IN THE COURT OF APPEAL 99.22

SUPREME COURT OF QUEENSLAND

Appeal No. 3251 of 1998

Brisbane

[Newberry v Parojam P/L]

BETWEEN:

RICHARD ROBERT NEWBERRY
(Plaintiff) Appellant

AND:

PAROJAM PTY LTD (Trading as P&R Deguara)
(ACN 065 105 008)
(Defendant) Respondent

Thomas JA
Shepherdson J
Jones J

Judgment delivered 19 February 1999.

Joint reasons for judgment of Thomas JA and Jones J, separate dissenting reasons of Shepherdson J.

APPEAL ALLOWED. SUBSTITUTE FOR THE ORDER MADE BY THE LEARNED TRIAL JUDGE THAT THERE BE JUDGMENT FOR THE APPELLANT AGAINST THE RESPONDENT FOR THE SUM OF $31,562.87 TOGETHER WITH COSTS TAXED ON THE APPROPRIATE DISTRICT COURT SCALE. RESPONDENT TO PAY COSTS OF AND INCIDENTAL TO THE APPEAL.

CATCHWORDS: **DAMAGES - personal injury - quantum - expert witness - conversion disorder - past economic loss - *Elford v FAI General Insurance Co Ltd* [1994] 1 Qd R 258**

Counsel: Mr P McMurdo QC, with him Mr B Harrison for the appellant.
Mr J Clifford QC, with him Mr T Morgan for the respondent.

Solicitors:	Macrossan & Amiet for the appellant. Peter Searles & Associates for the respondent.
Hearing Date:	21 October 1998.

IN THE COURT OF APPEAL

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Before Thomas JA
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JOINT REASONS FOR JUDGMENT - THOMAS JA and JONES J

Judgment delivered 19 February 1999

1 This is an appeal by the appellant against the quantum of damages for personal injuries which he sustained in the course of his employment on 30 May 1995. The learned trial Judge assessed damages in the sum of $80,486.72 with the following compilation:-

Pain, suffering, loss of amenities (inc interest)	$ 8,000.00
Past economic loss	$45,000.00
Loss of future earning capacity	$15,000.00
Loss of superannuation benefit 6% of ($45,000.00 + $15,000.00)	$ 3,600.00
Past and future care	$ 1,000.00
Special damages	$ 4,665.17
Fox -v- Wood component	$ 3,111.55
Out of pocket expenses	$ 100.00

	Interest thereon	$
10.00		
	Total	**$80,486.72**

Having found that the appellant contributed to his own injury to the extent of 50% the final award was for half the above assessment less the refund of $23,596.49 due to WorkCover.

2 The appellant was injured when a length of box steel fell on him from above, striking him on the lower back and loin. The length of steel had been used as a prop to hold up an hydraulic ram on a tip truck whilst it was being repaired. The appellant was working at replacing a wheel on the truck which had been raised by means of a jack. When the appellant lowered the jack the piece of steel was dislodged causing its fall.

3 The appellant sought treatment from his general practitioner, Dr MacIntosh, on 6 June 1995, some six days after the incident. He presented with pain and tenderness in the right lower lumbar region and swelling over the right long lumbar muscles. Returning ten days later he still had tenderness and a "slowly resolving contusion over the right lumbar muscles". Further physiotherapy was prescribed. One week after that review he presented with right side paraesthesia and pain. A CT Scan taken at that time showed a possible sequestered disc fragment at L4-5 level. This possibility, along with an alternative possibility, were excluded by subsequent MRI tests which showed the appellant's spine to be in a normal condition.

4 The appellant was referred to Dr Cook, an orthopaedic surgeon, who first examined him on 3 July 1995 and continued to treat him until 7 August 1996. Dr Cook's treatment consisted mainly of injections for pain and right sided sympathetic nerve blocks. All told, the appellant consulted Dr Cook on ten occasions. His diagnosis was that the appellant suffered a right sided lumbar sympathetic nerve

dystrophy. This diagnosis was accepted by the learned trial Judge despite the contrary opinions of two orthopaedic specialists, Drs MacFarlane and Gibberd each of whom examined the appellant on one occasion for the purpose of the trial. Their examinations were respectively in October 1995 and February 1996.

5 The appellant was examined also by neurosurgeon Dr Toakley and underwent EMG tests by Dr Cameron. These examinations and tests failed to find any organic explanation for the appellant's continuing symptoms.

6 The appellant was examined by two psychiatrists - Dr Alroe in July 1996 and Dr Gillman in January 1998 - presumably to establish whether any psychological mechanism impacted on his symptomology.

7 The appellant's symptoms were described by Dr Alan Cook in the course of his examination on 7 August 1996 as follows:

> "...he said that he had been having more pain than previously and overall felt worse. He said that the pain was bad across the lumbo-sacral region of his spine and extending up his spine above this level. He also said that he has still been experiencing headaches when the pain spreads up his spine. He also said that his right foot has been swelling and that the leg still feels cold as does his scrotum and between his legs have the same feeling (sic). He went on to say that his pain is present most of the time but does ease at times when the pain is a lot milder. He said that the pain increases if he lies down for too long or stands for more than one to one and a half hours. He said on this last occasion that sitting is the best position. Walking, he said, is not too bad for half to three quarters of an hour but if he walks long[er] than (sic) pain becomes much worse."[1]

The learned trial Judge found that the appellant "greatly exaggerated his description of pain and has adopted an abnormal gait".[2]

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1 Record p161.

2 Record p198.

8 All the medical specialists by whom the appellant was examined agreed that all of his symptoms could not be explained by reference to any organic injury he suffered. On this point Dr Cook said - in his report dated 27 January 1998 -

> "The writer however feels that in addition to the above there is also a large functional overlay and would agree with Dr Alroe's reports of 24 July 1996 and his subsequent letter dated the 19 September 1997. The diagnosis of right side lumbar sympathetic nerve dystrophy is also consistent with the EMG studies carried out by Dr John Cameron, Consultant Neurologist, in Brisbane, in July 1997.
>
> The above however does not explain all this man's symptoms and disability and in particular his peculiar gait and his very limited straight leg raising and it is felt that a large part of this is due to emotional or psychological affects as there is no orthopaedic explanation or neurological explanation for them."[3]

9 In his evidence Dr Cook said:-

> "Now, you've also said that despite that you felt there were psychological overlay in this matter (sic)? -- Yes, the sympathetic nerve dystrophy doesn't produce the type of gait that Mr. Newberry had when I first saw him and on - well, every time I've seen him, he's had this most peculiar abnormal gait.
>
> Has he been consistent in that gait on all the occasions that you saw him? -- Absolutely.
>
> And that could not be explained by your diagnosis? -- I feel it can't, no.
>
> All right and was it particularly that gait that you relied upon in arriving at the conclusion that there was some psychological overlay? -- Well, that plus his normal investigations that had been carried out, X-rays, scans, EMG's.
>
> Assuming that it were the case that into the future the problem of psychological overlay could be improved or elevated to some extent, would you still see there being any limitations placed upon him in terms of what he could or

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[3] Record p162.

> couldn't do, by virtue of the condition that you've diagnosed? -- It does greatly reduce the normal function of the limb as a whole so any occupation that involves him to stand on his leg for long periods of time, walk, sit for long periods of time, binding, lifting, carrying anything of any weight or substance or even working in a confined cramped space, would all considerably increase his pain level.
>
> Would you advise him in terms of whether he should avoid any heavy work or any heavy labouring work at all, just on the strength of that condition? -- I feel that physically he would not be able to do it." [4]

[4] Record p119.

9 The appellant attacks the assessment of damages on three grounds. Firstly, that the learned trial Judge, having found that the appellant suffered sympathetic nerve dystrophy, ought to have granted a higher award because that condition carried with it the difficulties and limitations set out in Dr Cook's cross examination which revealed the following features:-

> "You mentioned that excluding the psychological effects, a person suffering from - Mr. Newberry would have difficulty because of his dystrophy from a long period of standing, walking, sitting or heavy lifting or consistent bending? -- Yes
>
> Why would lifting be interfered with? -- It's not the actual lifting, it's the - seems to relate to the physical action or the physical activity. He would get quite a lot of pain even if he lifted a much lighter object, as lifting a heavy one.
>
> What are we talking about - 10 kilograms as distinct from 25, or ----? -- Yes
>
> Standing. Why would that result in a problem for him? -- Standing does not only increase back pain but increases the pain in the leg and the paresis becomes more intense to the point where they find that they can't stand, they either have to go and sit down, lie down, walk around, move around, anything to try to ease it.
>
> It sounds as though you're describing the sort of condition

> that would need an opportunity to stand for a while, to walk for a while, to sit for a while, you know, to be generally mobile? -- Yes. That is correct.
>
> Like a delivery driver? -- He probably could function as a delivery driver for a short time, perhaps anything from a few days to a few weeks, but the repeated getting in and out of the vehicle, loading/unloading articles, parcels, going up and down stairs, into premises, collecting/delivering, would considerably increase his back pain and leg pain.
>
> So, do you suggest that there is a cumulative problem as well as just individual problems with his standing, walking, sitting, bending, lifting? -- The longer they go on doing them for any one period of time or the longer they go on repeating the same action or activity, that is the thing that tends to increase the pain or aggravate their symptoms.
>
> Surely sitting watching television would have the same affect (sic) then? -- If he sat glued to his television set and didn't get up and get a drink or move around or go to the toilet, or just get up and walk around at odd intervals, yes, it would."[5]

10 Dr Cook's opinion was that the level of severity for the dystrophy condition was "a moderate degree" [6]. This assessment was made acknowledging the difficulty of apportioning how much of the disability was due to the sympathetic dystrophy and how much to the functional overlay. During the course of his cross-examination, the following exchange occurred:-

> "Are you able to put a measure on the - on the level of disability that one should normally suffer from the kind of dystrophy that you've diagnosed, or the degree of dystrophy that you have diagnosed? -- Oh, the degree of dystrophy, lumbar sympathetic nerve dystrophy varies enormously from mild to quite severe and intense to the point that someone with a very severe form of sympathetic dystrophy, not infrequently, ends up with an amputated limb on that

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5 Record 123-24.

6 Record p122.

> effected (sic) side. So Mr. Newberry obviously suffers from a milder form of a condition than that.
>
> And is it then the case that you are simply not able to determine how severe his condition attributable to dystrophy is, as distinguished from his psychological condition? -- Oh, I could only put it as a moderate degree. I couldn't give a specific percentage for it." [7]

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[7] Record p122.

11 Contrary to that expressed opinion, the learned trial Judge found that the appellant's condition was a mild one. The appellant contends that in these circumstances, because of the view which the learned trial Judge took about the appellant's exaggeration of symptoms, he erroneously substantially discounted the award. However his Honour's finding is consistent with the acceptance of Dr Cook's diagnosis, with its severity discounted because of the appellant's exaggerated presentation of symptoms.

12 The appellant's second contention is that the learned trial Judge's findings are to the effect that there was, additionally to those physical symptoms, some genuine but unquantifiable conversion disorder. If that is so, then the award of damages ought to have been much higher.

13 The appellant's third contention is that a proper consideration of the evidence ought to have led to a finding that his present disability was due to the continuing effects of the physical condition and the added effects of a conversion disorder notwithstanding the fact that there were some exaggerations in his complaints.

14 The relevant finding of the learned trial Judge which is the subject of this review is expressed in the following terms:-

> "It is beyond argument that many of Mr. Newberry's symptoms

> have no organcic (sic) basis. Dr Cook's diagnosis of sympathetic nerve dystrophy explains some of the symptoms particularly the coldness in the right leg and some back and leg pain.
>
> At best that condition is a mild one. I accept Dr Cook's opinion. The cold right leg was noted on July 3, 1995 which is relatively soon after the incident. Dr Cook examined Mr. Newberry on a number of occasions and had a good appreciation of the sites of the trauma to the lumbar area.
>
> However, I am satisfied that Mr. Newberry has greatly exaggerated his description of pain, and has adopted an abnormal gait. He initially suffered pain, but sought no medical attention. When he did seek attention, it was some time before he received any clear diagnosis, and in the meantime, as Dr Alroe described, he set about trying to convince doctors that there was something wrong with him. It is curious that the third nerve block produced no relief. Pain is subjective, and one possible explanation is that by then Mr. Newberry was not wanting pain relief. Rather he was committed to exaggerating his symptoms. I would expect that with the conclusion of his (sic) case there will be very little residual disability. Certainly it should not interfere with his capacity to work within the areas of plant operation for which he is skilled." [8].

It should be noted that at no time did Dr Alroe suggest that the appellant "set about trying to convince doctors". His remarks were part of a general comment which will be referred to later.

15 For the respondent it is contended that whilst there is no specific finding of malingering, a consideration of the finding set out above leads to an inference that the learned trial Judge concluded that the appellant was in fact a malingerer. The respondent points to the fact that his Honour did not accept the appellant's evidence in relation to five contested points on the issue of liability and the fact that the appellant made complaints to various doctors which is consistent only with dishonest feigning of symptoms - particularly, his abnormal gait, urinary frequency, straight leg raising, voluntary weakness

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[8] Record pp 197-8.

and sub-maximal effort when undergoing certain tests. The respondent contends also that his Honour's description that the appellant "adopted" an abnormal gait and "was committed to exaggerating his symptoms" was tantamount to a finding of malingering.

16 It is clear that the learned trial Judge formed an adverse view of the appellant. That was something he was entitled to do, notwithstanding the identification of eight indicators which, according to Dr Alroe, [9] tended to suggest a diagnosis of conversion disorder.

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[9] Record pp16-17.

17 The question whether the appellant was malingering or suffering a conversion disorder, or whether both factors existed, was very much in issue. Having found that the appellant did suffer sympathetic nerve dystrophy his Honour could not find that all symptoms complained of by the appellant were dishonest exaggeration. In relation to the dystrophy however his Honour found only one objective symptom attributable to it, namely coldness in one foot, and that the appellant had dishonestly exaggerated other symptoms such as pain, his distorted gait and limited straight leg raising. Dr Cook's opinion, which was essentially accepted by his Honour, recognised that there was "a large functional overlay", and the effect of his Honour's findings was to reject the suggestion that this could be regarded as a conversion disorder. It would follow that although his Honour did not expressly dub the appellant a malingerer, he regarded the functional overlay as stemming from conscious insincere conduct and exaggeration of the appellant so that this component is essentially non-compensable. In short, the damages that the respondent must pay are essentially those attributable to the sympathetic nerve dystrophy. Our reasons for concluding that the appellant is not entitled to damages for conversion disorder appear hereunder.

18 There was considerable focus on the psychological effects of the injury on which aspect there were tendered in evidence reports by Dr Alroe and Dr Gillman, both consulting psychiatrists. Dr Alroe also gave oral evidence.

19 In response to questions raised in a letter from the defendant's solicitors, Dr Alroe expressed the view that the appellant suffered either from "a conversion disorder in the DSM - IV sense or is malingering in that sense". In his evidence-in-chief Dr Alroe referred to various aspects of the appellant's pre-accident work history and social history which constituted the eight indicators referred to above. His preference for the diagnosis that the appellant was suffering from a conversion disorder and psychogenic pain rather than malingering appears to be based on his personal assessment of the appellant. In cross-examination Dr Alroe agreed that in determining whether there was a conversion disorder much depended on an impression one formed about the appellant's honesty. The following exchange took place:-

> "Is it possible that there's some overlap between the two and that there might be an element of exaggeration so perhaps some worsening of his disorder by this exaggeration - dishonest exaggeration? -- A mixture of the two?
>
> Yes? -- Yes, that's true. Where there was a mixture, though one would not tend to use the word malingering which is probably an all or nothing thing, but certainly embellishment occurs probably in most cases of people - it's actually the rule rather than the exception. In most cases there is some embellishment."[10]

It is clear from his Honour's findings that he regarded the appellant's exaggeration of symptoms as going beyond mere embellishment. Later in his cross-examination Dr Alroe said:-.

> "Fundamental to that proposition is the extent of dishonesty or the

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[10] Record p20.

> extent of exaggeration? -- Yes, well, it's often hard to know. But there's always a little bit of embellishment I find but that's understandable. I mean the individual is really trying to convince the doctor - and we've got an individual who's continually being told that they're lying or malingering so that they're keen when they see the doctor to prove to him that they have a genuine case. That's understandable. As to whether one should take a moral view of that or not I don't know, but it's understandable.
>
> Alright. And there's no objective way of - there's no comment you could make about the extent of the exaggeration in this case? -- No, other than to say that it's something that I think would - could be the subject of research and it would make a very interesting form of research and I'm sure there'd be interesting results, but I'm not aware that that's been done anywhere so I couldn't really answer that in this man's case or I couldn't apply the result of research that had been done elsewhere in this man's case I'm afraid." [11]

Thus the issue is determined by his Honour's assessment of the appellant's honesty.

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[11] Record pp23-24.

20 The learned trial Judge made no express finding that the applicant suffered any conversion disorder which, if it existed, would have been compensable. Despite the opinion of Dr Gillman and his report (R.184) and of Dr Alroe in his evidence (R.17) that the appellant was not a malingerer, the assessment was one peculiarly for the trial Judge and essentially based on findings as to the appellant's honesty. If it be the case that any part of the appellant's symptoms are attributable to a conversion disorder then it seems that he failed to convince the learned trial Judge that this is so, or at least, that it exists to any significant degree.

21 Consequently, we are not convinced that the appellant has identified any error in his Honour's failure to make the findings which would allow the second and third contentions raised on this appeal to be considered.

22 The learned trial Judge's assessment then has to be looked at in terms of the

findings clearly made - the acceptance of Dr Cook's diagnosis and the consequences which reasonably flowed from that finding. In this regard there is a serious gap in the evidence as to the nature of the condition of sympathetic nerve dystrophy. It is not known whether the condition is permanent or whether its effects are likely to worsen or to reduce over time. Certainly there was no evidentiary basis for his Honour's finding that by the end of 1996 the appellant was physically fit for work. Such a finding was not indicated by the opinion of Dr Cook on the occasion of his last examination of the appellant in August of that year.

23 Notwithstanding that shortcoming, the identified effects of the organic condition which we referred to above would suggest that the allowance of $8,000.00 for pain and suffering is manifestly inadequate.

24 The disallowance of any past economic loss beyond the end of 1996 leads to a similar conclusion being made about that particular assessment. His Honour's limitation on the duration of past economic loss is, in our opinion, not consistent with the acceptance of Dr Cook's opinion at the August 1996 examination and the thrust of Dr Cook's evidence about the appellant's working capacity. Dr Cook was well aware that the appellant was exaggerating his symptoms as shown by the passages referred to in paragraph 8 hereof. Excluding the psychological effects, the appellant's physical limitations remained significant although, as mentioned above, his Honour was entitled to regard the physical symptoms as something less than those of which the appellant complained to Dr Cook. Those limitations affected the appellant's capacity to lift, to stand and to drive and appeared likely to have continued beyond 1996.

25 The medical evidence does not indicate for how long the appellant would have experienced the deficits from the physical condition of sympathetic dystrophy nor whether

that injury gave rise to an increased susceptibility to further injury. Consequently the assessment of this allowance becomes very much a value judgment based on a discounted view of Dr Cook's description of the condition and its consequences referred to in paragraph 10 hereof e.g. difficulties with standing, walking and lifting. It is apparent from what he found in respect of past economic loss, that his Honour took the view that these deficits would moderate very significantly. For the loss of future earning capacity the learned trial Judge found that, by reason of the appellant's compensable injury, he would be more vulnerable in the work force. His Honour allowed $15,000.00 on this account. This represents something less than one year's income or an allowance of approximately $20.00 per week over the whole of the appellant's potential working life. On the basis of a continuing vulnerability based on the physical limitations described by Dr Cook, the allowance appears to be somewhat low.

26 It has already been noted that the appellant is of limited education and work experience which would make job changing and re-employment difficult. Whether one adopts an arithmetic formula with an attempt to assess a weekly diminution of earning capacity or makes a global assessment of an allowance the task is fraught with the same difficulty. Bearing in mind that the onus is on the appellant to establish the extent of his loss and having regard to the clear finding of the learned trial Judge that the appellant exaggerated his symptoms both to the doctors he consulted and to the court, the basis for making an assessment of this allowance is far from clear. However, the learned trial Judge did recognise that the appellant had a continuing vulnerability because of his injury. On the view we have taken of Dr Cook's evidence, the allowance should reflect the prospect of the appellant's future employment being punctuated by more than trivial periods of unemployment. We would assess the amount under this heading at

$30,000.00.

27 In the event that this court was persuaded to interfere with the assessment, each of the parties prepared a compilation of allowances consistent with that party's view of the evidence. Apart from a minor difference of view about the allowance for pain, suffering and loss of amenities the real issue between the parties relates to economic loss which appeared to spring from the difference in the appellant's pre-accident earning capacity.

28 The nett weekly wage adopted for the calculation of past economic loss was $450.00. This figure appears to be based on the appellant's actual earnings at the time of the incident which included a component for overtime. The appellant's employer gave evidence that in his view the appellant would have continued to work for him in his pre-accident capacity. His Honour accepted his rate of remuneration in the calculation for past earning lost though his Honour did not accept that there would be the incapacity after 1996. The pre-accident earning capacity of the appellant taken over a longer period of time, suggests that the allowance for long term loss of income would be closer to $350.00 per week.

29 An adoption of $350 per week as an appropriate figure for long term nett weekly earnings for the appellant would establish a primary calculated loss of $49,140. As a reasonably lengthy period is involved, a slight deduction for contingencies is justifiable. Accordingly, it cannot be said that his Honour's assessment of past economic loss ($45,000) is erroneous. It would seem that no interest was allowed on past economic loss although the appellant's receipt of worker's compensation weekly payments and social security benefits (totalling approximately $40,000) was less than the sum assessed. It would be appropriate then to allow interest on $5,000 of the past economic loss at 6% resulting in a further allowance of $810.00.

30 It has been agreed that superannuation loss would be calculated at 6% of the combined total of past and future economic loss namely $75,000.00. The allowance therefore is $4,500.00.

31 The remaining items appear to have been the subject of agreement below. The compilation of the appellant's damages should, in our view, have the following allowances:-

Pain, suffering and loss of amenities			$ 20,000.00
Interest thereon			$ 432.00
Past economic loss			$ 45,000.00
Interest thereon			$ 810.00
Future economic loss			$ 30,000.00
Loss of future superannuation benefits			$ 4,500.00
Fox -v- Wood			$ 3,111.55
Special damages			$ 4,665.17
Past Griffiths -v- Kerkemeyer		$ 800.00	
Future Griffiths -v- Kerkemeyer			$1,000.00
			$110,318.72
Reduced by 50%	$ 55,159.36		
Less Refund due to WorkCover	$ 23,596.49		$ 84,364.85
			$ 31,562.87

32 In *Elford v FAI General Insurance Co Ltd* [12] it was determined that if in substituting a proper figure for the components there is a substantial alteration to the total then the correction should be made. That appears to us to be the situation here.

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12 [1994] 1 Qd R 258 at 265.

33 We would therefore allow the appeal and substitute for the order made by the learned trial Judge that there be judgment for the appellant against the respondent for the sum of $31,562.87 together with costs taxed on the appropriate District Court scale. We would further order that the respondent pay the costs of and incidental to this appeal.

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Jones J

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AND:

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(ACN 065 105 008)
(Defendant) Respondent

REASONS FOR JUDGMENT - SHEPHERDSON J

Judgment delivered 19 February 1999

1 I have read the reasons for judgment prepared by Thomas JA and Jones J. Their Honours have set out a number of the relevant facts and I shall, in the course of these reasons, add to them. I have reached a different conclusion as to the result of this appeal and so I now state my reasons.

2 At the trial both liability for the plaintiff's alleged injuries and the nature and extent of those injuries and the quantum of his damages were in issue. The learned trial judge decided that the defendant was liable in negligence and that the plaintiff was

contributorily negligent. He found each party equally to blame. There is no appeal on liability.

3 The principal issue litigated on the appeal was the interpretation of that part of the learned trial judge's reasons for judgment appearing in paragraph 15 of the reasons of Thomas JA and Jones J in which the learned trial judge said:-

> "It is beyond argument that many of Mr. Newberry's symptoms have no organcic (sic) basis. Dr. Cook's diagnosis of sympathetic nerve dystrophy explains some of the symptoms, particularly the coldness in the right leg and some back and leg pain.
>
> At best that condition is a mild one. I accept Dr. Cook's opinion. The cold right leg was noted on July 3, 1995 which is relatively soon after the incident. Dr. Cook examined Mr. Newberry on a number of occasions and had a good appreciation of the sites of the trauma to the lumbar area.
>
> However, I am satisfied that Mr. Newberry has greatly exaggerated his description of pain, and has adopted an abnormal gait. He initially suffered pain, but sought no medical attention. When he did seek attention, it was some time before he received any clear diagnosis, and in the meantime, as Dr. Alroe's described, he set about trying to convince doctors that there was something wrong with him. It is curious that the third nerve block produced no relief. Pain is subjective, and one possible explanation is that by then Mr. Newberry was not wanting pain relief. Rather he was committed to exaggerating his symptoms. I would expect that with the conclusion of his (sic) case there will be very little residual disability. Certainly it should not interfere with his capacity to work within the areas of plant operation for which he is skilled."

4 Immediately before the above quoted passage, his Honour said:-

> "Dr. Alroe, psychiatrist says that Mr. Newberry either suffers from a conversion disorder or is malingering. He recognised in cross-examination that there may be some blending of these conditions in the sense that embellishment is understandable."

5 Before the learned trial judge there was debate as to whether, at trial, the plaintiff was suffering conversion disorder or was malingering and before this Court there was debate as to whether the learned trial judge found that the plaintiff was malingering and/or suffering from conversion disorder.

6 As Thomas JA and Jones J have pointed out the issue before the learned trial judge was determined by the learned trial judge's assessment of the plaintiff's honesty.

7 Before turning to the evidence on that aspect I mention a number of matters:-

1. The learned trial judge was in a far better position than any of the doctors to assess the plaintiff's honesty. He saw and heard the man give evidence not only on his alleged injuries and their consequences but also on the matter of liability for his alleged injuries. The doctors who expressed opinions on his honesty did so on much more limited material i.e. within the limits of their consultations with him and their respective specialties although it is fair to say that according to his report Dr Cook did see the plaintiff ten times, the last being on 9 August 1996.

2. The plaintiff within five weeks after 30 May 1995 walked with (to use Dr Cook's words) a "most peculiar abnormal gait" (T119). Dr Cook first saw the plaintiff on 3 July 1995 and in oral evidence said:-

> "every time I've seen him, he's had this most peculiar abnormal gait"

He was asked "Has he been consistent in that gait on all the occasions that you saw him?" and he answered "Absolutely". He said it could not be explained by his diagnosis.

3. The case on damages was fought on the basis that there was no organic reason for this gait and that the gait bore no relationship to any neurological disorder.

4. The learned trial judge accepted Dr Cook's opinion that the plaintiff had suffered sympathetic nerve dystrophy. Dr Cook alone diagnosed this

condition. Dr Gibberd an orthopaedic surgeon called by the defendant did not accept that diagnosis. Before giving evidence he had read Dr Cook's report and a transcript of Dr Cook's evidence.

5. Dr Gibberd said the sympathetic nerves were very, very well protected being right on the inside of all the skin fat and muscles on the abdominal wall (working from the back forward). The learned trial judge said that Dr Gibberd had pointed to the thickness of the lumbar muscles which made it unlikely that the blow on the loin would have damaged nerves in the abdominal cavity (T196). His Honour noted that Dr Gibberd accepted that a complaint made to Dr Cook on 3 July 1995 of a cold right foot could be a symptom of sympathetic nerve dystrophy. This complaint of a cold right foot was an objective sign of the dystrophy. Plaintiff complaints of lower back pain were not objective signs of the dystrophy. I mention that Dr Cook in his report described where the sympathetic nerves were sited in a human body.

6. Dr Gillman a consultant psychiatrist practising in Mackay gave a report dated 28 January 1998. He did not give oral evidence. His report is exhibit 22. He does not say when he saw the plaintiff. Dr Gillman says in his report that the plaintiff told him he had coldness in his right foot and "a feeling of coldness in the perineum (genital area)". The learned trial judge did not mention this coldness in the perineum. Dr Cook did not mention it nor was this aspect suggested to him in cross-examination. Dr Gibberd was asked about it and said it was a most bizarre symptom and sympathetic dystrophy does not in effect occur in that part of the body

(T136). Whether his Honour took into account this evidence from Dr Gibberd is not known.

7. Dr Cook's diagnosis of sympathetic nerve dystrophy relied in part on the results of the sympathetic nerve blocks which he said gave relief of symptoms for two or three days (T162). It is true to say however that according to Dr Cook's report the plaintiff told him after the third nerve block that he still had a lot of pain and the injection did not feel right. It is also true to say that Dr Cook recommended seven nerve blocks but there is no evidence the plaintiff had more than three.

8. There was no dispute at trial that the plaintiff exhibited and had for some time exhibited what was called a large functional overlay.

9. The plaintiff bore the onus of proving what injuries he had suffered as a result of the defendant's tort, the extent of those injuries and their duration (*Edwards v. Hourigan & Ors* [1968] Qd R 202).

8 I turn to the evidence touching on the assessment of the plaintiff's honesty.

(a) On the issue of liability his Honour made a number of findings in which he rejected the plaintiff's evidence which on various aspects conflicted with the evidence of defence witnesses. By way of example the learned trial judge found that the piece of box steel was lighter than the steel the plaintiff described as having fallen and struck him. He further found that the steel did not suddenly fall as the plaintiff had claimed, but that it was much more likely that the plaintiff let the jack down suddenly so that the steel which Stevens was using on top of the truck was dislodged. I do not propose to list the other examples but these findings against the plaintiff

must, I think, have been taken into account by the learned trial judge in assessing the plaintiff's honesty.

(b) Dr Alroe, a consultant psychologist practising in Rockhampton, had furnished written reports on the plaintiff and had given oral evidence. In his written report dated 24 July 1996 (exhibit 4) he had noted on physical examination:-

> "he walked in a bizarre way that seemed to bear no relationship to the alleged site of injury and related to no form of injury that I could determine. It certainly did not relate to the site that is alleged to be the site of the blow with the piece of steel."

His conclusion was:-

> "It is my opinion that this man does not have an organic lesion and especially in the light of his extraordinary walk I would suggest it to be wholly psychogenic. This is immediately obvious to the experienced observer and the alleged site of lesion does not in any case bear any relationship to the alleged loss of function."

On 19 September 1997 Dr Alroe gave a further written report (exhibit 6). This further report was in response to a letter from the defendant's solicitors seeking answers to a number of questions. In the course of that letter (exhibit 6) Dr Alroe explained "psychogenic" as meaning "arising wholly from the mind and having no origin in peripheral organic pathology". He said:-

> "It can be either consciously produced or as a result of presumed unconscious mechanisms. Such symptoms therefore are totally unlike those which arise from genuine physical illness and tend more to reflect the ideas the subject has about what he thinks would be the symptoms were he organically impaired."

In exhibit 6 he also said that the plaintiff either suffered from a conversion disorder in the DSM-IV sense or is malingering in that sense.

9 Dr Cook, in his report dated 27 January 1998 (exhibit 7), after stating his diagnosis of right side lumbar sympathetic nerve dystrophy, said:-

> "The writer however feels that in addition to the above there is also a large functional overlay and would agree with Dr. Alroe's reports of 24 July 1996 and his subsequent letter dated the 19 September 1997. ... The above however does not explain all this man's symptoms and disability and in particular his peculiar gait and his very limited straight leg raising and it is felt that a large part of this is due to emotional or psychological affects as there is no orthopaedic explanation or neurological explanation for them."

Dr Gibberd said that he had read Dr Alroe's reports and he agreed with Dr Alroe's views that the plaintiff did not have an organic lesion and especially in the light of his extraordinary walk suggested it to be wholly psychogenic. Thus the statement by the learned trial judge that "it is beyond argument that many of Mr Newberry's symptoms have no organic basis" is perfectly correct.

10 Dr Alroe was interposed as a witness during the plaintiff's evidence-in-chief. In the course of his evidence-in-chief Dr Alroe, when asked about conversion disorder and attention assessment and legal processes and what he meant by "attention and assessment" appearing in exhibit 6, said:-

> "The act of going and seeing large numbers of experts seems itself to exacerbate the problem."

The following questions and answers then appeared:-

> "Q. In his case you're aware that he's seen a number of orthopaedic specialists, people with experience in neurology, as well as psychiatrists. Is that all of some relevance to his overall condition, the fact that he's been through that process?
> A. Yes.
> Q. In what sense?
> A. Well it tends to - it tends, if anything - it does have an exacerbating element to it as I see it, but it also tends to crystallise the form of the symptoms so that they become much more consistent. That's not illogical

since we know that his condition is inconsistent with a demonstrable or any known demonstrable organic disorder. But the symptoms become consistent over time with the way they present at each assessment.
Q. This is something that can happen unconsciously, can it, in the case of the conversion disorder?
A. Well that is the theory. That's the idea behind conversion disorders, that the mechanism is essentially unconscious and the person is not consciously presenting symptoms. If they did so [sic] that they would be aware of what they were doing. They would [be] able to control them and we would be in the malingering situation.
Q. *In the case of what we might term the unconscious reaction, the fact that you go through that and we then get that consistency that you've spoken of, can that make the very symptoms and the very problems themselves more entrenched?*
A. *Well that's the idea. It's a process of entrenchment.*"

(the emphasis is mine)

11 In cross-examination the following questions and answers appeared (page 20):

"Q. Further to Mr Harrison's questioning, is it the case that in determining whether there is a disorder or whether it's malingering, you have to form an impression about his honesty?
A. Yes, that's true.
Q. And is your use of the word malingering essentially - or does it essentially connote dishonesty, in other words a dishonest feigning?
A. Yes.
Q. And the conversion disorder is, on the other hand, perhaps an honest feigning in that he's not consciously making a mental decision to feign. He's unconsciously ... ?
A. Correct, yes.
Q. ... Making a decision to feign?
A. Yes.
Q. Is it possible that there's some overlap between the two and that there might be an element of exaggeration so perhaps some worsening of his disorder by this exaggeration - dishonest exaggeration?
A. A mixture of the two?
Q. Yes?
A. Yes, that's true. Where there was a mixture, though one would not tend to use the word malingering which is probably an all or nothing thing, but certainly embellishment occurs probably in most cases of people - it's actually the rule rather than the exception. In most cases there is some embellishment."

12 In that later passage Dr Alroe appears to me to have accepted that as the learned trial judge said that there may be some blending of conversion disorder and malingering in the sense that embellishment is understandable.

13 It seems to me that in the present case the learned trial judge found that there was such a blending with the conversion disorder aspect being limited to some understandable embellishment by the plaintiff. Embellishment is not, as I read his Honour's sentence the same as malingering. It is true that his Honour did not expressly find that the plaintiff suffered a conversion disorder nor did he expressly find that the plaintiff was malingering. We were told in argument that the learned trial judge was asked to find that the plaintiff did suffer a conversion disorder. He has not made such a finding and it seems to me that it must be reasonably inferred that he refused to make that finding.

14 Nevertheless, the following sentence in his Honour's reasons for judgment - and it appears in the portion quoted earlier - shows that his Honour did conclude that the plaintiff had acted deliberately and dishonestly:-

> "However, I am satisfied that Mr. Newberry has greatly exaggerated his description of pain, and has adopted an abnormal gait."

In my view the choice of the word "adopted" illustrates the deliberate and conscious aspect of the description of pain and the gait.

15 The emphasis in his Honour's reasons is on deliberate exaggeration of symptoms and that began from within several weeks after the date of the injury. The plaintiff regularly attended Dr Cook and I noted that in Dr Cook's report (exhibit 7) he said (page 160) when speaking of a review of the plaintiff on 11 August 1995 (presumably at the Mackay Base Hospital):-

> "The anatomy of the back and back wall of the abdomen was shown to Mr. Newberry and how the lumbar sympathetic nerves run down on the

> abdominal side on the back wall of the abdominal cavity. ... He was advised at this time to have further right side sympathetic nerve blocks and referral to Dr. Agar Wilson was also considered."

16 I note that at that stage Dr Cook said:-

> "It was felt at this time that there was a functional overlay in this man [*sic*] overall clinical picture."

17 I have concluded that the learned trial judge did in effect find that the plaintiff was malingering although he did not use the word "malinger" or any derivative of it.

18 His Honour, having found that the plaintiff suffered sympathetic nerve dystrophy as a result of the 30 May 1995 injury obviously could not find that the plaintiff was dishonestly feigning or dishonestly exaggerating all his symptoms. He declined to find any conversion disorder in the plaintiff and thus, leaving aside the one objective symptom attributable to sympathetic nerve dystrophy i.e. the coldness in one foot his Honour in effect found that the plaintiff was dishonestly exaggerating other symptoms which included his complaints of pain, his peculiar gait and very limited straight leg raising.

19 The following words used by his Honour are criticised by Mr McMurdo, QC, who appeared for the plaintiff in this Court:-

> "and in the meantime, as Dr. Alroe's described, he set about trying to convince doctors that there was something wrong with him"

20 On my reading of the transcript of Dr Alroe's oral evidence and his reports I do not see the doctor describing the plaintiff as having set about trying to convince doctors. What I did note was that at page 23 of the transcript Dr Alroe was asked in cross-examination:-

> "Fundamental to that proposition is the extent of dishonesty or the extent of exaggeration?"

He answered:-

> "Yes, well it's often hard to know. But there's always a little bit of embellishment I find but that's understandable. I mean the individual is really trying to convince the doctor - and we've got an individual who's continually being told that they're lying or malingering so that they're keen when they see the doctor to prove to him that they have a genuine case. That's understandable. As to whether one should take a moral view of that or not I don't know, but it's understandable."

I do not interpret this passage as referring specifically to the plaintiff.

21 Thus it may be fairly said that his Honour erred in using the words "as Dr. Alroe's described". However in my view, leaving those words aside, it was open to the learned trial judge to find on the evidence, as he did, that the plaintiff set about trying to convince doctors that there was something wrong with him. One of the things he did was, as his Honour said, adopt an abnormal gait. In my view, his Honour's error in using the above words did not vitiate the findings he made in that sentence in his reasons. These findings indicate malingering.

22 I am well satisfied that the learned trial judge did find that, apart from the sympathetic nerve dystrophy and one objective symptom relevant thereto, the plaintiff was malingering from several weeks after 30 May 1995. With a mixture of one complaint genuinely referrable to the sympathetic nerve dystrophy and other complaints referrable only to dishonest exaggeration how did the learned trial judge assess damages?

23 The learned trial judge formed what I consider a very unfavourable view of the plaintiff's honesty and that view was reflected in certain of the components in the awards made. On 16 March 1998 his Honour assessed as follows:-

	$
Pain suffering and loss of amenities including interest	
Past economic loss (to end of 1996)	45,000.00
Future economic loss (on basis of some vulnerability in the work force)	15,000.00
Lost employer contributions to superannuation (on agreed basis of 6% of lost income	3,600.00
Past and future assistance	1,000.00
Special damages paid by WorkCover	4,665.17
Income Tax (*Fox v. Wood*)	3,111.55

Other special damages and interest

$80,486.72

24 The limiting of damages for past economic loss to the end of 1996 is challenged. His Honour did so on the bases (expressed in the reasons for judgment) that by that time the plaintiff was physically fit for work and was avoiding work by describing exaggerated symptoms of pain.

25 An examination of his Honour's reasons shows that the $45,000 did not represent past economic loss to the end of 1996. His Honour said he assessed past economic loss on the bases of the figures in Ex 35 and "that represents a loss of $37,000 in income and there should be a further sum allowed while he found work. I assess past economic loss at $45,000."

26 Exhibit 35 was a document prepared by the plaintiff's lawyers setting out the plaintiff's contentions as to the components in the award to be made. The $37,000 is the equivalent of approximately $450 per week for 19 months (82 weeks) from 30 May 1995 to 31 December 1996 - this weekly loss was consistent with evidence as to the plaintiff's actual pre-accident nett weekly earnings from the defendant.

27 Mr McMurdo argues that there was no evidence before his Honour justifying that limitation to the end of 1996. It is true that no witness spoke of the plaintiff being capable of returning to work by the end of 1996. Nevertheless the evidence showed that the only objective symptom of the sympathetic nerve dystrophy was the cold foot. There was evidence of the peculiar gait, the very limited straight leg raising, complaints by plaintiff of pain and all of this evidence was entirely subjective with no objective clinical signs to confirm them. I note that Dr Gibberd in his report of 16 February 1996 (Ex 14) said:

> "Testing for power [on examination on 16 February 1996] was difficult as he had voluntary weakness present but with encouragement I think all modalities of power to course (sic) testing were normal."

I note also that in that same report Dr Gibberd said "when seen physically I felt he was probably fit for work but mentally definitely not". Dr Cook last saw the plaintiff on 7 August 1996. There was no evidence to show that the plaintiff did again consult a doctor seeking medical attention for any aspect of the injuries allegedly suffered on 30 May 1995. Dr Cook said in exhibit 7 (dated 27 January 1998):-

> "As this man has not been seen since the 7 August 1996 it is not possible to comment on his present Orthopaedic status and to any degree of permanent partial incapacity or disability. His prognosis must remain doubtful in the longer term."

Bearing in mind the plaintiff's onus of proving the injuries attributable to the defendant's tort and their duration and bearing also in mind the learned trial judge's findings against the plaintiff of greatly exaggerating his description of pain and adopting an abnormal gait, I cannot say that the learned trial judge was not able to infer (as he did) that the plaintiff was physically fit for work by the end of 1996. The learned trial judge was in a far better position than this court to assess the plaintiff and the evidence before him.

28 The plaintiff as appellant has failed to persuade me that the assessment of damages by the learned trial judge was wholly erroneous and such that this court should interfere with it. I would dismiss the appeal.