SUPREME COURT OF QUEENSLAND

CITATION:	*Cervellin v Russo & Suncorp Metway Insurance* [2006] QSC 239
PARTIES:	**ELICHIA MAREE CERVELLIN** (Plaintiff) AND **VICTOR ANTHONY RUSSO** (First Defendant) AND **SUNCORP METWAY INSURANCE LIMITED** **(ACN 075 695 966)** (Second Defendant)
FILE NO/S:	S72 of 2006
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	23rd August, 2006
DELIVERED AT:	Townsville
HEARING DATE:	15th and 16th August, 2006
JUDGE:	Cullinane J
ORDER:	**Judgment for the Plaintiff against the Defendant**
CATCHWORDS:	DAMAGES FOR PERSONAL INJURY – where liability has been admitted – QUANTUM - where plaintiff claims damages for injuries sustained by her as a result of a motor vehicle accident – damage to the cervical spine and to the lumbar spine.
COUNSEL:	Mr P. Lafferty for the Plaintiff Mr W. Elliott for the Defendant
SOLICITORS:	Roati and Firth for the Plaintiff Cleary and Lee for the Second Defendant

[1] The plaintiff claims damages for personal injuries sustained by her as the result of a motor vehicle accident which occurred near Ingham on 11th December 2000 when a vehicle in which she was a passenger ran off the road and overturned.

[2] The cause of action is admitted.

[3] The plaintiff was born on 16th Feb 1985. She had just completed Grade 10 at Gilroy Santa Maria College and was participating in a school based traineeship in hospitality at the time she was injured. She had part time work as a waitress at a restaurant in Ingham at this time.

[4] She completed Grade 11 at the Ingham State High School and left school at the end of 2001 aged 16.

[5] She moved to Townsville shortly afterwards with her parents where she completed her traineeship in hospitality.

[6] It is her case that she at all times intended to make a career in the hospitality industry.

[7] At the time of her accident the plaintiff was engaged in a number of sporting pursuits at school. These included athletics, touch football, soccer and European handball. She achieved considerable success in these playing at a representative level particularly in relation to the latter sport where she represented Queensland and spent some time at the Australian Institute of Sport. In some instances these activities ceased when she left school but I am satisfied she has not been capable of engaging in most of these activities and that this represents a significant loss to her. I am satisfied she was a good sportsperson and that this was important to her. She presents as a strong, fit person.

[8] In the accident she sustained soft tissue damage to the cervical spine and to the lumbar spine. She was not admitted to hospital but was given an injection and her neck was placed in a collar and she was sent away until the radiographer was available. Subsequent x-rays showed no bony injury.

[9] She has complained since that time of pain and discomfort and loss of movement in the cervical spine as well as headaches, as well as symptoms in her lumbar spine.

[10] It is her case that she has as a consequence a significant impairment of her earning capacity because of her disabilities.

[11] There is a substantial dispute between orthopaedic surgeons who have given evidence in the matter before me as to whether she has any disabilities as a result of the accident. Dr Maguire was called by the plaintiff and Dr Halliday by the defendant. In addition Dr Giles who is described as a clinical anatomist and Kathryn Purse, an occupational therapist were called by the plaintiff. Dr Giles is not a medical practitioner.

[12] It is Dr Maguire's opinion that the plaintiff had suffered soft tissue damage to the cervical and lumbar spines causing permanent disabilities in each area.

There is a loss of movement of the cervical spine and some pain on movement of the lumbar spine. The cervical symptoms cause headaches. Dr Maguire observed muscle spasm in the right para spinal muscle region when he examined her. He says that this is an objective symptom which cannot be simulated. Dr Giles also observed spasm and found loss of movement and pain on movement broadly in accord with that observed by Dr Maguire.

[13] Dr Halliday on the other hand says that there was no loss of movement and applying the AMA guides concluded that she fell into DRE classification 1 having no impairment of the body. He accepted there was pain on certain activity. Dr Maguire applying the same criteria assessed five percent impairment of the whole person because of the cervical disability and one percent whole person impairment because of the symptoms in the lumbar spine.

[14] It is Dr Maguire's opinion that the plaintiff will continue to experience ongoing problems particularly with the cervical spine. He thinks that her employment in the hospitality industry is likely to be limited to part time work and that she may benefit from some job retraining a view also expressed by Kathryn Purse.

[15] Dr Halliday did not think there was any limitation upon her earning capacity.

[16] There were some aspects of Dr Halliday's evidence which merit comment. In his report he says that the plaintiff takes "nil" medication. This is contrary to the plaintiff's evidence and what Dr Maguire and Dr Giles record. In evidence Dr Halliday said that the plaintiff had not answered this question and when he spoke to her about it she said "Panadol occasionally". It is a little disconcerting that he should in these circumstances have recorded "nil" under the heading of medication.

[17] Something similar occurred in relation to the question of whether the plaintiff had any difficulty with household tasks. He records her as saying she had no difficulty but says that in a conversation she referred to some difficulties with some of these activities.

[18] Dr Halliday expressed the view that the loss of movement Dr Giles recorded was not greatly dissimilar to what he recorded as full movement.

[19] The evidence suggests that the restriction of movement of a person suffering soft tissue damage might fluctuate and be observed differently by different persons examining her. Making full allowance for this I have difficulty accepting Dr Halliday's evidence that there was full movement of the cervical spine when he saw her. I think his examination of her may not have been as complete as it should have been.

[20] I am satisfied that the plaintiff suffers soft tissue damage to the cervical spine and the lumbar spine and that she has been left with permanent disabilities in these areas with the former the most significant. I am satisfied that these disabilities restrict and will continue to restrict her capacity to work at least without suffering unacceptable levels of pain.

[21] I turn now to the plaintiff's work history since the accident.

[22] The plaintiff and her family moved to Townsville at the end of 2001 or beginning of 2002 and she commenced part time employment as a waitress. She had been seen by Dr Watson, a specialist in rehabilitation medicine at the end of 2001 at which time he described her symptoms as detracting from her quality of life rather than her employability as at that time she appeared to be coping "with some degree of stoicism and with the help of analgesic" with her work although she stated that the pain was significantly more severe on the days when she was working than when she had been at school.

[23] At the same time as she commenced her employment as a waitress she commenced a traineeship at another restaurant as a waitress working approximately 20 hours per week. In the position first referred to she was working on a part time basis. Her employer at the restaurant where she was a trainee increased this to about 40 hours per week and the plaintiff says that she could not maintain this work because of the pain. In October 2002 she ceased that work because of the headaches and pain she was suffering from and says that it took her some months to recover from the consequences of this.

[24] The plaintiff has not attended medical practitioners but has throughout the period that I am concerned with, sought relief from pain through massage therapy, acupuncture and attendance at chiropractors and the taking of analgesics.

[25] Her next employment was in July 2003 when she commenced as a waitress at a restaurant in Townsville. The work involving carrying heavy dishes and trays which she says aggravated her pain levels to such a degree that she had to cease this work after a few weeks. She had been working limited hours at that restaurant.

[26] In late August 2003 she started at the Plaza Hotel in Townsville as a waitress working on average 20 hours per week and at the same time also worked at Crazy Clark's as a shop assistant but was only able to continue this for a few days as the work was heavy involving the stacking of shelves. Her next employment was in November 2003 as a bar attendant at a hotel in Townsville for approximately 10 hours per week. She was continuing her employment at the Plaza Hotel for approximately 20 hours per week. Her employer at the Plaza Hotel increased her hours and in January 2004 she ceased this employment because she says she was not able to continue because of the symptoms she suffered from. She commenced working at the Holiday Inn for approximately 25 hours per week whilst maintaining her employment of about 10 hours per week at the Criterion Hotel. This means that by about mid 2004 she was working approximately 30 to 35 hours per week but she says with great difficulty and enduring high levels of pain.

[27] She decided to reduce her workload in an attempt to improve her condition overall and in June 2004 moved to Darwin with her family. There she obtained work as a bar attendant at an Irish bar working approximately 35 hours per week. In addition to her bar work she did some gaming work associated with a keno terminal. Because the work was casual and because

such work ceases once the wet season commences this work came to an end at the end of October of that year.

[28] She moved to South Australia in November 2004 with a friend but could not find any work in the hospitality industry there and continued on to Western Australia where she commenced work as a bar attendant at a tavern. Her work hours she says were increased fairly shortly after she commenced to about 30 to 35 hours per week. She ceased that employment in May 2005 because she found that the pain associated with the work she was doing increased significantly and her headaches were especially severe. Her symptoms had worsened whilst she was in South Australia.

[29] She returned to Townsville in May 2005 to be close to her friends and family. She started work at a hotel as a bar attendant in late May 2005 working for a manager who she says was sympathetic to her difficulties and who made concessions for her. The manager, Adrian Doyle, gave evidence and spoke of the difficulties which the plaintiff appeared to have. He confirmed that he made allowance for these difficulties. The plaintiff left that employment when Mr Doyle left in late June 2006. The plaintiff had in September 2005 taken a second position at a restaurant (Raw Fresh) working approximately 10 to 15 hours per week. She has continued this employment, working what she says are varying hours of 10 to 20 hours per week earning between $150 and $300 net per week. Evidence before the court supports that she has at least in the last couple of months or so been working only 10 hours per week.

[30] A DVD was placed in evidence before me. This shows the plaintiff engaged in a number of activities without any obvious difficulty. She is shown walking a significant distance along the Strand to work and the evidence is that she walked to and from work. She strides along briskly and purposefully. There is evidence, part of which is shown on the DVD that she on one occasion walked up Castle Hill although she says this was a reaction to some hurtful events that occurred immediately before. She is shown moving items of significant weight to a vehicle and from a vehicle. She bends freely and without any difficulty.

[31] Each of the medical witnesses saw the DVD and each said that it did not affect the opinion that each had expressed.

[32] Indeed the effect of the evidence is that the plaintiff is not really prevented from doing any specific activity but her difficulty is that she cannot engage in certain activities on a repetitive or prolonged basis which is what gives rise to her pain and headaches. Her present work involves the preparation of food and similar activity and is relatively light. She can perform this for longer periods than she can perform other tasks in the hospitality industry she has worked in which involve carrying items, stacking fridges and shelves and similar activities and which involve associated with these being on her feet for extended periods.

[33] As I have said I accept the evidence that she has a permanent disability and I also accept that the plaintiff at least while she works in the hospitality industry will probably not be able to work a 40 hour week but will be limited

to working somewhat shorter hours. Nonetheless she has demonstrated a capacity to work significantly longer hours than the 10 hours per week she has been working for the last couple of months or so. I recognize that care has to be taken in accepting at face value her work history and the number of hours that she has worked in the various jobs she has had as being a true representation of her true earning capacity. This has come only at the cost of significant pain as the hours became greater and as she worked those hours for more extended periods.

[34] There is before me a summary taken from the plaintiff's evidence showing the periods during which she worked for the various employers and the number of hours per week that she worked. (Exhibit B) It shows the periods during which the plaintiff was out of work after ceasing such employment. The plaintiff has contended that her past economic loss should be assessed on the basis that she would have worked 52 weeks of the year at the same hourly rates had she not had the accident and that it is a simple matter of deducting from the figure thus produced the income that she has earned.

[35] I think that the plaintiff's approach is simple and would over compensate the plaintiff. Whilst I am satisfied she was desirous of working and would have sought employment in the hospitality industry whenever she was out of work the fact is that work in such an industry tends to be somewhat casual and the plaintiff as a young person would also I think have been likely to have had periods out of work particularly as she took the opportunity to move from place to place. Nonetheless she has suffered loss during this time both when off work after stopping because of pain and when working limited hours.

[36] As I have said Dr Maguire and Kathryn Purse are both of the view that the plaintiff might benefit with some retraining although Ms Purse was not able to suggest what field she might be retrained into as she thought that required some vocational assessment which she had not made. She thought she would have been capable of working 25 "or so" hours a week in her current employment which involves the preparation of food.

[37] The plaintiff expressed the view that if she wished to work longer hours then she thought that that would be available to her.

[38] When she saw Dr Maguire in July 2005 she told him she was working some 10 to 15 hours per week. Whatever the position was at the time she actually saw Dr Maguire it is obvious that during 2005 she was working considerably longer hours than this.

[39] Ms Purse thought that there would be some restrictions on the plaintiff's capacity to work at a computer or sitting for continuous periods but that making some allowances which would enable her to move around and take a break from time to time she could work for longer hours although she thought she would find it difficult to maintain full time hours.

[40] The evidence of Dr Maguire and Ms Purse does not entirely exclude the plaintiff's being able to work in a suitable position on a full time basis although I think the effect of this evidence, which I accept, is that she is likely to be employed on something less than a full time basis even in areas

of clerical or administrative work which may be more suitable to her than hospitality work. In her evidence she expressed the view that she had always desired to work in the hospitality industry and she did not see why she should be forced out of it. She has by now some significant experience in that industry. She may from time to time be able to work full time in that industry but could not do so on a prolonged basis and I think that it is unrealistic to assess damages upon the basis that she would be employed on a full time basis in the hospitality industry. She can plainly work significantly longer hours than she is presently working.

[41] I had the impression that the plaintiff was an honest witness who has tried very hard to maintain employment even under the difficult conditions that her disabilities have imposed on her.

[42] So far as general damages are concerned, as I have already said, the plaintiff's main difficulty is associated with the prolonged continuous performance of certain tasks. It is this rather than her inability to perform activities which is the primary consequence of her soft tissue injuries. She has some difficulties associated with certain domestic activities. She has had to give up her sporting activities as a result of her injuries and this I am satisfied is something that she sees as a very significant loss to her.

[43] So far as general damages are concerned, I assess these at $37,500.00.

[44] I allow interest at the rate of two percent per annum on $15,000.00 for 5.75 years producing a figure of $1725.00.

[45] The question of the plaintiff's past economic loss is impossible to assess mathematically. As counsel for the defendant pointed out there have been some years in which the plaintiff has earned substantial sums of money, not far removed from what she would have earned if working full-time.

[46] Some allowance has to be made for the fact that she may have been out of employment for periods in any case particularly as she may have taken the opportunity to travel. I do not lose sight of the fact that employment opportunities in this industry would present themselves to such a person.

[47] I allow $27,500.00 for past economic loss and I allow interest for 5.75 years at 2.8 percent producing a figure of $4,427.50. Past superannuation at nine percent on $27,500 is allowed in the sum of $2,475. 00.

[48] So far as future economic loss is concerned there is a substantial difference between the parties in this regard. The defendants acknowledge a restriction of the plaintiff's capacity to earn an income but suggest it is quite limited whereas the plaintiff contends for a loss in the order of $350 per week.

[49] There is evidence of the hourly rate that the plaintiff has been paid in her current position where she works 10 hours per week. It is plain that she has a capacity to work considerably more hours than this without exposing herself to unreasonable levels of pain. I have already referred to the fact that the evidence does not exclude the possibility of her working fulltime although I

think that the reality is that she is more likely to be confined to part time work.

[50] The plaintiff is now only 21. Her future economic loss must be regarded as substantial.

[51] Making allowance for the various contingencies and vicissitudes involved, I allow the plaintiff for future economic loss, the sum of $175,000.00. This reflects the present value of a loss of about $200 per week for 35 years.

[52] I allow future loss of future superannuation at nine percent of this sum producing a sum of $15,750.00.

[53] There are claims for past and future care and assistance. The plaintiff has obviously required considerable care and assistance in the past. It is the assessment Ms Purse that the plaintiff requires and will require four hours per week for some of the heavier domestic tasks and for assistance with shopping. She does not require any assistance with her personal care. I think that four hours per week somewhat overstates the position. One hour of this is allowed for shopping activities. Having seen the DVD and the activities the plaintiff engages in I have some reservations as to whether she needs any assistance with this but in any case it would seem she could avoid the need for this by adopting the simple expedient of using a shopping trolley and handling smaller items. Similarly she will not have the same need for assistance with domestic tasks if she were living in a flat or apartment, something which is not improbable. I recognize that no allowance has been made for tasks associated with the maintenance of a yard or garden. Rates for past and future care and assistance are agreed upon.

[54] There must be taken into account also the possibility that as she aged the plaintiff may have required assistance in this regard in any case. There thus needs to be some discounting to the claims which are made.

[55] So far as the past is concerned I allow $15,000.00 and I allow interest at 5% on this sum for 5.75 years producing a figure of $4,312.50.

[56] So far as the future is concerned I allow $35,000.00.

[57] Special damages are agreed upon in the sum of $7,000 and I allow interest at the rate of 2.8 percent per annum for 5.75 years on this sum producing a figure of $1,127.00.

[58] There are claims for future pharmaceutical expenses and future medical expenses which were not really the subject of dispute but as they are calculated over 63 years, I think some discount should be made. I allow in respect of future pharmaceutical expenses the sum of $8,000.00 and future medical expenses the sum of $4,800.00.

[59] There is a claim for future rehabilitation expenses. This was the subject of some contest as the calculations placed before the court suggested a claim in the order of $65,000. In fact the claim is for a little more than $14,000. The claim is supported by the evidence of Dr Maguire who suggests that the plaintiff would benefit from ongoing massage therapy and other forms of

assistance. The claim is based upon ongoing massage therapy and I allow it in the sum of $14,167.50.

[60] The total of the above sums is $353.784.50

[61] I give judgment for the plaintiff against the defendants in the sum of $353,784.50.