SUPREME COURT OF QUEENSLAND

CITATION:	*Young v Bayliss & Anor* [2005] QCA 445
PARTIES:	**RHONDA GAYE YOUNG** (plaintiff/appellant) **v** **KYM BAYLISS** (first defendant/first respondent) **SUNCORP METWAY INSURANCE LIMITED** ACN 075 695 966 (second defendant/second respondent)
FILE NO/S:	Appeal No 5292 of 2005 SC No 10783 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	7 November 2005
JUDGES:	Williams and Jerrard JJA and Muir J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed** **2. Appellant to pay the respondents' costs of and incidental to the appeal, to be assessed on the standard basis**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – REMOTENESS AND CAUSATION – PROOF OF CAUSATION – appellant brought personal injuries claim arising out of a motor vehicle accident with the first respondent in February 2001 – appellant had sustained a thoracic spine fracture in a previous motor vehicle accident in May 2000 – orthopaedic surgeon gave a written opinion that a separate fracture of the thoracic spine was sustained in the February 2001 accident – in cross-examination surgeon conceded there was a possibility that the appellant's thoracic spinal injuries had been solely caused by the May 2000 accident – judge found that surgeon had resiled from his written opinion – judge used this finding along with other evidence to support a conclusion that the appellant had not established on the balance of probabilities that the

February 2001 accident caused more than temporary soft tissue aggravation – whether judge erred in his findings or conclusion as to causation

Motor Accident Insurance Act 1994 (Qld), s 55F

Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1, cited
Girlock (Sales) Pty Ltd v Hurrell (1982) 149 CLR 155, cited
Murray v Kickmaier [1979] 1 NSWLR 414, cited

COUNSEL: G R Mullins for the appellant
P V Ambrose SC, with M P Kent, for the respondents

SOLICITORS: K M Splatt & Associates for the appellant
Jensen McConaghy for the respondents

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Jerrard JA and I agree with all that he has said therein. However, I would record, more by way of emphasis, some matters which have led me to conclude that (even if there was some fracture to the end-plate of T-7 occasioned in the accident of 20 February 2001) the quantum as assessed by the learned judge at first instance was appropriate.

[2] When the appellant was examined by Dr Sellbach in the emergency department of the Royal Brisbane Hospital about three hours after the accident on 20 February 2001 she complained of "mild to moderate tenderness in the cervical spine at C2-3" but had a "good painless range of movement". The appellant did not complain of neck pain and the doctor's examination revealed no neurological symptoms, and no head injury.

[3] A week or so later when seen by Dr Lindsay at the pain clinic at the Royal Brisbane Hospital the appellant gave an account of "constant and intense pain beginning 27 May 2000". The appellant then made no complaint of any increase, or difference, in pain level in consequence of the incident on 20 February 2001.

[4] On 8 January 2002 the appellant wrote to her general practitioner Dr Jhinku seeking information from him to support her claim for damages arising out of the accident on 27 May 2000 in the United States of America. Relevantly she said in that letter:

> "Due to this injury, and the pain I have been in now for nearly 2 years, since the accident in the USA on the 27th May 2000, I am approaching you in respect to obtaining certificates or statements of disability. To be dated back to the accident in the USA, 27th May 2000. I need these statements to state my inability to work, outlining the following reasons:
> The extreme pain I have been in that has been constant and now even worse since May 27, 2000.
> The instability of the injuries; and the extent of them not totally clear until recently.
> The pain killers I have been on, and how some of them have been of a nature in which one made me sick, and also some times disorientated.
> . . .

> Basically I need these statements/certificates to state my total inability to work since I was first injured, May 27, 2000. It will be nearly impossible for me now to get any kind a note or certificate from the USA, as I was being treated by the Naval Hospital in San Diego . . .
>
> . . .
>
> It is very important that these requested di[s]ability statements state the date back to this time, and include all the reasons why I have been unfit to work."

[5] On 14 January 2002 she also wrote a letter to Dr Day, the orthopaedic surgeon, whose evidence is discussed at some length in the reasons for judgment of Jerrard JA. Relevantly in that letter she said:

> "I am writing to you today in reference to the request for a disability certificate/statement, due to the injuries to my vertebrae bones of T7 and 2 x T8, sustained on the 27th May 2000, in San Diego, USA.
>
> . . .
>
> My life has been completely ripped apart because of this accident, that was the fault of an unin[s]ured motorist, and it is now nearly 2 years later and I have to live with pain, and adjust my life, and my future employment aspirations because of this, and I just need to clean up my past, debts and all . . ."

[6] Given the whole of the evidence the learned judge at first instance was justified in concluding that in the accident of February 2001 the appellant sustained a temporary soft-tissue aggravation of her back condition which would have been acute for about four weeks, and after that would have diminished until after another four weeks she would have reverted to her condition immediately prior to that accident. But even if one added in some fracture to the end-plate of T-7 that caused no exacerbation of symptoms already present, the evidence did not establish it would have any long term consequences for the appellant.

[7] The learned judge at first instance was also justified on the evidence in concluding that the appellant had not established that she was suffering from eczema as a result of the accident of February 2001. The learned judge at first instance, particularly given the evidence of Dr Chalk, a psychiatrist, was clearly entitled to conclude that the appellant had been "psychiatrically symptomatic" over a lengthy period of time that pre-dated the collision of February 2001.

[8] It follows that the learned judge at first instance was justified in concluding that there was "no evidence that the component of the plaintiff's mental condition attributable to the collision of 20 February 2001, or any of it, has prevented the plaintiff using her remaining earning capacity".

[9] All of those considerations support the conclusion reached by Jerrard JA that the appeal should be dismissed and the appellant ordered to pay the respondents' costs of and incidental to the appeal assessed on the standard basis.

[10] **JERRARD JA:** This appeal is in proceedings for damages for personal injuries brought in this Court against the respondents, arising out of a motor vehicle accident in Brisbane on 20 February 2001. By orders made on 3 June 2005 Ms Young got judgment against the second respondent for the amount of $31,142.91, a modest

sum when compared with the amount sought for her by her counsel during submissions at the trial, $493,622.43. The orders made on 3 June 2005 reflect costs consequences for Ms Young under s 55F of the *Motor Accident Insurance Act* 1994 (Qld). Her grounds of appeal claim error by the learned trial judge, in essence, by the finding that Ms Young had not established that it was more probable than not that the collision in February 2001 was the cause of more than temporary soft tissue aggravation, and in assessing damages accordingly.

[11] The appellant's written outline describes the major issue at the trial being whether Ms Young had sustained injuries to her thoracic spine in the accident on 20 February 2001, or whether those were caused in an earlier accident in the USA on 27 May 2000. Ms Young's case at the trial depended significantly on the opinion of an orthopaedic surgeon, Dr Day, the only expert in orthopaedics called at the trial. Dr Day's written opinion prior to the trial was that there were two separate thoracic spine fractures occurring as a result of two separate injuries, that a radiological abnormality had been demonstrated in the body of T-8 following the USA accident on 27 May 2000, and that there was little doubt that a (separate) fracture of the seventh thoracic vertebrae was sustained in the motor vehicle accident on 20 February 2001. That second fracture at T-7 had resulted, in Dr Day's opinion, in a whole person impairment of between 5% and 7% when assessed with knowledge of the T-8 fractures, permanent in nature.

[12] The learned trial judge wrote that had Dr Day's opinion and assessment remained as set out in his most recent report prior to the trial, that evidence, being the only evidence concerning causation of the plaintiff's condition, would have supported her case that she suffered a severe aggravation of her condition in the collision of February 2001. The aggravation referred to would be the fracture at T-7 adjacent to the abnormality at T-8, that being a superior end-plate infraction, itself giving rise (if assessed separately and alone) to a permanent whole body impairment of between 5% and 8%. However, the learned trial judge was satisfied that Dr Day had considerably modified his assessment, when cross-examined by senior counsel for the respondents. The final question at the end of a lengthy passage of cross-examination on the issue was in these terms:

> "What I am getting at is this. In this case it is certainly possible that the injuries that we can see at T-8 and T-7 may indeed all have been caused in the May 2000 accident? – That is – yeah, that's a hypothesis that, it is impossible to say either way, isn't it."

[13] The learned trial judge concluded that Dr Day had resiled from his previous opinion by admitting there were two possible explanations for the condition of the plaintiff's spine, one favourable to her case and the other not; and that since Dr Day's opinion was the only expert evidence on the cause of the plaintiff's back condition, it was not possible to be satisfied that it was more probable than not that the collision in February 2001 was the cause of any more than temporary soft tissue aggravation. That conclusion is the one principally under attack on the appeal. Ms Young's counsel argued that the learned judge had relied for the conclusion only on the quoted portion of cross-examination, and erred in doing so and in reading so much into it. It was argued that mere recognition of another possible cause of the injury to T-7, as a hypothesis, did not mean Ms Young had failed to establish her case on the balance of probabilities, in the absence of evidence that that second possibility

was an equal probability. Her counsel referred to the statement by Reynolds JA in *Murray v Kickmaier*[1] that:

> "I would only say for myself that, once it is conceded that the appropriate standard of proof in a case such as this is proof of the balance of probabilities, that is a standard that allows of the co-existence of possibilities. The submission which has been made is, in effect, a denial of what is implicit in that concession, and amounts to an assertion that the criminal onus applies, when clearly it does not."

[14] That case was concerned with proof of parenthood in proceedings under the *Maintenance Act* 1964 (NSW). The flavour of the reasoning is better expressed in the remarks by Samuels JA[2] that:

> "In the present case, the learned judge appears to have taken into consideration the possibility of the other man's paternity but, nonetheless, decided that, on the balance of probabilities, the defendant (the present appellant) was responsible. That appears to accord with perfectly proper reasoning."

That was not a case of possibilities equally probable.

[15] The evidence supporting a conclusion that it was not possible to be satisfied that it was more probable than not that the February 2001 collision caused a bony injury to Ms Young's thoracic spine, that being her chief complaint, consisted of a good deal more than Dr Day's acknowledgement of the possibility of the May 2000 accident being the cause. A number of those other matters had been drawn to Dr Day's attention in the cross-examination leading up to the quoted question and answer. In both the February 2001 and May 2000 collisions, a motor vehicle the plaintiff was driving was hit from behind by another vehicle, when hers was stationary. The evidence before the learned trial judge included evidence:

- that the impact in the May 2000 collision was greater than that in the February 2001 collision, and that Ms Young described the first collision as a huge bump in which she had her neck snap forward[3] and her chest came into contact with the steering wheel of her vehicle;
- that from that collision she suffered pain in the back and neck, was found on examination to have cervical strain and chest-wall contusion, and painkilling drugs were prescribed;
- the pain persisted, became unremitting, and she became confused and disorientated by painkillers;
- on 18 October 2000 she was given a referral to a pain clinic by a doctor in San Diego. The doctor's reasons for doing that were recorded as complaints of "chronic pain…presently on multiple medications";[4]

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1 [1979] 1 NSWLR 414 at 416

2 At NSWLR 415

3 To a doctor at the Naval Medical Centre, San Diego, USA; her then husband was in the US Navy

4 AR 524

- on or about 7 December 2000 Ms Young took an overdose of medicine prescribed, or available, for pain relief; she had developed an addiction to it. On 13 December 2000 she returned to Australia;

- on 28 December 2000 Ms Young, who was pregnant, consulted a Dr Bretz, an Obstetrician and Gynaecologist at the Royal Women's Hospital in Brisbane and told Dr Bretz that her back pain had been unchanged since May 2000 despite the drugs she had been taking. That same day, Dr Bretz referred her to the Royal Brisbane Hospital ("RBH") Pain Clinic for management of her back pain, listing the many analgesics she had taken. Dr Bretz recorded a description of "Back pain unchanged since May 2000"[5] and which had been uncontrolled by the listed analgesics;

- on 16 January 2001, at the RBH Pain Clinic, Ms Young told a Dr Kate Sugars and a Dr Linnane, that she had "Ongoing chronic back pain from motor vehicle accident…significant pain impairing her employment."[6] On 18 January 2001 she went back to the United States, returning to Queensland on 19 February 2001, the day before the accident;

- around 26 February 2001, after the second collision the subject of the litigation, Ms Young attended a Dr Lindsay at the RBH Pain Clinic, as a result of Dr Bretz's referral of 28 December 2000. Dr Lindsay did not record anything regarding the second collision in terms of symptoms, although she was told of both accidents, and Ms Young gave that doctor an account of constant and intense mid back pain since 27 May 2000;

- on 8 January 2002 Ms Young wrote to a Dr Jhinku, describing extreme pain which she had been in that had been constant, and "now even worse",[7] since 27 May 2000; that letter made no reference to the February 2001 accident. The purpose of the letter was to get a certification from that doctor (her GP) of ongoing disability since 27 May 2000;

- in a letter dated 14 January 2002 to Dr Day, written for the same purpose, Ms Young wrote that her life had been "completely ripped apart" as a result of the accident of 27 May 2000. Her letter to Dr Day, who of course knew of the February 2001 accident, did not suggest that accident was a source of her constant pain;

- her answers, dated May 2002, to interrogatories administered in litigation about the USA collision clearly attributed fractures of both the T-8 and T-7 vertebrae to the May 2000 collision, as well as loss of a capacity to continue modelling;

- documents obtained from Ms Young's employers in 2000, concerning her earnings that year after the 2000 collision, bore the notations by her "This was a permanent position in which I couldn't continue due to pain/injury/medical obligations due to these", and "Due to pain/painkillers I could not continue this position". (Those statements referred to the result of the collision in 2000.)

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5 AR 614
6 AR 642
7 AR 525

[16] The matters raised with Dr Day in cross-examination, which he was asked to accept,[8] included that as a result of the May 2000 accident:

- Ms Young lost her capacity to continue her previous employment as a model;
- was in chronic pain;
- (because) prescribed painkilling medication did not give her any relief;
- nor did physiotherapy, nor the use of a Tens machine;
- (and so) she was given a referral to a pain clinic because the medication was not giving her relief;
- and (that) all of the above had occurred in the USA;
- where she overdosed, on or about 7 December 2000, on medication for pain relief to which she had become addicted;
- that as at the date of the February 2001 accident Ms Young was still significantly disabled from the May 2000 accident, since she had a referral at that time to the pain clinic at the RBH;
- it was very difficult to understand exactly what part of the thoracic spine may have been injured in the May 2000 accident, relying on the radiological reports from the USA, because Dr Day did not know the type of machine being used or the technique being applied.

[17] Those matters were all established with Dr Day before the respondents' senior counsel asked him the question quoted earlier. In context, the question invited the doctor to accept that Ms Young's history of pain and prescription of medication after the May 2000 accident, and the limited radiological evidence, made it possible that the injuries at T-8 and T-7 might all have been caused in the first accident; and the doctor agreed with that suggestion. The only basis on which the doctor could sensibly have done otherwise would be by an answer that relied on the matter described in his evidence-in-chief as his reason for the opinion that there was little doubt that fracture of the T-7 was sustained in the second accident, namely that that fracture looked acute on a CT scan of the thoracic spine on 20 August 2001. The cross-examination did not directly challenge his evidence-in-chief that the T-7 fracture looked acute on either that CT scan, or an MRI done on 8 November 2001; nor that that was why there was little doubt that the T-7 fracture was sustained in the second accident.

[18] The respondent relied also on the following evidence to suggest there was uncertainty or ambiguity about the location of fractures of the thoracic spine before February 2001:

- a reference in an examination at the San Diego Naval Medical Centre on 13 August 2000, recording "Still the same. Stabbing in T-7 level in back";[9]

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8 These matters were asserted in the plaintiff's evidence, or by her to medical practitioners

9 AR 413

- a radiological examination on 18 July 2000 which recorded that Ms Young was "…quite tender over the spine from T-7 up to T-1";[10]

- a radiological examination report dated 17 August 2000 that recorded Ms Young describing "persistent pain about t8 10 weeks post mva";[11]

- Dr Day's report of 12 February 2002, which referred to radiology of the thoracic spine following the United States accident as demonstrating "what appeared to be" a T-8 compression fracture;

- Dr Day's letter of 19 February 2002 (to Ms Young), which recorded that when first seen on 27 August 2001 Dr Day had noted severe right arterial chest pain "possibly" from a right T-7 or a T-8 nerve root problem.

[19] After her overdose on painkilling medication there had been a period of perhaps two and a half months in which she had medicated herself with aspirin and mersyndol. She was also prescribed, or taking, zoloft. She was five months pregnant at the time of the February 2001 collision, and continuing consumption of pain killing medication at her 2000 level was contra-indicated.

[20] Mr G Mullins, counsel for the appellant, conceded early in the appeal hearing that the radiological evidence, the history of Ms Young's experience of pain, and the quoted answer in cross-examination given by Dr Day, considered together, would have justified a finding by the learned trial judge that Ms Young had not proved her claim for damages. Nevertheless, Mr Mullins argued, the learned judge had erred in reasoning as follows:

> "[20] Since Dr Day resiled from his previous opinion by admitting there were two possible explanations for the condition of the plaintiff's spine one favourable to her case and the other not, and since his was the only expert evidence on the cause of the plaintiff's back condition, it is not possible to be satisfied that it is more probable than not that the collision in February 2001 was the cause of more than a temporary soft-tissue aggravation which was conceded by the defendants. That aggravation would have been acute for about four weeks and after that would have diminished until after another four weeks she would have been able to resume normal activity…"

[21] Mr Mullins contended that Dr Day had not resiled from his previous opinion, but I respectfully disagree. I consider it unlikely Ms Young would have brought a case for judgment if Dr Day's written opinions prior to the trial had advised that it was impossible to say whether Ms Young had suffered two separate thoracic spine fractures as a result of two separate injuries. That latter, pre-trial, opinion was quite correctly described by the learned trial judge as one that supported the plaintiff's case that she had suffered a severe aggravation of her existing condition in the collision of February 2001. I agree with the learned trial judge that Dr Day resiled from that in cross-examination.

[22] Acknowledging that Dr Day did so resile, I confess I do not quite understand why he did. The matters put to him by the cross-examiner, and the evidence described in

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10 AR 441

11 AR 443

this judgment, justify a finding that the February 2001 accident had very few, if any, consequences for Ms Young, judged by her own descriptions of her condition before and after it. But none of what was put to Dr Young in cross-examination could challenge his opinion that the T-7 fracture looked acute to him (on the August 2001 CT scan and November 2001 MRI scan), and his further opinion that for that reason there was little doubt that the T-7 fracture was sustained in the second accident. The cross-examination was a skilful flanking attack on those opinions, but that was all. Nevertheless, there was no re-examination on the point, so Ms Young's case was no better than an argument that the learned judge should overlook, ignore, or go behind Dr Day's evidence in cross-examination.

[23] That argument would be that the defendant had not met the basis upon which Dr Day had expressed his conclusion supporting Ms Young's case, namely that her T-7 was fractured in the February 2001 accident, and that she was entitled to a finding that had happened, there being no radiological evidence showing a T-7 fracture before February 2001 and an unchallenged opinion after that date that its appearance left little doubt that it happened then. But a court cannot overlook evidence apparently rebutting or defeating a plaintiff's claim, particularly when the plaintiff could have explained away that evidence, but did not. While I consider it tempting to go behind Dr Day's answer in cross-examination, on the basis that it contained an unjustified concession, this Court is in no better position to do that than the trial judge was. Without any further evidence in re-examination, there are only competing possibilities[12] at best as to whether the evidence established a T-7 fracture in February 2001.

[24] In any event, even granting the conclusion in Ms Young's favour of a T-7 fracture in February 2001 does not alter the position that the defendants did otherwise meet the plaintiff's case as to damages, by demonstrating that from her own out of court descriptions, the consequences of the May 2000 event had continued in her life unabated before and after February 2001. Whether or not the T-7 was fractured in the February 2001 accident, the conclusion was open that the consequences of the fracture of the T-8 in May 2000 would have caused Ms Young the same degree of ongoing pain and disability she had suffered since 20 February 2001, had there been no collision on that date.

[25] The respondents conceded that this Court might uphold the appeal and re-assess the general damages for pain and suffering, by reason of a conclusion that the plaintiff had established a fracture of T-7. It appeared common ground on the appeal that if that was all the evidence established, and if the plaintiff otherwise failed to establish any significant sequelae of that injury, it would be appropriate to allow her damages for pain and suffering extending perhaps to three years from the date of the accident. Ms Young was awarded $20,000 for past pain, suffering, and loss of amenities by the learned judge, consisting of damages for temporary soft tissue aggravation of the pre-existing thoracic spine injury, and for aggravation of her mental condition. I would not increase the award for general damages.

[26] Ms Young's grounds of appeal also complain of an independent error by the learned trial judge, in not allowing damages for economic loss in March and April 2001, despite a finding that there was an impairment of her earning capacity in that period.

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12 *Girlock (Sales) Pty Ltd v Hurrell* (1982) 149 CLR 155 at 161, citing from the decision in *Bradshaw v McEwans Pty Ltd*, now reported at (1951) 217 ALR 1

The judgment reflects a further finding, namely that there was no paid work available to the plaintiff in that short period, and that while the February 2001 accident probably had affected her earning capacity to some degree at that time, the judge was not satisfied that she would have obtained employment then. Her daughter Teah was born on 19 June 2001. I note the appellant's counsel does not challenge the other findings by the learned trial judge about earning capacity, including that while there was some impairment of earning capacity in 2002 that was attributable to the continuing effects of the collision of 27 May 2000; in those circumstances the appellant has not shown error by the learned judge in assessing past economic loss.

[27] I would accordingly dismiss the appeal and order that the appellant pay the respondent's costs of and incidental to the appeal, to be assessed on the standard basis.

[28] **MUIR J:** I am in general agreement with the reasons of Jerrard JA and agree with the orders he proposes. I desire, however, to give some additional reasons of my own.

The appellant's injuries

[29] The appellant, who was born on 8 January 1972, was injured in a motor vehicle accident on 27 May 2000 in the United States. As a consequence of that accident, she suffered pain in the back and neck and, on admission to a hospital in San Diego, was found to have cervical strain and chest wall contusion. That injury caused the appellant persistent pain for which the appellant resorted to pain relief medication. On 28 December 2000, the appellant, who was then pregnant, informed her obstetrician, Dr Bretz that her back pain had been unchanged since May 2000 despite her resort to pain relieving drugs. He referred her to a pain clinic for pain management.

[30] On 20 February 2001, the appellant was injured in the accident the subject of these proceedings. She was admitted to the emergency department of the Royal Brisbane Hospital complaining of abdominal and back pain. Dr Sellbach, who examined her, detected no neurological symptoms, head injuries or loss of consciousness. She did detect some mild to moderate tenderness in the cervical spine at C2-3 and concluded that it was unlikely that the plaintiff had suffered any bony injury and that it was more likely that her pain was the result of soft tissue injury at approximately the same site as the injury suffered in May 2000.

Dr Day's reports

[31] Dr Day, the only orthopaedic surgeon called to give evidence, was the appellant's treating surgeon at the Royal Brisbane Hospital's spine clinic.

[32] In a letter to the appellant dated 12 February 2002, he advised:

> "The information that we have from the United States is that you sustained an injury to your thoracic spine on 27.05.00. Radiology of your thoracic spine following this demonstrated what appeared to be a T8 compression fracture.
> A nuclear medicine scan dated 17.08.00 demonstrated no increase in uptake in Technetium 99 M and the findings were that the fracture was not recent. The reason they say this was that the scan postdated

> your motor vehicle accident by 10 weeks. The result of the bone scan is that it has demonstrated that any bone injury probably did not occur in the year 2000.
> You subsequently had another motor vehicle accident in February 2002. It appears that you were significantly disabled at this time as you were being seen through the Pain Clinic at the Royal Brisbane Hospital."

[33] On 19 February 2002, Dr Day wrote to the appellant advising:

> "**ORTHOPAEDIC EVALUATION:**
> When first seen on 27.8.01, I noted severe right anterior chest pain, possibly from a right T7 or a T8 nerve root problem involving radicular pain in the segmental nerve root.
> **TREATMENT**
> MRI scan of the thoracic spine was performed on 8.11.01 and failed to demonstrate any disc protrusion or nerve root compression in the thoracic spine. An endplate irregularity at T8 was noted."

[34] In a report prepared for the appellant's solicitors dated 8 October 2003, he gave the opinion that:

> "[The appellant] appears to have suffered two separate thoracic spine fractures as a result of two separate injuries.
> The first injury occurred in the USA in 2000.
> The second injury occurred in February 2001 in Australia."

[35] Dr Day concluded in his report dated 7 May 2004, prepared for the appellant's then solicitors:

> "A radiological abnormality had been demonstrated in the body of T8 following the motor vehicle accident in the United States on 27.5.2000.
> Radiological abnormalities were demonstrated in the bodies of T7 and T8 following the motor vehicle accident in Australia on 20.2.2001. The abnormalities in the end plates of the vertebral bodies left minor deformity of the vertebrae.
> *There is little doubt that a fracture of the 7th thoracic vertebra was sustained in the motor vehicle accident on 20.2.2001*. Whether a second fracture was sustained in the body of T8 in the same motor vehicle accident is immaterial as an abnormality had already been demonstrated in that vertebral body and the end result of the abnormalities is that there was no increase in deformity or wedging of the vertebral body and therefore no demonstrable increase in impairment.
> **IMPAIRMENT ASSESSMENT**
> *The abnormality demonstrated in the body of T8 has been attributed to an incident which occurred prior to 20.2.2001*." (emphasis added)

Dr Day's oral evidence-in-chief

[36] In evidence-in-chief Dr Day was referred to his 20 February 2001 report. He said he could not recall having access to "the original radiology from the United States".

[37] When asked the reason for his observation that: "There is little doubt that a fracture of T7 was sustained in the second accident", he remarked "It looked acute." Dr Day was referred to notes in respect of the 2000 accident which referred to a healed T8 fracture. The following exchange then occurred:

> "Yes. Well, this second accident was nine months after the first accident?- - Yes.
> Assuming very similar forces are applied to the spine, what apparently – or appears to you to have happened in this second accident in relation to that previous fracture?- - Oh, that's a good question."

[38] Objection was then taken and after legal argument Dr Day said:

> "It's very difficult to compare what I see on a film in the Royal Brisbane with another radiologist's report and I think the reason it's a good question is that it's really unanswerable."

Dr Day's cross-examination

[39] In cross-examination Dr Day conceded that at the time of the second accident the appellant was "already significantly disabled" as a consequence of the May 2000 accident.

[40] The doctor was asked "…it is very, very difficult as I understand your evidence to quite understand exactly what may have been injured in the May 2000 accident as a consequence of the radiological reports?" He responded, "Yes". He affirmed that he did not know "what type of machine" was used in the United States or the technique that had been applied there in order to provide the information on which the reports were based. He then conceded that it was apparent from the radiological reports "that there was reference to possible degeneration at a level T-6". He further conceded that it was not uncommon for mistakes to be made and it was not possible to be certain the precise location of the degeneration noted in the United States reports without "the images" giving him the ability to "count down the thoracic vertebrae".

[41] The following exchange then occurred:

> "What I am getting at is this. In this case it is certainly possible that the injuries that we can see at T-8 and T-7 may indeed all have been caused in the May 2000 accident? – That is – yeah, that's a hypothesis that, it is impossible to say either way, isn't it."

[42] There was no re-examination in respect of the concession contained in the paragraph quoted in paragraph [41] above, which for convenience, I will refer to as "Dr Day's concession".

The conclusion drawn by the primary judge in respect of Dr Day's concession

[43] The primary judge understood from Dr Day's concession that "Dr Day (had) resiled from his previous opinion by admitting that there were two possible explanations for the condition of the (appellant's spine) one favourable to her case and the other not". As the only expert evidence on the cause of the appellant's back condition was that of Dr Day, his Honour concluded that "it is not possible to be satisfied that it is more probable than not that the collision in February 2001 was the cause of more than a temporary soft-tissue aggravation which was conceded by the defendants."

The appellant's argument

[44] Counsel for the appellant submits that Dr Day's critical observation is consistent with his earlier statement that "there is little doubt that a fracture of the 7th thoracic vertebrae was sustained in the motor vehicle accident on 20.2.2001" and that all Dr Day is conceding is that there is another "possibility" or "hypothesis" and that "he could not be certain to 100%". It is submitted that in order to displace the more positive evidence given by Dr Day in his evidence-in-chief, "it would have been necessary for the [respondent] to demonstrate that the second hypothesis was more probable than the former hypothesis or that they were of equal probability".

[45] In address, counsel for the appellant conceded that there was evidence upon which the primary judge could have found that the appellant had not established that her loss of employment prospects was caused by injuries sustained in the second accident. He submitted however that the primary judge had determined the matter of causation, wrongly, by reference only to the evidence of Dr Day. In support of this conclusion he referred, in particular, to the following passages in the primary judge's reasons :-

> "[19] Had Dr Day's opinion and assessment remained as set out in his last report, that evidence, being the only evidence concerning causation of the plaintiff's condition, would have supported the plaintiff's case that she suffered a severe aggravation of her condition in the collision of February 2001. But Dr Day did modify his assessment when cross-examined by Mr Ambrose S.C. on behalf of the defendants. …
>
> [20] Since Dr Day resiled from his previous opinion by admitting there were two possible explanations for the condition of the plaintiff's spine one favourable to her case and the other not, and since his was the only expert evidence on the cause of the plaintiff's back condition, it is not possible to be satisfied that it is more probable than not that the collision in February 2001 was the cause of more than a temporary soft-tissue aggravation which was conceded by the defendants. That aggravation would have been acute for about four weeks and after that would have diminished until after another four weeks she would have been able to resume normal activity, according to Mr Lawson whose evidence I accept."

Was the primary judge entitled to treat Dr Day's concession as contradicting his earlier oral and documentary evidence?

[46] Dr Day's concession, as construed by the primary judge, was, of course, contradictory to the opinion firmly given in his 7 May 2004 report which was the subject of implicit confirmation in his oral evidence in chief. The records of the radiological procedures, which the appellant underwent in the United States and Australia after the first and second accidents respectively, support the opinion initially formed by Dr Day.

[47] There is scant evidence in the United States reports of end plate fractures of the appellant's spine at T7 whilst the later Royal Brisbane Hospital reports show end plate fractures at T7 and T8.

[48] In the light of this evidence and of Dr Day's documentary evidence, reports and evidence in chief his concession is somewhat suprising and thus merits careful analysis.

[49] On the one hand medical records plainly supported the conclusion that the T7 injury was caused by the second accident. On the other hand, a medical specialist who had considered those records gave the opinion that it was impossible to say either way whether the injuries may have been all caused in the earlier accident. Dr Day's concession followed an earlier concession by him that it was very difficult to "understand exactly what may have been injured in the May 2000 accident as a consequence of the radiological reports". He had accepted that the appellant was "significantly disabled" as a result of the first accident at the time of the second and he had said that "it is often very difficult even for trained radiologists to get it [ie, the precise level of a fracture or other injury] right."

[50] In those circumstances, the existence of reports which supported a contrary conclusion may have permitted the primary judge to discount/reject Dr Day's concession or to regard it as not displacing the effect of other evidence, but he was not obliged to do so. He was entitled to accept the evidence of the only medical practitioner called to give evidence who had examined the appellant and considered the relevant medical reports.

Other evidence supporting the primary judge's findings

[51] As Jerrard JA's reasons observe, Dr Day's concession was supported by a great deal of other evidence. That evidence strongly suggested the existence of spinal injuries resulting from the 2000 accident which gave rise to symptoms which changed little up to and after the time of the second injury.

[52] A written referral of the appellant to a pain clinic in the United States on 18 December 2000 recorded that the appellant was "stable but has chronic pain … presently on multiple meds …". The appellant did not attend this pain clinic but she attended one in Brisbane within a few months.

[53] A radiological examination report dated 18 July 2000 of Dr Kilner (in the United States) refers to the appellant being "… quite tender over the t-spine from t-7 up to t-1…" and having "a depression deformity…at approximately the T-8 vertebral body ...". On 13 August 2000 medical records record the appellant as continuing to experience "stabbing pain in T-7 level in back …".

[54] In paragraph 8 of his reasons the primary judge drew attention to the appellant having told Dr Bretz that her back pain had been unchanged since May 2000 despite the drugs she had been taking. That evidence was unchallenged. It was earlier found that on 8 December 2000 the appellant had taken an overdose of painkillers.

[55] As the primary judge's reasons record, on examination by Dr Sellbach immediately after the 2001 accident, the appellant had "a good painless range of movement" and "no complaint was made of neck pain". Attention is drawn in the reasons to Dr Sellbach's conclusion that it was unlikely that the plaintiff had suffered any bony injury as a result of the 2001 accident and that it was more likely that her pain was the result of a soft-tissue injury at approximately the same site as the injury suffered in May 2000.

[56] On referral from Dr Bretz the appellant saw Dr Lindsay at the Royal Brisbane Hospital Pain Clinic in February 2001. Dr Lindsay's notes record nothing in relation to the second accident. They do record, however, a history of severe and constant pain since the 2000 accident and the cessation of the appellant's modelling work as a result of that accident.

[57] On 8 January 2002 the appellant wrote a letter to Dr Jhinku referring to the extreme pain which she had been in "now for nearly 2 years, since the accident in the USA". She said "the extreme pain" has been constant and "now even worse, since 27 May 2000". The words "and now even worse" are probably an assertion that the level of pain had increased at about the date of the letter. A little earlier in the letter she mentioned "…the additional pains I have been experiencing in the last 2 months, on the left side of back just above the T8 vertebrae area". The additional pain, however, does not appear to have been noticed near the time of the 2001 accident.

[58] Dr Jhinku, who was the appellant's treating general practitioner, was not told of the second accident until 17 July 2002.

[59] In a letter to Dr Day of 14 January 2002 the appellant sought a disability certificate in respect of "the injuries to my vertebrae bones of T7 and 2 x T8 sustained on 27 May 2000 …". The letter stated "My life has been completely ripped apart because of this accident … it is now nearly 2 years later and I have to live with pain."

[60] On the second page of the letter the appellant wrote:

> It is very important that these requested disability statements state the date back to this time [May 27, 2000] and include all the reasons why I have been unfit to work."

Conclusion

[61] The evidence just discussed supports the primary judge's finding that it is not possible to be satisfied that it is more probable than not that the collision in February 2001 was the cause of more than a temporary soft-tissue aggravation. Even if it were to be accepted that the T7 injury occurred in the second accident the evidence does not establish that it gave rise to more than temporary additional pain.

[62] In paragraph 26 of his reasons the primary judge concluded that the appellant's earning capacity had not been adversely affected by the earlier accident and that it had not been shown that any further adverse affectation had resulted from the second accident. The evidence discussed above justifies that finding.

[63] For the above reasons, I would dismiss the appeal with costs.