SUPREME COURT OF QUEENSLAND

CITATION:	*Martin v Rowling & Anor* [2005] QCA 128
PARTIES:	**JULANNE MARTIN** (plaintiff/appellant) v **HELEN ROWLING** (first defendant) **SUNCORP METWAY INSURANCE LTD** ACN 075 695 966 (second defendant/respondent)
FILE NO/S:	Appeal No 5840 of 2004 Appeal No 8644 of 2004 SC No 3606 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury – Quantum Only
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 April 2005
DELIVERED AT:	Brisbane
HEARING DATE:	9 November 2004
JUDGES:	McMurdo P, Fryberg and Mullins JJ Separate reasons for judgement of each member of the Court, Fryberg and Mullins JJ concurring as to the orders made, McMurdo P dissenting
ORDER:	**1. The appeal in Appeal No 5840 of 2004 is allowed** **2. The judgment in favour of the appellant given on 9 June 2004 is set aside** **3. The orders for costs made on 8 September 2004 are set aside** **4. The proceeding is remitted to the Trial Division for a new trial** **5. Each party is given leave to make written submissions with respect to costs orders in respect of Appeal No 5840 of 2004 and the order for costs in respect of the trial of the proceeding that took place in February 2004 within 10 days of the publication of the reasons for judgment** **6. The appeal in Appeal No 8644 of 2004 is dismissed** **7. The appellant must pay the respondent's costs of Appeal No 8644 of 2004 and the costs of the application to obtain leave to appeal from the orders for costs made**

on 8 September 2004 to be assessed

CATCHWORDS: EVIDENCE – WITNESSES – where respondent's expert witness gave medical evidence that, if accepted, was damaging to appellant's case – where that medical evidence was not put to appellant in cross-examination – where trial judge relied on that medical evidence – whether rule in *Browne v Dunn* breached

PROCEDURE – JUDGMENTS AND ORDERS – STATEMENT OF REASONS FOR DECISION – where trial judge made finding on the basis of respondent's expert medical evidence and rejected evidence given by appellant and appellant's expert medical evidence – whether trial judge failed to give any or adequate reasons for finding – whether the appellant had a justifiable sense of grievance about the reasoning of trial judge

Beale v Government Insurance Office of NSW (1997) 48 NSWLR 430, cited
Browne v Dunn (1893) 6 R 67, applied

COUNSEL: S S W Couper QC, with G R Mullins, for the appellant
K N Wilson SC, with R F King-Scott, for the respondent

SOLICITORS: McInnes Wilson Lawyers for the appellant
Jensen McConaghy for the respondent

[1] **McMURDO P:** I gratefully adopt the statement of the relevant facts and issues fully set out in the reasons for judgment of Mullins J. I will only repeat or add to these to explain my reasons for reaching a different conclusion, dismissing the appeal.

[2] The plaintiff appellant, Ms Martin's, primary contention is that the learned trial judge failed to give adequate reasons in his decision on the critical issues at trial. She also contends that the learned trial judge erred in not finding that her ongoing symptoms were caused or contributed to by the motor vehicle collision; in not finding that her ongoing symptoms caused by the motor vehicle accident impacted upon her ability to perform her employment; in finding that orthopaedic surgeon Dr Gillett's evidence supported that conclusion; in not giving adequate consideration to the expert evidence of medical witnesses relied on by Ms Martin; and in failing to give adequate consideration to the evidence of witnesses called by Ms Martin as to her ongoing symptomatology and its impact on her capacity to perform her employment both in the past and future. She further contends that the judge erred in assessing the damages awards for past economic loss ($110,000), future economic loss ($75,000) and general damages for pain, suffering and loss of amenities ($35,000).

[3] In giving reasons for decisions, a judicial officer is obliged to adequately disclose the process of judicial reasoning so that justice is not only done but seen to be done.[1] A judge should refer to relevant evidence; set out any material findings of

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1 *Beale v GIO of New South Wales* (1997) 48 NSWLR 430, Mason P (with whom Sheller JA agreed) at 431.

fact and any conclusions or ultimate findings of fact reached; give reasons for making the relevant findings of fact and conclusions or for preferring one conclusion to another and explain how the law has been applied to the facts found. This is because the reasons must place the parties in a position to understand why the decision was made sufficiently to allow the exercise of any right of appeal and so that any appellate court considering the decision can understand the reasoning process.[2] The obligation to give adequate reasons does not require the reasons to necessarily be lengthy or elaborate but they should articulate the essential ground or grounds upon which the decision rests.[3]

[4] Ms Martin was injured in a motor vehicle accident in May 1998. Her damages claim against the respondent defendant was heard in the Trial Division of this Court over six days in February 2004. The defendants' liability was admitted. It is accepted, as the learned primary judge found, that Ms Martin suffered a whiplash injury to her neck and an associated injury to the brachial plexus. She also claimed to have injured her right hip and pelvis, right shoulder, right scapula and collarbone, the lumbo-sacral spine and suffered a resulting major depressive disorder and a pain disorder.[4] The relevant evidence at trial has been set out by Mullins J. Much of it concerned whether Ms Martin left her employment in the pharmaceutical industry with Merck Sharp and Dohme ("MSD") in June 1998 because of the effects of the accident in May 1998 or because of employer dissatisfaction with her work performance unrelated to the accident.[5] In June 2004, his Honour delivered his reasons awarding Ms Martin $330,668.39 in an economically worded seven page judgment the subject of this appeal.

[5] The judge found that Ms Martin left MSD not because of her injuries resulting from the motor vehicle accident but because of an accumulation of events associated with MSD management's perception of her work and her relations with some of her fellow employees.[6] His Honour was not, however, satisfied that he should treat Ms Martin as an habitual liar about her continuing physical disabilities.[7] That carefully expressed statement was not, of course, an acceptance by his Honour of Ms Martin's evidence of her pain and physical disabilities arising from the accident. His Honour recognised that the central issue in the trial was the continuing extent of Ms Martin's physical disability arising from the accident and its effect on her capacity to work full-time.[8]

[6] His Honour stated that he rejected Ms Martin's claim on this central issue because he accepted neurologist Dr Cameron's evidence.[9] Dr Cameron treated Ms Martin on referral from her general practitioner on 25 January 1999 and 24 February 1999 and examined her again for a medico-legal report at the request of the defendants on 7 April 2002. His Honour noted that Dr Cameron formed the opinion that Ms Martin had largely recovered from her neck injury received in the accident by March 1999

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2 Above, Meagher JA at 441-444. See also *Mirage Resorts Holdings Pty Ltd as Trustee of the Mariners Paradise Property Trust v Brellen Pty Ltd* [2003] QCA 579; Appeal No 10462 of 2003, 24 December 2003, [55]-[57].

3 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, McHugh JA (as he then was) at 280.

4 Reasons for judgment *Martin v Rowling & Anor* [2004] QSC 210, [1].

5 Above, [2].

6 Above, [6].

7 Above, [8].

8 Above, [2] and [8].

9 Above, [18].

but was still suffering symptoms related to her shoulder injury received in the accident. He found no evidence of a brachial plexus injury and believed her acute neck symptoms and those in her right upper limb had largely resolved when he saw her in February 1999. Significantly, he could not find any wasting or weakness in her upper or lower limbs.[10] Ms Martin's complaints of her present symptoms were a new development from the history taken by Mr Cameron in April 2002 when she seemed quite well apart from shoulder pain and he could not relate her present symptoms to her injury in the accident apart from her shoulder problems.[11]

[7] Apart from Dr Cameron's expert evidence, his Honour referred only to that of Dr Tuffley and Dr Gillett. Dr Tuffley saw Ms Martin in August 1999 at the request of the defendants; he could not then find any objective evidence of a significant cervical spine injury.[12] In referring to Dr Gillett's evidence, his Honour noted that Dr Gillett inferentially included Ms Martin in the minority group of people who suffer whiplash injury but do not improve and develop chronic symptoms; high pressure work and longer hours increase those symptoms; in assessing her post-injury working capacity he was reliant on Ms Martin's reports of her symptoms; she was certainly capable of working to 65 per cent capacity. Dr Gillett conceded in cross-examination she would be able to work five days a week at a desk job although with some pain and discomfort.[13] His Honour did not refer to Dr Gillett's evidence in re-examination that Ms Martin's ability to work a full week was dictated by her pain levels and that some sufferers of chronic pain may manage it by choosing to work three days a week and pursuing recreational and domestic interests whilst others may work five days a week rather than pursuing other interests. Despite Dr Gillett's evidence in re-examination, his Honour was entitled to find *some* support in Dr Gillett's evidence to which he referred (that Ms Martin should be able to work five days a week at a desk job) for Dr Cameron's opinion that her ability to sustain her current work was not significantly limited by accident related injuries, especially as Dr Gillett's view that Ms Martin suffered a seven per cent impairment to the upper limb shoulder girdle as a result of the accident was more generous than the five per cent disability found by his Honour.[14] His Honour's finding of percentage disability was supported by the evidence of Drs Duke, Scott-Young, Campbell and Tuffley.

[8] His Honour also stated that his own observations of Ms Martin during her lengthy evidence at trial were that she showed no outward signs of pain or fatigue apart from one or two occasions when she rubbed her shoulder and that her concentration did not lapse.[15] Although not a ground of appeal, it was suggested during the appeal hearing that if judicial weight were to be placed on Ms Martin's appearance and demeanour during the trial to determine her pain levels, this should have been clearly put to her so that she had an opportunity to respond. In determining the central issue (whether, and if so the extent to which, accident related injuries prevent Ms Martin from working to full capacity in her business consultancy) his Honour was entitled to take into account his observations that Ms Martin showed no outward signs of pain or fatigue and was able to give focussed evidence whilst sitting in the witness box over three days. She stated in cross-examination at the

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10 Above, [13].
11 Above, [15].
12 Above, [12].
13 Above, [11].
14 Above, [16] and [24].
15 Above, [16].

commencement of the third day that the only pain killer she had taken the previous day was Panadol. His Honour was not substituting his own view of whether the pain from injuries received in the accident significantly incapacitated her from working for those of expert witnesses as was done, for example, in *Yorke v The General Medical Assessment Tribunal & Anor*.[16] His Honour was entitled to use his observations of Ms Martin as a witness as support for Dr Cameron's view that injuries received in the accident did not significantly affect her present ability to work as a business consultant.

[9] Dr Cameron's evidence was not demonstrated to be incapable of acceptance and the expert evidence relied on by Ms Martin[17] was not so compelling that his Honour was obliged to accept it in preference to that of Dr Cameron. His Honour was not required to specifically state why he preferred Dr Cameron's evidence to each of the other medical experts whose evidence may have supported Ms Martin's claim that her injuries prevented her from working to her full capacity so as to meet his obligation to provide reasons for his decision. It was sufficient for his Honour to state his reason for accepting Dr Cameron's opinion. His Honour's acceptance of Dr Cameron's evidence (that the injuries from the accident did not significantly prevent Ms Martin from working to full capacity) meant that his Honour also rejected Ms Martin's claim that she was suffering from a major depressive disorder or pain disorder arising from the accident. In any case, there was no convincing evidence to support such a claim: psychiatrist Dr Byth, who interviewed Ms Martin on 31 August 1999 and again on 14 February 2002, thought that she was fit to return to full-time work from August 1999[18] and Ms Martin did not call any recent medical opinion evidence to gainsay that of Dr Byth.

[10] The learned judge was not obliged to accept Ms Martin's evidence supporting her claim that her present pain and disability was related to the accident. The testimony of those who worked with her over the years (that she seemed to regularly take pain killers and at stated times appeared to have discomfort around her neck and shoulder)[19] did not require his Honour to accept that Ms Martin's injuries arising from the accident significantly affected her present capacity to work. His Honour's acceptance of Dr Cameron's evidence on the central issue (that Ms Martin did not have any significant limitations in her ability to sustain her current work arising from injuries received in the accident) meant that his Honour was not compelled in determining this central issue to find whether Ms Martin's evidence as to her present level of pain and disability was credible. It may well be that, especially in the light of Ms Martin's present work as a business consultant, his Honour was reluctant to make a finding about credit where this was not essential to determine the central issue in the case.

[11] Dr Cameron's conclusion was based on his examinations of Ms Martin and her report of her symptoms to him. Although not specifically stated, it is clear from his Honour's reasons that he accepted Dr Cameron's recollection of Ms Martin's reported symptoms to him. Ms Martin has not raised as a ground of appeal that she was denied the opportunity to comment on Dr Cameron's recollection of her statement of symptoms. The important rule of practice and procedural fairness

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16 [2002] QCA 519; Appeal No 1741 of 2002, 29 November 2002.

17 Set out in Mullins J's reasons at [58]-[66].

18 Appeal record book, 1297-1298.

19 Set out in Mullins J's reasons at paras [54]-[56].

known as the rule in *Browne v Dunn*[20] is that, unless notice is given of a cross-examiner's intention to rely upon such matters, it is necessary to put to a witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of the witness's evidence. The rule cannot, however, be applied without qualification, particularly in an action for damages for personal injuries in relation to a claimant's evidence about symptoms and capacities where damages are always in issue.[21] Whilst I have been unable to find in the transcript of the trial any passage where Dr Cameron's relevant evidence was specifically put to Ms Martin, it seems clear that Ms Martin and her lawyers had access to all of Dr Cameron's reports relied on by the respondent well before trial. In his report of 19 October 1999, he noted: "her neck symptoms had largely resolved".[22] In his 2002 report, he stated: "Initially she had neck discomfort but this seems to have largely resolved".[23] Dr Cameron was cross-examined by Ms Martin's counsel who clearly put to Dr Cameron that Ms Martin did not tell him on 24 February 1999 that her symptoms had resolved or that she had largely recovered.[24] Earlier under cross-examination, Ms Martin said she did not tell lies to the doctors who examined her.[25] Ms Martin, on completion of her re-examination was stood down, not excused. Neither counsel applied to recall her. Ms Martin's counsel, in his written submissions at trial, urged his Honour to reject Dr Cameron's evidence insofar as it was inconsistent with the medical evidence on which Ms Martin relied.[26] The defendants, in their submissions at trial, relied on Dr Cameron's opinion based on questioning Ms Martin that her neck injuries had largely resolved.[27] The procedural rule in *Browne v Dunn* did not in the circumstances of this case prevent his Honour from accepting Dr Cameron's evidence: see *Bulstrode v Trimble*,[28] *Stern v National Australia Bank*,[29] *Seymour v ABC*[30] and *Gutierrez v R*.[31]

[12] His Honour found, consistent with Dr Cameron's view, that Ms Martin suffered continuing shoulder pain attributable to the accident and concluded that, although this did not significantly decrease her ability to work in her present lucrative position, some allowance must be made for that disability which would have a limited and transitory effect on her earning capacity.[32] It follows that whilst his Honour did not accept that Ms Martin's pain from accident related injuries significantly affected her present ability to work, he did accept that part of her evidence, supported by Dr Cameron, that she suffered some pain and discomfort related to the shoulder injury caused in the accident which affected her ability to work.

[13] Whilst the primary judge's reasons could have been more comprehensive, they sufficiently explained to the parties in a reasoned way why his Honour rejected Ms

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20 (1893) 6 R 67 (HL).

21 Butterworths, *Cross on Evidence*, vol 1 (at service 86) [17455]; *Thomas v Van den Yssel* (1976) 14 SASR 205, 207.

22 Appeal record book, 1258.

23 Appeal record book, 1265.

24 Transcript, 277-278.

25 Transcript, 101, lines 20-30.

26 Supplementary appeal book, 94, para 25.

27 Above, 114, at (10)(g).

28 [1970] VR 840, 848-849.

29 (2000) 171 ALR 192, 203.

30 (1977) 19 NSWLR 219, 236.

31 [1997] 1 NZLR 192.

32 Above, [18].

Martin's claim that accident related pain significantly affected her present ability to earn income, preferring Dr Cameron's view to the medical evidence on which she relied.

[14] His Honour, having found that the only accident related injury presently affecting her ability to earn income was the shoulder injury and that this has a limited and transitory effect on her ability to work from time to time,[33] was entitled to conclude that it was impossible to adopt a precise mathematical approach to economic loss.[34] His Honour's reasons disclose he generally accepted the approach urged on him by the defendants (that but for the accident Ms Martin would have obtained employment by October 1998 after leaving MSD in June 1998) giving a figure of $116,250 for economic loss up until trial.[35] His Honour, however, moderated the defendants' suggestion that this sum should be discounted by 30 per cent to about $89,000 to reflect that Ms Martin was able during this period to complete her Master of Business Administration which she commenced in 1997 and instead assessed past economic loss at $110,000. This approach, clearly set out in the judgment, discloses transparent and logical reasoning. It was consistent with the judge's findings, which were well open on the evidence.

[15] His Honour assessed Ms Martin's loss of future earning capacity, including future superannuation rights, at $75,000.[36] In the light of Ms Martin's present high income as part-owner of a business consulting firm, that allowance was modest. The defendants submitted at trial that Ms Martin's future economic loss should be limited to about $50,000 to recognise that her symptoms may infrequently cause her to leave work early or to take off an occasional day. Ms Martin submitted that she should receive an award of about $300,000. Ms Martin's present work is largely sedentary and well suited to management of pain and discomfort arising from the shoulder injuries found by the judge to be attributable to the accident: she can freely move around and has considerable control over her work conditions because she is self-employed. His Honour was cognisant that Ms Martin is now in highly paid employment[37] but because her accident related injuries do not significantly affect her capacity to fully participate in her business consultancy, he awarded $75,000, 50 per cent more than the award suggested by the defendants. Whilst another judge may well have given a more generous award for future economic loss, I am not persuaded that the award of $75,000 was outside a sound exercise of discretion in the light of his Honour's findings which were open on the evidence.

[16] His Honour awarded $35,000 for pain, suffering and loss of amenities on the basis that Ms Martin suffered a whole person impairment of about five per cent, rightly noting that most of the many doctors who gave evidence in the trial assessed her as having a whole person impairment in that region.[38] As noted earlier, that finding was open on the evidence. The award of $35,000 was well within a sound exercise of discretion: cf *Venables v Gould & Anor*.[39]

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33 Above, [18] and [21].
34 Above, [20].
35 Above, [20].
36 Above, [22].
37 Above, [22].
38 Above, para [16] and para [24]. This finding was consistent with the evidence of Drs Duke, Scott-Young, Campbell and Tuffley.
39 [2001] QDC 320.

[17] It follows that Ms Martin has not made out any of her grounds of appeal. I would dismiss the appeal (Appeal No 5840 of 2004) with costs to be assessed.

[18] Ms Martin has indicated that she does not wish to pursue her appeal against the costs order made on 8 September 2004 (Appeal No 8644 of 2004) independently of the appeal from the substantive judgment (Appeal No 5840 of 2004). Appeal No 8644 of 2004 should also be dismissed. The appellant should pay the respondent's costs of that appeal and the reserved costs of the application for leave to appeal from the costs order.

[19] **FRYBERG J:** This case was set down for trial twice and adjourned before finally getting a hearing. Some 40 witnesses, including a number of medical witnesses, were called. The trial lasted six days. The appeal books contained 1600 pages most of which were completely irrelevant to the issues in the appeal. The appellant sought and obtained leave from the trial judge to appeal the order on costs separately. That appeal was abandoned at the outset of the hearing. Now there is to be a further hearing. The costs must be enormous. And all this over an assessment of damages!

[20] Evidently the reason for all the excitement is that the respondent (the defendant) believed that the appellant lied, both in her claim and to some of the doctors who examined her, about the reason for the termination of her employment with the company which employed her at the time of the motor vehicle accident in which she was injured. It had some pretty reasonable grounds for that belief. Its strategy at trial was to discredit the appellant by demonstrating that she was a liar and was willing to lie to such an extent that nothing she said could be relied upon. Its then counsel cross-examined the appellant about her former employment for the best part of two days. He cross-examined her about what she told the various doctors of the reason for its termination. He cross-examined her about little else. Unfortunately for the respondent he did not achieve his objective. The judge did not make the finding which the respondent sought. His Honour, rightly in my respectful opinion, concluded that any resolution of the collateral factual issues relating to the appellant’s behaviour and qualities as an employee was unlikely to throw much light on the principal issues in the case. It is unfortunate that these issues were explored in the detail in which they were. Any collateral attempt to identify fault in a warring workplace in which, as his Honour found, there was possible jealousy and rivalry affecting her treatment was always likely to have been inconclusive. Unless the respondent could demonstrate that the appellant probably knew that her termination was not because of her injuries, the inquiry was likely to go nowhere. His Honour held, “I am not satisfied that I should treat the plaintiff as an habitual liar in respect of the evidence about the difficulties she had at work or about her continuing physical disabilities” and that “she may have misstated the reasons for her dismissal”. He also referred to Dr Cameron's evidence that many of the symptoms of which the appellant complained seemed to be a new development from the history which he took in April 2002. But that is all. A wink toward irony and a nod toward previous inconsistent statement do not amount to an adverse finding of credibility.

[21] The concentration on the one issue meant that the defence spent little time cross-examining the appellant about the symptoms of which she complained. There was some cross-examination directed to her capacity to do housework and cooking and an attempt to demonstrate pre-accident back pain. Otherwise (apart from some

questions about her ability to drive a car and to go surfing some time before trial), her evidence about those symptoms and their effects stood unchallenged. It was to some extent corroborated by evidence from other witnesses who had observed her behaviour, and (of course, given its nature) it was not directly contradicted by any witness. Much of the evidence is recorded in the reasons for judgment of Mullins J. I need not repeat it.

[22] The trial judge's key finding is also set out by her Honour.[40] Importantly the judge found that the appellant's shoulder pain was attributable to the accident, but (in effect) that it did not contribute significantly to any loss of earning capacity. The problem is discerning why he so held. He made "some allowance" for it. He assessed damages for future economic loss "on the basis that she continues to have some shoulder pain which may inhibit her capacity to work from time to time". He also held that he should take into account the effect that the continuing disability of her shoulder would have had on her ability to work prior to trial. He seems to have disregarded her other injuries in this context. Again it is not clear why. He referred to her apparent lack of discomfort in the witness box, a matter which could be relevant to her current earning capacity; but the weight to be attributed to his observations of her is diminished by the fact that no one asked her how she then felt or why she was showing no signs of discomfort. I agree with Mullins J's observations on these matters.

[23] Dr Gillett and Dr White were called as witnesses for the plaintiff and Dr Tuffley and Dr Cameron as witnesses for the defendant.[41] There were a number of other medical witnesses. Mullins J has summarised most of the evidence of the first three so far as it is relevant to my reasons. In his reasons the judge referred to the evidence of Dr Gillett, Dr Tuffley and Dr Cameron only. He based his key finding on the evidence of Dr Cameron, with slight support from Dr Gillett. Mullins J has identified problems with that evidence.[42] Again I agree with what her Honour has written. And there is a further difficulty.

[24] An important part of the evidence of Dr Cameron upon which the trial judge relied was summarised by his Honour in these terms:

> "[Dr Cameron] also said that many of the symptoms that Ms Martin now complains of seemed to be a new development from the history he took in April 2002 when she seemed quite well apart from shoulder pain; T280-281. Nor could he relate the symptoms of which she now complains to her initial injury apart from the shoulder problems; T282 ll. 21-23."

The evidence to which his Honour referred was given during Dr Cameron's cross-examination. In a question counsel described the appellant's complaints. They were, in short, ongoing shoulder and neck pain, headaches and ongoing hip pain. He suggested that those complaints were consistent with the original injury seen on Dr Cameron's examination in January 1999. Dr Cameron said that she was complaining then of shoulder, arm and neck pain (which was unresponsive to the question). Counsel suggested the headaches were consistent with that. Dr Cameron answered (again unresponsively) that the headaches were migraine and not related

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40 Paragraph [46] of her reasons for judgment.

41 Shades of *Casablanca*!

42 Paragraph [82].

directly to any injury. Counsel then put to him that the appellant fitted into that category of people who hadn't recovered from their musculo-ligamentous injury. Dr Cameron repeated his theory that this group usually had other reasons for not recovering. He said he could not explain her symptoms. Then he added, "In my last assessment most of them didn't really exist, so they seemed to be a new development to my last history in April 2002. So I am not sure why she should be having those symptoms now." Counsel suggested to him that she had complained of neck pain; he responded that she did not and that that he had specifically asked. Counsel put to him that if she did have the symptoms she would have difficulty exerting herself in a demanding work role. Dr Cameron answered (again unresponsively), "I would have great difficulty attributing them to the injury she suffered at this late stage, particularly when I saw her in 2002 she seemed quite well, apart from the shoulder pain."

[25] Dr Cameron had given no evidence in chief, apart from identifying and affirming his reports of his examinations of the appellant, including the examination in April 2002. That report was written in late September 2002. In it he recorded:

> "Since [the accident], she's had ongoing problems which she relates to that accident. At this time she still complains of pain which she indicates over the right anterior shoulder region. She has constant discomfort at this site. She also states she experiences some swelling, at times, in her right interscapular region on the side of her neck. Her right shoulder blade feels uncomfortable. She is aware of restricted shoulder movements on the right and reports little, if any, improvement. She said he *[sic]* right arm still hurts to elevate above shoulder height. She states she has occasional numbness over her outer shoulder and occasional numbness involving her right little finger. She has no specific radiation from her neck into this region. She says the most severe pain is over the back of her right shoulder. She also states she has right hip pain which she indicates over her right buttock. She said initially the pain was over the outer aspect of the right hip region. … She states she also has occasional headaches. She describes typical migraine headache in which she experiences a disoriented feeling, blurred vision. On occasions, these headaches occurred daily and seemed to increase with her working activities. … She states there has been some improvement in her various discomforts since the accident. She is now more mobile."

In summary the report identified complaints of shoulder and neck pain, headaches and hip pain, the very symptoms which counsel put to the doctor in cross-examination. Similar complaints were made to Dr Tuffley at his examination of the appellant in January 2002 and to Mr Johnston, a clinical psychologist who examined her in August and October 2002.

[26] Dr Cameron's 2002 report expressed the opinion that the appellant's neck pain seemed to have largely resolved. He was unable to offer any explanation "as to why there is ongoing disturbance at this late stage" in relation to her right hand, shoulder and right hip pain. He wrote:

> "I can't offer any reason why her shoulder and hip pain persists at this late stage, being some 4 years following this injury. One would have anticipated soft tissue injuries to have resolved within a matter

> of months. There appear to be some emotional factors pre-existing which probably contribute to this ongoing convalescence."

That hardly suggests that she "seemed quite well". Nor did his summary of her complaints suggest that she had complained only of her shoulder; quite the reverse.

[27] Dr Cameron's oral evidence, if accepted, was very damaging to the appellant's case. If the evidence that she "seemed quite well" in 2002 were accepted, it supported a conclusion that only her shoulder complaint could be attributed to the accident. If she made no complaint of her other symptoms, it not only added support to that conclusion, but also was damaging to her credit. Had counsel for the respondent been aware of that evidence, he would have been obliged to put it to the appellant during her cross-examination unless it was something which was "so manifest that it is not necessary to waste time in putting questions upon it".[43] It would have been manifest to the plaintiff and her lawyers that the defence case was that she was a person whose testimony was generally unreliable - that would have appeared from her cross-examination. It would also have been manifest from their doctors' reports that the defence contended that both in 2002 and at the time of trial she in fact suffered no significant disability except in her shoulder. However there was no reason why they should have thought that the defence was contending that she had not told Dr Cameron of her complaints or that upon presentation to him she seemed quite well. Those matters were not put to her in cross-examination and they are contrary to the thrust of the defendant's medical reports.

[28] The probability is that counsel for the respondent was not aware of it; otherwise he would have elicited it in evidence in chief. When the evidence was given, counsel faced a tactical decision. He could ignore it or he could rely upon it. If he chose to rely upon it, he was obliged to apply to have the appellant recalled for further cross-examination, so that it could be suggested to her that, apart from her shoulder, she was quite well in April 2002 and that she made no complaint of other symptoms to Dr Cameron.[44] It was not the responsibility of counsel for the appellant to make such an application. He did not wish to rely upon the evidence.

[29] In the event counsel for the respondent chose to leave the position obscure. In a lengthy address on the appellant's credit he did not refer to Dr Cameron's evidence. When he came to deal with the question of disability, he submitted that the judge should "consider closely" the evidence of Dr Cameron and Dr Tuffley. Both of them, he submitted, gave detailed explanations of why they couldn't find anything much wrong with the appellant and dealt with all of the competing suggestions. He submitted that the judge would be impressed with what they had to say about the plaintiff.

[30] His Honour responded to this general invitation by relying upon the evidence set out above.[45] In my judgment he was in error to do so. The plaintiff was entitled to the opportunity to express her position on the allegations made orally by Dr Cameron. To decide the case on a basis that placed substantial reliance upon those allegations was unfair.

[31] Before us Mr Wilson SC on behalf of the respondent dealt with the matter this way:

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43 *Browne v Dunn* (1893) 6 R 67 at p 71.

44 *Smith v Advanced Electrics Pty Ltd* [2003] QCA 432.

45 Paragraph [24].

> "As to the submissions made by our learned friend that the plaintiff was not cross-examined on her complaint of symptoms and the effect that they had on her. … the case was fought, to a great extent, on the plaintiff's allegation that her injuries forced her to leave her employment. … [What we submit] is that she was given her chance to have that say when it was put to her in terms that she didn't have those problems which caused her to leave her employment with Merck Sharpe and Dohme."

However the thrust of what was put to the plaintiff in that context was that she left her employment because she was sacked for reasons unrelated to her medical condition. That cross-examination was not directed toward the identification of that condition, much less the position when she saw Dr Cameron in 2002.

[32] His Honour found that the appellant "may have misstated the reasons for her dismissal", but did not make an adverse finding on her credibility. On the other hand, neither did he make a favourable one. As Mr Couper QC for the appellant conceded, the alleged loss of earning capacity derived not from physical disability but only from pain. Only the appellant could give direct evidence of pain. Given the importance of the issue, to omit a credibility finding was an error. It is understandable that his Honour would not wish to be harsh toward the appellant; but a reasoned finding as to her credibility was necessary. Indeed, the respondent had submitted to his Honour that the plaintiff's credit was vital to the resolution of the issues raised in its submissions. In its absence it is not possible to explain the ellipses in his expression of his reasons; nor can we rectify the omission. This Division must decide the appeal on the basis of its own conclusions "save to the extent, if any, that the primary judge enjoys advantages that cannot be fully recaptured by the appellate court"[46]. In the absence of a video recording of the evidence we cannot recapture the advantages which assist findings of credibility, even if the transcript induces a surge of scepticism.

[33] In summary, the amounts awarded by his Honour were plainly affected by his key finding. That finding was substantially based upon an approach which, having regard to the tactic adopted by the defence, was not open in the absence of an adverse finding on the appellant's credibility. In some important respects his Honour's reasons do not sufficiently disclose what medical evidence he accepted and why, and why he did not fully accept the plaintiff's evidence regarding her symptoms. The combination of these matters means that his judgment must be set aside.

[34] Because of the importance of the appellant's credibility to the resolution of the case, we cannot make the assessment ourselves. There must be a further hearing; further findings must be made; and judgment must be entered in accordance with them. The question of further evidence is a matter for the parties. If they cannot agree it can be resolved by the judge who hears the matter. At the very least it will be necessary for the plaintiff to be further cross-examined if the respondent wishes to persist in the approach which it has taken. It would be most desirable for the further hearing to take place before the same judge. That is the respondent's position and I do not think that such a course would be unfair to the appellant. However the matter must abide the exigencies of listing in the Trial Division.

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46 *Anikin v Sierra* (2004) 79 ALJR 452; [2004] HCA 64.

[35] As to the appeal on costs I agree with Mullins J.

[36] I agree with the orders which her Honour proposes.

[37] **MULLINS J:** The appellant was successful in obtaining a judgment given on 9 June 2004 against the respondent in the sum of $330,668.39 for damages for injuries sustained by the appellant in a motor vehicle accident ("the accident") on 11 May 1998. Liability for the accident was not in issue at the trial.

[38] The appellant had just turned 38 years old when she was injured. At that time she was employed in the pharmaceutical industry with Merck Sharp and Dohme ("MSD"). She suffered a whiplash injury to her neck and an injury to her right shoulder in the accident. The appellant ceased working for MSD on 28 June 1998. On 16 August 1999 the appellant commenced as a territory manager with Stryker Australia Pty Ltd ("Stryker") and worked until 28 October 1999 as a sales representative marketing maxillo-facial implants. The appellant resumed on a part time basis in the second semester of 1999 a Masters degree in Business Administration that she had commenced in 1997 when working for MSD which she then completed on a full time basis during 2000. From 12 March 2001 until 19 December 2003 the appellant worked as a business consultant for a firm Mercuri Urval and from January 2004 until the trial worked as a part owner of another business consulting firm called Odin Consulting ("Odin").

[39] The respondent defended the appellant's claim on the basis that the appellant had exaggerated the effect which the injuries had on her and her ability to work and had misrepresented the reason for her leaving MSD as being related to the injuries she suffered in the accident.

[40] The learned trial judge made an express finding (at paragraph [6] of the reasons for judgment ("the reasons")) that it was not the accident which caused the appellant's departure from MSD:

> "It seems clear to me, however, that it was not her motor vehicle accident which precipitated her departure from the company but the accumulation of events associated with MSD management's perception of her work and her relations with some of her fellow employees. Whether that related to personality problems or jealousy or suspicion of her, rather than a failure to perform by her, seems to me to be not particularly relevant to my task because of her subsequent work history and demonstrated ability to perform work at a high level except in so far as she is affected by her residual physical complaints."

[41] It had been submitted on behalf of the respondent to the learned trial judge that the circumstances surrounding the appellant's departure from MSD were relevant to the appellant's credit in respect of her evidence about her injuries and their effect. The learned trial judge concluded (at paragraph [8] of the reasons):

> "I gained little advantage, however, in assessing what the true effect of her accident was on her from trying to resolve disputed questions of fact about her behaviour and qualities as an employee of MSD during the 18 months before the accident. In other words, I am not satisfied that I should treat the plaintiff as an habitual liar in respect of the evidence about the possibilities she had at work or about her

> continuing physical disabilities. She may have been a manipulative manager, may not have been wholly truthful with her fellow employees and may have misstated the reasons for her dismissal from MSD. There is, however, sufficient evidence of possible jealousy and rivalry affecting her treatment and of other employees who continue to think well of her to lead me to the conclusion that any resolution of those collateral factual issues is unlikely to throw much light on the principal issues here."

[42] In paragraph [10] of the reasons, the learned trial judge set out some of the appellant's evidence about her injuries in these terms:

> "Let me turn then to the plaintiff's complaints about her injuries. She says that she wakes up with pain everyday and that this pain also causes her sleeplessness at night. She equates the low level pain from which she suffers to a scale of 3 out of 10. She also complains of high level pain at level of 8 out of 10 which creates a sharp stabbing pain through her shoulder and takes her breath away. She also says that she suffers from chronic pain when she writes, with her right arm, at a level of about 6.5 to 7 out of 10. She described it as 'not sharp and stabbing it's just this really deep, insidious pain that is in my shoulder that goes up into my head'."

[43] The learned trial judge then proceeded to refer to some of the evidence of each of Drs Gillett, Tuffley and Cameron on their respective opinions and observations about the nature and effect of the appellant's injuries. The learned trial judge did not in the course of the reasons analyse the evidence of any other medical witnesses.

[44] The learned trial judge observed at paragraph [16] of the reasons:

> "My own observations of the plaintiff under cross examination over two days support the submission made by Mr Hanson QC on behalf of the defendant that she showed no outward signs of pain or fatigue, apart from 1 or 2 occasions on which she rubbed her shoulder, and no lapse in concentration. Most of the many doctors who gave evidence assessed her as having suffered a whole person impairment in the region of 5%."

[45] The learned trial judge found (at paragraph [17] of the reasons) that the appellant's shoulder injury contributed to her decision to leave the pharmaceutical industry, because she found difficulty in carrying around some of the equipment which she was required to demonstrate to medical practitioners whom she visited. The learned trial judge also expressly referred in paragraph [17] to the reasons for the appellant's change to working in the management field and that the appellant "claims to be limited to working up to 3 days a week instead of 5 because of her injuries".

[46] The key finding made by the learned trial judge on the limitations on the appellant's ability to work, as a result of the accident, were set out in paragraph [18] of the reasons:

> "On the evidence of Dr Cameron, which I accept, I do not believe that it is appropriate to attribute any significant limitations in her ability to sustain her current work to her accident. Dr Gillett's evidence to which I have already referred supports that approach. It

> seems to me that her continuing shoulder pain can be attributable to the accident but I do not believe, that it, by itself, would lead to a very significant decrease in her ability to work in the consulting role which she has now adopted and for which she is well qualified. I will make some allowance for that disability as I believe that it will have a limited effect on her ability to work from time to time."

[47] The learned trial judge considered that if the appellant had stayed in the pharmaceutical industry, there was not a high likelihood of her ascending to the position of a national sales manager, because of his assessment of the evidence of her last 18 months at MSD, and that she would have not been willing to work or live interstate after she formed the relationship with her partner early in 1998 which encouraged her to stay in Queensland. See paragraph [19] of the reasons.

[48] In respect of calculating past and future economic loss, the learned trial judge stated:

> "[20] It is impossible to be precise, on the findings I have made, in calculating her past and future economic loss. The approach submitted by the defendants' counsel was to assume that she would have obtained employment after leaving MSD by about October 1998 at a rate similar to what she earned with Stryker Australia to the time when she commenced working for Mercuri Urval in March 2001, less what she earned at Stryker Australia, leading to a figure of $116,250.00, which, they submitted, should be discounted significantly, by 30%, because she was able to complete her university degree during that time. There is some merit in that approach.
>
> [21] I believe that I should also take into account, however, the continuing disability in her shoulder and the effect that that would have had on her ability to work. Accordingly I assess her damages for past economic loss at $110,000.00. In assessing interest on that loss I will take into account the fact that she has been paid $48,044.30 through Social Security or WorkCover benefits.
>
> [22] Her damages for future economic loss I have assessed principally on the basis that she continues to have some shoulder pain which may inhibit her capacity to work from time to time. It is not possible to assess precisely the likely effect on her working hours but she is in highly paid employment which will increase the likely result. In the circumstances I assess her loss of future earning capacity as $75,000.00 including any component for the loss of future superannuation rights on the basis that she is likely to continue to be effectively self employed."

[49] The learned trial judge assessed the damages for pain, suffering and loss of amenities at $35,000 on the basis that the appellant had suffered a "whole person impairment" of about 5% (at paragraph [24] of the reasons). The learned trial judge apportioned $25,000 of the general damages to the period between the date of the accident and the date of the assessment of the damages.

The effect of the reasons

[50] In summary, the learned trial judge:

(a) found that the appellant suffered injuries to her neck and shoulder as a result of the accident;

(b) found that the accident did not cause the appellant to cease working for MSD;

(c) found that it was the appellant's shoulder injury, in particular, that contributed to the appellant's decision to leave the pharmaceutical industry;

(d) found that the appellant was not "an habitual liar" in respect of the evidence about the difficulties she had at work or about her continuing physical disabilities;

(e) found that at the time of the trial the appellant still suffered from continuing shoulder pain that was attributable to the accident;

(f) impliedly, found that the appellant's neck pain had resolved by the time of trial;

(g) found that the appellant had suffered a whole person impairment of 5%;

(h) found that there were no significant limitations attributable to the accident on the appellant's ability to sustain her current consulting work;

(i) found that past economic loss should be calculated by reference to lost income between October 1998 and March 2001 on the basis that the appellant's continuing disability in her shoulder had an effect on her ability to work during that period;

(j) impliedly, found that the appellant did not suffer any economic loss between March 2001 and the date of the trial;

(k) found that future economic loss should be assessed on the basis that the appellant continues to have some shoulder pain which may inhibit the appellant's capacity to work from time to time; and

(l) impliedly, rejected the appellant's evidence that she was limited to working 3 days each week instead of 5 days each week because of her injury sustained in the accident.

Grounds of appeal

[51] The grounds of appeal set out in the notice of appeal were that the learned trial judge erred in fact and in law in:

"(1) Failing to give any or any adequate reasons for the rejection of the evidence of Dr's (*sic*) Gillett, O'Callaghan, Campbell, White and Olsen;

(2) Finding, against the evidence and the weight of evidence, that the plaintiff did not suffer any significant limitations in her ability to sustain her past and current employment to the disabilities she suffered as a consequence of the subject accident;

(3) Failing to give any or any adequate reasons as to the assessment of damages for past and future economic loss;

(4) Failing to make any or any adequate findings or give any or any adequate reasons as to the cause of the plaintiff's ongoing symptomatology."

The trial

[52] In order to address the grounds of appeal, it is necessary to refer to some of the evidence in greater detail. The trial lasted 6 days in February 2004. Evidence was given over 5 days and there was 1 day for addresses. The appellant spent almost 2 days in giving evidence. The critical evidence given by her on the symptoms in her shoulder and neck from which she said she was suffering at the time of the trial and had been suffering for the previous 2 to 3 years was (at R63):

> "Firstly your right shoulder and your neck?-- Yes.
>
> How often do you have pain?-- Every day.
>
> How painful is it?-- It depends on what I've done the day before. My shoulder – I wake up with pain every day. I don't sleep all night, I wake up through the night with pain, because it doesn't matter whether I lie on my back or my side my shoulder starts to ache. Low level pain would be around, out of ten, a three. A high level pain, if I do something that's acute, like strumming the guitar the other night, I got sharp stabbing pain through my shoulder and I would put that about an eight, it takes your breath away. The chronic – the more chronic pain that I get when I start to do work with writing and that sort of stuff is probably around the six and a half/seven, but it's just chronic. It's not sharp and stabbing it's just this really deep, insidious pain that is in my shoulder that goes up into my head.
>
> Does the pain always go from your shoulder into your head?-- Yeah, it always goes from my shoulder into my head, so if I talk about having a headache it's actually a shoulder ache but my whole head, on this side of my head, is aching and throbbing and I find it hard to think.
>
> Does your neck hurt at the same time?-- It does hurt but you can feel – you can actually feel the point. It's a straight line from the back of my shoulder right up through my head, so it's not the actual neck bones themselves that are hurting, it's soft tissue on the right side of my neck.
>
> In any case, how often do you get these headaches?-- Every day. When my shoulder is bad my hip is also very painful.
>
> When you say you get the pain every day what – is it bad every day?-- Every day I take Panadol. I suppose it's bad. It's not – it's not excruciating the way it was unless I keep working or I keep pushing past – when the pain starts to increase I'm supposed to stop what I'm doing. That's what my physio told me to do. If I don't stop then the pain gets quite excruciating."

This is the evidence that is summarised in paragraph [10] of the reasons.

[53] The appellant gave evidence that she managed her pain, if she managed her workload, and she did that by controlling the numbers of hours and sort of work that she did (R66). She gave evidence that her capacity to work at the time of trial

compared to her pre-accident working capacity was about 60% to 65% (R67). While the appellant was working at Mercuri Urval in February 2003, she reduced her working week from 5 days to 3 days per week which reduced her package to 60% of what it was when she was working full time. In July 2003, the appellant increased her working week to 4 days per week, until she ceased working for Mercuri Urval. Her arrangement with her partners in Odin was that she would work 3 days per week and her income would be calculated accordingly. The appellant's potential taxable income from Odin, if she were able to work to full capacity, was estimated by one of her partners in Odin (Mr Dodd) to be $300,000 per annum. Business consulting was therefore a more remunerative form of employment for the appellant than working in the pharmaceutical industry.

[54] Ms Pamela Hall gave evidence of the observations she made of the appellant during the period when Ms Hall was employed as office manager of Mercuri Urval in Brisbane and personal assistant to the appellant between May 2001 and February 2003. Ms Hall saw the appellant on a daily basis and stated that she observed the appellant "constantly taking painkillers" and rubbing her right shoulder and neck and that the appellant's pain seemed to worsen in the last 6 to 8 months that Ms Hall was employed at Mercuri Urval.

[55] Mr Darryl Howe worked at the Brisbane office of Mercuri Urval between March and August 2001. When there was an increase in the work involving interviews for hours at a time, Mr Howe observed the appellant to be struggling at the end of the day, in the sense that she was constantly rubbing the area around her head and neck and appeared to have headaches.

[56] Mr Aaron Dodd worked on a number of occasions with the appellant at Mercuri Urval and is now one of her partners in Odin. He observed that if the appellant was interviewing for a long time, she had problems with her back, as she would take a break and say that she needed to walk and stretch her back. He estimated that this occurred on at least 6 occasions when they worked together at Mercuri Urval. He considered that the appellant was not as productive as he was during a day's work, because of the breaks she had to take.

[57] Medical witnesses who gave oral evidence included pain specialist Dr J P O'Callaghan, orthopaedic surgeons Dr P F R Duke, Dr G N Askin, Dr G E Gillett, Dr J C Tuffley and Dr David White, occupational physicians Dr J Olsen and Dr K Adam, occupational therapist Mr S A Hoey, psychologist Mr B M Johnston, neurologist Dr J Cameron, psychiatrist Dr A Byth and physician Dr T Myers.

[58] Dr Askin saw the appellant on 22 October 1998 at the request of her general medical practitioner. On examination Dr Askin noted restricted movement of the appellant's right shoulder due to pain and that the movements of her neck were restricted in all ranges. He diagnosed soft tissue injuries as a result of the accident.

[59] Dr Gillett who saw the appellant on one occasion on 2 November 1998 at the request of her solicitors for a medico-legal report diagnosed a musculo-ligamentous injury and capsulo-ligamentous injury involving the cervical spine and right shoulder girdle. On the basis of the subsequent reports from other medical specialists which reported on the appellant's continuing symptoms, Dr Gillett expressed the opinion when giving evidence that the appellant fell within the category of persons who did not get better following a whiplash injury. It was in

cross-examination that Dr Gillett made the statement that was referred to in paragraph [11] of the reasons to the effect that he could not see any reason why the appellant could not work 5 days per week at a desk job, although she would have some pain and discomfort associated with that. In re-examination, however, Dr Gillett agreed with the proposition that the appellant's ability to work a full week was dictated by her pain levels and stated (at R263 to R264):

> "Is her ability to work a full week dictated by her pain levels?—Yes. If you are a person with chronic pain and you have a task to do which you need to do, then at this level of impairment that I assessed and other people assessed you would be able to do that. But with the pain, that may impact upon your abilities in that work from time to time or impact upon your abilities outside that work. So some individuals it may be that for over all the management of their whole life, they will work three days a week and then do recreational/domestic pursuits. Or they might work five days a week and the other aspects are put on hold or other people do them for them. It's about managing your pain, that's the whole principle. If you have chronic pain, you need to manage it and modify. Now, you do things to accommodate it because you are going to have pain all the time."

[60] The appellant's general medical practitioner also referred her to Dr Duke. She was seen by Dr Duke on 20 November and 1 December 1998. Dr Duke diagnosed cervico brachial pain typical of cervical strain from a motor vehicle accident which gives neck stiffness and pain radiating out into the mid trapezius. He also diagnosed pain around the clavicle and shoulder pain. He explained when giving evidence that the pain that appeared to limit the appellant's movements was coming from an area between the shoulder and the neck.

[61] Dr Olsen saw the appellant on one occasion only on 31 March 1999 at the request of the appellant's solicitors. He diagnosed a moderately severe right brachial plexus injury and expressed the opinion that she remained fit for the range of activities that she was performing prior to the accident, but her main difficulty was dealing with the pain from the injury.

[62] Mr Johnston first assessed and psychologically tested the appellant on 25 March and 23 April 1999 at the request of the appellant's solicitors. The appellant then consulted Mr Johnston on 10 occasions between 5 August 1999 and 17 July 2000 for treatment. Mr Johnston then assessed and psychologically tested the appellant again on 27 August and 8 and 22 October 2002 for the purpose of a medico-legal report requested by the appellant's solicitors. By that stage Mr Johnston was of the opinion that the appellant was continuing to experience a mild to moderate level of emotional distress which would be best classified as an adjustment disorder with mixed anxiety and depressed mood of moderate severity and a pain disorder associated with both psychological factors and a general medical condition. He considered there was no evidence to suggest malingering or deliberate exaggeration of symptoms, but that there continued to be a slight impairment in her employability.

[63] When Mr Hoey assessed the appellant's functional capacities at the request of her solicitors on 1 June 2000, he was of the opinion that her mild physical restrictions and "severe somatic complaints" precluded her from commercial employment at

that stage, but that she should be able to return to the work in the clerical or sales field. He observed "a lot of muscle spasm and problems with her cervical spine". He considered the appellant was not dealing well with the extreme pain that she was experiencing.

[64] Dr Scott Campbell, a neurosurgeon, saw the appellant on one occasion on 2 December 2000 for the purpose of preparing a medico-legal report at the request of her solicitors. The appellant complained of persisting pain in the neck, right shoulder, right clavicle and right hip. On examination of the appellant's cervical spine, Dr Campbell noted a decreased range of movement by 30% in all directions and that the appellant experienced pain at the extremities of movement. He noted tenderness over the right paraspinal muscles, trapezius muscle and the shoulder capsule joint and examination of her right shoulder revealed decreased abduction and flexion to 90º. Dr Campbell diagnosed chronic soft tissue injuries to each of those areas. Dr Campbell was not required for cross-examination.

[65] Dr David White saw the appellant on 1 June 2001 for the purpose of a medico-legal report requested by her solicitors. He assessed the appellant as having 10% whole person impairment, as a consequence of the injury sustained to her cervical spine. He was of the opinion that the injury to her right shoulder resulted in a significant rotator cuff syndrome, amounting to a 20% whole right upper limb permanent impairment. He thought that the appellant was capable of doing an office job where there was freedom for her to move, but pain would be a limiting factor for her.

[66] Dr O'Callaghan anaesthetised the appellant's right shoulder and arm daily for 3 days from 28 April 2003 to enable her to be treated more aggressively by a physiotherapist. Despite the anaesthetic, Dr O'Callaghan observed that the appellant continued to be extremely tender over the neck region and in the region of her right scapula. On 2 May 2003 Dr O'Callaghan injected the tender muscle points in the region of the appellant's right scapula with Botox in order to relax or paralyse the tender areas in the muscle. When Dr O'Callaghan saw the appellant next on 19 November 2003, she reported that after the Botox wore off, her pain felt worse than prior to the Botox injection. Because the Botox injection temporarily relieved muscle spasm, Dr O'Callaghan was of the opinion that the appellant has myofascial pain arising from trigger points over the scapula. Dr O'Callaghan explained that myofascial pain meant muscle pain. Even though Dr O'Callaghan saw the appellant for the first time almost 5 years after the accident, on the basis that he had observed the appellant suffering muscle spasm and the appellant's response to the treatment he administered and on what the plaintiff had told him of her symptoms, he diagnosed that she had developed chronic pain as a result of the accident and that she was a person who fitted into the category of persons who suffer chronic pain for the rest of their life after a whiplash injury.

[67] Dr Cameron first saw the appellant on 25 January 1999 at the request of her general medical practitioner. He noted on examination that there was discomfort with right shoulder abduction and internal rotation, the appellant was tender over the right rotator cuff insertion and that neck movements were also mildly restricted, particularly in rotation. Dr Cameron diagnosed a severe soft tissue injury to the appellant's right shoulder and neck and that there was an element of acute cervical strain. He suggested an MRI scan which was performed on the appellant's neck on 1 February 1999 and was normal.

[68] Dr Cameron saw the appellant again on 24 February 1999 when he considered, on the basis of a physical examination and medical assessment, that her neck injury had largely resolved, but that she was still experiencing pain around the right shoulder.

[69] Dr Cameron saw the appellant again on 7 April 2002 at the request of the respondent's solicitors. On examination he noted that the appellant appeared to have restricted right shoulder movements in abduction, but that internal/external rotation were not restricted. He also considered that she had a full range of neck movements. He considered that she suffered a soft tissue injury, predominantly to the right shoulder, as a result of the accident and that her neck problems had resolved and the pain she was continuing to experience related to her shoulder problem. He could not find any evidence of neurological impairment and there was no evidence that she had suffered a brachial plexus injury or cervical root injury in the accident. He considered that the pain in the right shoulder region was orthopaedic in nature and would be better addressed by a specialist in that area.

[70] During cross examination, Dr Cameron was asked to respond to the suggestion that the appellant's pain was myofascial pain or cervicobrachial pain. He stated (at R281):

> "These are rubbish terms. It's just like saying it's a day outside. It means nothing. Myofacial (*sic*) means muscle and soft tissue pains. It tells you nothing about the pathology, the underlying mechanism going on or how it's manifested. Cervicobrachial pain just means neck and arm pains. It tells you nothing."

[71] Dr Tuffley saw the appellant on 26 August 1999 at the request of the respondent's solicitors for a medico-legal report. He diagnosed strain of the musculo-ligamentous supporting structures of the cervical spine with some referred pain into the right upper limb; mild soft tissue injury in the region of the right shoulder; and minor soft tissue injury in the right posterior iliac region. Dr Tuffley considered that there was no objective evidence of a significant cervical spine injury and there was some mild evidence of a right supraspinatus tendonitis syndrome that was not present in December 1998 when the assessment was made by Dr Duke. Dr Tuffley considered there was no objective evidence of an ongoing impairment in the function of the appellant's cervical spine and that he did not consider her to have any significant disability due to the small impairment she had in her neck and right shoulder region.

[72] Dr Tuffley was provided with subsequent medical reports and examined the appellant again on 24 January 2002. On examination there was a full active and passive range of motion of the appellant's cervical spine, the appellant was tender between the base of her neck and the superior angle of her right scapula, cervical region pain was aggravated by rotation, lateral flexion to the left and maximum forward flexion of the neck, there was full rotation and external rotation of the right shoulder and active and passive abduction of the right shoulder was possible only to 120º and of the left shoulder was possible to 150º before the appellant complained of pain radiating to the base of her neck. Dr Tuffley noted that on this occasion, unlike his assessment in 1999, there was some evidence of a small impairment of the function of the right shoulder. He was of the opinion that the appellant had sustained a small partial and permanent impairment in the region of her neck and right upper limb equivalent to a 5% impairment of the whole person. Dr Tuffley conceded in cross-examination (at R458) that a small number of people who sustain

a musculoligamentous injury to the cervical spine area do not improve and have long term symptoms and chronic pain. He pointed out that he did not find a lot of objective evidence to support the levels of pain that the appellant was claiming to experience.

[73] Dr Byth interviewed the appellant on 31 August 1999 for the purpose of a medico-legal report requested by the respondent's solicitors. He did not consider that the appellant's symptoms of anxiety and depression were severe enough to warrant a DSM-IV diagnosis, her complaints of mild anxiety and depression could be seen as a normal reaction to her physical injury in the accident and any incapacity from which she suffered was due to her physical injury, rather than psychological symptoms. Dr Byth also disagreed with Mr Johnston's diagnosis of a chronic pain disorder, as he considered that the appellant's complaints of pain were a normal reaction to her soft tissue injury. Dr Byth assessed the appellant again on 14 February 2002. He remained of the same opinion that he had expressed previously.

[74] Dr Myers saw the appellant on 29 September 1999 for the purpose of a medico-legal report requested by the respondent's solicitors. On examination Dr Myers noted that there was marked tenderness of the right shoulder joint with abduction being limited to 90º which resulted in some tingling in the ulnar nerve fingers. Examination of the appellant's neck revealed some tenderness of the local strap muscles due to muscle spasm. There was also some impairment of extension and rotation to the right. Dr Myers observed that although a full range of movement could be elicited passively, the extremes of movement caused some discomfort. Dr Myers diagnosed a soft tissue injury to the neck with improvements in the symptoms and soft tissue injury to the right shoulder. He noted that her shoulder symptoms still troubled the appellant after lifting or driving and prevented her from using her dominant right hand as much as she would like. He observed that the precise diagnosis of her shoulder pain remained uncertain.

[75] Dr Adam examined the appellant on 7 June 2000 for the purpose of a medico-legal report requested by the respondent's solicitors. Dr Adam was of the opinion that the appellant's disability appeared to have been prolonged and raised the possibility that her incapacity may have been extended by psychological factors or by the possible development of a fibromyalgia like syndrome. He was of the opinion that the appellant was capable of working, provided that she was not required to lift heavy objects or undertake prolonged uninterrupted driving.

[76] Although the appellant's solicitors obtained a medico-legal report dated 12 November 2002 from orthopaedic surgeon Dr Scott-Young, it was tendered at the trial by the respondent. The appellant was first reviewed by Dr Scott-Young on 10 November 1999, on referral from her general practitioner. Dr Scott-Young was of the opinion that the appellant had a whiplash injury to her neck and referred her for assessment to the Whiplash & Physical Diagnostic Clinic at the University of Queensland. He reviewed the appellant on 29 March 2000 with the report from the Whiplash Clinic. He further reviewed the appellant on 20 July 2000 and 21 February 2001. For the purpose of the medico-legal report, he examined the appellant on 20 September 2002. Dr Scott-Young expressed the opinion that the appellant was suffering from a whiplash injury to her cervical spine with a whole person impairment related to her cervicothoracic region of 5%. He expressed the opinion that the appellant's injuries sustained in the accident did not currently affect her ability to be employed and should not result in the need for early retirement.

Reasoning process

[77] It is appropriate to observe that it appears that the respondent was so focused on attacking the credit of the appellant arising out of the reasons that she gave on various occasions for why she left the employ of MSD and seeking adverse findings of credit against the appellant, in order to have the critical issues disposed of by the learned trial judge in favour of the respondent, the respondent did not assist the learned trial judge with any rational analysis of all the medical evidence in conjunction with the appellant's evidence relating to the critical issues. The respondent was so reliant on attacking the appellant's credit in a general sense, that the learned trial judge did not have the benefit of a cross-examination of the appellant directed to testing her evidence about the symptoms from which she said she was suffering in the period of 2 to 3 years prior to the trial and how that affected her capacity to work.

[78] It is apparent from the above summary of the evidence that the appellant's evidence about the symptoms from which she said she suffered at the time of trial and for the previous 2 to 3 years was supported to some degree by the evidence of Ms Hall, Mr Howe and Mr Dodd and by some aspects of the medical evidence, particularly of that given by Dr Gillett, Dr O'Callaghan, Dr White and Dr Campbell.

[79] The primary complaint made on behalf of the appellant on the hearing of the appeal was that the learned trial judge did not expose his reasoning for rejecting the appellant's evidence of the extent to which she had been and was disabled from performing her work as a business consultant and for rejecting the evidence that supported the appellant in this respect. This argument covered all 4 grounds of appeal.

[80] It is undisputed that a trial judge is obliged to provide reasons for making the relevant findings and conclusions and, where evidence has been rejected, to explain the reasons for so doing, in order to avoid any sense of grievance or injustice on the part of the party who has been adversely affected by the findings: *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430, 431, 443-444. See also *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 278-279, *Mirage Resorts Holdings Pty Ltd v Brellen Pty Ltd* [2003] QCA 579 at paragraph [57] and *Wiki v Atlantis Relocations (NSW) Pty Ltd* (2004) 60 NSWLR 127, 135-136.

[81] The learned trial judge identified the critical issues as being the extent of the appellant's physical disability and its effect on her ability to work full time (at paragraph [2] of the reasons) and reached a conclusion in relation to each of those matters: that she had a disability in her shoulder that "will have a limited effect on her ability to work from time to time" (at paragraph [18] of the reasons) and that therefore she was not limited to working 3 days per week instead of 5 days per week. In concluding that there was a disability in the appellant's shoulder which had a limited effect on her capacity to work, the learned trial judge did not make a specific finding on what was the nature of that disability and the symptoms by which it was manifested.

[82] In reaching those conclusions on the critical issues the learned trial judge made it clear that he accepted the evidence of Dr Cameron (at paragraph [18] of the reasons). It is not apparent, however, how reliance on the evidence of Dr Cameron

deals with the nature and extent of the symptoms in the appellant's shoulder at the date of trial and the effect of those symptoms on her ability to work as a business consultant, when Dr Cameron disavowed, quite properly, expressing an opinion on the pain in the appellant's right shoulder which he believed was orthopaedic in nature and therefore not properly within his expertise as a neurologist.

[83] To the extent that the learned trial judge appears to have relied on Dr Tuffley's evidence, as it is set out in paragraph [12] of the reasons, Dr Tuffley excluded the existence of objective evidence of a significant cervical spine injury, but conceded that the degenerative change in the appellant's supraspinatus tendon could occur from a soft tissue injury.

[84] The learned trial judge found support for Dr Cameron's evidence in one small aspect of Dr Gillett's evidence to which the learned trial judge referred in paragraph [11] of the reasons. That was the evidence that Dr Gillett gave under cross-examination where he conceded that the appellant should be able to work 5 days per week at a desk job, although she would have some pain and discomfort associated with that. There was no attempt in the reasons, however, to reconcile that aspect of Dr Gillett's evidence with the balance of his evidence and the evidence given by the appellant and others of the effect on her of pain from which she suffered whilst sitting at her desk for lengthy periods.

[85] The learned trial judge was invited by the respondent to act on the appellant's "apparent lack of discomfort in the witness box". An express submission was made by the respondent in respect of the appellant's degree of disability to the effect that the appellant spent the bulk of 2 days under cross-examination during which she showed no outward signs of pain or fatigue and no lapse in concentration. In paragraphs [16] of the reasons the learned trial judge referred to the fact that his observations of the appellant under cross-examination accorded with the submission made on behalf of the respondent. It does not appear that the substance of these observations which related to a matter in issue were put to the appellant. Although referring to them, the learned trial judge did not state in the reasons how, if at all, he relied on his observations of the appellant in reaching his conclusions on the critical issues.

[86] The learned trial judge did not explain why he had not relied on any of the other medical evidence that dealt with the relevant issues or why he preferred the evidence of Drs Cameron and Tuffley and one aspect of Dr Gillett's evidence to the exclusion of all the other medical evidence. There may very well be good reason why the learned trial judge was not disposed to accept the medical evidence that could be treated as supporting in some respects the appellant's own evidence of the pain from which she said she was continuing to suffer and how she said it had disabled her from working full time as a business consultant. It may be that the learned trial judge did not consider much of the medical evidence relied upon by the appellant to be of relevance in dealing with the critical issue of whether the pain described by the appellant precluded her from working on a full time basis as a business consultant. It may be that the learned trial judge did not consider that medical opinion based on examinations of the appellant in 1998 or 1999 was probative of the appellant's symptoms in the period of 2 to 3 years prior to the trial. It may be that the learned trial judge did not accept the appellant's evidence of the extent of the pain from which the appellant described herself as suffering in the 2 to 3 years prior to the trial and that the medical opinions to the extent that they were

based on the appellant's description of her pain were not helpful. The problem is that on the basis of what is disclosed in the reasons, it is a matter of speculation as to how and why the learned trial judge disposed of the appellant's own evidence on these issues and that which supported her evidence.

[87] It follows that there must exist on the part of the appellant that justifiable sense of grievance about the reasoning of the learned trial judge on the critical issues which gives rise to a miscarriage of justice and must result in the appeal being allowed.

[88] If the appeal were to be allowed and the judgment of the learned trial judge set aside, it was suggested on behalf of the appellant that either the Court of Appeal could assess damages or that a new trial be ordered. In view of the lack of specific findings of the learned trial judge on the nature and extent of the appellant's symptoms in the period of 2 to 3 years prior to trial and the failure to expose the reasoning for the conclusions that the learned trial judge did reach, it is necessary that there be a new trial.

[89] It is therefore not appropriate to deal with the detailed arguments that were addressed on the appeal in respect of the errors alleged in the assessment for past and future economic loss and damages for pain, suffering and loss of amenities.

[90] It was canvassed in a superficial way on the hearing of the appeal, as to whether it was appropriate that the new trial taken place before the learned trial judge. There were some reasons advanced that would justify the new trial being heard by another judge. There is nothing, however, to prevent the parties from reaching an agreement on the basis on which the new trial should be conducted or limiting the issues for the new trial. Such a course may be facilitated by the conduct of the new trial before the learned trial judge. That will be a matter better disposed of, when arrangements are being made in the Trial Division for the listing of the new trial.

[91] As the appeal has been successful, the appellant in the normal course should expect an order in her favour for the costs of the appeal. There is also the matter of the costs of the trial before the learned trial judge. The respondent foreshadowed that it wished to make an application for an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973 (Qld). The appellant also foreshadowed that she wished to make a submission that the court had the power to deal with the costs of the first trial.

[92] In view of what has been foreshadowed by both parties, as to the nature of the further submissions which they would wish to make in respect of costs orders, as a result of the appeal being allowed, leave should be given to each party to make those submissions after publication of the reasons for judgment.

Appeal on costs

[93] After the learned trial judge delivered the reasons and gave judgment for the appellant, there was a subsequent hearing in respect of the appropriate costs orders. Those costs orders were made on 8 September 2004. Because the notice of appeal in respect of the judgment had been filed prior to the date of the costs orders, the appellant applied to the learned trial judge for leave to appeal from the decision as to costs made on 8 September 2004, in order to agitate a specific ground of appeal in respect of those costs orders that was independent of the outcome of the appeal in respect of the substantive judgment. That leave was given on 22 September 2004

and the question of the costs of the application to obtain that leave was reserved to the Court of Appeal.

[94] At the commencement of the hearing of the appeal, the court was informed that the appellant was not pursuing the appeal against the costs order independently of the appeal against the substantive judgment. It follows that Appeal No 8644 of 2004 should be dismissed. It was argued on behalf of the appellant that the appellant was prejudiced by the timing of the costs orders and forced to agitate a separate appeal in relation to costs. It was submitted that if the point that was foreshadowed in the outline relating to the appeal against the costs orders had been able to be agitated on the hearing of the appeal against the substantive judgment, there may not have been separate costs consequences for the appellant in respect of that argument.

[95] It is correct that the making of the costs orders, after the appeal against the judgment had been filed, resulted in the second appeal. It is more relevant in determining the question of the costs of the second appeal, however, that the separate appeal instituted in respect of the orders for costs based on a ground unrelated to the substantive judgment has not been pursued. The respondent should therefore have the costs of that appeal.

[96] It is also necessary to deal with the question of the reserved costs in respect of the application to obtain the leave to appeal against the costs orders. As the appellant has abandoned that appeal, she should pay the costs of obtaining the leave for that appeal.

Orders

[97] The following orders should be made:

1. The appeal in Appeal No 5840 of 2004 is allowed.
2. The judgment in favour of the appellant given on 9 June 2004 is set aside.
3. The orders for costs made on 8 September 2004 are set aside.
4. The proceeding is remitted to the Trial Division for a new trial.
5. Each party is given leave to make written submissions with respect to costs orders in respect of Appeal No 5840 of 2004 and the order for costs in respect of the trial of the proceeding that took place in February 2004 within 10 days of the publication of the reasons for judgment.
6. The appeal in Appeal No 8644 of 2004 is dismissed.
7. The appellant must pay the respondent's costs of Appeal No 8644 of 2004 and the costs of the application to obtain leave to appeal from the orders for costs made on 8 September 2004 to be assessed.