SUPREME COURT OF QUEENSLAND

CITATION:	*Constantinou v Ansett Australia Ltd* [2004] QSC 419
PARTIES:	**ARTHUR CONSTANTINOU** (plaintiff) **v** **ANSETT AUSTRALIA LTD** **(ACN 004 209 410)** (defendant)
FILE NO/S:	s228 of 2000 s17 of 2003
DIVISION:	Trial
PROCEEDING:	Claim for damages
ORIGINATING COURT:	SUPREME COURT
DELIVERED ON:	26 November 2004
DELIVERED AT:	TOWNSVILLE
HEARING DATE:	8-10 November 2004
JUDGES:	CULLINANE J
ORDER:	**Judgment for the plaintiff against the defendant in the sum of $395,450.40**
CATCHWORDS:	MASTER AND SERVANT — SAFE SYSTEM OF WORK — PERSONAL INJURIES — NEGLIGENCE — BREACH OF DUTY — BREACH OF STATUTORY DUTY — BREACH OF CONTRACT — DAMAGES — CONTRIBUTORY NEGLIGENCE — where plaintiff employee fell down open hatch of vessel — whether risk of injury foreseeable — whether defendant owed duty of care to provide a safe system of work — whether plaintiff failed to keep a proper lookout so as to avoid injury — whether damages can be reduced for contributory negligence in contract after *Astley* under s. 312 of the *Workcover Queensland Act* 1996 DAMAGES — MEASURE OF DAMAGES — PAIN AND SUFFERING — QUANTUM — LOSS OF EARNING CAPACITY — whether plaintiff continues to suffer spinal

problems and psychiatric problems as a result of the accident — whether plaintiff is malingering — whether there is a loss of earning capacity

Evidence Act 1977 (Qld)
Law Reform (Joint Tort Feasors Contribution, Contributory Negligence and Division of Chattels) Act 1952 (Qld)
WorkCover Queensland Act 1996 (Qld)
Work Place Health and Safety Act 1995 (Qld)

Astley v Austrust Ltd (1998-99) 197 CLR 1
Campbell v CSR Limited & Anor [2002] QSC 266
Martin v Mackay City Council [2001] QSC 433
Rogers v Brambles Ltd (1998) 1 Qd.R 212
Tabulo v Bowen Shire Council [2004] QSC 38
Wylie v ANI Corporation Ltd (2002) 1 Qd.R 320 at 336

COUNSEL: Mr M Grant-Taylor SC for the plaintiff
Mr S Williams QC together with Mr M O'Sullivan for the defendant

SOLICITORS: Bennett & Philp Solicitors for the plaintiff
McInnes Wilson Lawyers for the defendant

[1] The plaintiff sues in respect of personal injuries suffered by him on 9th December 1997.

[2] There is an issue as to both liability and the quantum of damages.

[3] The circumstances surrounding the occurrence of the incident were dealt with relatively briefly in the evidence, the plaintiff giving the only relevant evidence on the subject.

[4] The plaintiff was employed as a concierge/porter and early on that morning went on to a vessel "The Reef Goddess" owned by the defendant for the purposes of travelling from Hayman Island to the mainland (Shute Harbour) to meet guests who were arriving and were to be transported to the island.

[5] The vessel was moored at a marina. The plaintiff entered the vessel at the rear and proceeded towards the front cabin. After he went on to the vessel he saw a deckhand, one Azzopardi who was washing the outside of the vessel. The plaintiff's evidence was that the skipper also was on the vessel at that time although he did not see him.

[6] The plaintiff intended to go to the front cabin where there was a table and where he intended to carry out certain paperwork associated with the incoming guests.

[7] Photographs show the vessel from the rear where the plaintiff entered it and the area throughout the vessel where the plaintiff intended to progress as well as showing the front cabin where he was intending to go.

[8] As one makes one's way forward there is an area (referred to in evidence as an ante-room) where the passageway narrows. There was a sill which it was necessary to step over as one left this area and entered the front cabin. Immediately beyond the sill but, I am satisfied, unknown to the plaintiff there was an open hatch. The hatch led to the engine room below.

[9] The plaintiff says that he had never seen the hatch open before nor was he aware that such a hatch existed. He had been on the vessel many times.

[10] He said that he was looking ahead as he moved forward and did not see the hatch. He fell through it approximately some three metres or so to the floor below.

[11] In cross-examination it was put to the plaintiff that a person looking where he was going would have seen the open hatch some six to ten metres prior to reaching it. He did not accept this saying, "I don't think so" but it is clear from the photographs that one ought to be able to see the open hatch some distance ahead.

[12] The existence of an open hatch was in the position where it was plainly constituted a risk of injury to persons walking along the area where the plaintiff was walking from the rear to the front of the vessel. The realisation of the risk carried with it the possibility of very serious injury.

[13] The plaintiff has instituted proceedings in contract, tort and breach of statutory duty.

[14] It can be inferred that an employee of the defendant left the hatch open. In any case the defendant owed a duty to the plaintiff to provide a safe place of work which duty is non-delegable and it plainly failed in that duty in this case.

[15] Section 312 of the *WorkCover Queensland Act* 1996 (as it then stood) provides as follows:

"*Liability of employers and workers*

312. (1) In deciding whether a claimant is entitled to recover damages not reduced on account of contributory negligence, or at all, all courts must have regard to whether the claimant has proved such of the following matters as are relevant to the claim -

(a) that the employer had made no genuine and reasonable attempt to put in place an appropriate system of work to guard the worker against injury arising out of events that were reasonably readily foreseeable;

(b) that the actual and direct event giving rise to the worker's injury was actually foreseen or reasonably readily foreseeable by the employer;

(c) that the worker did not know and had no reasonable means of knowing that the actual and direct event giving rise to the injury might happen;

(d) that the injury sustained by the worker did not arise out of a relevant failure of the worker to inform the employer of the possibility of the event giving rise to the injury happening, in circumstances in which the employer neither knew nor reasonably had the means of knowing of the possibility;

(e) that the worker did everything reasonably possible to avoid sustaining the injury;

(f) that the event giving rise to the worker's injury was not solely as a result of inattention, momentary or otherwise, on the worker's part;

(g) that the injury sustained by the worker did not arise out of a relevant failure of the worker to use all the protective clothing and equipment provided, or provided for, by the employer and in the way instructed by the employer;

(h) that the worker did not relevantly fail to inform the employer of any unsafe plant or equipment as soon as practicable after the worker's discovery and relevant knowledge of the unsafe nature of the plant or equipment;

(i) that the worker did not inappropriately interfere with or misuse or fail to use anything provided that was designed to reduce the worker's exposure to risk of injury.

(2) If the claimant relies exclusively on a failure by the employer to provide a safe system of work and fails to prove the matter mentioned in subsection (1)(a), the court must dismiss the claim.

(3) If the claimant fails to prove the matter mentioned in subsection (1)(b), the court must dismiss the claim.

(4) If the claimant fails to prove any of the matters mentioned in subsection (1)(c) to (i), the court must –

(a) dismiss the claim; or

(b) reduce the claimant's damages on the basis that the worker substantially contributed to the worker's injury.

(5) In deciding whether a worker has been guilty of completely causative or contributory negligence, the court is not confined to a consideration and reliance on the matters mentioned in subsection (1)(c) to (i)."

[16] This is one of four provisions constituting part 8 of chapter 6 of the Act.

[17] The claim is not exclusively based upon a failure to provide a safe system of work (there is a claim for breach of statutory duty) but is substantially so based. In any case, the plaintiff has, in my view, demonstrated that the defendant made no genuine and reasonable attempt to put in place an appropriate system of work to guard against the relevant risk. The risk was plainly foreseeable by the defendant.

[18] It was not contended that the plaintiff should fail because of a failure to satisfy the requirements of either s. 312(1)(a) or (b).

[19] I am also satisfied that the plaintiff has not established that he did everything reasonably possible to avoid the injury as provided for in s. 312(1)(e). Although he says that he was looking ahead his lookout must have been defective. It was conceded that the plaintiff had satisfied s. 312(1)(f) and it is obvious that any failure to keep a proper lookout on his part could not have been the sole cause of the incident.

[20] The defendant acknowledged that it would not be appropriate to deny the plaintiff a right to recovery because of a failure in the circumstances of this case to satisfy s. 312(1)(e) and I think such a concession is plainly correct. As I have said, the risk posed by the open hatch was one which gave rise to the possibility of very serious injury.

[21] Rather the defendant contended for a finding of contributory negligence.

[22] The plaintiff submitted that in so far as the claim was based on contract no reduction for contributory negligence can be made. This was said to be because of the judgment of the High Court in *Astley v Austrust Ltd* (1998-99) 197 CLR 1.

[23] The effect of this judgment was statutorily abrogated subsequently but the amending legislation does not affect the cause of action here.

[24] I was referred to an earlier judgment of mine in *Tabulo v Bowen Shire Council* [2004] QSC 38 in which I held that no such reduction could be made in a similar case. I have also been referred to other judgments of this court in which a different view has been expressed. See *Martin v Mackay City Council* [2001] QSC 433 and *Campbell v CSR Limited & Anor* [2002] QSC 266.

[25] I propose to adhere to the view I expressed in *Tabulo*. The reasons might be briefly summarised as follows:-

(a) Part 8 of Chapter 5 of the *WorkCover Queensland Act 1996* (as it then stood) does not confer a separate and independent power to reduce damages for contributory negligence which would remain unaffected by *Astley's* case.

(b) The power to reduce damages for contributory negligence is contained in the *Law Reform (Joint Tort Feasors Contribution, Contributory Negligence and Division of Chattels) Act* of 1952. Prior to the amendment consequent upon Astley's case an award of damages could not be reduced under that Act where the cause of action, sued on was in contract.

(c) The provisions of Part 8 of Chapter 6 should be regarded as setting out the considerations which govern the exercise of the power to reduce damages for contributory negligence in actions between employees and employers. As will be noted, the onus of proof is the reverse of that at common law.

(d) Since the 1952 Act did not at the relevant time apply to actions in contract Part 8 should be regarded as similarly circumscribed having application only to actions in tort and breach of statutory duty.

[26] The plaintiff advances a claim for breach of statutory duty based upon s. 30 of the *Work Place Health and Safety Act*. It was held in *Rogers v Brambles Ltd* (1998) 1 Qd.R 212 that proof of a breach of this section gives rise to a cause of action. The plaintiff is also entitled to succeed in negligence based upon the earlier findings of fact which I have made.

[27] In relation to each of these causes of action I am satisfied that the plaintiff was guilty of a failure to keep a proper lookout. I would reduce his damages by 20% for his contributory negligence in that regard.

[28] The plaintiff is entitled to recover damages on the most favourable basis to him namely contract. See *Wylie v ANI Corporation Ltd* (2002) 1 Qd.R 320 at 336.

[29] The plaintiff left school in Grade 12 and commenced, but did not complete, a mechanical engineering course. He conducted his own ice cream van business for about five years. This was not financially profitable.

[30] Following this he commenced employment with the defendant at Hayman Island in September 1996.

[31] The plaintiff, I am satisfied, was at the time of the accident, a fit, active man who placed a good deal of pride in his physical fitness. He kept himself fit by engaging in a variety of activities. This included weight lifting and other activities in the gymnasium at Hayman Island. He had been a successful sportsman in judo and soccer as a younger person

[32] In the accident he fell approximately 3 metres. His jaw was struck as he fell through the hatch and his cervical spine was forced backwards. He fell on his back. It appears he does not have a complete recollection of the fall. He sustained damage to his teeth in the fall. He was taken to the Hayman Island Medical Centre where he says he received some pain killing drugs and thereafter was airlifted to the Mackay Base Hospital. It appears he discharged himself from the hospital and returned briefly to Hayman Island and then to Melbourne which was his home. He saw his general practitioner, Dr Keddie some days later.

[33] He was referred to a psychologist, Carol Moylan and also underwent physiotherapy. He saw the psychologist for approximately three months on a weekly basis and the physiotherapist for approximately four weeks from late December.

[34] In about February 1998 he decided to return to Hayman Island with a view to resuming his work. It appears that he underwent a panic attack there and he again returned to Melbourne where he consulted the psychologist again and also a

psychiatrist, Dr Fennessy. Dr Fennessy was not called as a witness nor was any report from him tendered.

[35] The plaintiff's evidence is that during this time he was suffering pain and discomfort particularly in his lower back, extending into his leg and that he also had some problems with his knee. He had lesser problems with his cervical spine but suffered from symptoms there.

[36] He returned to weight lifting activities which seems on the evidence, largely to have involved presses where the weights were borne on the arms. He also played squash. This evidence surprised some of the medical witnesses and it would seem to have been inadvisable.

[37] The plaintiff's evidence suggested that he had an aversion to pursuing medical treatment at this time. He rather sought to put the accident behind him by returning to his earlier activities.

[38] When he continued to suffer from problems in his upper and lower spine he decided to go to Mt Athos in Greece for a period of meditation. This occurred in the first half of 1998. He also visited Italy and other parts of Greece but the purpose of the trip was to seek relief through meditation and a period of quiet and reflection and he says that he benefited from this.

[39] He commenced to work as a private investigator on his own behalf in late 1998. He was engaged by a company IAA Pty Ltd and he carried out this work from about late August 1998 until July 2000. He was then employed for a short period by JI & Associates as a private investigator before ceasing work. The plaintiff was assaulted in June 2002. This adversely affected him both physically and psychiatrically for a period but has had no long term effect upon him.

[40] He says that he had a good deal of pain and discomfort during the time he was performing the work of a private investigator which involved long hours and a good deal of driving but persisted with it. In 2000 he suffered a deterioration of his spinal symptoms and developed sciatica. This led him ultimately to cease work as a private investigator and he has not performed any work since.

[41] The plaintiff has, on the case, presented on his behalf, a significant disability of the upper and lower spines and a severe psychiatric condition. His current condition precludes him from employment in any field in which he has previously worked and any residual earning capacity that he has is limited at best to sedentary or light work. It is the defendant's case that the plaintiff suffered either no or a minor injury to his back in the fall which ceased to have any effect at a relatively early time following the accident. If there is any ongoing relationship between his spinal problems and the accident it is a minor one. It is said that if he suffers from any psychiatric condition this is unrelated to the accident. It is the defendant's case that the plaintiff has in fact embarked upon a fraudulent course over the last four years from about 2000 when he ceased to work and that the evidence as a whole should lead to the conclusion that he is a malingerer. Reliance is particularly placed on what are said to be inconsistencies in his behaviour, his apparent capacity as shown on video compared to what he says is his capacity and false claims which are said to have been made to those who have examined him.

[42] A substantial number of medical witnesses were called. There is a good deal of disagreement between them.

[43] For the plaintiff, the following specialists were called or their reports were tendered in evidence:

(a) Dr King, an orthopaedic surgeon of very considerable experience having been involved with spinal injuries and trauma units for some forty years.

(b) Dr Mouritades, a psychiatrist who first commenced to see the plaintiff in 2000 and who continues to treat him.

(c) Dr Moore, a psychiatrist who saw the plaintiff in 1999 and diagnosed him as suffering from a chronic post traumatic stress disorder at that time.

(d) Dr de Graaff, who is described as a consultant physician in rehabilitation medicine.

(e) Dr Jensen, a neurosurgeon.

(f) Ms Moylan, the psychologist to whom I have referred.

(g) Dr Simon Wylie, who is a prosthodontist. His evidence is not the subject of any dispute and he was not called.

(h) The reports of Dr Malios, an occupational physician who is now in poor health and who saw the plaintiff in June 2001 were placed before the court under s.92 of the *Evidence Act*. His evidence was of course not the subject of any cross-examination.

[44] For the defendant the following witnesses were called or their reports were tendered in evidence:

[45] (a) Dr Lucille Douglas, a psychologist, who saw the plaintiff in February 2002. There were unusual features of her results to which I will refer shortly.

[46] (b) Dr Nave, an orthopaedic surgeon who saw the plaintiff in 2001 and who later observed a video which had been shown to him and provided a further report.

[47] (c) Dr Jones, a physician who examined the plaintiff on behalf of WorkCover Queensland Bowen's office in October 1998.

[48] (d) Dr Dubois, a radiologist who commented upon certain radiological evidence in the form of x-rays, CT scans and MRIs. There was some difference between him and Dr King in relation to one aspect of these which is not, in the result, of any significance.

[49] (e) Dr Nothling, a psychiatrist who saw the plaintiff in February 2002 and who commented also upon the video to which I have made reference.

[50] (f) Dr Saines, a neurologist who saw the plaintiff in September 2002.

[51] (g) Dr Pease, whose reports were tendered by the defendant but who had seen the plaintiff at the request of his solicitors in November 2001. He is described as a consultant physician.

[52] The plaintiff gave evidence before me in a composed manner although on a couple of occasions he became emotional and appeared to be on the verge of crying.

[53] He walked to the witness box unaided although he appeared to have a limp. My impression of him is of a somewhat defeated man who from time to time became emotionally upset.

[54] Rather than any extensive canvassing of the medical evidence it is appropriate I think if I set out the conclusions which I have reached after a consideration of the evidence as a whole and as well address certain particular features of the evidence upon which reliance has been placed by the defendant.

[55] This is a case in which it is not possible to be adamant about many things but the evidence, in my view, justifies certain conclusions as being probable.

[56] I found Dr King's evidence the most convincing of the witnesses who gave evidence of the plaintiff's physical condition. He is an orthopaedic surgeon of more than 40 years experience. He saw and treated the plaintiff for his physical complaints during 1999 and 2000 and is the specialist who has had most to do with the plaintiff of those who have seen or treated him for his physical complaints. Dr Malios's view is consistent with that of Dr King. Dr Nave accepts that the plaintiff has a disability of the spine as a result of his fall although his complaints of pain exceed what he would have expected.

[57] I am satisfied that the plaintiff suffered significant damage to his lumbar thoracic spine involving the discs and ligamentous structures at different levels of the spine. Some of this damage appears in the radiological evidence which includes CTs of the lumbar spine in July 1998 and August 2000 as well as later MRIs.

[58] The plaintiff had osteochronitic change in the lower thoracic spine at the time of his accident which is as Dr King explained, a developmental abnormality. There was not on the evidence which I accept, any pre-existing degenerative changes in his lumbar spine. The plaintiff was, as I have said, only 26.

[59] The plaintiff's spinal problems have fluctuated but have continued and they deteriorated in 2000.

[60] The plaintiff was diagnosed by Dr Moore in March 1999 as suffering from a chronic post traumatic stress disorder as a result of the injuries sustained in the accident obtaining relief from his symptoms and psychiatric problems during the period that he was at Mt Athos. Since the deterioration in his physical condition, his psychiatric condition has become worse. I accept Dr Mouritades' assessment of his condition as being one of a major depressive disorder with post traumatic stress reaction and social phobia.

[61] The plaintiff was seen by Dr Jones in 1998, a few months before Dr King saw him. Dr Jones says that the plaintiff's complaints were rather vague but included complaints of spinal problems. He found a relatively minor degree of restriction of

the cervical spine which he described as "voluntary" (Dr King subsequently found a full range of movement of the cervical spine) and relatively limited restriction of movement of the lumbar spine. He thought that the plaintiff had made a recovery from the accident of December 1997. However given the plaintiff's evidence of ongoing complaints which I accept and given Dr King's evidence I do not accept this opinion.

[62] Dr Jones' evidence is the most unfavourable to the plaintiff of those who have expressed an opinion about the plaintiff's physical condition. The symptoms can, it seems to be common ground on the evidence, fluctuate and it may be that the plaintiff's symptoms were at their best when he saw Dr Jones.

[63] Whether this is so or not, I accept Dr King's evidence that in early 1999 the plaintiff was suffering from pronounced symptoms in the lower spine and lesser symptoms in the upper spine and I accept the plaintiff's evidence that he had had such complaints since the time of the accident.

[64] The plaintiff on my assessment of him has significant permanent disabilities of the upper and lower spine with the lower spine being the more serious. He has a serious psychiatric condition which will remain. He has had a substantial destruction of his earning capacity but retains in my view some capacity to earn an income. This was the view of Dr de Graaff and also of Dr Jensen who thought the plaintiff would be fit for some light or sedentary work. Dr Nave seems to have thought he might be capable of some such work although he qualified this as being "in theory".

[65] There were some aspects of the evidence which not surprisingly gave rise to serious questions as to the genuineness of the plaintiff's claims and the defendant understandably placed particular emphasis upon these.

[66] When the plaintiff saw Dr Saines on 26th September 2002 he declined to sit on the couch and asked to be examined in a seated position. He "seemed unable" to flex his lower back and was "hesitant" to give up his crutches to attempt this movement.

[67] The plaintiff said that he refused to bend and adopted an attitude of non cooperation towards Dr Saines. He had earlier in evidence expressed some degree of antipathy towards those examining him on behalf of the defendant taking the view that they were not there to attempt to help him overcome his problems. And some as he saw it had reported in a way which he thought misrepresented his situation. It is not clear who he is referring to there although it is plain he strongly disagreed with some of what Dr Jones had reported.

[68] The plaintiff denied that he had attempted to represent to Dr Saines that he was unable to flex his spine.

[69] Similarly when he saw Dr Lucille Douglas, a psychologist, on behalf of the defendant on 15th February 2002 he completed a number of tests which involved providing answers to certain questions in a way which resulted in a somewhat bizarre profile of scores indicating the presence of, to use Dr Douglas's words, "quite severe psycho pathology". The plaintiff says that he simply filled in the answers indiscriminately without any serious attempt at addressing the questions

involved. This I take it to be consistent with the attitude of non cooperation that I have referred to above.

[70] The defendant relied upon this conduct as being indicative of someone who is not genuine and who is advancing a consciously false claim. Whilst the conduct does not reflect favourably upon the plaintiff, I do not think it necessarily follows that he should be regarded as a malingerer. Indeed if his explanations are accepted they are not the actions of a malingerer. It is difficult to see any other sensible explanation for what occurred in his interview with Dr Douglas and I am inclined to accept what he says about Dr Saines.

[71] The defendant also pointed to the fact that the plaintiff did not between September 1988 and May 2000 consult any doctor or any physiotherapist. The plaintiff acknowledged this and said that whilst he was in continuous pain, "I felt I could deal with it myself."

[72] He had commenced working in late 1998 and thought that by working and by pursuing his physical activities he would overcome his problems.

[73] The plaintiff was engaged in what might be described as a heavy exercise programme from about March 1998 which he said he undertook with a view to overcoming his problems. This included bike riding and swimming.

[74] The weight lifting which he was doing largely involved taking the weights on his arms rather than on his spine. Some of the doctors who were asked about these activities expressed surprise and thought they were inadvisable. On the evidence which I accept, particularly that of Dr King, I do not think it is inconsistent with his having the problems that he complains of with his upper and lower back however inadvisable they may have been.

[75] He gave evidence of the difficulties which he was having whilst working as a private enquiry agent.

[76] Mr Iannou who had engaged the plaintiff as a private enquiry agent gave evidence that he observed the plaintiff during the time that he was engaged by him in apparently quite a degree of pain. The plaintiff would often lie on the floor telling Mr Iannou that this was the only way he could relax. He would sometimes crawl across the floor to retrieve something.

[77] He says that his condition deteriorated in early 2000 when he developed severe low back pain and after this he commenced taking medications which he was able to obtain including valium and Panadeine Forte and he also started abusing alcohol. He did this, he said, so as to be able to continue working. The work which he was doing largely involved isolating himself from others.

[78] He resumed seeing the psychologist, Carol Moylan, in August 2000.

[79] Whilst the failure to see a doctor for his problems during the period I have referred to is quite remarkable I do not think it is something which compels a finding that he had by this time overcome his problems and that any injury which he had sustained was no longer causing him any difficulty. On the contrary I am satisfied that he was continuing to have significant symptoms in his spine as well as suffering psychiatric

problems which he sought to deal with in his own albeit wrong-headed way. He seems to have been unhappy with doctors whom he did not see as helping him. He later changed his general practitioner because of some "falling out" with Dr Keddie who he did not think was helping him with his back problem.

[80] Some emphasis was placed upon what are said to be inconsistencies in his presentation to Dr Jones and Dr Pease and in particular measured movements and observed movements. It seems to have been common ground that a person's movements can fluctuate from day to day and Dr King said that there may be reasons why they will fluctuate during an examination. Dr King did not seem to place much reliance upon observed movement suggesting that movement is something best measured rather than determined by observation. I do not regard the evidence of these matters as suggesting a malingerer.

[81] Another matter on which emphasis was placed was the video which is Exhibit 11. This was taken over three days in September 2002. It shows the plaintiff at a hotel, outside the hotel near a taxi, and seated on the balcony of the hotel. There are occasions where the plaintiff appears to bend but because of some obstruction of vision it is not clear exactly how far he bends or the manner in which he is bending. The plaintiff at this time was using two walking sticks and appeared to use them to raise himself. The part of the video most relied upon occurs when the plaintiff is seated on the balcony of the hotel and appears to freely get to his feet and then use a stick to enter the hotel room. The incident is a very brief one and the distance the plaintiff is seen to move is very short.

[82] Dr Nothling, a psychiatrist called by the plaintiff particularly placed emphasis upon this ultimately taking the view that it would affect the opinion that he expressed that the plaintiff suffered from a psychiatric condition and result in him expressing no psychiatric opinion about the plaintiff.

[83] On the other hand others who saw it, such as Dr King and Dr Mouratides, did not think that what was shown in the video affected the views that each had expressed. Dr Nave, an orthopaedic surgeon called by the defendant thought that the plaintiff's movements were freer than what he had seen when he examined him although on my reading of his evidence adhered to the view that he had previously expressed as to the plaintiff's limitations and the impairment of his capacity to work.

[84] On my observation of the video, whilst it is of very short duration, it does seem to show the plaintiff being able to stand without using a stick which he then appears to have used only when on his feet. The plaintiff himself acknowledged that it showed him moving more freely than he had been moving whilst shown in other parts of the hotel earlier. This is not inconsistent with the plaintiff's condition fluctuating but I acknowledge it provides some evidence that he may be capable of freer movement than was observed over the remainder of the period covered by the video. However the fact that the movement involved was over a very short distance and time limits its value in my view.

[85] Finally the defendant contended that the different presentations of the plaintiff over a period including his time in the witness box were such as to lead to an adverse conclusion on the issue of his honesty. When the plaintiff gave evidence he walked to the witness box unaided although he limped. It is clear from the evidence that he

had at different times used a wheelchair and walking sticks. The plaintiff had been assaulted in late June 2002 and he relates his lowest ebb to the time after his assault and says that he has of more recent times made progress. I will return to this shortly.

[86] When seen by Dr Jensen in September 2003 he said that he was unable to stand without sticks and was recorded by him as then using walking sticks. When seen by Dr Pease in March 2003 he was in a wheelchair which was being pushed by his parents. This was approximately nine months after he was assaulted. When seen by Dr Nothling in February 2002 he was not using walking sticks although he said he had used them prior to that. He lay on the floor during part of that interview and from time to time got up and walked up and down the office.

[87] The plaintiff's evidence was that he had stopped using the walking sticks around November 2003. However Dr de Graaff's evidence is that when he saw him in January 2004, whilst he appeared to be somewhat better, he was "still on sticks".

[88] Particular emphasis is placed by the defendant upon the evidence of Dr Mouratides, the psychiatrist who has seen him for the last four years and who he sees as having provided considerable assistance to him. She saw the plaintiff in August and October 2004. She said in answer to a series of questions that what was shown on the video was consistent with the way in which the plaintiff presented in October and August "this year".

[89] On the other hand she had earlier said that she could not recall from her notes whether in August or October the plaintiff was using walking sticks. It was put to her:

> *"I asked you how he presented to you at your surgery this year, would it be fair to say that your observations of him is consistent with the ones that you've just given us. That is, where he would present with the walking sticks and would have real difficulty in manoeuvring. Would that be fair to say? --- Sometimes yes, sometimes not so much."*

[90] The plaintiff gave the following evidence:

> *"HIS HONOUR: Mr Constantinou, I know Mr Williams has asked you this a couple of times, but it's not clear. What do you see as having been responsible, for the improvement in your condition from the time when, as I'm hearing and as I've seen, you using walking sticks-----?—Yeah.*
>
> *-----or in a wheelchair?—Yeah.*
>
> *Is it medical treatment? Assistance from any particular form?—I think it's assistance in the sense that I changed my general practitioner. He changed a lot of my medication at that time. My persistence in wanting to improve myself and move on.*
>
> *What do you mean, your persistence?—Well, when you're on your back for a period of time, your legs waste away.*
>
> *Yes?—Yeah, and it takes a lot of time to try to build back up-----*

Yes?-- ----- and I used then as an aid.

You used what?—As an aid to get me along.

But what do you say got you back on your feet, back----?—Well, you-----

-----to the situation you are now? Was it some exercise regime?—Yeah.

Some medical treatment?—I think overall it's got a lot to do with your exercising and being persistent with it and – and my – just being persistent with it and continuing-----

Doing things what?—Being persistent with your exercise and getting the help you can and accepting-----

What sort of help?—Well, through my doctor, my psychiatrist.

Who's the psychiatrist?—Despina Mouratides.

And you've seen that as being helpful, have you?—She has helped me. She's stayed with us. Over the four years she's had-----"

[91] The defendant's argument was that the evidence should satisfy the court that the plaintiff, only a matter of weeks prior to trial was attending Dr Mouratides using walking sticks, whilst at trial he presented as being able to walk without any sticks and without any need for support. The argument was that this change came from a recognition on his part that he could no longer maintain the false claim that he needed the walking sticks and that his appearance at trial so shortly after attending Dr Mouratides' surgery using walking sticks provides evidence of malingering.

[92] I do not find this argument a particularly attractive one. If the plaintiff had reached the point of realising that he could no longer maintain the false claim that he had hitherto been advancing then the logical course for him to take would be to abandon the action. Similarly if he had been malingering up until that time by affecting a need to use walking sticks but intended to pursue the claim it is difficult to see why he would not have maintained the false claim up to and including the trial. It would have been obvious to him that he would have been called on to account for the difference between his position only a few weeks ago and at trial. It is difficult to see what point there would have been in abandoning what would have been the false claim persisted in until a few weeks ago that he used sticks to support himself but to pursue the claim generally. I think that, to the extent Dr Mouratides is to be taken as asserting that the plaintiff was using sticks in August and October 2004 she is mistaken.

[93] I am inclined to accept what the plaintiff says on this subject that he has in fact been able to improve his situation by persisting in activity and exercise and that he has also been helped in this regard by the treatment he has received from Dr Mouratides. I think it likely he has not used walking sticks from the early of part of this year. The conclusion I reach then is one which reflects favourably on him rather than adversely.

[94] The plaintiff has suffered a great deal and I am satisfied has tried very hard to overcome his problems. He will continue to suffer significant restrictions upon his activities and these restrictions burden him considerably and cause him a good deal of distress.

[95] I assess general damages in the sum of $65,000.

[96] So far as past economic loss is concerned a claim is advanced in the sum of $94,000. This is based upon the assumption that the plaintiff would have earned $375 per week between 1997 and 1999 and between $550 and $600 per week between 1999 and 2004. The different rates appear at paragraph 34 of the plaintiff's written outline.

[97] There is deducted from this the amounts which the plaintiff actually earned whilst in employment as a private enquiry agent. There is force in the defendant's submission that the assumed rates of pay substantially exceed what the plaintiff in fact was earning whilst working during the period he was engaged as a private enquiry agent during which he was working quite long hours.

[98] Similarly there is some discrepancy between the evidence which the plaintiff has given as to his earnings whilst working for the defendant and what appears in his statement of loss and damage.

[99] I do not lose sight of the fact that a substantial discount has already been built into the amount advanced to reflect "notional periods of unemployment." Given the period involved some allowance has to be made for other contingencies and a minor allowance should be allowed for a residual working capacity.

[100] I allow in respect of past economic loss the sum of $60,000.

[101] I allow in respect of superannuation entitlements $4,200 representing seven per cent.

[102] So far as interest is concerned, the plaintiff has earned about $40,000 since the accident. In addition he has received social security payments, the precise amount of which is not before the court. Reference is made by Dr Nothling in his report (Exhibit 17) of some $185 per week by way of social security payments. If that rate has continued until the present the amount which the plaintiff has received by way of income substitution would exceed the amount assessed. I am not persuaded that any allowance should be made for interest on past economic loss.

[103] So far as future economic loss is concerned the plaintiff advances a claim based upon $300 per week representing one half of a starting rate of $600 per week net to allow for a residual earning capacity and for contingencies.

[104] I have already referred to the fact that $600 weekly substantially exceeds what he had earned. Whilst there is a substantial reduction in the assumed rate for future economic loss I think it should be further reduced. I do not think there is any justification for allowing the total loss of earning capacity for two years as the plaintiff contends. This is presumably based upon the evidence of Dr Mouratides who thinks that in a couple of years the plaintiff will have reached the point where he will no longer need ongoing psychiatric care but I do not think this could be

understood as meaning that he is totally unemployable in the meantime. Dr Mouratides has a pessimistic view of the plaintiff's capacity to work in the future. However I accept that the plaintiff has some residual earning capacity and the plaintiff's written argument also accepts this.

[105] I allow in respect of future economic loss the sum of $200,000.

[106] I allow loss of superannuation entitlement based at nine percent for future economic loss producing a figure of $18,000.

[107] There are claims for special damages which are sworn to in Exhibit 7. These total $36,107.32. Of these some $9,019 will represent amounts paid by the plaintiff and the sum of $3,124 is claimed by way of interest at five percent on this amount.

[108] Whilst there was in addresses some challenge to the claims for acupuncture, the plaintiff swears that this treatment helps him "to live with my pain" by providing temporary relief. This evidence was not challenged in cross-examination and I propose to allow the claim. I allow the special damages and interest claimed.

[109] There are claims for future psychiatric expenses, prosthodontics expenses and pharmaceutical expenses in the sums of $4,000, $5,000 and $13,300 respectively. All of these it seems to me are proved and should be allowed.

[110] The *Fox v Wood* component is some $1,138.62.

[111] The total then of the above sums is $409,869.94. From this has to be deducted the WorkCover refund of $14,419.54 leaving a figure of $395,450.40.

[112] I give judgment for the plaintiff against the defendant in the sum of $395,450.40.