SUPREME COURT OF QUEENSLAND

CITATION:	*Gibbings-Johns v Corliss* [2010] QSC 49
PARTIES:	**TERRY EDWARD GIBBINGS-JOHNS** Plaintiff **And** **DENNIS BRUCE CORLISS** Defendant
FILE NO/S:	S76 of 2008
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	24 February 2010
DELIVERED AT:	Supreme Court Rockhampton
HEARING DATE:	2 – 3 February 2010
JUDGE:	McMeekin J
ORDER:	**There will be judgment for the plaintiff in the sum of $196,152.00**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – where plaintiff suffered serious injury to the left eye – where claims made for past economic loss, impairment of future earning capacity, future treatment costs and special damages – where plaintiff denied claim for aggravated and exemplary damages *Civil Liability Act* 2003 (Qld), s 62(e) *Commerical Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 *Giller v Procopets* [2008] VSCA 236 *Hick v Frisby and Anor* [2008] QSC 161 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170
COUNSEL:	G. Crow for the plaintiff

M. Grant-Taylor SC for the defendant

SOLICITORS: Macrossan & Amiet for the plaintiff

Suthers Lawyers for the defendant

[1] **McMeekin J:** Terry Edward Gibbings-Johns claims damages for a penetrating injury to his left eye. He alleges that he was injured when a pot glass was thrown at him by the defendant, Dennis Bruce Corliss, early in the morning of Saturday, 7th May 2005.

[2] Both liability and quantum are in issue.

[3] The defendant denies throwing the glass or indeed any object. There is substantial dispute as to what occurred.

[4] There is no doubt that the plaintiff suffered an injury to his eye in the course of the events of the night. Whilst there is no onus on the defendant he submits that there are alternative possible mechanisms of injury which explain the injury.

The Competing Versions

[5] The defendant is and was at the relevant time the publican conducting the Grand Hotel at Childers. He and the plaintiff had known each other for some time before the night in question. He had barred the plaintiff from entering his hotel some months before. The precise reason was in dispute but the salient point is that there was bad feeling between the two men.

[6] The relevant events occurred at about 1am or a little later on the Saturday morning. The police arrived at 1.15am and all witnesses with any reliability of recollection agreed they arrived within minutes of the relevant events occurring.

[7] The plaintiff had commenced drinking at the Childers Hotel at around 8pm to 9pm the night before. He left that hotel after closing and was heading home. At this stage he was heavily intoxicated.

[8] His path home took him past the Grand Hotel. What precisely then happened is the subject of conflicting accounts.

[9] The plaintiff claims that he saw the defendant through a window of his hotel and asked to be let in. He claims that he was then leaning against the window which was in an open position. He alleges that the defendant then abused him verbally. He became upset. He responded to the abuse by banging the window frame with the palms of both hands. The window above him shattered and fell in front of him. He stood back from the window. He then observed the defendant to throw a pot glass that had been resting on his knee straight at him through the window striking him in the face. It was then that he was injured.

[10] The defendant contends that the first he knew of the plaintiff's approach to the hotel was when he heard a loud kicking of the front door of the hotel. He had closed the hotel for the night. The doors and windows were shut and the blinds over the windows drawn. An object was thrown through a window of the hotel smashing the pane of glass in the window. He was cut on the ear in the course of this and suffered

copious bleeding. The blind over the window was thrown into the hotel and up sufficiently to allow him to observe the plaintiff standing outside. The plaintiff then head butted the remaining glass around the window frame. The police were called and arrived within minutes. He did not throw anything nor shout abuse at the plaintiff.

The Versions of the Witnesses

[11] Several witnesses were called on each side. To varying extents they supported the parties who called them. Each witness was subjected to criticism because of their alleged partisanship or because their capacity to accurately observe, record and recall relevant events was adversely affected by the consumption of alcohol, or both.

[12] The plaintiff called Clinton Homann, Martin Leavey and Kevin Henderson.

[13] Mr Homann says that he had just left the Grand Hotel after spending the evening drinking there. He was standing outside the hotel when he observed the plaintiff approach. The plaintiff argued with the defendant through the door of the hotel. The defendant was in the process of closing the hotel for the night. He was not paying much attention at this stage. His account then was:

> "And as I was walking away, I heard the window smash and I looked back and I saw Terry [ie the plaintiff] standing there and then a couple of seconds later a shiny thing coming from inside the pub and hit him in the face."

[14] Mr Homann observed the plaintiff to put his hands to his face and stumble around after being struck. He estimated that he was 20 to 25 metres away from the plaintiff when he made these observations. He estimated the plaintiff to be two to three metres back from the window when struck. He thought that the "shiny object" looked like an ashtray.

[15] Mr Leavey was also a patron of the hotel on the evening in question. He said that he had left the hotel after closing, heard "big arguing" with "a lot of swear words" between the plaintiff and the defendant and then:

> "I was probably about 30 metres away from the front of the pub, talking with a couple of friends, and I heard a bit of a scuffle happening out at the pub, and I turned around and seen - seen Terry hit the pub window, and it - it collapsed down and broke the window, and then I - I seen what looked like a pot glass. I didn't see who threw it, but I seen it come out of the window and hit Terry in the face, and yeah, that's when Terry grabbed his eye, and then the police arrived shortly after that."

[16] His recollection was that the plaintiff was a couple of paces back from the window when he was struck by the thrown glass. He estimated that eight to ten seconds elapsed between the plaintiff hitting the window and being hit by the glass. Despite those recollections he accepted the proposition that it was possible that the plaintiff was struck by falling glass from the broken window but in so doing repeated that he "was fairly sure" that he had seen something thrown out the window.

[17] Mr Henderson was an employee, of sorts, working at the hotel – he worked for his board and keep. He was cleaning up glasses and the like. He says that he observed the defendant to walk outside, come running back inside, that there was then a noise as if someone was kicking the door of the hotel, some object smashed the window, the defendant went to the window of the hotel and abuse was exchanged by the two men, and then his account was as follows:

> "*Now, after - did something happen after the two men were arguing?* Yeah, Dennis grabbed a ashtray and when Terry was close enough for aim, he threw it and hit him. …
>
> *Did you see him throw it?* I saw him throw it, yes.
>
> *And after he threw it, did you see anything or hear anything then?* I heard Terry yell out that he'd been hit in the eye or hit in the head with a glass. He thought it must've been - thought it was a glass but it was an ashtray.
>
> *And then what happened?* And Terry came a bit closer to the - to the window and you could see that he was holding his face and then there was still
>
> *Well, just slow down. How was he holding his face?* Um, the one - I can't remember whether it was one or two hands up his - up his face from where I was, you could just see him near the window.
>
> *And then what happened?* Then he started walking away. He just sort of disappeared out of my sight and then Dennis was still yelling at him and that, and then trying to line - like, trying to throw another ashtray, which he did throw."

[18] Mr Henderson says that he was only three or four metres from the defendant when this occurred.

[19] Mr Henderson also asserts that on the day after the incident the defendant told him that he had destroyed DVD surveillance of the previous evening and that if he was asked about the events of the evening he was to say that the plaintiff ran into a wall.

[20] The defendant called Wade Gooden, Margaret Bell who is a family friend, and his wife, Pam Corliss.

[21] Mr Gooden was another patron of the hotel. He was seated outside the hotel. He says that he saw the plaintiff arrive, he was yelling, he reached into a bin beside the seat on which Mr Gooden was located, picked out a stubby bottle from the bin and smashed a window of the hotel with it. He immediately then left the area. The plaintiff was three to four metres away from the window when it smashed and he appeared to be uninjured at that stage. He recollects that the blind covering the window was in the raised position. He says that he could see into the bar of the hotel through the window.

[22] Ms Bell was a guest staying at the hotel that evening – her arrangement with the Corlisses was that she would stay from time to time at no charge. She says that she was assisting in cleaning up that evening after closing time. The hotel was closed up for the evening. She heard a commotion and banging at the front door and her evidence was then:

> "I come in through the door, turned to put the glasses onto the bar, and at that point, that's when I'd heard something crashing. Um, I'd seen a stubbie coming through the window. The blind flapped at the same time. Shards of glass went everywhere, and this is sort of placing and then turning and looking, and that's what I'd seen at that point."

[23] She said that the defendant threw nothing through the window. She recalled a verbal confrontation between the two men after the window was smashed which went on for some minutes. She said that the blind was up about a foot to 18 inches and not more than two feet. She could not a say how it came to be up. In re-examination she added the following evidence:

> "I then also seen Mr Johns try to get into the window.
>
> *How did he do that?* He head-butted the brick area. He head-butted the window sill, and he also head-butted the - there was a - a shard of glass - like that's the window sill, there's a shard of glass about this, and there was another one on this here, and he head-butted those. But he had hit the wall and hit the window sill and hit the glass.
>
> *With his head?* With his head."

[24] I should mention that the defendant and his witnesses maintained that Mr Henderson was not present at the material time but upstairs. Mr Henderson maintained that Ms Bell was not present.

[25] Mrs Corliss said that she observed a banging or kicking on the front door of the hotel, that her husband came from behind the bar and went to a window to see what was amiss, that as he approached the window a stubby came through the window and struck her husband. The blind flew up when the stubby came through it and she saw the plaintiff standing outside. She then observed the plaintiff to strike the window with his head on more than one occasion breaking more glass. She said that her husband did not throw any object through the window. She denied that her husband entered into any argument with the plaintiff or shouted abuse at him or raised his voice to him.

The Defendant's Arguments

[26] The defendant attacked the credibility of the plaintiff and each of his witnesses.

[27] Mr Grant-Taylor of senior counsel, who appeared for the defendant, submitted that the plaintiff was demonstrably of dishonest character. He pointed to the plaintiff's extensive criminal history, which included offences of dishonesty, his admittedly false statements to a prospective employer, an ATO adjustment in 2004 to a Notice of Assessment indicating that an audit or investigation had occurred requiring such adjustment, the inconsistency in his account of when headaches came on after the subject injury, and his assertion that the breaking of the hotel window on the night was accidental despite his plea of guilty to a wilful damage charge.

[28] Further he submitted that the plaintiff's character revealed by his criminal history, involving as it did offences of violence and damage to property, made it more likely that he would behave as the defendant contended that he did – that is by senselessly attacking the door of the hotel and the head butting of the window.

[29] It was further submitted that the plaintiff's account was inherently improbable. The most cogent of the grounds advanced was the fact that when arrested on the evening for wilful destruction of property the plaintiff failed to complain to the police that he had been attacked as he now contends.

[30] Each of the plaintiff, Mr Homann and Mr Leavey was plainly affected by alcohol. Each had been drinking for many hours before the relevant events occurred. Their capacities to observe, record and recall events must have been affected.

[31] Mr Henderson was grossly partisan and should not be believed. He and the defendant had had a serious falling out. Some time after the night in question the defendant accused Mr Henderson of stealing from him and dismissed him from his "employment". Mr Henderson denied the charge. He admitted that he disliked the defendant.

[32] Mr Homann should not be accepted not only because of his probable gross drunkenness but because he became involved when requested to do so by the plaintiff personally, thereby demonstrating a bias in the matter, and further that he admitted that he had twice approached police to have his statement withdrawn. It was submitted that he had told the defendant only the week before trial that he could not remember anything of these events.

[33] Mr Leavey, it was said, should not be believed because of his failure to observe the plaintiff pick up a stubby from the bin as Mr Gooden observed. Mr Gooden, it was contended, should be preferred on this issue not only because of his proximity to the bin and his apparent lack of partisanship but because the throwing of a bottle through the window was consistent with the accounts of all other witnesses save the plaintiff and explained the cut to the defendant's ear suffered on the night.

[34] Finally it was argued that the account advanced by the defendant's witnesses provided a credible explanation for how the plaintiff came by his injury – either through the shards of glass falling on him when he smashed the window or by reason of his head butting the window.

[35] Dr Moon, an ophthalmic surgeon, accepted that shards of glass falling from a height would be consistent with the type and extent of injury that she observed.

[36] It was submitted that Ms Bell was the most credible of the witnesses, not particularly affected by alcohol, and convincing in the manner of giving her evidence.

[37] If I was of the view that an object was thrown at the plaintiff it was submitted that the evidence was consistent with that object being an ashtray, that the only evidence about the ashtrays in the hotel was to the effect that they were of solid construction and hence it was submitted that such an object was unlikely to shatter on striking a human face. Hence I should dismiss the plaintiff's claim.

Rejection of the Defendant's Case

[38] I have determined that the probabilities favour a finding that the defendant did throw a glass object at the plaintiff thereby causing his eye injury. I will set out my reasons for that view.

[39] I accept that if the plaintiff was unsupported by other testimony I would reject his account. His failure to complain to the police on the night of the attack despite his own arrest, his poor character as displayed by his extensive criminal history, his evident drunkenness demonstrated not least by his attempt to gain entry to the hotel from which he had long been barred and sometime after 1am and after it was closed, and his attack on the fabric of the hotel, which occurred even on his own account, all cause considerable concern.

[40] However there is other testimony and I find it to be persuasive. Significantly, the coincidence of three witnesses each claiming to have seen an object thrown through the window of the hotel and strike the plaintiff with he immediately reacting as he would if injured, along with the matters I set out below, persuades me that that is what occurred.

[41] A possible explanation for the failure to complain to the police on the night is that the plaintiff did not appreciate that he had suffered a significant injury to his eye until about a week later. I suspect that he was well aware that he had provoked the incident by attacking the hotel for no good reason and had nothing much to complain about if all he had suffered was a cut on his face. As well he was grossly intoxicated and could not have been thinking too clearly when apprehended.

[42] Mr Homann was a young man who was plainly uncomfortable in being involved in the dispute. I was told that his attendance at trial was compelled by subpoena. He is a regular at the Grand Hotel to this day. If anything his sympathies probably lie with the defendant. That explains his efforts to have his statement retracted.

[43] Mr Grant-Taylor submitted that Mr Homann plainly accepted that he told the defendant in the week prior to trial that he recalled nothing of these events but that is not how I heard the evidence come out. The transcript shows a non-committal "mmm" when propositions were being put. The difficulty is that two quite separate things were being put – one was that he said he was not going to court which proposition I think that he accepts and one that he could not recall because of his condition on the night. When the second of those was squarely put he rejected it.

[44] He gave his evidence in a forthright way. There is no reason to think that Mr Homann is partial to the plaintiff. There is a significant age difference. They were not shown to be particularly friendly. I am confident that he believes what he claims to have seen.

[45] While Mr Homann was plainly affected by alcohol that does not necessarily mean he was unable to see and recall what occurred. Again if there was no other evidence the criticisms that can be made of him might well have won the day for the defendant.

[46] Mr Leavey was, so far as these things can be judged with telephone evidence, an impressive witness. He too gave his account in a direct way. He seemed independent of the parties. He made concessions. It is noteworthy that he approached the police on the night and indicated that he was a witness to what occurred. He said that he provided his statement at a fairly early stage after the event. I am conscious of the cross examination on that latter point and can only observe that there can be a difference between the date a statement is given and the date when the police have it signed.

[47] The submission that I should reject Mr Leavey's account because it is contrary to Mr Gooden's version of events suffers from the defect that it pre-supposes either the accuracy of Mr Gooden's account or the impossibility of both accounts being accurate. It seems to me entirely possible, subject to what I have to say below, that in the circumstances that prevailed that one witness might fail to see an event that another does witness. Much depends on when their attention was first drawn to what was transpiring, whether they looked away or were distracted for a moment, and their degree of interest in what was going on.

[48] I accept the force of the criticisms made of Mr Henderson. He first provided a statement after his dismissal, the dismissal being on grounds which he says were false. Plainly there is the significant possibility of bias causing Mr Henderson to perjure himself. However four things struck me about his evidence. First he gave his evidence well. There was no uncertainty in his manner. Second, there was a deal of detail. Mr Henderson did not seem to me to be the sort of person with an imagination sufficient to supply that detail and yet be able to withstand cross examination. Third, Mr Henderson did make concessions at times that he did not need to and which may have been against his interest if he was making up a story. For example he accepted the possibility that a stubby came through the window, an essential part of the defendant's version and contrary to the plaintiff's account. He must have realised that such a concession would suit the defendant's cause. He accepted the possibility of other members of the defendant's family being present and he could not but have appreciated the significance of placing witnesses at the scene who may be inclined to assist the defendant. Fourth, he claimed it was an ashtray not a pot glass thrown. If he was making up a story then it seems odd that he would pick an ashtray rather than a glass. Mr Grant-Taylor argued that an ashtray would be less likely to shatter on a man's face. As a very general proposition that can be accepted. But that makes it improbable that Mr Henderson would make up a story with an ashtray being thrown.

[49] A further matter of significance in the assessment of the reliability of these three witnesses is that not only do they coincide in their account of an object being thrown through the window and striking the plaintiff, but their accounts are broadly consistent in other ways. They each also heard or observed a significant verbal altercation going on between the two men. They each relate a smashing of the window – consistent with the plaintiff causing it – and then the object being thrown. They each deny seeing the plaintiff head butt the window – an essential part of the defendant's version. They each saw the plaintiff react as if injured when struck. There is no reason to think that the three men got their heads together to concoct an account.

[50] On the other side I have some concerns about the defendant's witnesses and their accounts. It is striking that even though the defendant faced a criminal charge arising out of his conduct that evening, neither his wife nor Ms Bell provided statements to the police. If Ms Bell was an eye witness, and on their accounts that was obviously known to the defendants to have been so, it is difficult to understand why she was not advanced as someone the police should interview. She not only would have exonerated the defendant, but would have provided evidence that a principal witness against the defendant – Mr Henderson – was not present. Ms Bell says that she was at all times unaware that the defendant faced criminal charges. Similarly Mrs Corliss has Mr Henderson as not present. I find it inexplicable that the defendant would not have striven to ensure that the police had their accounts.

[51] Second, it is distinctly odd that every witness, save Mr Gooden, who said that he immediately quit the area once the window was smashed by the plaintiff, related that there was a significant verbal altercation between the two men but Mr and Mrs Corliss denied it.

[52] Third, Ms Bell failed to inform the court of the head butting of the window until her re-examination. It is difficult to see how she could omit such an event if relating what she saw. She asserted that she did not mention it as she was not asked, but Mr Grant-Taylor was careful to ask her non-leading questions in chief and she came out with the balance of her account but omitted this very significant part. Nor did she relate it immediately when Mr Grant-Taylor returned to the issue after the completion of cross-examination.

[53] Fourth, despite Mr Henderson claiming that he was told by the defendant that the DVD surveillance had been deliberately destroyed the defendant failed to tender any independent proof of his claim that the camera in the bar area had proved faulty on several occasions and had been repaired but to no avail. One would expect there to be documentary proof of repairs and presumably a witness familiar with the continued failure of the camera.

[54] Fifth, the investigating officer, Senior Constable Forster, recorded a conversation on the night with the defendant that is not entirely consistent with his present account. According to Senior Constable Forster when he asked the defendant to explain the state of the plaintiff's face he replied, "I don't know, I don't know if he head butted the window." Given that the defendant contends that he observed the plaintiff to head butt the window on about three occasions it is odd that the police officer had the impression that the defendant was in some doubt about whether that happened. I appreciate the points made in cross examination – some time passed between the conversation and the recording of it by the officer and there is not a great deal of difference between what is recorded and a possible version more consistent with the defendant's account. But there is a deal of difference between an expression of doubt about the head butting of the window and the present account.

[55] Sixth, Mr and Mrs Corliss had the blind over the window in the down position throughout. Every other witness put the blind in the raised position, notably Mr Gooden who was called by the defendant. The position of the blind is of significance – if it was in the down position it would have been difficult if not impossible for the defendant to have thrown something through the window opening. So on two material issues – the state of the blind and the existence of an altercation of some sort – the defendant and his wife contradict all other witnesses. The only witness to support them in their claim that the plaintiff head-butted the window frame is their friend Ms Bell and she failed to mention the matter in her evidence in chief.

[56] Seventh, the notion that the plaintiff was injured by shards of glass from his smashing of the window – however one assumes that occurred – is not supported by any other witness. I have mentioned the extent of Mr Leavey's support. Mr Gooden says that the plaintiff was well back from the window when he threw the stubby and appeared uninjured after doing so. He it seems was the closest to the plaintiff at the time. No one has the plaintiff looking up at falling glass when close to the window as he would need to be if it was his slamming of the raised window and frame that resulted in the injury.

[57] To put these points in context it is necessary to bear in mind Dr Moon's evidence. The injury was to both the anterior and posterior chambers of the eye. Such an injury was more consistent with a projectile entering the eye with some force. Hence she doubted that the head-butting of the window, with the probability of the forehead first making contact with the pane of glass, would be a likely mechanism of injury. Glass dropping from a height would meet her perception of a projectile. She was not asked, but I assume, that she would accept that the direct striking of the eye onto a shard of glass when head–butting the window and its frame would involve sufficient forcible entry into the eye to explain the injury.

[58] Eighth, it is difficult to believe that the two independent witnesses called by the plaintiff – Mr Homann and Mr Leavey – would not have seen and recalled the head butting of the window if it occurred, and I bear in mind that they were affected by alcohol. They clearly claim to have been watching the plaintiff at the relevant time. For a man to thrust his head and face onto broken glass in a window frame is a bizarre event to witness, and not likely to be either missed or forgotten.

[59] Ninth, the defendant claims to have evicted Mr Homann from the hotel at about 6pm that evening. The difficulty is that not only does Mr Homann deny the eviction but that is the effect of Mr Gooden's evidence as well. While it is not entirely clear, Mr Gooden seemed to accept the proposition that he and his friends, who included Mr Homann, went to the hotel together after work. I note the discrepancy in their accounts as to the possible arrival time – 5pm according to Mr Homann and 6.30pm according to Mr Gooden – which throws some doubt on this. But he clearly believed that they left the hotel together at closing time and the impression from his evidence is that they had spent the evening at the hotel. So the defendant is in conflict with his own witness on the point. And I am satisfied that Mr Homann was outside the hotel at 1am. If he was evicted at 6pm I think that it would be very unlikely that Mr Homann would be outside the hotel seven hours later. There is an obvious advantage to the defendant claiming that he evicted Mr Homann. If he was sufficiently intoxicated so as to warrant eviction at 6pm that would suggest that his condition by 1am, assuming that he continued to drink as he claimed, would be such that he could not possibly be a reliable witness, and would throw into doubt his very presence at the scene.

[60] I have not resolved the conflicts in the evidence concerning how the window was broken by the plaintiff and the nature of the object thrown by the defendant. I do not think it essential to do so. The manner of the breaking of the window is only a peripheral matter and in my view its resolution does not have the consequence that Mr Grant-Taylor contended for.

[61] While there is some force in the submission that it is more likely that a pot glass would smash on a man's face than a solid ashtray, that does not preclude the possibility of each being capable of causing injury. All depends on the characteristics of the ashtray and I note that the defendant failed to provide examples of the ashtrays used in the hotel at the time and called no evidence to establish the point made in argument.

[62] None of the matters that I have discussed, when taken in isolation, would be sufficient of itself to tip the probabilities the plaintiff's way. But taken together, and with the findings I have made as to the reliability of the plaintiff's witnesses, they justify the conclusion that the plaintiff has discharged the onus on him of

establishing that the defendant threw a glass object into his face and thereby caused the penetrating injury to his eye. In reaching that conclusion I have borne in mind the nature of the acts in question and the seriousness of their consequences for the defendant: see *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171.

The Assessment of Damages

[63] The damages are to be assessed pursuant to the provisions of the *Civil Liability Act* 2003. I have set out my understanding of those provisions in other decisions and see no reason to repeat them here.[1]

General Damages

[64] The parties are agreed that the relevant Item in the Schedule is Item 27 ("serious eye injury"). They differ as to the applicable ISV. The range of ISVs allowed under the Item is 11 to 25. Mr Grant-Taylor contends for an ISV of 20. Mr Crow submits that the maximum should be allowed and that a 25% increase should apply.

[65] The plaintiff was born on 13 October 1970 and so is presently aged 39 years. He was 34 years when injured.

[66] Dr Moon explained the nature of the injury and its effects. The plaintiff is left with some vision in the left eye – Dr Moon assessed the visual acuity at 6/60 or 80% loss of the vision in that eye – some scarring to the skin surrounding the eye, scarring of the cornea and retina, and distortion and enlargement of the pupil. The impairment to vision results in a whole person impairment rating under the AMA guides of 19%. The plaintiff has some cosmetic deformity in addition. There have been interferences with the plaintiff's pastimes and employment given the difficulties with depth perception. He can no longer pursue his trade as a roof tiler. He has pain behind the eye which can wake him at night. He complains of headaches which I deal with below.

[67] In my view the ISV allowed for in Item 27 is appropriate. I assess an ISV of 25 and assess damages at $35,000.[2] I have assessed the ISV at the upper end of the scale to take account of the significant extent of the loss of vision and the injuries to which Dr Moon has referred other than the damage to the eye. As well the plaintiff is at significant risk, estimated at 50%, of problems such as glaucoma, retinal detachment and cataract with the possibility of corneal decompensation and blindness.

Past Economic Loss

[68] A significant claim is made for past economic loss. The defendant contends for a modest global sum. The plaintiff contends that he has been unable to maintain his pre-accident employment as a construction labourer because of the injury and particularly because of headaches associated with the injury. The defendant disputes that the headaches are shown to be related to the injury.

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1 See for example *Hick v Frisby and Anor* [2008] QSC 161 at [21] – [28].

2 *Civil Liability Act* 2003 (Qld), s 62(e).

[69] The evidence in relation to the headaches is not particularly satisfactory. The headaches came on long after the injury – sometime in 2006 it appears. The lack of contemporaneity between injury and onset, unexplained, counts against there being a connection.

[70] A report was tendered from a Dr Sole, a consultant physician, in which he proffered a diagnosis of "atypical migraine". The history that Dr Sole received was that the headaches were associated with pain behind the eye, photophobia, and "very slight tearing". While that history suggests that the subject injury plays some apart in the aetiology of the headaches, all depends, obviously, on the reliability and accuracy of the history provided. Significantly, there is nothing in Dr Sole's discussion or treatment, at least to a layman's eye, that seems to indicate an acceptance that the cause of the severe headaches was the eye injury.

[71] Dr Moon was not asked to relate the headaches to the eye injury despite it being perfectly evident from Mr Grant-Taylor's cross-examination of the plaintiff that he was putting in issue their connection with the injury.

[72] Finally Dr Moon said in relation to a question directed to the appropriateness of certain medication, that it might be justified if there was a headache, and that was said in a context clearly relating the symptom to the subject injury. That is the full extent of the medical evidence.

[73] The point is of some significance. The plaintiff clearly attributes his continued unemployment to these debilitating headaches. While he attributes his resignation from his employment at Borthwick's Meatworks in Mackay, where he worked for a period of about 13 months and easily the most significant employment that he has had post accident, to his eye injury, it seems clear that it was the onset of these migrainous type headaches that was the cause of him ceasing work.

[74] It is fundamental that the degree of proof required will depend on the importance of the issue and the means available to a party to advance proofs of their contentions. Here the plaintiff seeks $141,000 for past loss and $242,000 for the future – 75% of his claim. An expert ophthalmologist was called but not asked to relate the plaintiff's complaint of headache to the subject injury. That failure permits an inference to be drawn that any answer she might have given would not have assisted the plaintiff: *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418-419 per Handley JA.

[75] The issue, of course, is not whether the eye injury is capable of producing headaches from time to time, or whether the plaintiff might well have headaches from time to time. Rather the issue is whether the grossly debilitating headaches of which the plaintiff complains and for which he has needed treatment are a consequence of the subject injury. I am not persuaded that the plaintiff has established that they are such a consequence. That finding severely limits the damages that can be allowed.

[76] Dr Moon accepted that the plaintiff could work in an abattoir provided he had adequate eye protection. She said that he could perform general labouring work. The principal restriction that she placed on his future activities was that he would be at risk at heights because of his difficulties with depth perception. Hence work as a roof tiler was plainly excluded.

[77] The restriction on working as a roof tiler was not so significant here. The plaintiff had not in fact worked in that capacity for some years before the subject incident and had no intention of going back to that work at the time he was injured. His plan was to follow the construction labouring work.

[78] It is evident that construction labouring work has been available over the time since the subject injury was sustained. It is not clear that the plaintiff could not perform that work over the entire period since the incident. He explained that he lost his pre-accident position because his eye was playing up in the early stages following the sustaining of the injury. He claimed that it was unsafe for him to return to construction labouring work, but no evidence was proffered as to what aspects of such labouring positions made it inappropriate for the plaintiff to return to that work in the longer term.

[79] As noted above there was some force in the criticisms that Mr Grant-Taylor made of the plaintiff's credit worthiness.

[80] As well the defendant points out that the plaintiff has had a number of plainly unrelated conditions that would have impacted on his earning capacity including carpal tunnel, back strain and gout. He was a heavy drinker and a user of marijuana which may have affected his ability to access some sites.

[81] On balance I am not persuaded that the plaintiff has made out a case that the injury explains the difference between what he has earned since the injury was sustained ($26,804) and what he might have earned as a construction labourer (suggested by Mr Crow to be in the order of $700 per week and $173,600 in total).

[82] In my view the plaintiff has suffered some loss given his need for treatment to his eye, his need to attend at the eye clinic from time to time, and his inability to return to his trade. He had well paid employment at the time of injury earning approximately $800 per week which I accept that he lost as a consequence of this injury.

[83] Doing the best that I can I assess the loss in a global sum of $50,000.

Impairment of Earning Capacity in the Future

[84] Assessment of future impairment of earning capacity involves similar considerations. Given Dr Moon's opinion that the plaintiff can perform labouring work and given that that is the type of work that the plaintiff was likely to follow if uninjured then only a modest sum can be allowed.

[85] It is significant that the plaintiff cannot return to his trade.

[86] Again all that I can do is assess a global sum bearing in mind that any impairment is over the next 26 years

[87] He has the significant risk of the complications I have mentioned which, if they occur, will interfere with his capacity further.

[88] I assess the damages at $75,000.

Future Treatment Costs

[89] There is the prospect of a need for future treatment given the complications that are possible and it is appropriate that the plaintiff be reviewed annually as Dr Moon suggested. While the possible treatments if complications arise are expensive, there is no certainty that they will be required and of course there must be a discount for the present receipt of damages for a future expense.

[90] Mr Crow contends for $21,690 and Mr Grant-Taylor concedes $10,000 under this head of loss. The significant difference reflects the differing assumptions concerning the issue of the cause of the headaches of which the plaintiff complains.

[91] In my view, $10,000 adequately covers the prospective costs related to the injury.

Special Damages

[92] Again counsel contend for differing amounts of special damages that reflect the disputed issue as to the cause of the headaches.

[93] I propose allowing the Royal Brisbane Hospital item ($7,541.55) and a small amount for further expenses. There is no precise way of computing this amount. I am satisfied that the plaintiff needed some treatment and medication from time to time that can be fairly attributed to his eye injury.

[94] I assess special damages in the sum of $8,000.

Aggravated and Exemplary Damages

[95] A claim was made for aggravated or exemplary damages but given the plaintiff's own conduct, he in my view being the initial aggressor, the significant compensation that I propose to award, the fact that the defendant reacted on the spur of the moment to the attack on his hotel, and the lack of any significant humiliation or distress to the plaintiff in the manner of injury, it would be inappropriate to allow that claim: see the discussion in *Giller v Procopets* [2008] VSCA 236 at [200].

Summary

[96] The remaining heads of loss were not contested.

[97] In summary I assess the damages as follows:

General Damages	$35,000.00
Past Economic Loss	$50,000.00
Interest on Past Economic Loss[3]	$6,840.00
Past loss of Superannuation Benefits	$4,500.00
Future Loss of Earning Capacity	$75,000.00
Future Loss of Superannuation Benefits	$6,750.00
Future Treatment Costs	$10,000.00
Special Damages	$8,000.00

[3] Adopting 2.88% for all interest claims

Interest on Special Damages	$62.00
Total Damages	**$196,152.00**

Orders

[98] There will be judgment for the plaintiff in the sum of $196,152.00.

[99] I will hear from counsel as to costs.