SUPREME COURT OF QUEENSLAND

CITATION:	*Xu v Thurgood & Anor* [2008] QSC 288
PARTIES:	**WEI (WENDY) XU** (plaintiff) **v** **TORY THURGOOD** (first defendant) and **SUNCORP METWAY INSURANCE LTD** (second defendant)
FILE NO:	10356/07
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	12 and 13 November 2008
JUDGE:	Martin J
ORDER:	**JUDGMENT FOR THE PLAINTIFF IN THE SUM OF $74,556.39.** **APPLICATION FOR LEAVE TO ADDUCE FURTHER EVIDENCE IS REFUSED. PLAINTIFF TO PAY THE DEFENDANTS' COSTS OF AND INCIDENTAL TO THE APPLICATION ON THE STANDARD BASIS.**
CATCHWORDS:	TORTS - NEGLIGENCE – ESSENTIALS OF AN ACTION FOR NEGLIGENCE - DAMAGE – where plaintiff claimed an inability to work due to headaches suffered as a result of a motor vehicle accident - extent to which the headaches impaired her ability to work as a real estate agent – how to quantify her economic loss – whether loss could be quantified by comparing plaintiff's sales to sales of other agents. PRACTICE AND PROCEDURE — Application for leave to adduce further evidence — Relevant test. *Civil Liability Act* 2003, s55, s59 *Civil Liability Regulation* 2003, s3 *Australasian Meat Industry Employees Union; Ex parte*

Ferguson (1986) 67 ALR 491

Finborough Investments Pty Ltd v Airlie Beach Pty Ltd [1995] 1 Qd R 12

Reid v Brett [2005] VSC 18

Smith v New South Wales Bar Association (No 2) (1992) 176 CLR 256

Watson v Metropolitan (Perth) Passenger Transport Trust [1965] WAR 88

COUNSEL:	Mr M Grant-Taylor S.C. for the plaintiff Mr S C Williams Q.C. with Ms J McClymont for the second defendant
SOLICITORS:	Shine Lawyers for the plaintiff
	Jensen McConaghy Solicitors the second defendant

[1] In the early afternoon of 13 December 2005 the plaintiff (Ms Xu) was driving her motor vehicle in a southerly direction along Main Street at Kangaroo Point. She brought her vehicle to a complete halt at a red light at the intersection of Main Street and Cairns Street. The defendant was in a vehicle travelling behind her. He failed to stop and his vehicle collided with the rear of Ms Xu's vehicle.

[2] It is agreed that, as a result of the collision, Ms Xu suffered:

(a) A soft tissue injury to her cervical spine, and

(b) A soft tissue injury to her lumbar spine.

The injury to her cervical spine has left her with a permanent disability. Liability is admitted. Only quantum is in issue.

The plaintiff

[3] Ms Xu was born in China. At the time of the accident she was 35 years old, she is now 38. In 1990 she came to Australia to study English – an endeavour in which she was very successful. Further studies resulted in her obtaining a degree of Bachelor of Commerce from Griffith University. She has two sons – one is eight years old, the other is five. She is divorced.

[4] In 2002 she commenced employment as a trainee with Metro First National (then Metro First Reality), a real estate firm with its office in South Brisbane. Soon after that she obtained her qualification as a real estate salesperson.

The contentions

[5] Ms Xu's case is that, as a result of the accident and the injuries, she has suffered and continues to suffer pain, discomfort and headaches. As a consequence, her capacity to discharge the duties of her employment as a real estate consultant has been seriously compromised. Ms Xu says that she can no longer work the hours she did before the accident and that has led to a substantial drop in income.

[6] For the defendants it is said that Ms Xu's evidence of suffering very significant headaches was embellished. Further, it was contended that she has continued to work and has sustained little loss of income.

The plaintiff's injuries

[7] The plaintiff complained of three major consequences following the accident.

[8] First, there was discomfort in her neck, a symptom of which was a restriction in turning her head. This arose, for example, when she attempted to check the 'blind spot' of her vehicle when she was driving.

[9] Secondly, Ms Xu experienced lower back pain when, for example, undertaking domestic cleaning tasks.

[10] Thirdly, and most importantly, Ms Xu said she suffered from debilitating headaches which would occur three to four times a week and which prevented her from working while they lasted.

[11] It was with respect to the history of frequent, severe headaches that the defendants said that Ms Xu had exaggerated her account. Unlike some injuries which are capable of objective quantification; headaches and their effects fall to be assessed primarily on the evidence of the plaintiff. It is appropriate then, in assessing those effects, to consider the plaintiff's actions and earlier accounts in order to determine whether the headaches have occurred and, if so, their severity. It follows, then, that I should consider the history of the plaintiff's actions and the relevant medical evidence on this subject.

[12] The first examination was undertaken on the day after the accident by Dr O'Sullivan. His clinical findings as recorded in the medical certificate which accompanied Ms Xu's 'Notice of Accident Claim Form' were:

> 'Paraspinal soft tissue pain and tenderness left side of neck aggravated by movement.'

[13] The doctor estimated that treatment would be required for six to 12 weeks and that Ms Xu would be fit to resume normal duties on 17 December 2005, some four days after the injury. I note that on the form Ms Xu has added in her own writing the words 'Worked for one hour' next to the doctor's entry about the date when she would be fit to resume work. I do not draw much from the absence of any reference to headaches. Other evidence satisfies me that headaches can be a common consequence of a whiplash neck injury and can develop some time after the accident.

[14] On 23 November 2006 Ms Xu was examined by Dr Campbell, a neurosurgeon. He noted that Ms Xu continued to complain of neck pain and stiffness and lower back pain and stiffness. He also noted that Ms Xu said:

> 'The neck pain has a tendency to radiate across to the left shoulder an up to the suboccipital region. When the neck pain is severe there are associated headaches which cause decreased concentration and irritability.'

She told him that the neck pain and lower back pain were aggravated by day to day activities. Dr Campbell records that Ms Xu told him that at the time of the accident she was working 50 to 60 hours a week but that since the accident she was unable to cope with those hours and worked 30 to 40 hours a week. The doctor regarded Ms Xu's prognosis with respect to performing light duties as a real estate agent was satisfactory but that her prognosis for return to normal duties was 'guarded to poor'. He said that her condition could be regarded as stable and stationary with maximal medical improvement having taken place. Ongoing management should be based, he said, on the prevention of aggravating factors and maintenance of good posture. So far as the cervical spine injury was concerned he rated Ms Xu as suffering a seven per cent whole person impairment. He rated her towards the higher end of the range due to the severity of pain and impact of the pain on the activities of daily living. With respect to the lumbar spine injury he rated her as suffering a two per cent whole person impairment. As a result he rated Ms Xu as having a nine per cent whole person impairment which is likely to be permanent.

[15] Finally, he said:

> 'Ms Xu is coping at work as a real estate agent but has had to reduce her hours of work from 50-60 hours per week to 30-40 hours as her symptoms are aggravated by her work. Erecting signs, driving to and from properties and work at the computer all aggravate her symptoms. She will probably find that she cannot return to her previous hours due to her injuries. She will also be more prone to taking time off sick when her symptoms are severe.'

[16] Dr Weidmann, a neurosurgeon, examined Ms Xu on 13 March 2007. His account of what she told him about the pain she was suffering is consistent with her account to Dr

Campbell. Dr Weidmann's view was consistent with Dr Campbell to the extent that he was also of the view that she had reached maximum medical improvement and that she would not benefit from any additional treatment, therapy or rehabilitation. He, though, regarded her as being medically fit to continue working as a real estate agent. That view was explored in cross-examination in the following way:

> 'And if one accepts her when she says that the severity of her symptoms are such that at times she can't tolerate looking at a computer screen, she has the greatest of difficulty driving, she has problems with her mobility and she suffers crippling headaches, if that is more accurate there would be nothing unreasonable at all in an expectation that her working capacity might well be reduce -----?—No.
>
> ----- from 50 to 60 hours a week to 30 or 40 hours a week?—Yes, I would accept that proposition.'

[17] In support of the argument that the plaintiff has exaggerated the extent and severity of her headaches, the defendants point to the following as indicating different accounts being given by the plaintiff which reflect on her credit generally:

(a) In the Notice of Accident Claim form delivered to the insurer the plaintiff declared that she had returned to work on 16 December 2005.[1]

(b) In the 'Statement of Loss and Damage' signed by the plaintiff on 7 February 2008 she said that she was unable to work between 14 December 2005 and 24 February 2006.[2]

(c) The chronology prepared by the plaintiff for use in this Court on her behalf asserts that she returned to work on 24 February 2006.

(d) To both Drs Campbell and Wiedmann she stated that she had four months off work.

(e) In her evidence she said that she returned to work a few days after the accident but for only one to two hours each day.

(f) When cross-examined about her statement to Dr Campbell that she had been off work for four months, she said that she only went to work about two to four times during the period until 24 February and then for the rest of the four month period only worked for half an hour or so a day.

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1 Exhibit 5.

2 Exhibit 7.

[18] I note that in Mr Thompson's report[3] (to which further reference will be made) he says that he was instructed that Ms Xu had been "unable to maintain employment of any kind until 24 February 2006".

[19] Two items of importance in assessing her absence from work are Exhibits 8 and Appendix 5 to Exhibit 10. The latter is a letter from Metro First National to the solicitors for the plaintiff of 28 August 2006. It sets out a number of answers to questions asked by the plaintiff's solicitors. Two of those answers are:

(a) 'Wendy was absent from work from the 14/12/05 to 24/2/06.'

(b) 'Since returning to work Wendy spends an average of about four hours a week away from work to go to various doctor and specialist appointments.'

[20] In a similar letter of 29 August 2007 (Exhibit 8) Metro First National writes to the solicitors for the defendants and answers similar questions in a similar way. The dates of absence from work are the same but with respect to the time away from work the answer was:

> 'Since returning to work Wendy spends an average of about four hours a week away from work to go to various doctor and specialist appointments or due to not being well enough to attend the office.'

[21] Both letters were signed by Julie Thieme, who was described by Geoffrey Dowling (a principal of Metro First National) as being the 'accounts person' of the firm. In cross-examination, Mr Dowling confirmed that Ms Thieme was a person who knew of the accuracy of the contents of the letter of 29 August 2007.[4] Ms Thieme was not called by the plaintiff.

[22] Counsel for the defendants also pointed out that the plaintiff had not sought any physiotherapy or chiropractic treatment for her symptoms since 2006. Similarly, she had not sought any medication stronger than Panadol by way of analgesia. Ms Xu said that although she had not specifically consulted any medical practitioner about her condition, she would speak to her doctors when she was seeing them for other issues. She also said that her general practitioner when asked what she should do to not have so much pain said 'Just nothing much' and advised her to see another physiotherapist.

[23] I find it difficult to accept that a person who was experiencing the frequency and severity of headaches claimed by the plaintiff would, for the last two years, have done nothing and sought no assistance with respect to the pain she says she was suffering. Ms Xu said that she did not take up any of the referrals for further physiotherapy because she was unable to afford it. She was, though, able to see general practitioners from time to time and could have sought from them advice as to stronger or different analgesics.

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3 Exhibit 10

4 Exhibit 8.

[24] There was evidence from Mr Dowling that Ms Xu's absences from the office at various times led him to believe that she might have had a second job. That evidence, though, like the evidence of other employees who spoke about when they would see Ms Xu in the office, is no more than his impression of a state of affairs and was incapable of being quantified.

[25] Ms Xu said that she frequently had to leave the office and go home because her headaches were so severe that she could not work.

[26] The only record of the time she spent away from the office is to be found in the letters of Ms Thieme. I find those letters to be particularly persuasive in these circumstances.

[27] The first was created in August 2006 (about eight months after the accident) and the second in August 2007 (about 20 months after the accident). The information contained in the letter is similar, but there is a change in the comment made about absence of work in the second letter. In that letter Ms Thieme says that the average of four hours away from work included time away due to not being well. That indicates that fresh consideration was given to the issue and, in doing so, the average length of time absent from work was reconfirmed and was reconfirmed by a person who was in a position to know the true situation.

[28] That evidence is consistent with the prognosis of Dr Wiedmann. Ms Xu's account of her time away from work was not consistent – it altered according to the person she was addressing and it changed during her evidence.

[29] I accept Ms Xu when she says that she suffers from headaches but I find that they do not and have not affected her to the extent claimed. Consistent with that, I prefer Dr Wiedmann's assessment of her full body impairment as being a five per cent permanent impairment.

Effect on income

[30] In support of her claim for past and future economic loss the plaintiff pointed to details of her commission income before and after the accident and also sought to gain assistance from a comparison of her income with two other salespersons employed by Metro First National.

[31] The plaintiff was paid commission only, that is, she received no retainer. Her share of the commission earned on a sale of a property was 50 per cent of the whole commission. Whether that amount included superannuation was the subject of some

discussion. Mr Dowling, a principal of the plaintiff's employer, said that Ms Xu's superannuation was included in her share of the commission.[5] I accept that.[6]

[32] Ms Xu estimated that, prior to the accident, she had been working 50 to 60 hours a week. After the accident, she said, she could only work an average of 30 to 40 hours a week. The range presented by those estimates is quite large. To take the greatest difference in hours would result in her only working half the hours she had worked before the accident. To take the least difference would result in her working 80% of the hours she had worked before the accident. All of those figures, though, must be accepted for what they are: extremely rough estimates without any other evidence to support them.

[33] It was submitted for the plaintiff that there was a significant reduction in her post-accident earnings and her taxation returns and commission statements were examined and said to support that conclusion. It is not, though, as simple as that. It was accepted by Ms Xu that there was a delay in receiving her commission payments because of the way in which sales were processed and that there could be a lag of up to six months between doing the work and receiving payment. Mr Williams Q.C. provided a schedule in which the plaintiff's income was set out and then various adjustments were made. Some of the adjustments reflected the delay I have referred to, others reflected time when Ms Xu was not in Australia. I am satisfied that the adjustments are supported by the evidence and I set them out below.

Period	**Gross Income**	**No. sales**	**Av. per sale**	**Adjustment/Comment**	**Adj. Gross income**	**Adj. Av. per sale**
2003-2004	$53,583	24	$2,233		$53,583	$2,233
2004-2005	$43,938	15	$2,929	See below (2) *(increases 04/05 to $56,558 for 20 sales)*	$56,558	$2,949
2005-2006	$62,794	21	$2,989	(1) 6 units sold from Di Francesco for commissions totalling $19,457 (2) July '05 paid for 5 sales effected in previous financial year - $18,099 should be attributed to 2004/2005 *(reduces 05/06 to $50,144 for 17 sales)*	$50,144	$2,949
2006-2007	$43,111	13	$3,334	(3) Was overseas for 80 days (28/5 – 15/8/06) which is all in the 06/07 earnings period. Extrapolating the amount earned over 365 days ($43,340/285x365) *(increases 06/07 to $55,505)*; number of sales is similarly extrapolated to 16.6.	$55,505	$3,343

5 T1-82.

6 An application was made to re-open the plaintiff's case on this topic. I deal with that application below.

2007-2008	$44,580	N/K	N/K	(4) This period includes the first half of '08 in which there has been a significant market downturn.	$44,580	N/K

[34] Two reports from Mr Thompson (a forensic accountant) were received in evidence. They were not expert reports in the usual sense – rather, they were a series of calculations based upon assumptions he had been asked to make by the plaintiff's solicitors. Nevertheless, the reports were useful in setting out the case for the plaintiff.

[35] Mr Thompson was asked to assume that:

(a) Ms Xu's commission was exclusive of superannuation;

(b) Two other employees – Ms Martin and Mr Quinn – were comparable with Ms Xu.

[36] He then, for the purposes of his calculations, assumed that Ms Xu would have achieved average commission income in line with Ms Martin and Mr Quinn. Evidence was called from both Ms Martin and Mr Quinn. While both of them had been real estate salespersons for about the same time as the plaintiff, and all of them were employed by Metro First National, I do not accept that anything other than the broadest comparison among them can be drawn. For example, Ms Martin worked reduced hours in this calendar year and for only six months of the last financial year, yet she earned substantially more than Mr Quinn. It was obvious that each of them has their own way of doing business and that is reflected in their financial performance. While they all sell within the same market – residential – the niches within that market are approached differently by each of them. I do not accept that it is valid to extrapolate from their performances and arrive at a figure which accurately represents any future loss of the plaintiff.

Past Loss

[37] Ms Xu was away from work for some time after the accident. She took the opportunity to undertake two, short overseas holidays in that period. On the evidence I regard that fact as not affecting her claim. She was also away from Australia for a longer period when she travelled to China.

[38] On the basis of her not being able to work for about four hours each week, I accept that that would have an effect on her ability to earn income. The extent of that effect is difficult to assess. In one week it may have had no consequences, in another it could have had by, for example, her not being able to obtain a listing.

[39] Any assessment in these circumstances falls into the category dealt with in s 55 of the *Civil Liability Act* 2003. It provides:

> **55 When earnings can not be precisely calculated**
>
> (1) This section applies if a court is considering making an award of damages for loss of earnings that are unable to be precisely calculated by reference to a defined weekly loss.
>
> (2) The court may only award damages if it is satisfied that the person has suffered or will suffer loss having regard to the person's age, work history, actual loss of earnings, any permanent impairment and any other relevant matters.
>
> (3) If the court awards damages, the court must state the assumptions on which the award is based and the methodology it used to arrive at the award.
>
> (4) The limitation mentioned in section 54(2) applies to an award of damages under this section.

[40] The loss made before the accident has to be nett of expenses and income tax. Mr Williams Q.C. submitted that the expenses should be assessed at 25% to 35% of gross income on the basis of an answer given by Ms Xu. That answer was given without the benefit of recourse to financial records. I accept the figure used by Mr Thompson – 15% - that being the figure he drew from the plaintiff's tax returns. It is also a figure more likely to be incurred by someone whose expenses are effectively confined to motor vehicle and telephone costs. I also accept the figure of 35% put forward by both sides as an appropriate average tax rate.

[41] An inability to work for about four hours a week translates to an annual (based on a 40 hour week and a 48 week working year) loss of about 5 weeks over a year. That, though, may not accurately reflect the possible loss incurred because, on the evidence, income earned is not just a factor of time spent working. It has been approximately three years since the accident. Taking into account that length of time, the adjusted income and sales figures in the schedule, and the time during which the plaintiff has not been able to work I think that a global amount of $18,000.00 gross would be appropriate. After subtracting expenses and tax[7] I arrive at a net loss of $9,945.00. That figure includes superannuation.

Future Loss

[42] For the same reasons as I have set out above, any assessment of future loss has to be on a global basis. When asked about her likely retirement, her evidence was that she intended to keep working until she was 60 or 65. I will proceed on the basis that she will work until 65 years of age. Using the same reasoning as I applied for the assessment of past loss (that is, a net loss of $3,315.00 a year) I consider that a sum of

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[7] $18,000 - $2,700(expenses at 15%) = $15,300
$15,300 - $5,355 (tax at 35%) = $9,945

$50,000.00 fairly compensates the plaintiff for a diminution in her earning capacity over the next 27 years.

General damages

[43] General damages are required to be assessed according to the *Civil Liability Regulation* 2003 and so identification of the injuries suffered by the plaintiff needs to be undertaken. The evidence supports a finding that the 'dominant injury'[8] is that to her cervical spine. The range in Item 88 of the Regulation for an injury of that type is 5 to 10. The comment about an appropriate level for ISV is:

> 'An ISV of not more than 10 will be appropriate if there is whole person impairment of 8 per cent caused by a soft tissue injury for which there is no radiological evidence.'

[44] The adverse impact of multiple injuries on Ms Xu does not require an increase in the ISV. The lumbar spine injury is a minor injury which would fall under Item 94. Taking into account both injuries and the requirements of s 3 of the Regulation, I assess the ISV for both injuries at 9 which results, upon use of the relevant scale, in an award of general damages of $9,800. No interest is available on that award.

Care

[45] There is a claim for damages for care rendered on a gratuitous basis. That claim does not satisfy s 59 of the *Civil Liability Act*. There is no evidence upon which I could find that the plaintiff has required domestic assistance exceeding the statutory threshold in s 59(1)(c) of the Act.

[46] The plaintiff, in submissions, sought an award for future paid services. No claim for that was made in the statement of claim and no application was made to amend the statement of claim. I accept the submissions made by the defendant that, even had the statement of claim been amended, then any assessment of the need for future paid care would need to take into account that there had been a very small expenditure for such services to date and the medical evidence from Dr Wiedmann was that the plaintiff was not precluded from undertaking the usual domestic activities.

Future medical treatment etc.

[47] The plaintiff seeks an award of a global amount to recognise future expenditure on physiotherapy. The plaintiff gave evidence that one reason she ceased obtaining physiotherapy was that it had no lasting effect. In those circumstances I find that it is unlikely that she would be seeking physiotherapy in the future.

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8 *Civil Liability Regulation* 2003, s 3.

[48] There is an agreed sum of $1740.60 for medication.

Special damages

[49] These are agreed in the sum of $1,965.30.

Order

[50] I give judgment for the plaintiff in the sum of $74,556.39.

Component	Amount
General damages	9800.00
Special damages	1965.30
Interest on out of pocket expenses	136.49
Past economic loss	9945.00
Interest thereon	969.00
Future economic loss	50000.00
Future treatment	1740.60
Total	**74556.39**

I will hear submissions on the costs of the action.

Application to re-open

[51] This hearing of evidence and submissions concluded on 13 November. On 20 November the plaintiff sought to re-open her case to call further evidence relating to the incidence of superannuation payments and whether they were or were not included in the "commission" received by the plaintiff.

[52] In cross-examination Mr Dowling, a director of Metro First National, gave this evidence[9]:

> Your agents all work pure commission only? -- Not all of them, no.
>
> Some are paid base salary, are they? -- Correct. It depends on the Work Choices legislation and that sort of thing.
>
> Okay. In Ms Xu's case it is pure commission? -- Correct.

9 T 1-82

> There is no superannuation payment in addition? -- The superannuation is included in the commission calculation. We have to pay super, as anyone does.
>
> Oh, I see. Although she's not paid a wage, she's paid commission----? -- Plus super.
>
> -----plus super, or is there super within the commission?-- Well, it depends how you work it.
>
> She's on 50 per cent? -- So it's 46 point something per cent plus super.
>
> Okay. So it's into 50 per cent? -- Yep, yep.

[53] Mr Dowling was not re-examined on that exchange.

[54] Mr Thompson, in his first report[10], said:

> "4.9 In relation to Ms Xu's share of commission, I am instructed:
>
> (i) Ms Xu has received the following percentage commissions (inclusive of superannuation):
> Up to July 2007 - 44.04%
> From July 2007 - 50%
>
> (ii) The Agency receives the remaining 56%/50% of the commissions' (sic) payable."

[55] Originally, paragraph 4.9(i) of his report had read: "… commissions (exclusive of superannuation)". In cross-examination he said that the word "exclusive" was a typographical error and asked that his report be corrected to read "inclusive" instead.[11]

[56] Mr Grant-Taylor SC seeks to re-open his client's case to lead evidence consistent with a letter from Mr Dowling which reads:

> "17 November 2008
>
> TO WHOM IT MAY CONCERN
>
> Claimant: Wendy Xu

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10 Exhibit 10

11 T 2-20, lines 39-50

> In (sic) am writing to confirm the percentage of commission payable to the above employee on gross commission to the company is 50% plus 9% superannuation of the net commission.
>
> Yours sincerely
>
> Geoff Dowling
>
> Director"

[57] No explanation is proffered for Mr Dowling's proposed change in his evidence.

[58] The guiding principle in deciding whether to give leave to reopen is whether or not the interests of justice are served by allowing or refusing leave: *Finborough Investments Pty Ltd v Airlie Beach Pty Ltd.*[12]

[59] There are, though, other matters which must also be considered. In *Reid v Brett*[13] Habersberger J (referring to the decision in *Australasian Meat Industry Employees Union; Ex parte Ferguson* [14]) summarised the relevant principles in the following manner:

> [41] The criteria governing the exercise of the discretionary power to re-open a case to admit further evidence where the hearing has concluded but judgment has not been delivered have been said to be as follows:
>
> (a) the further evidence is so material that the interests of justice require its admission;
>
> (b) the further evidence, if accepted, would most probably affect the result of the case;
>
> (c) the further evidence could not by reasonable diligence have been discovered earlier; and
>
> (d) no prejudice would ensue to the other party by reason of the late admission of the further evidence.

[60] The authorities referred to above and others[15] all relate to evidence which is "fresh" or "new", being evidence which has arisen since the trial, or evidence which could not by reasonable diligence have been discovered earlier. The evidence sought to be led should the plaintiff be allowed to re-open does not fall into either category. All the

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12 [1995] 1 Qd R 12

13 [2005] VSC 18

14 (1986) 67 ALR 491

15 *Watson v Metropolitan (Perth) Passenger Transport Trust* [1965] WAR 88 at 89; *Smith v New South Wales Bar Association (No 2)* (1992) 176 CLR 256

plaintiff seeks to do is to have a witness contradict the evidence which he gave. Evidence about which no point was taken, no re-examination was sought, and no further evidence was called. No explanation for the proposed change is given and, even if it was allowed to be given, would leave the court with conflicting evidence (Mr Thompson's report) from witnesses called by the plaintiff.

[61] The application is refused and the plaintiff must pay the defendants' costs of and incidental to the application on the standard basis.