs and feet. Many elicited expressions of anxiety and other "emotional" states.

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6 Although the plaintiff has received physiotherapy since that time, no physiotherapist has given evidence about complaints or treatment since 12 June 1996.

7 The plaintiff was taking analgesics when he first consulted Dr Wyton: see Ex 5, p. 3. He had not, it seems, been doing so in late July: see report of Dr Parkington, Ex 48 p. 2.

8 Ex 9.

[29] Dr Wyton, in his 1998 report, mentions the continuing drug regime: Naprosyn and Prozac. And he then expected that the plaintiff would need anti-inflammatory medications indefinitely, as well as ongoing "modalities of palliative relief for his back condition". By February 2002, when examined by Dr Nothling, the plaintiff was regularly taking Naprosyn, Panadeine Forte, the antidepressant, Moclobemide, and, three to four times a week, cannabis.[9]

Plaintiff's Case

[30] The plaintiff contends that the accident has produced a different state of affairs from that which prevailed before June 1996. He contrasts his post-accident circumstances – allegedly involving such discomfort and disability as to prevent his working at all – with an earlier, periodic incapacity for work caused by occasional, acute exacerbations of his lower back condition – something which had always improved with time: in the past, as he put it, a back "strain" would "… come good in a week; it could come good in three months; but … it always came good …". In other words, he used to experience chronic, lower back ache that, episodically, flared into a temporarily disabling condition. Since the accident, he has, he asserts, been afflicted by a strong, ever-present pain that restricts movement, denies all gainful employment, necessitates taking drugs daily, and requires regular "microwave" treatment.

[31] His condition is controversial, both as to the true extent of his problems[10] and as to the influence of the accident on them.

[32] The case that the accident hurt the lower back is supported by Drs Kelly, Pentis, Wyton and Yaksich.

[33] By the time he testified, Dr Kelly had not seen the plaintiff for six years. So his testimonial impression of the effect of the accident – that the back was "significantly worse" afterwards – was based on reflections on his notes, and on the fact that he did not order the CT scan until after the accident. More useful than his attempt to recall his impressions years ago is a report he wrote on 10 October 1996, extracts of which emerged in his cross-examination. Dr Kelly, who had known the plaintiff to have had several aggravations of lower back pain from which he had always previously recovered, then wrote that the plaintiff had:

> "Sustained injuries to his lower back in the accident resulting in more than six months of pain necessitating restriction of activities, physiotherapy and various other treatments. He has however progressed satisfactory and full recovery anticipated".[11]

[34] Dr Wyton also considered that the accident had affected the back. In September 1997, he reported[12]:

> "Mr Lewis has apparently sustained an acceleration-deceleration when he was hit from behind while seated in his vehicle. He admits to pre-existing degeneration in his low back which was probably

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9 See also the pharmacy expenses in the period January 1999 – March 2003 listed in Ex 20.

10 Neither side suggests that the pre-accident symptoms and limitations were not reliably described in the 1994 disability pension application and in the contemporaneous, pre-accident statements to Dr Kelly, Mr Christensen and Mr Ey.

11 The transcript may be inaccurate in indicating the grammatical curiosities.

12 Ex 5.

> substantially aggravated by that impact … Any acute injuries caused at the time of the accident should have now settled, leaving only more persistent and chronic problems."

[35] Dr Yaksich, a neurosurgeon, in May and June 1997, wrote[13]:

> "Prior to the incident in the motor vehicle, he had suffered with back ache from time to time, but he had never lost any time from work or had any significant problems. He worked in the brick laying and concrete trade and had not been able to work since the time of the motor vehicle accident. …
>
> He has quite severe pain in bed at night and this was not present prior to the motor vehicle accident …
>
> It is likely that there was significant degenerative change present at the two lower lumbar disc levels prior to the motor vehicle accident, but these changes were not causing any significant and severe pain that interfered with his activities. His present pain and disability is directly related to the incident he was involved in.
> …
> The backache and disc lesions present prior to the motor vehicle accident are likely to have continued without any significant change or increase in backache or disability in the absence of the motor vehicle accident … I would regard the motor vehicle accident as being the underlying cause of his present pain, disability and inability to return to work activities at this time."

[36] Dr Pentis, an orthopaedic surgeon consulted in February 1998, reported at the time[14]:

> "He has had no major problems with his back in the past although it has gone out at times. He has required physiotherapy but no surgery or other major forms of treatment … He does have a degenerative spine and this more than likely pre-existed the accident. He has aggravated this degenerations (sic) on occasions and this accident has caused the disc to rupture and cause difficulties at L4 - 5 and possibly L5 - S1. … The overall incapacity is a 30% loss of the efficient function of his body as a whole and I would assume 15% loss of the efficient function of his body as a whole is due to the affects (sic) of the accident."

Different Perspective

[37] Two other orthopaedic specialists hold a contrary opinion.

[38] Dr Parkington has practised as an orthopaedic surgeon for 20 years. He testified that the "minor bump" from behind in the collision was "not capable of causing the disc

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13 Exs 35 and 36. Dr Yaksich was not available to testify. His reports were received pursuant to s 92 of the *Evidence Act* 1977.

14 Ex 3.

prolapse" that accounted for the symptoms the plaintiff described to him on 29 July 1996. His reports[15] explain his opinion:

> **"MECHANISM OF INJURY:**
>
> Mr Lewis told me that he was injured in a road traffic accident which occurred when he was driving a ute carrying some timber. He was wearing a seat-belt and the vehicle was fitted with a head-rest. He stopped suddenly in some traffic and a car ran into the back of his ute. He was not seriously injured, he was able to drive the vehicle into a loading bay afterwards and got out and exchanged addresses. His vehicle was not seriously damaged and no repairs were necessary. It was drivable afterwards and he drove home. He consulted his general practitioner the same day because he said he had back pain. He was treated with massage and has been investigated with a Cat scan. He takes no analgesics and he has been receiving physiotherapy twice a week for the last eight weeks. Since the accident he has not returned to work. …
>
> **CURRENT SYMPTOMS:**
>
> Mr Lewis complains of low back pain radiating into the right buttock and right groin with associated spasms. There is no pain in his legs and no associated numbness in his legs. He said that he has limped eversince (sic) the accident.
>
> **SOCIAL ACTIVITIES**
>
> He has varying sleep disturbance. He has discomfort when sitting, standing and walking. He gets relief from lying down. He is doing some bending but his lifting is limited. Coughing does not aggravate his back pain.
> …
>
> **PREVIOUS HISTORY:**
>
> … He has had lots of skeletal injuries in the past, such as an elbow dislocation, fractured tibia and fibula, ankle sprains, knee injuries and dislocated acromioclavicular joint, all sustained playing football. He has never been injured in a car accident before.
>
> He has had similar pain in his back starting about a year ago and he was treated with physiotherapy.
> …
>
> **EXAMINATION:**
>
> On examination, he appeared to be in some discomfort when I saw him today and he sat tilted sideways to the left during the consultation. He is 5'9 tall and weighs eleven and half stone. He walks with a limp holding his right knee very stiff. Despite this he is

[15] 29 July and 28 August 1996 (Exs 48 and 49).

slim and muscular and stands straight. When he was dressing he was able to stand full weightbearing on the right leg in order to put his pants on.

There appears to be some stiffness in the lumbar spine and he flexes forwards hands to reach his mid thighs only. Extension is painful. Lateral bending to the left is 15 degrees and to the right is 5 degrees.

In the lower limbs the reflexes were present and equal. The circulation and sensation was normal. Straight leg raising was 70 degrees on both sides with a negative sciatic stretch test. There was no wasting or weakness in the lower limbs. At the end of the examination he sat up on the examination couch with both legs fully extended.

RADIOLOGY:

…

CT scan of the lumbo-sacral spine dated 7.6.96 showed a large right L4/5 disc prolapse. …

OPINION:

Mr Lewis is suffering from a prolapse intervertebral disc at the L4/5 level. He has surprisingly little in the way of physical signs and some of these are conflicting.

Mr Lewis was suffering from symptoms prior to the accident in which he was involved.

This accident involved only minimal violence and there was no damage to his vehicle. It did not require to be repaired. Whilst he may have had some discomfort in his back after the accident he was able to walk normally afterwards and get out of the vehicle, exchange addresses and drive the vehicle etc, although he saw his own doctor that evening. I do not think that the violence and nature of injury involved can have caused the disc prolapse from which he is suffering. He was experiencing symptoms in his back prior to this accident and I think that the disc prolapse existed prior to the road traffic accident in which he was involved.

Mr Lewis has no physical signs at the present time and he should, therefore, continue to be managed conservatively. If his discomfort does not settle, however, considerations should be given to him having lumber (sic) discectomy…"

"Mr Lewis has a disability of 10% loss of function of the body as a whole. I believe that his disc prolapse existed prior to him being involved in a road traffic accident. I don't think any of his present symptoms are attributable to the road traffic accident and if he did have minor lumbar discomfort after that accident, I consider the effects of the accident were temporary and have now ceased. I

believe the whole of his ongoing complaints are due to spinal disease which existed prior to the road traffic accident in which he was involved."

[39] Dr Martin, an orthopaedic surgeon retained by the first defendant's insurer, saw the plaintiff in April 1999. A few days later, he reported[16]:

> "When in my waiting room, Mr Lewis would not sit. He limps, favouring the right leg. In my consulting room, he lowered himself 'gingerly' into a chair.
>
> Whilst sitting in the chair, as I took his history, he was perched on his left buttock, applying pressure through his right hand, which was on the arm of the chair.
>
> Mr Lewis is a fit looking male, weight 70kg, height 170cm. He would not walk on the balls of his feet. He could walk on his heels. When standing, he would not extend his back. He would demonstrate a few degrees only, of lateral flexion, in either direction. He would demonstrate only a few degrees of forward flexion. He then indicated to me that he was experiencing low central lumbar pain. This pain allegedly prevented Mr Lewis from bending further forward than the few degrees that he would demonstrate to me.
>
> In the supine position, there was no resistance to passive simultaneous hip and knee flexion on the left side. Straight leg raising on the left was 90^{o} with an accompanying complaint of back pain. Again in the supine position, there was active resistance to any attempt at passive simultaneous right hip and knee flexion. Straight leg raising was possible to 10^{o} only on the right. Deep tendon reflexes are all present and equal.
> …
>
> Mr Lewis, when requested, sat on the examination couch, without apparent difficulty, knees extended, hips flexed to 90^{o}. In this position, excellent lumbar flexion was demonstrated. There was excessive tenderness to light palpation centrally, in the mid-lumbar area.
> …
>
> The most striking feature of this assessment, relates to Mr Lewis' bizarre presentation which is not consistent with any underlying causative organic pathology. There are clear inconsistencies during clinical examination. Furthermore, Mr Lewis' demeanour and his general abnormal postures adopted throughout my assessment, reinforce my clear perception that Mr Lewis does not suffer from symptoms resulting from any organically based spinal condition.
>
> Radiological investigations performed on the 7th June 1996, four days after subject accident, show well-established pathology at the L4 L5 level in the lumbar spine. These changes pre-dated subject

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16 Ex 45.

> accident, by a number of years, and would have been responsible for any back symptoms to which Mr Lewis admitted, prior to the accident.
> …
>
> The fact that a CT scan demonstrated a disc protrusion at the L4 L5 on the right side, four days after subject accident, does not mean that this disc protrusion resulted from the accident. This disc protrusion was a consequence of the pre-existing degenerative process involving the L4 L5 disc. There never has been any clinical evidence elicited by examining doctors, to suggest that this disc protrusion has ever caused pressure on the right L5 nerve root.
>
> Mr Lewis's current bizarre presentation indicates to me that he is clearly attempting to portray a picture of severe pain and resulting disability. His presentation, as stated, bears no relationship to any conceivable underlying pathology. Certainly, there is no underlying pathology which could reasonably result from subject accident. Furthermore, any pathology which is present in the lumbar spine, pre-dated subject accident.
>
> I am lead to believe that Mr Lewis was working in spite of intermittent back pain, prior to subject accident. In my opinion, this situation has not changed. In other words, Mr Lewis is capable of work in his former capacity."

[40] Testifying under an antagonistic cross-examination, Dr Martin characterized as "manufactured" the plaintiff's gait as he walked towards the witness box.

Whose opinion is preferable?

[41] Dr Kelly has never known the details of the pre-accident history and complaints related to, or the details of the treatment by, Mr Christensen and Mr Ey. And that the CT scan was ordered on the second post-accident consultation could be an unhelpful consideration. That decision may well have been prompted by Mr Ey's letter proposing such an investigation rather than by an apprehension on Dr Kelly's part that something significant had happened in the accident. His testimony that the back was significantly worse after the accident needs to be assessed with these things in mind.

[42] The utility of his 10 October 1996 report is affected by his acknowledged ignorance of the history the plaintiff had conveyed to the physiotherapists in the two months preceding the accident. Moreover, the report speaks of "more than six months of pain…" having been caused by "injuries… in the accident". By October, more than six months had elapsed since 27 March, when complaints of acute back pain resulted in the referral to Mr Christensen. The report was written barely four months after the accident.

[43] Dr Wyton's knowledge of the pre-accident situation was derived from the plaintiff. He was told of some pre-existing back pain, and that, over the years, the plaintiff had occasionally visited chiropractors to "get his back put in, whatever that means". However, the plaintiff led Dr Wyton to understand that he had been able to work an eight hour day for months – perhaps years – on end before the accident. And he withheld from Dr Wyton that, not long before the accident, he had complained to Dr

Kelly and the physiotherapists of pain extending into the right buttock and leg – symptoms which, Dr Wyton acknowledged, were indicative of acute disc prolapse impinging on the nerve. Those were also, Dr Wyton testified, "the symptoms that he had when he saw me", which suggested to Dr Wyton that the plaintiff's "problems now could be a continuation of that" pre-accident state.

[44] Dr Yaksich was materially mistaken about the pre-accident position.

[45] Dr Pentis knew from a report[17] from the department where Mr Christensen and Mr Ey worked that the plaintiff had received physiotherapy in the months leading to the accident. But such information as he had had presented an incomplete picture of the extent of the complaints and treatment. This deficiency in his understanding of the severity of pre-accident symptoms is a consideration in evaluating the acceptability of his opinion. Still, Dr Pentis did know that pre-accident pain had referred into the right buttock; and he realized that this pain was caused by nerve impingement occasioned by disc prolapse.

[46] Dr Pentis's testimony, however, was less definite in attributing the post-accident complaints to the accident. It is, he said, "quite probable" that the accident "did cause some soft tissue damage"; and it "may have damaged further whatever was the problem with the discs there prior to the accident". The impact force "may have been enough" to "push" an already degenerative disc "out far enough to cause further problems".

[47] The plaintiff himself attaches considerable significance to work he performed shortly before the accident. He regards his industry at that time as proof that the accident caused the disc prolapse.

[48] In mid-March 1996, the plaintiff worked for two days, concreting, which was heavy manual labour. On 13 May, he spent a few hours as a "driver assistant". More to the point, on 31 May and 1 June, he was engaged in constructing a block and concrete retaining wall for Mr Singh. This work too was heavy labour: it probably accounts for the complaint of back soreness through "laying bricks" made to Dr Kelly two hours after the accident.[18] On the morning of the accident, the plaintiff removed rubbish and carted material using his vehicle.

[49] Mr Ey would not have expected the plaintiff to have carried out such physically demanding work as building Mr Singh's wall were he suffering from the disc prolapse evident in the 7 June CT scan. But Mr Ey's expectations are not a satisfactory basis for calling into question the views of orthopaedic specialists. The doctors who testified on the topic considered that someone with the plaintiff's back problems, including sciatic-like symptoms extending to the leg, ought not to have been attempting heavy manual labour. Under such stresses, the back would have been on borrowed time. Moreover, neither Dr Parkington nor Dr Martin commented[19] on the proposition that the work done shortly before the accident was inconsistent with the plaintiff's then suffering the prolapsed disc.

Resolution

[50] Dr Kelly's notes show improvement of the back within about four months of the accident. By the time Dr Wyton was consulted, however, an increase in

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17 The contents were not disclosed in evidence.

18 The plaintiff attributed the pain to work done at his sister's home.

19 Although Dr Parkington was invited to comment: T278 line 27-30.

symptomatology was apparent. It is not suggested that the ongoing pain and limitations can be explained by the financial disincentives to rehabilitation presented by the litigation or by the successful disability pension application. And the possibility that the complaints are associated with a pain disorder was rejected by Dr Nothling, who concluded[20] that the plaintiff is "not suffering from any diagnosable psychiatric disorder causally related to the … accident". In those circumstances, such symptoms and restrictions as actually have persisted since shortly after the accident appear to be attributable to the natural progression of the pre-existing degeneration.

[51] All considered, therefore, Dr Parkington's opinion appears preferable. His views are those of an experienced specialist, formed within weeks of the accident, informed by a report of Dr Kelly[21], and supported by a later assessment by Dr Martin.[22]

Quantification

[52] Accepting Dr Parkington's views, the damages must be modest.

[53] The component of the award for pain and suffering and loss of the enjoyment of the amenities of life is assessed at $2000 – a figure conceded by the defendants.

[54] The defendants are content that a global assessment be attempted in respect of physiotherapy, medication, and medical attendances between the accident and Dr Parkington's examination on 29 July. They propose $500, which seems reasonable, and will be allowed.

[55] As to economic loss, the plaintiff probably lost a few casual job opportunities in the seven weeks or so between the accident and Dr Parkington's assessment. The defendants suggest that $2,000 is fair compensation under this head. The lost income is not shown to be more.

[56] The damages are therefore assessed as follows:

Pain and suffering and loss of the enjoyment of the amenities of life	$2,000.00
Interest (4% at 7.4 years)	$592.00
Out of pocket expenses	$500.00
Economic loss	$2,000.00
Interest on economic loss (10% at 7.4 years)	$1,480.00
TOTAL	**$6572.00**

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20 In a report dated 25 February 2002, tendered by consent (Ex 8).

21 Dated 7 June 1996, the contents of which have not been disclosed.

22 Dr Martin's views were arrived at after considering the reports of Drs Yaksich, Pentis, Parkington and Kelly, as well as pertinent radiological material. His opinion is also acceptable.