SUPREME COURT OF QUEENSLAND

CITATION:	*Johnson v Nominal Defendant* [2003] QSC 472
PARTIES:	**DAVID LESLIE JOHNSON** (plaintiff) **v** **THE NOMINAL DEFENDANT** (defendant)
FILE NO/S:	SC No 2241 of 2001
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	19 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	10, 11, 12 December 2003
JUDGE:	Holmes J
ORDER:	**Judgment awarded for the plaintiff against the defendant in the sum of $117,380.38**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – where plaintiff injured in motor vehicle accident – where plaintiff had pre-existing conditions – whether loss of employment due to injuries – what damages to be awarded *Batista v Citra Constructions Pty Ltd & Anor* (1986) 5 NSWLR 351 *Lee v The Queen* (1998) 195 CLR 594 *The Queen v Perry (No 2)* (1981) 28 SASR 95 *Ramsay v Watson* (1961) 108 CLR 642
COUNSEL:	G W Diehm for the plaintiff J B Rolls for the defendant
SOLICITORS:	Butler McDermott & Egan Solicitors for the plaintiff Corrs Chambers Westgarth for the defendant

The motor vehicle accident

[1] Liability is admitted in this case. The plaintiff, David Leslie Johnson, was born on 8th November 1962. He was injured in a motor vehicle accident in the evening of 17 March 1998, when he swerved to avoid a car which pulled out onto the highway in front of him. His vehicle, a Toyota Seca sedan, left the road, rolling over and landing on its roof at the bottom of an embankment. The plaintiff said that he was

unconscious for what he perceived as a brief period, of perhaps two to five minutes, and then came to, to find that he was upside down in his seatbelt. He managed to climb out through the smashed back window of his vehicle and make his way back to the roadside. A passing truck pulled up and rang the emergency services for him.

[2] The plaintiff was examined by ambulance officers at the scene. The Queensland Ambulance Service record on the call out, tendered by consent, shows that he gave the ambulance officers an account of the accident. His Glasgow coma scale was recorded at 15/15. He was found to have a contusion to his scalp, but he was not taken to hospital. The plaintiff said that a tow-truck driver arrived to tow his car away and gave him a lift to a petrol station, from where he rang his wife, who collected him from there and took him home.

Earlier accidents

[3] This was not the plaintiff's first motor vehicle accident. In 1979, he sustained a fracture on the right hand side of his skull in a collision, and was admitted to the Gold Coast Hospital. He told neurologists examining him for the purposes of this litigation that he had been unconscious for a period of between 6 and 8 eight hours after that accident. The notes of observations made of him while he was in hospital show that he had headaches for the week during which he was hospitalised, and was suffering from eye symptoms including nystagmus (rapid eyeball oscillation). The lasting consequence of that injury was that he was left completely deaf in his left ear, and suffered tinnitus in it. That tinnitus was, he said, intermittent: it would come and go a couple of times per day, and by 1998 was very mild.

[4] In 1994 the plaintiff was in another motor vehicle collision and suffered, he said, a whiplash injury. He did not take any time off work as a result, and did not consult any doctor. Between 1994 and 1998, he said, his neck was "a little bit iffy", by which he meant "a little bit sort of stiff".

The immediate aftermath of the 1998 accident

[5] Immediately after the 1998 accident, the plaintiff said, he had a lump on the right hand side of his head and a tender area from the top of his forehead back towards his ear. The following day he woke sore and stiff, and went to a general practitioner, who told him to take Panadol and stay off work for a few days. (He had worked since 1994 as a driver for Australia Post, and at the time of the accident was based at the Northgate transport depot.) Two days later the plaintiff went to another general practitioner, Dr Alroe, who treated him regularly over the following weeks. Dr Alroe gave evidence, and his notes were tendered. The plaintiff was seeing him on an almost daily basis in late March, complaining of neck pain and stiffness. He initially prescribed heat treatment and an anti-inflammatory, and also referred the plaintiff to a physiotherapist. The plaintiff said that the physiotherapy gave him only temporary relief.

[6] One of the consequences of the accident was that the plaintiff became anxious about driving. Dr Alroe referred him to a psychologist, Ms Jacqueline Trost, who considered that the plaintiff was suffering from "a significant degree of Post-Traumatic Stress Disorder in the form of avoidance and arousal symptoms". Dr Alroe seems to have shared the view that post-traumatic stress disorder was involved. Ms Trost encouraged the plaintiff to resume driving. Dr Alroe's notes indicate that on 31 March 1998, the plaintiff reported that he was starting to drive a

little, and by 28 April 1998 he was driving to work at Maroochydore from his home at Marcoola.

The plaintiff's return to work

[7] The plaintiff had remained away from his work at Australia Post until 8 April 1998, when a graduated return to work (four hours per day) on a rehabilitation programme was commenced. Over the period up to his return to work, the plaintiff said, his neck was sore, and when he returned on light duties it was aggravated. During that time the plaintiff saw Dr Alroe every couple of weeks. Dr Alroe described his neck condition as progressively improving, with some deterioration noted on an examination of 13 May 1998, when his range of neck movement appeared to have decreased. Dr Alroe ascribed that to the increase in activity with the plaintiff's return to work.

[8] The return to work programme initially took place over a period up to 12 May 1998, and was supervised by an occupational therapist, Ms Kate Harrison, as rehabilitation case manager. She maintained contact with the plaintiff over a period of about six months up until September 1998. Ordinarily the plaintiff had worked from the transport depot at the Northgate Australia Post centre. For the purposes of his return to work he was assigned to light duties, firstly at Maroochydore and later at the Northgate mail centre.

[9] The plaintiff returned to full-time work and his normal driving duties on 13 May. In evidence he said that he continued to suffer from some neck pain if he were lifting, or changing gears. He avoided, as much as he could, driving trucks and undertaking long distance runs. When he was driving mail vans he experienced some dizziness performing what were called "pillar runs": collections from post boxes. On 28 May, according to Ms Harrison, he told her that he was managing his normal duties without difficulty, although he got an occasional twinge in his neck. Some days later, however, he injured his neck and back doing some lifting. He reported the further injury to Ms Harrison and on 3 June went off on compensation again.

[10] The plaintiff returned to Dr Alroe, who referred him to a physiotherapist and to an orthopaedic surgeon for assessment. Dr Alroe noted at this time a decrease in the plaintiff's range of movement and spasm in the neck. He saw the plaintiff on five occasions in June. On the last of those, on 26 June 1998, the plaintiff described his neck as "92%". He had a full range of movement. The plaintiff was then complaining of some forgetfulness and loss of concentration.

[11] On 29 June the plaintiff returned to work, at that time working about 5 hours a day, and from 11 July re-commenced full time duties. On 17 July he reported to Dr Alroe that he had had a flare of neck pain when he did a pillar run. On 24 July he told Ms Harrison that he was managing well. On 4 August he told Dr Alroe that he was still suffering from neck stiffness with pillar box runs, and similarly told Ms Harrison that he had had some increase in his symptoms but it was not nearly as bad as before. He said that he was reporting early in case it became any worse.

[12] Dr Alroe saw the plaintiff again on 14 August, when there was some improvement. The plaintiff said he was coping with the pillar box runs. His main area of pain was at C7. Dr Alroe's note of the consultation records that he examined the plaintiff's neck and found that he had a full range of movement in all directions except for

right rotation, for which he had not recorded a result. He did not see the plaintiff again until November of the following year.

[13] Meanwhile, Ms Harrison had made arrangements for the plaintiff to see an occupational therapist for treatment over a series of appointments, but he attended only one. He said that he felt that his condition was worse after the occupational therapist did some pulling and stretching of his neck. After he missed three appointments, Ms Harrison contacted him on 1 September. He reported that he was managing well at work and there were no difficulties. The rehabilitation management of the case was closed. The plaintiff was encouraged to contact Ms Harrison if he had any further problems, but he did not do so.

[14] It was put to the plaintiff that after the rehabilitation program concluded, he had not taken any sick leave or contacted anyone from rehabilitation complaining of difficulties with his neck. He conceded that was so, but said that towards the end of November 1998 he was having trouble with his neck and back again. He had said to Mr Peter Rush, one of the Australia Post coordinators, that his back and neck were "not real good". Mr Rush had suggested that he might have to have more time off, but not long after that, incidents leading to his dismissal from Australia Post took place. Mr Rush gave evidence; he said that if anything he regarded as a serious complaint were made to him, he would have organised a medical appointment. If a passing comment about pain were made, he would question whether it were really painful, and (assuming an affirmative response) an incident report would be completed and the evaluation process would follow.

The plaintiff's dismissal

[15] The plaintiff lost his employment with Australia Post early the following year. On his own account, the sequence of events which led to his termination began at the end of December 1998, when a supervisor, Mr Vella, told him he could not go home before the end of his shift. The plaintiff said it was the usual practice to leave about an hour before the shift's end, if the day's duties were finished. Despite the supervisor's direction to remain, he left the premises. When he reached the car park he realised that his shift actually ended half an hour later than he had reckoned it to. He thought of returning, but because he saw others leaving, he decided not to go back. In the course of leaving, he said, he did swear at another employee. On the following day Mr Vella sought an apology, and there was again a verbal altercation.

[16] In January 1999, those events led to the plaintiff's being required to attend a counselling session with Mr Brian Cushing, the manager of the Northgate transport depot, and another Australia Post official. On Mr Cushing's account, the plaintiff left while the process was being explained to him. The plaintiff said that he left because he did not agree with what Mr Cushing was saying. He was subsequently instructed to attend a medical examination but refused to do so, because, he said, he was already seeing a doctor. He was stood down from duties, and about a fortnight later given notice of the termination of his employment. The plaintiff commenced an unfair dismissal claim but withdrew it before it was heard.

[17] Mr Vella and Mr Cushing both gave evidence, the thrust of which was that the plaintiff, while apparently able to perform his duties, was difficult to deal with both before and after his motor vehicle accident. He could not be persuaded to listen to any other point of view, and would become loud in assertion of his own case. That

picture seemed to me entirely consistent with the plaintiff's own account of the events leading up to his dismissal, which conveyed a pattern of aggressive obstinacy at every point of the process.

The plaintiff's prior and subsequent work history

[18] The plaintiff commenced work with Australia Post in 1994 as a driver of heavy vehicles, both vans and rigid vehicles (that is to say, not semi-trailers). He had left school after completing grade 10 with results which he said were "not the best". After that he had worked in factory and labouring jobs with the exception of four months working for Corporate Affairs in a filing job. He agreed that before starting work for Australia Post he had been unemployed 50% of the time.

[19] The plaintiff said that he had not worked again after finishing up with Australia Post. He made some enquiries about obtaining employment with some transport companies, and did succeed in obtaining a position with Cleanaway. He worked with that company for a day; but the job involved emptying bins from parks and other council areas, and he found it aggravated his neck condition. He had not worked since, and had been on a disability pension since September 2000. He said that he did not think he could work truck driving because of his balance problems and his poor hearing. He could not work as a labourer because of his back and his neck.

The plaintiff's subsequent medical treatment

[20] In November 1999, the plaintiff resumed his visits to Dr Alroe, complaining of neck pain and stiffness once more, as well as of lower back pain. In December 1999 Dr Alroe records the plaintiff's unsuccessful attempt at work for Cleanaway. In January 2000 the plaintiff attended complaining of his tinnitus, and in March, of his poor balance in the dark. In July, there were more complaints of problems with tinnitus. On 19 July, the plaintiff was exhibiting a very limited range of movement in his neck, and Dr Alroe provided a treating doctor's report to Centrelink, in which he set out the plaintiff's symptoms as neck pain and headaches aggravated by bending, mild limitation on neck movements, tinnitus and deafness. "Date of onset" was shown as 20 March 1998. Dr Alroe said that was the date of the first attendance by the plaintiff on him; it did not follow that the symptoms commenced then. In August, the plaintiff was complaining of neck and lumbar pain.

[21] There was then a gap, with no further consultations relating to neck pain, tinnitus or balance symptoms, until the plaintiff attended in September 2002, apparently seeking, once more, a report from Dr Alroe to Centrelink. He recounted symptoms of loss of concentration, light-headedness, dizziness and tinnitus, but said that his back and neck were "not too bad". Dr Alroe recorded in his notes on this occasion that the plaintiff was applying for a disability support pension, and also recorded his view: "I don't think he's entitled". Oddly enough, he completed a treating doctor's report to support the application on the same day, indicating a view that the plaintiff would not be able to return to full-time work for more than two years. Dr Alroe also recorded in his notes his opinion that the plaintiff's symptoms had a psychological basis, although, in evidence, he said that the degenerative change in the plaintiff's neck, loss of hearing and tinnitus were established organic conditions. After that date there were no further consultations of any relevance with Dr Alroe.

The plaintiff's evidence of his symptoms and their effect

[22] The plaintiff's complaints of his post-injury symptoms and consequent difficulties were as follows: During the period he was back at work, there was no time at which his neck was entirely pain free, and the pain was aggravated by activity. There had been no improvement in his neck between that time and the present. The pain was in the centre of his neck, unlike the neck pain he had had between the 1994 and 1998 accidents, which was in the area of the trapezius muscles. He described the current pain as a "bone problem". He also experienced pain and muscle spasm under his left shoulder blade. His tinnitus had gone from "very soft and mild" pre-accident to loud and continuous noise. He had a constant light headache, which got worse with the tinnitus. His sleep had been affected; he took time to go to sleep because of the tinnitus and often woke during the night.

[23] The plaintiff said his balance was impaired by the sensation of movement he experienced when he looked down if he looked down while walking or running. That occurred also, to a degree, when he was standing still and it was worse the higher he was. When he was driving trucks for Australia Post he had experienced dizziness on the pillar run and considered himself a danger to others. He was most troubled by the tinnitus and balance problems of all his symptoms; he felt that they had got worse. He had found since the motor vehicle accident that his concentration was "probably not the best" and that his short term memory was poor: he would forget where he had put things.

[24] The plaintiff had been a regular surfer before the accident, but he said he had limited his surfing after it, and did not go out in big surf anymore. He spent his days watching television and doing some work around the house. He played football with his children and took his 10-year-old son surfing every day. In terms of household jobs, his wife did more mowing, as did his oldest son, because of the pain he experienced around his shoulder blade if he mowed.

Ruling on Ms Harper's evidence

[25] The plaintiff's de facto wife, Karren Harper, gave evidence as to complaints by the plaintiff of his symptoms. That evidence was the subject of objection, counsel for the defendant contending that it was hearsay. Counsel for the plaintiff relied on the rule that contemporaneous statements about health or physical sensation were admissible. That rule has variously been described as an exception to the hearsay rule, or as an example of admissibity as part of the *res gestae*. In *Ramsay v Watson*[1] the High Court preferred the former basis. There was some discussion in that case of the rationale of the rule being that it was the best or only evidence available; but, the court finding that the rule did not assist in the circumstances of the case, there was no final pronouncement on the point.

[26] In *Batista v Citra Constructions Pty Ltd & Anor*[2] the NSW Court of Appeal specifically addressed the question of whether the rule was confined to cases where evidence was not available from the person suffering symptoms, and concluded (although Mahoney JA, while concurring, expressed some doubt) that the rule did

[1] (1961) 108 CLR 642 at 648.
[2] (1986) 5 NSWLR 351.

not "depend upon that absence of better or more available evidence"[3]. In reaching that conclusion, the court referred to *The Queen v Perry (No 2)*[4] in which Cox J admitted evidence in a criminal case of the alleged victim's complaints of symptoms to doctors, although the alleged victim himself, being regarded as unreliable, was not called.

[27] Although at first glance the acceptance in *Perry* and *Batista* of complaints of symptoms as original evidence seems at odds with the requirement that the factual basis on which an expert such as a medical practitioner relies be independently proved[5], the crucial requirement justifying receipt of the evidence as original evidence seems to be that of contemporaneity. On the clear and persuasive authority of *Batista*, I accept, not without qualm, that neither the hearsay nor the best evidence rule operates to preclude the receipt of evidence of contemporaneous complaints of pain or discomfort by the plaintiff as original evidence.

Ms Harper's evidence of the plaintiff's complaints

[28] Ms Harper said that the plaintiff had complained to her, at various times after the accident, of experiencing soreness in his neck and under his shoulder blade, a loud ringing in his head, and headaches. Ms Harper maintained that the plaintiff had not, on her observation, had full range of movement of his neck and shoulders at any time after the accident. He had found heavy lifting aggravated his neck, and it was clear that certain activities and certain positions he assumed in sleeping or sitting provoked pain. He had described to her, when looking down from a wharf, feeling ill because of a sensation that everything was swirling underneath him, and he had complained of a similar difficulty when walking on uneven ground. His concentration seemed poor; she would speak to him and find that he had not absorbed what she had said. She also saw signs of poor concentration when he was reading: he would start to read the paper, then throw it down. He was forgetful: he would put things away and not recall where he had put them. He had also become more argumentative. There had been a period shortly after the accident, lasting for a couple of months, when he was drinking an excessive amount of alcohol. They had an argument and he struck her, with an open hand, on the back of her head. He had not done such a thing before.

[29] Ms Harper said that for the first couple of weeks after the accident she did all the housework and yard work, and drove the plaintiff to all his doctors' appointments. That could take five hours per day, and that state of affairs lasted six to eight weeks after the accident. After that period, the plaintiff began assisting more around the house, but she continued doing about five hours per week extra work, which lessened over time to about two hours per week. Those estimates, however, included driving which would account for half the time in each case. It still remained the case that she or her elder son did the mowing and whipper-snipping in the yard.

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[3] at 355.
[4] (1981) 28 SASR 95.
[5] See *Lee v The Queen* (1998) 195 CLR 594 at 604.

Medical opinion

[30] The principal medical witness for the plaintiff was Dr Don Todman, a neurologist. In his first report, dated 7 November 2002, he recorded the plaintiff's cervical spine movements as restricted by 30-40% in each range of movement. He noted that the plaintiff gave an account of continuing headaches, dizziness and spinal pain since the March 1998 accident, which could therefore be directly attributed to it. He considered the plaintiff to have a 15% permanent disability related to his cervical spine injury and post-traumatic headaches. He thought the plaintiff incapable of work, and likely to remain so for the next 3-5 years; he might be able to undertake up to 20 hours of sedentary work after that time.

[31] Dr Todman recommended that a magnetic resonance imaging (MRI) scan of the plaintiff's head and neck and a neuropsychological assessment be undertaken. In accordance with those recommendations, on 31 December 2002 the plaintiff underwent MRI scans of the brain and cervical spine. The former revealed a small area of gliosis (loosely described as scarring) in the right frontal region, which was likely to be post-traumatic. The scan of the cervical spine showed moderate spondylosis, most prominent at C6/7.

[32] Ms Debbie Anderson, a neuropsychologist, interviewed the plaintiff and his de facto wife, Ms Karren Harper, in February 2003, and administered a range of tests designed to give an approximation of his pre-morbid and current levels of intellectual function. Ms Anderson found that the plaintiff's performance on a general intelligence test was in the low average range. His performance on memory tests was variable, with no consistent pattern of dysfunction appearing. There were no signs of impairment on the measures of higher cognitive function (planning and integration functions). The profile was not one "clearly suggestive of organic brain dysfunction". Ms Anderson thought that psychological distress and pain were likely to have contributed to the plaintiff's apparent poor concentration, affecting his memory performance and information processing ability. Those factors appeared to have resulted from the motor vehicle accident, and it was likely that they had had some impact on his ability to maintain employment.

[33] Dr Todman examined the plaintiff again after the MRI scan and Ms Anderson's assessment, and gave a report dated 14 March 2003 dealing with those reports. In it, he said that the area of gliosis of the MRI scan appeared to be "historically linked" to the March 1998 accident; it was consistent with the symptoms described by the plaintiff. The plaintiff's problems with memory identified by Ms Anderson were likely to be the result of both brain injury and psychological distress, the MRI scan having confirmed the existence of organic brain injury. The cognitive impairment amounted to a 20% whole person disability.

[34] In evidence, Dr Todman expressed the view that the plaintiff had sustained a closed head injury in the 1998 accident, and his problems with short-term memory, as well as mood change and increased tinnitus, were probably the result of a mild traumatic brain injury. The plaintiff's neck injury was of a whiplash type, damaging the muscles and ligaments of the spine. It was likely also that the plaintiff had sustained cervical facet joint injury on the left. Injury of that kind to the neck, Dr Todman said, would not ordinarily be evident on MRI scan. The neck injury contributed to the plaintiff's headaches. Dr Todman had not been told anything about the plaintiff's 1994 whiplash injury. It was first raised with him by the

plaintiff's counsel on the day he gave evidence. He said that, given the plaintiff had not missed work or consulted a doctor, he would regard it as a minor event which would not alter the opinions expressed in his report.

[35] Dr Todman was cross examined about the apparent difference in impact of the 1979 and 1998 accidents, and in particular the fact that the 1979 accident had produced a fractured skull, an extended period of unconsciousness and residual symptoms of tinnitus and deafness, compared with the 1998 accident in which any unconsciousness appeared to have been transient, there was no significant post-traumatic amnesia, and a full Glasgow coma score had been recorded. He said that it was the consequences, rather than the circumstances, of the accident which mattered. There had been a substantial recovery, apart from deafness, from the 1979 skull injury. The consequences of the 1998 accident, on the other hand, were profound, on what he described as "historical data"; by which, it emerged, he meant what the plaintiff had told him. He regarded the gliosis on the MRI as "historically linked" to the 1998 accident because, again, of the "historical data" in the form of the plaintiff's account, which he regarded as amounting to objective evidence. In response to the proposition that it seemed more likely that brain injury would result from an incident involving an actual skull fracture, Dr Todman offered the view that more severe brain injury could in fact occur when the skull had not fractured, so that the impact had fallen on brain rather than bone.

[36] Dr James Curtis, an orthopaedic surgeon, also provided a report and gave evidence for the plaintiff. He had examined cervical spine x-rays taken in April 1998 and May 2001, noting that there was some narrowing of C6/7 on the earlier x-rays, which had increased significantly on the 2001 x-rays. He considered that the changes shown on x-ray were probably related to the 1994 motor vehicle accident, and were likely to have been made symptomatic by the 1998 accident. He had, however, been given a history that the plaintiff was asymptomatic during the period between the two accidents. A description of stiffness in the neck prior to 1998 would, he said in evidence, be consistent with symptomatic degenerative change. He still thought, however, that the radiological evidence of degenerative change was greater than would have been expected from the natural progression of degeneration without additional injury.

[37] On examination of the plaintiff, Dr Curtis had found a 25% restriction of movement in all directions. The plaintiff had given him an account of intermittent episodes of pain and stiffness, precipitated by tasks involving pulling or lifting or extending his neck, and usually settling with rest. He suffered from such episodes of pain every few months, with episodes of less severe pain in between. Dr Curtis said that the natural history of a degenerative disc condition was a fluctuation of symptoms from one day to the next, with episodes of flare-up becoming more frequent and pain more severe as further degeneration occurred. The plaintiff's headaches were probably arising from his neck condition, but he could not say whether that was due to the effects of degeneration, or injury, or both. Dr Curtis had (in the absence of information about pre-accident neck symptoms) assessed a 5% whole person impairment, which would preclude the plaintiff from performing heavy manual work, but left him able to perform light work such as, for example, taxi driving. The plaintiff would at some stage have reached that point by reason only of the pre-existing degeneration in his spine. There was no nerve root involvement which would explain the plaintiff's complaint of pain referred to his shoulder.

[38] While still working for Australia Post, the plaintiff had been sent, in September 1998, to Dr John Cameron, neurologist, for a medico-legal report. He gave Dr Cameron an account of neck pain and stiffness which spread into the left shoulder and left elbow, pain over the left side of his back, headaches, some unsteadiness and short-term memory disturbance. Dr Cameron did some memory tests which elicited a variable response. There was no identifiable neurological reason for the inconsistency. He had also undertaken some tests of the plaintiff's gait and balance which proved normal. An examination of the plaintiff's neck and range of neck movement elicited no restriction. Dr Cameron considered that the plaintiff had suffered a soft tissue injury which should settle. It was conceivable some symptoms might persist; he estimated that if that were so, the residual effect would amount to 1 or 2% overall impairment of the plaintiff's functioning. The plaintiff's symptoms of headache and forgetfulness were likely to be reflective of a mild anxiety which should resolve.

[39] Questioned on the issue in evidence, Dr Cameron did not agree with Dr Todman that the gliosis shown on the MRI scan of the brain was linked to the March 1998 accident. The extended period of unconsciousness after the 1979 accident which had produced a fractured skull and one-sided deafness indicated that the lesion was related to it, not the second accident. He was unimpressed by the theory that a fractured skull might be a sign that the brain was spared the full force of the blow; he said that it simply meant that the blow in the first accident was sufficient to fracture the skull. Having seen the results of Ms Anderson's neuropsychological testing he did not, in any event, think that there was any frontal lobe impairment. The tinnitus that the plaintiff was experiencing in his left ear was not a sign of brain injury. Its increase in effect after the 1998 accident constituted an exacerbation of an existing disturbance.

[40] Dr Cameron said he thought it likely that most of the plaintiff's current neck problems were related to cervical spondylosis. The pattern of cervical spondylosis was that it would flare up from time to time and then settle; whereas neck trauma would cause a relatively constant pain and restriction during the period it was operative. He considered that the plaintiff was physically fit to work. If he experienced discomfort with heavy lifting, he should avoid it; but it was likely to be related to cervical spondylosis rather than the motor vehicle accident.

[41] A third neurologist, Dr Noel Saines, gave a report dated 12 May 2003, and also gave evidence. The plaintiff complained to him of forgetfulness, difficulty in concentration and increased irritability. Dr Saines was unable to relate those symptoms to any brain damage. He considered it far more likely that the gliosis shown on the MRI was the result of the 1979 head injury than that it was related to what he described as a "mild head injury" in 1998. Like Dr Cameron, Dr Saines did not subscribe to the view that the absence of skull fracture might be indicative of a greater force applied to the brain; he considered that a head injury associated with a fractured skull was more likely to cause brain damage than one in which there was no fractured skull. Nor did he consider that the symptoms of tinnitus and imbalance had anything to do with brain injury.

[42] Dr Saines said that on his examination, the plaintiff exhibited a moderate restriction of neck movements in all directions, and particularly on extension. He considered the plaintiff's neck symptoms relatively mild. He would have anticipated in any event that the degenerative changes in the cervical spine would have become

symptomatic. He assessed a 2% permanent impairment of bodily function on the basis that underlying cervical degeneration had been exacerbated by the accident. He had not been made aware of the 1994 whiplash injury. Dr Saines considered that the plaintiff could return to his previous employment, although he might need to avoid heavy lifting because of the underlying cervical degeneration.

[43] Dr Ian Dickinson, orthopaedic surgeon, saw the plaintiff for medico-legal purposes on 24 April 2002. He noted that the plaintiff had a restriction of rotation to the sides of approximately 75%, but flexion and extension were unrestricted. He did not think that the plaintiff's persisting symptoms were related to anything suffered as a result of the accident, and it was unlikely that it had caused him anything other than a soft tissue injury, which should have settled. The persistence of symptoms was in his view "of functional nature". There was nothing to prevent the plaintiff working. In cross-examination, he rejected the proposition that an MRI scan would not reveal soft tissue injury. Muscle and ligament tears would show, as would oedemal swelling of injured tissues. Once healing had occurred, the signs of injury would no longer be apparent, unless there was such significant injury as to cause muscle or ligament to be replaced by fibrous tissue. He thought it most unlikely that a soft tissue injury, not discernible on MRI scan, would leave permanent symptoms. Pain could be the result of a number of psychological processes.

[44] Dr John Quayle, an ear, nose and throat surgeon, gave a report dated 24 October 2002, and gave evidence, in respect of the plaintiff's complaints of tinnitus and loss of balance. He explained that the nystagmus which the plaintiff was recorded as suffering in 1979 was the product of imbalance, and could be evidence of an injury to the balance segment of the inner ear. That was likely to produce acute giddiness in the short term, with some adaptation over time. The plaintiff had described to him a feeling of imbalance, particularly when walking on uneven ground, and had said also that if he turned quickly he had the sensation that things kept moving. He had not given any account to him of any disturbed balance when looking down from a height, but it was predictable that he would have problems on a ladder or working above head height. Those problems were likely to have existed to some degree since 1979, although they might have become more obvious as a result of trauma or anxiety. Thus, the imbalance might have been aggravated by the 1998 injury, but it was not clear that it had, in fact, become appreciably worse.

[45] Dr Quayle had undertaken a series of tests to establish whether the plaintiff was suffering from vertigo. It elicited no evidence to suggest that he would, on normal activities, experience it. He considered that neither the tinnitus nor the plaintiff's unsteadiness would prevent him working. He gave what he himself described as a "very rubbery" estimate of a 5% impairment in respect of the plaintiff's tinnitus; that was because, strictly speaking, in workers compensation cases, the assessment related to the psychiatric damage caused by the tinnitus, and there was no indication of any such damage in the plaintiff's case. He accepted that anxiety at a level discernible on psychiatric assessment might accentuate the plaintiff's sensations of both tinnitus and imbalance.

[46] In 1998, the plaintiff was referred by Australia Post for psychiatric evaluation by Dr Martin Nothling, and at Dr Nothling's suggestion was referred for psychological assessment to Dr Lucille Douglas. Dr Douglas carried out her assessment in May of 1998. She administered the Minnesota Multiphasic Personality Inventory, second edition (MMPI-2). The plaintiff's reporting indicated the presence of some mild

levels of tension and anxiety. The results were not, however, consistent with the profile of an individual suffering post-traumatic stress disorder. In cross-examination Dr Douglas accepted the proposition that the plaintiff might have been understating his symptoms.

[47] Dr Nothling completed his report on the plaintiff shortly after Dr Douglas' assessment. He did not think that the plaintiff was suffering from post-traumatic stress disorder, although he accepted that he would have suffered from what he described as "situation specific anxiety": a normal reaction to a frightening motor vehicle accident. The plaintiff did not appear to him to be suffering from anxiety at the time of his interview, and he did not diagnose any psychiatric disorder. In cross-examination Dr Nothling was asked to comment on a series of matters reported by Ms Harper to Ms Trost, the psychologist, on 30 March 1998. Those were that the plaintiff had become moody and irritable, physically aggressive on one occasion, with diminished concentration; and that he was drinking unusually large quantities of beer. To a suggestion that these signs might be indicative of anxiety or psychological distress, Dr Nothling said merely that the behaviour was consistent with someone drinking to excess at the time.

[48] Another psychiatrist, Dr Unwin, examined the plaintiff in May 2001. He observed that the plaintiff when he first saw him had a frightened appearance. He regarded that as unexceptional; it did not continue into the examination so as to require any particular observation. The plaintiff had reported a number of symptoms, but not sufficient to amount to what Dr Unwin called a "codeable level" of anxiety, and his behaviour and presentation did not lead him to any conclusion of a psychiatric disorder suffered at the time of examination or previously.

[49] The remaining evidence which might loosely be described as medical came from Mr Sean Campbell, a physiotherapist who practised at the clinic where the plaintiff had been treated on referral from Dr Alroe. Mr Campbell had not been at the clinic himself at that time, but he examined the notes and without objection reported that they showed the plaintiff had attended 14 physiotherapy sessions over 11 weeks. His improvement was said to be moderate, but often only temporary. Mr Campbell had himself examined the plaintiff in November 2003. He had not had any radiological evidence, nor seen any orthopaedic or any neurological report, and the plaintiff's medical history, as he understood it, was of a whiplash injury 20 years ago from which he made a rapid and full recovery. He found a 50% reduction in the plaintiff's capacity for extension of his cervical spine, 15% reduction of his flexion to left and right, and 45% and 35% respectively reduction of rotation to left and right. He diagnosed left C5-T2 facet joint trauma.

Findings

[50] Of the expert evidence, I do not accept the opinion of Dr Todman that the plaintiff has organic brain injury related to the 1998 accident. I found unconvincing his relation of the gliotic appearance on MRI scan to the 1998 accident rather than the 1979 accident. Neither common sense nor other expert neurologist opinion supports that view. As to whether the plaintiff in fact had any cognitive impairment attributable to brain injury, I accept the evidence of Ms Anderson as to her findings that the results of testing did not provide any clear evidence of organic brain dysfunction, particularly given the reinforcement of that evidence by the less extensive testing of Dr Cameron, and his conclusion that there was no neurological reason for any inconsistency demonstrated in memory testing.

[51] Ms Anderson's view that it is likely that pain levels and psychological distress contributed to the variability in the plaintiff's test results seems to have been advanced for want of any other explanation, given the absence of organic brain injury. She goes on to say that it is likely that the same factors had some impact on his capacity to maintain employment. However those statements were made by her in complete ignorance of the circumstances in which the plaintiff's employment was terminated.

[52] I should say at this point that I do not accept the submission put on behalf of the plaintiff that his dismissal was the result of argumentative and aggressive behaviour because of psychological distress resulting from the accident. While there certainly was such behaviour by him, at the heart of events leading to the loss of his job was a fundamental rigidity and obstinacy which seem at all times to have been a feature of his personality. In particular, his decision not to return to work even when he realised his mistake as to the end time for his shift, and his refusal to attend for medical examination have nothing to do with distress and everything to do with wilful obduracy. I do not accept, therefore, that there was any connection between the accident and the plaintiff's dismissal.

[53] To be fair to Ms Anderson she was asked to conduct a neuropsychological assessment, not a general psychological evaluation. I put no weight, however, on her conclusions in this regard. I think it significant that Dr Nothling, who examined the plaintiff in May 1998, did not observe any anxiety or distress in his presentation, although he accepted that some anxiety had existed specific to the events of the accident, around the time of its occurrence. Nor did Dr Unwin, whose examination was conducted in May 2001, observe any appreciable level of anxiety or psychological distress. If Ms Anderson is right in attributing poor performance to those features in 2003, it becomes impossible given the lapse of time, and ensuing events such as the plaintiff's loss of employment through, as I consider it, his own obstinacy, to say that there is a connection with the motor vehicle accident.

[54] Neither Dr Todman nor Dr Dickinson related the cervical spondylosis apparent on x-ray and MRI scan to the plaintiff's neck symptoms, and Mr Campbell, of course, was unaware of it. I do not accept the views of Dr Todman, whose calm acceptance of patient history as conclusive seemed to me to depart from the objective. Mr Campbell had neither the information nor the medical expertise to give his opinion force. As between the views of Dr Dickinson on the one hand, and Drs Curtis, Cameron and Saines, the weight of opinion residing in the latter group, taken with the history of the plaintiff's symptoms, points to an acceptance of the existence and significant effect of cervical spondylosis.

[55] While I accept that the plaintiff's evidence, and that of Ms Harper, that he has had neck symptoms since the accident is broadly correct, a more accurate picture of the pattern of those symptoms is to be gained from contemporaneous records than from their recollections almost six years on. The plaintiff's complaints as to the intensity of his symptoms clearly fluctuated when he was attending Dr Alroe, with improvement to the point of having a full range of movement on 26 June 1998, then flare ups with activity in July and August of that year. In September Dr Cameron elicited a full range of movement. There seems to have been a year without difficulties requiring medical attention up until November 1999, another break in complaints to July – August 2000, and another quiet period after that. Consistently with that picture the plaintiff complained to Dr Curtis of episodic pain, and Ms

Harper's evidence was that the plaintiff's neck condition was aggravated by activity and certain postures. Clearly enough, there were variations in the range of neck movement exhibited to the various examining specialists, and that may well have been the result of limitation by pain at different times.

[56] The trend of flare ups and settling neck pain, according to both Dr Curtis and Dr Cameron, was consistent with the natural history of degenerative disc change. I find that the plaintiff's symptoms for about six months after the accident were probably due to a soft tissue injury resulting from trauma; but thereafter the pattern is one of degenerative change, aggravated and accelerated to some minor degree by the effects of the accident. It seems to me that the assessments of impairment of Drs Curtis, Cameron and Saines are not so very far apart, particularly given that Dr Curtis' assessment of 5% was given in the belief that the neck condition was asymptomatic prior to 1998.

[57] Dr Todman considered that the plaintiff's headaches were attributable to the neck injury, but I did not, for reasons already outlined, find his evidence compelling. Dr Cameron thought they were probably the result of mild anxiety. Dr Curtis, while accepting they were related to the neck condition, said it was impossible to say to what extent they might be connected to trauma or underlying degeneration or a combination of the two. I accept that the accident is likely to have played some part in accelerating and aggravating the underlying degenerative condition, and to that extent should be regarded as contributing to the headaches.

[58] As to the plaintiff's capacity for work, I accept the preponderant medical opinion that he is fit for work, although he would be better advised to avoid heavy lifting. The last, I find, is largely due to the degenerative condition in his neck, although there may be some contribution from the trauma of the motor vehicle accident to that condition. I do not set any store by Dr Alroe's certifications in 2000, and again in 2002, that the plaintiff was unlikely to be able to return to full-time work within the next two years, given that Dr Alroe seems to have held one opinion ("I don't think he's entitled") while conveying another.

Pain suffering and loss of amenities

The plaintiff is to be compensated for the soft tissue injury sustained in the accident and an exacerbation and acceleration of pre-existing and already symptomatic neck degeneration. He has also suffered some exacerbation of tinnitus and has some increased sensation of imbalance. He clearly does not have any psychiatric sequelae, although I accept that he had, not surprisingly, what Dr Nothling described as "situation specific anxiety", successfully resolved by Ms Trost's treatment in the eight weeks or so immediately post accident. Taking all those factors into account, I consider the appropriate award for pain and suffering and loss of amenities to be $35,000. Interest should be awarded at 2% on half that amount as pre-trial pain and suffering for the 5.75 years since the accident, giving another $2,012.50.

Special damages and future treatment

[59] The plaintiff's special damages consisted of the Health Insurance Commission figure for charges of $1,489.15, and the medical and rehabilitation costs paid by Australia Post in amounts of $3,423.37 and $1501.66 respectively. Interest would

only be payable on the $47 which is the out-of pocket component of the Health Insurance Commission charges, at 5% amounting to $13.51.

[60] Given my view that there is no convincing evidence that the plaintiff continues to experience psychological distress connected with the accident, I do not consider any award for the cost of psychological treatment warranted.

Past economic loss

[61] As already indicated, I consider that the termination of the plaintiff's employment was entirely the result of his obduracy rather than accident-produced. He seems to have made very little effort after that time to obtain further employment. With that in mind I will make global awards to reflect what I find is the minor contribution of the accident to the plaintiff's reduced employability. For past loss, in the period after the cessation of his employment with Australia Post, I award $15,000; for the future $30,000. The plaintiff is entitled to interest on past loss; at 5% for 5.75 years that gives $4,312.50. He is also entitled to loss of superannuation at the agreed rates of 7% for the past ($1050) and 9% for the future ($2,700). The refundable benefits, in an amount of $8,229.94, paid by Australia Post, which are in the nature of a *Fox v Wood* component, should also be awarded.

Past and future care

[62] Ms Harper said that she assisted the plaintiff for five hours per day for the first six to eight weeks after the accident, and for two and a half hours per week (excluding driving, which the plaintiff was clearly capable of doing himself) reducing to one hour a week (excluding driving) thereafter. I consider that the claim for the initial period should be allowed for seven weeks at $12 per hour, giving a figure of $2,940, with a global figure thereafter. While accepting that there has been continuing assistance (and may be into the future), the contribution of the accident, it is probable, has diminished over the period so as to make the plaintiff's need for help largely the product of his underlying condition. In those circumstances I will allow a further $3,000 for the period to date, and $5,000 for the future. Interest is payable on the past figure of $5,940 at 5%, giving another $1,707.75.

[63] The following is a schedule of damages in accordance with what is set out above:

Description	**$**
Pain and Suffering and loss of amenities	35,000.00
Interest at 2% per annum on $35,000 for 5.75 years	2,012.50
Special damages - HIC, rehabilitation, medical	6,414.18
Interest on out-of-pocket expenses at 5% p.a. for 5.75 years	13.51
Past loss of wages	15,000.00
Interest on past loss of wages	4,312.50
Past loss of superannuation contribution at 7% of award	1050.00
Loss of future earning capacity	30,000.00
Loss of future employer superannuation contributions at 9%	2,700.00
Fox v Wood component	8,229.94
Past care	5,940.00
Interest on past care at 5% p.a. for 5.75 years	1,707.75
Future care	5,000.00
TOTAL:	$117,380.38

Order

[64] I give judgment for the plaintiff against the defendant in the amount of $117,380.38. I will hear the parties as to costs.