SUPREME COURT OF QUEENSLAND

CITATION:	*Bathis v Star Track Express Pty Limited and Ors* [2009] QSC 331
PARTIES:	**BRIAN RAYMOND BATHIS**
	(Plaintiff)
	V
	STAR TRACK EXPRESS PTY LIMITED (ACN 001 227 890) FORMERLY MULTIGROUP DISTRIBUTION SERVICES PTY LTD
	(Defendant)
FILE NO/S:	S3304/2008
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Brisbane
DELIVERED ON:	13 October 2009
DELIVERED AT:	Brisbane
HEARING DATE:	22 – 23 April 2009 and 14 – 15 September 2009
JUDGE:	Byrne SJA
ORDER:	
CATCHWORDS:	DAMAGES – MEASURE OF DAMAGES – PERSONAL INJURIES – Economic loss – Pain and suffering – *Griffiths v Kerkemeyer* – Other pecuniary loss – whether plaintiff failed to mitigate loss by undertaking pain alleviation procedures
	Griffiths v Kerkemeyer (1977) 139 CLR 161
	Lawes v Nominal Defendant [2008] 1 QdR 369
	Sutherland Shire Council v Heyman (1985) 157 CLR 424
COUNSEL:	Mr R C Morton for the plaintiff
	Mr D J Kelly for the defendant
SOLICITORS:	Morton & Morton Solicitors for the plaintiff
	Rodgers Barnes & Green for the defendant

Dismantling the Deck

[1] On the night of 23 January 2000, the plaintiff drove a prime mover towing two trailers loaded with freight into the defendant's depot at Archerfield. There he spent the night. On the morning, not long before dawn, he was woken by the defendant's staff so that his trailers could be unloaded.

[2] The lead trailer had a demountable mezzanine deck, situated above the trailer tray. The deck was in two parts. Both front and rear halves were held in place by metal supports: a wall and centre stays on either side of the trailer deck. The mezzanine deck halves rested on cup holders that were manually fitted into the supports.

[3] On his journey, the plaintiff had been told by his employer that the mezzanine deck had to be dismantled at the defendant's yard. He had not previously towed a trailer with such a deck and did not know how to dismantle it. When he asked his employer how to do that, he was led to understand that the defendant's forklift drivers would tell him what needed to be done.

[4] An arrangement was in place between the plaintiff's employer and the defendant for the latter's forklift operators to assist in dismantling decks on trailers towed by the plaintiff's employer's drivers.

Plaintiff's Story

[5] The plaintiff gives this account of the incident in which his right hand was crushed by the rear section of the mezzanine deck.

[6] So that the freight could be removed, the plaintiff opened the driver's side vinyl curtain. He lifted out metal gates at the sides of the front section of the trailer and placed them beside the prime mover.

[7] Mr Brosnan, one of the defendant's forklift drivers, arrived to use his forklift to unload the freight, which was stored on pallets. That done, he drove away to unload other trailers. When he returned after a short while, the plaintiff asked Mr Brosnan how to go about dismantling the mezzanine deck. Mr Brosnan replied: "You'll be right, mate. We'll get through it." Mr Brosnan was implementing the employers' arrangement.

[8] Mr Brosnan told the plaintiff that he first needed to drop the two tine holders on the driver's side of the front section of the mezzanine deck.

[9] A tine holder is a rectangular piece of metal. A gap in the middle retains the tines (or forks) of the forklift when they are inserted to enable the deck to be lowered or raised. When not in use for that purpose, the holder is folded up in a horizontal plane below the deck and kept in place by a bolt.

[10] The plaintiff took Mr Brosnan's advice. He released the locking bolts. When the tine holders dropped down into a vertical plane, Mr Brosnan put the tines of his forklift into them. The tines were about four feet long and three inches wide. Mr Brosnan operated his machine to raise the mezzanine deck a little. This was the cue for the plaintiff to remove the cup holders, which he did. He placed them on the rear part of the trailer and jumped off the trailer. Mr Brosnan began lowering the mezzanine deck using his forklift.

[11] The deck had not descended to the trailer floor when the plaintiff went to get the gates that he had put next to the prime mover. As he was doing this, he heard a loud bang. When he turned to look at the trailer, the front section of the mezzanine deck was lying on top of the trailer deck, flush with it. The tine holders of that section of the deck were retracted into the folded position. The plaintiff did not know how that had happened. Nor did he bother to ask Mr Brosnan.

[12] The plaintiff put the gates back up on the front section of the trailer. Standing on the trailer deck, he then dropped the tine holders on the rear section. Mr Brosnan bought his forklift in, put the tines into the holders and raised the deck slightly to allow the plaintiff to remove the cup holders. That done, once the plaintiff got out of the way, Mr Brosnan lowered the rear section to the trailer floor.

[13] The tine holders remained down, leaving the mezzanine deck raised above the trailer tray. At this stage, the tines were still in their holders.

[14] Next, the plaintiff set about removing the two main support stays. He had difficulty withdrawing the spring-loaded bolts that held the posts in place. Mr Brosnan, who was asked to help out, decided to use the safety cage of his forklift to raise the roof about an inch, relieving pressure on the bolts. To achieve this, he withdrew the tines from the holders, repositioned the forklift and raised the roof with the elevated safety cage. This let the plaintiff remove the centre support poles while standing on the front section of the mezzanine deck.

[15] The plaintiff asked Mr Brosnan what to do with "this stuff": a reference to cup holders and support poles. Mr Brosnan told him to put the items under the mezzanine deck, storing them in the space between the mezzanine and trailer decks. The mezzanine deck needed to be raised to allow the objects to be placed beneath it. So Mr Brosnan drove his forklift towards the middle of the rear section of that deck, about the distance of the length of the forks from the driver's side of the deck. He then manoeuvred the forklift so that the tines could be deployed to raise the driver's side section of the deck about 30cm: as the plaintiff put it, just enough so that the tine holders were lifted above the trailer floor.

[16] The plaintiff slid the main support posts and the cup holders under the slightly raised mezzanine deck while Mr Brosnan, remaining on his forklift, observed what was happening.

[17] The plaintiff got off the front section of the collapsed mezzanine deck. Moving behind the forklift, he went to the rear to collect more cups. Next, he put two cups under the mezzanine deck, placing his hands under that deck as he did so.

[18] At this stage, the deck was held in a raised position by the tips of the tines, which were positioned under a metal lip. This lip, about 1 cm wide, formed the top section of a C-shaped channel that ran along the side of the mezzanine deck.

[19] It was "going on daylight", and the area around the front of the forklift was lit by its headlights. Other lights in the depot were on. But the state of the lighting where the tines were positioned was affected by shadows. The plaintiff did not see that the tines were in the C-channel. He presumed they were under, and supporting, the raised mezzanine deck.

[20] Thinking it common sense to fold the tine holders in, the plaintiff decided to fold up the forward tine holder. He could see its lower right-hand corner. He also noticed that one of the tines was slightly to the rear of the tine holder. He used his left hand to withdraw the retaining bolt. Then "as soon as I went to slide the tine holder back", he testified, "down come the" 1.4 tonne deck, crushing his right hand.

[21] Asked whether anything had happened to collapse the deck, "I do believe the trailer had moved", the plaintiff answered. However, he has "no idea" what might have caused that.[1]

[22] Mr Brosnan, who was on his forklift when the deck fell, jumped off the machine. The plaintiff asked him to raise the deck from his hand. Mr Brosnan reversed his forklift, put the tines beneath the mezzanine deck, and raised it with his machine.

Another version

[23] Mr Brosnan had worked at the defendant's depot as a forklift driver for 3-4 years. He had considerable experience in dropping mezzanine decks. The procedure for collapsing tine holders after the deck was lowered involved, he said, withdrawing the tines, and then nudging the holders. That small force usually sufficed to collapse the holders, leaving the deck resting on, and flush with, the trailer tray.

[24] Mr Brosnan, who says that he had previously assisted the plaintiff about 20 times to lower a mezzanine deck, gave this account in evidence-in-chief.

[25] Just before sunrise, Mr Brosnan emptied the trailer of its pallets, using his forklift. Next, he used the tines to lift the front mezzanine section. Cup holders were removed. The deck was lowered to the tray. He then manoeuvred the tines to push the tine holders back, folding them underneath that section of the deck.

[26] Next, the rear section was lowered. The tine holders on this section were "stuck down or even broken". Mr Brosnan's attempt to collapse them by nudging them with the tines failed. He reversed back. He asked the plaintiff "what are we going to do?" The plaintiff, who was standing to Mr Brosnan's right, near the trailer, did not respond. With the headlights of his forklift illuminated, Mr Brosnan manoeuvred his machine to put the tips of the tines into the C-channel. Then he raised the deck a little by elevating the tines.

[27] Mr Brosnan got off his forklift, telling the plaintiff that he was "going to find a pallet board". He had taken a couple of steps towards the rear of the trailer when he heard "an almighty bang", followed by a scream. He turned to see the plaintiff's hand stuck beneath the deck. He jumped back onto his forklift, reversed it, and lowered the tines. He repositioned the tines, this time putting them under the deck. Then he raised the deck so that the plaintiff could extract his hand.

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[1] The cause of the collapse is uncertain. The statement of claim originally alleged that the tines were manoeuvred by Mr Brosnan "in such a way as to cause or permit the mezzanine deck to freefall…". The plaintiff denies having said as much to the lawyers, and this allegation is not pursued. That the trailer would independently move at the moment the plaintiff put his hand onto a tine holder is curious. He does not accept that the deck was tipped from the tines by what he did with his hands. There is, however, no other obvious explanation for the trailer movement. The freight had been unloaded. Nothing indicates that brakes had not been properly applied. And there is no evidence of another event – such as a sudden wind gust – that could have moved the trailer.

[28] An amended defence of 22 April 2009 alleges that:

> "…the Plaintiff requested James Brosnan to lift the floor slightly by placing the forklift tines under a metal lip forming part of the C channel shaped side of the mezzanine floor to enable him to collapse the tine holders manually;
>
> In accordance with the Plaintiff's request, James Brosnan removed the forklift tines from the tine holders, re-positioned them in the C channel shaped side of the mezzanine floor and raised the floor slightly;
>
> James Brosnan then got off the forklift and approached the plaintiff to ask about what the Plaintiff wanted to do about the tine holders not being up;
>
> The Plaintiff advised James Brosnan that he would push them up with his hands. Before James Brosnan was able to get back onto the forklift the mezzanine floor fell onto the Plaintiff's hands".

[29] Mr Brosnan disowned this assertion that the plaintiff had asked him to put the tines into the C-channel. That was his idea, as he accepted in evidence.

[30] On the day after the accident, Mr Brosnan signed this statement:

> "Brian Bathis…had asked me for a hand in lowering the floor on the…Drop Deck trailer.
>
> I lifted the floor with the forklift and he removed the supports, I then lowered the deck onto the floor. The lugs hung down as the springs to hold them up weren't working properly.
>
> I pulled the forkblades out and put them back in again under the deck, and hopped off the fork to see what Brian wanted to do about the lugs not being up, he said that he would push them up with his hands. Before I could get back onto the forklift it had fallen on his hand.
>
> I jumped onto the forklift started it and lifted the deck off his hand."

[31] Mr Brosnan accepted that the assertion that he had put the tines "…under the deck" was knowingly false: a lie told because he thought he might be blamed for the plaintiff's injury. He had, as he realised when he put the tines into the C-channel, perched the deck precariously on the tips of the tines. He knew then that if he had instead slipped the tines under the deck a reasonable distance – "six inches, a foot or so" – the deck could not have collapsed, in which event the plaintiff would have folded the tine holders up manually, in safety. Moreover, it was his job to ensure that the raised deck was secure rather than unstable as he had left it.

Indifference

[32] In evidence, at first, Mr Brosnan made no mention of having been told by the plaintiff that he was going to collapse the tine holders by hand. Later, he testified that the plaintiff had told him that he was going to push the tine holders up by hand shortly before doing so.

[33] "Five or ten seconds", Mr Brosnan testified, elapsed between when the plaintiff made that statement and when he heard the plaintiff scream. This interval was, as Mr Brosnan accepted, ample time to have warned of the danger before the plaintiff moved his hand under the deck. Mr Brosnan did not tell the plaintiff that the tines were in the C-channel or warn him that he should not put his hand under the deck.

[34] Informed that the plaintiff was about to put himself in harm's way, Mr Brosnan chose to remain silent. This was a considered decision. Reflecting at the time on what could well happen to the plaintiff, "I just thought to myself", he testified, "yeah, if you're stupid enough to put your hand under there, it's your own fault."

[35] Mr Brosnan was consciously indifferent to the serious risk of injury to the plaintiff that he appreciated he had created by putting the tines into the C-channel.

[36] The plaintiff has no memory of telling Mr Brosnan that he intended to fold up the tine holders. And in a statement made in October 2000, the plaintiff supplied a fair amount of detail concerning the incident. This included that, as he "went to fold the tine holders, the trailer moved and the decking slipped off the tines … and … fell on my hand". The document contains no suggestion that he told Mr Brosnan he was going to touch the tine holders.

[37] The plaintiff suffered excruciating pain when the deck fell on his hand. In those circumstances, that he told Mr Brosnan he intended to push the tine holders up might not have been imprinted on his memory. Whatever the explanation for the plaintiff's lack of recall, more probably than not, the plaintiff announced his intention to push up the tine holders, and 5-10 seconds later did so. Two factors particularly support that finding. First, what Mr Brosnan testifies the plaintiff told him he would do is what the plaintiff proceeded to do. Secondly, Mr Brosnan mentioned the episode in the statement he signed the day after the incident.

Acceptable testimony

[38] The plaintiff's account is preferable to Mr Brosnan's, except in that one respect.

[39] Mr Brosnan admitted to memory lapses: scarcely surprising after almost 10 years. But he was also given to saying insupportable things; as examples, initially suggesting that the plaintiff had taken drugs on the morning of the incident; later acknowledging that there was no foundation for that nasty imputation; and Mr Brosnan was at first sure that the plaintiff had not moved the support poles for the rear section of the mezzanine deck but later acknowledged that he could not remember whether that had happened. There are also differences between his statement and his testimony. The former makes no mention of nudging the rear section tine holders in an unsuccessful attempt to collapse them. Nor does it refer to going to get pallet wood to knock them in. Mr Brosnan also accepted that it was not correct to say, as his statement had, that the tine holders remained down because "the springs to hold them up" were not working properly.

[40] Mr Brosnan's evidence that he had worked with the plaintiff to collapse mezzanine decks many times before cannot be accepted. He is confusing the plaintiff with another of the many drivers who came to the depot. His contemporaneous statement makes no reference to such prior experience with the plaintiff. And Mr Brosnan accepts that the plaintiff asked him where to store the cup holders taken from the support poles, which is not the kind of conversation that would have occurred if the two men had often worked together to collapse a deck.

Liability

[41] It was plainly foreseeable by a reasonable person in Mr Brosnan's situation that the plaintiff would put his hand under the deck to push the tine holders up, as he had said he would do. And Mr Brosnan had, as he appreciated at the time, created a danger of injury to the plaintiff by imprudently, and unnecessarily, putting the tines into the C-channel rather than 6-12 inches beneath the deck.

[42] Mr Brosnan was obliged to take reasonable care to prevent the occurrence of the foreseeable risk of injury to which he had exposed the plaintiff by his actions.[2]

[43] There was no impediment to warning the plaintiff of the danger. Mr Brosnan's failure to do so involved such a substantial departure from the standard of care reasonably to have been expected as to breach the duty of care owed to the plaintiff.

[44] The plaintiff would not have put his hand under the deck if Mr Brosnan had warned him of the danger. So Mr Brosnan's negligence was a cause of the injury.

[45] As Mr Brosnan was acting in the course of his employment, the defendant is vicariously liable for his negligence.

Contributory Negligence?

[46] Has the defendant established contributory negligence?

[47] When the plaintiff put his hand under the deck, the lighting was such that he had not noticed that the tines were in the C-channel. Despite having seen that the forklift was a distance back from the trailer, the plaintiff presumed that the tines were under the deck. He did not check to see where they were. If had he noticed that the tines were in the C-channel, he would not have put his hand under the deck. In that event, the injury would not have happened.

[48] So the critical issue is whether, exercising reasonable care for his own safety, the plaintiff should have checked to see where the tines were.

[49] When the plaintiff touched the tine holder, there had been nothing in Mr Brosnan's conduct to suggest that he might employ unsafe methods in dismantling the deck. No less importantly, the plaintiff told Mr Brosnan that he intended to push up the tine holders. He got no reaction, let alone a warning. In those circumstances, it was reasonable for the plaintiff to have assumed, as he did, that Mr Brosnan had secured the raised deck in a way that would not expose him to injury were he to use his hands to collapse the tine holders. Misplaced reliance on Mr Brosnan, whose

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[2] cf *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 479; *Lawes v Nominal Defendant* [2008] 1 QdR 369, 377, 381.

callous indifference could not reasonably have been anticipated, cannot fairly be characterised as contributory negligence.

Pain and Suffering

[50] The plaintiff was born in December 1969.

[51] The plaintiff's dominant, right hand was severely crushed when the deck fell. In considerable pain, he was taken by ambulance to the Princess Alexandra Hospital. A painkiller was administered. His hand was in plaster for a short time. On return to his home in Albury, he was admitted to hospital for two days because of pain and swelling in the hand.

[52] Extensive treatment was required during the three and a half months the plaintiff was away from work, including physiotherapy, hand therapy, medication and splinting.

[53] The plaintiff saw Dr Todhunter, a pain specialist, in May 2001. By that time, his hand continued to swell, especially in use. It became cold at times. The plaintiff was working as a truck driver, although with more difficulty than before his injury. Painkillers were being taken but there was a limit to the extent to which that was possible: Panadine Forte had a tendency to cause drowsiness. He was taking 6 - 8 Panadol daily.

[54] Dr Todhunter assessed the condition as complex regional pain syndrome.

[55] In October 2001, Dr Todhunter performed an intravenous guanethedine block on the right side. This provided pain relief for a couple of days. In February 2002, a radiofrequency sympathectomy in the region of the right stellate ganglion was performed by Dr Todhunter.

[56] By mid-April 2002, pain in the hand, spontaneous as well as that experienced on holding things, had significantly decreased. Driving a truck was easier. For about a year, minimal treatment was needed for ongoing symptoms.

[57] Three years after the incident, the plaintiff consulted Dr Kenny, a psychiatrist, who reported that heavy lifting with the right hand remained a problem. There were occasional cramps in the hand. Sensation in the hand had improved considerably since the sympathetic nerve block eleven months earlier. But activities remained restricted. The plaintiff could not play golf or water ski: pastimes he had enjoyed before the injury.

[58] The plaintiff told Dr Kenny that he was occasionally irritable, experiencing frustration over his symptoms and restrictions. He had been taking the anti-depressant Zoloft for nearly two years. Dr Kenny thought he should continue with that medication for another two years.

[59] Dr Kenny considered the plaintiff to be a strong, resourceful, hardworking man who suffered a very mild adjustment disorder in response to his symptoms and limitations. He assessed the condition as a "10% psychiatric impairment… secondary to his physical symptoms".

[60] Dr Kenny characterised the incident in which injury was sustained as a psychologically distressing experience, with the hand trapped for a minute. There had been bad dreams about it. The plaintiff experienced severe pain for some time.

[61] In April 2004, the plaintiff saw Dr Rowe, a specialist occupational physician. By this time, the plaintiff was ingesting Panadol in large doses: on a good day, six; on a bad day, up to 20. He was no longer taking Zoloft.

[62] Symptoms at the time of Dr Rowe's examination involved swelling of the right hand and allodynia at the back of the hand, wrist and about the thumb. The hand would sweat and change colour. There was burning and painful feeling much of the time as well as a tendency to knock the hand, resulting in extreme pain. The plaintiff had lost grip strength. His activities were, as Dr Rowe put it, "compromised". Nonetheless, the plaintiff worked hard as an interstate driver, on the road 12-16 hours a day, five days a week. He was not required to load, tie down, or change tyres: only to drive. He had not returned to golf or water skiing. He tended not to do physical work around the house.

[63] Dr Rowe's examination of the hand showed it to be swollen, particularly about the thumb and knuckles of the metacarpophalangeal joints in the second and third fingers. The hand was perspiring. There were limited movements of the thumb and restrictions in finger joints. Grip strength was low. The plaintiff could not close his hand. Fingers were compromised in movement because of swelling and thickness about the hand. There was hypersensitivity of the hand and about the dorsal aspect of the wrist.

[64] Dr Rowe, who expected that the plaintiff would need future medical treatment, including nerve blocks and analgesics, considered that the plaintiff had a 30% permanent loss of efficient use of the right arm below the elbow – mainly based on the loss of grip strength and loss of movement in the thumb, index and middle fingers.

[65] The procedure in February 2002 alleviated, for about 18 months, debilitating pain shooting up the arm to the collarbone. But the nerves regrew. In May 2004, Dr Todhunter repeated the procedure.

[66] In August 2004, at home in Albury, the plaintiff was assessed by Mr and Mrs Ravagnani. Mrs Ravagnani concentrated on functional ability and future needs. Her husband assessed vocational potential and labour market access. The plaintiff had recently returned to work after six weeks light duties after losing his grip while getting into a truck in the rain. A few weeks later, he had fallen and broken two ribs which he afterwards re-broke when moving a pallet jack.

[67] In their report in September 2004, the Ravagnanis listed the difficulties the plaintiff was experiencing: pain in the hand, especially the thumb, index and second fingers that was exacerbated by physical exertion or prolonged vibration from driving; skin discolouration and patchiness; swelling and sweating to the hand; altered sensation from half way down the forearm to the fingers; reduced grip strength associated with decreased strength in the limb as a whole; difficulty with heavy lifting or excessive use of the hand; occasional intense pain, particularly associated with sudden or jarring movements; bumping and knocking of the hand causing extreme pain; inability to shake hands results in social awkwardness; difficulty with house and garden maintenance, especially whipper-snippering, requiring others to assist

with household tasks; difficulty with simple tasks such as turning on taps and opening jars; frustrating inability to help with heavy domestic tasks which used to be his domain; difficulty with right-handed tasks involving aspects of personal care and routine, such as doing up buttons, zippers and shoe laces; and inability to undertake car maintenance. His symptoms and restrictions brought frustration, irritability and impatience with his children and stresses on the relationship with his wife.

[68] The Ravagnanis reported:

> "An injury to the dominant hand is always quite debilitating but even more so in a man who makes his living out of manual work. Mr Bathis has been left with a painful, hypersensitive right hand, which has never fully recovered. He finds that he bumps it and knocks it and that he has difficulty with all fine and gross motor tasks, with repetitive use, heavy use or even weight bearing through it. He has significantly reduced grip strength and has difficulty with any machinery or equipment, which vibrates or jars his hand. He has become over-protective and is beginning to rely heavily on the left hand for most tasks. His loss of function affects all aspects of his life and in particular, his ability to work and to attend to his domestic needs.
>
> Mr Bathis requires ongoing medical management including further hand therapy to try to improve his level of function. In the longer term he will require intermittent therapy to treat flare ups, medication, review by doctors and specialists. He would benefit from specific equipment as outlined throughout the report."

[69] It was recommended that the plaintiff undergo psychological assessment and at least three months of counselling to cope with adjustment problems, pain management, and ongoing relationship difficulties.

[70] In December 2004, the plaintiff moved from interstate to local driving, mainly because of family pressure. His wife wanted him home more often because, as he testified, "she was sick of me hurting myself…" – a reference to further injuries sustained because of the condition of his hand – and "being away".

[71] In November 2005, Dr Todhunter suggested a thoracoscopic sympathectomy. This would have required general anaesthesia, admission to hospital for three to four days, two weeks off work, and cost about $7,000. The treatment was expected to alleviate pain for more than five years and possibly indefinitely.

[72] By the middle of 2006, the pain-relieving effects of the 2004 procedure had abated. The plaintiff unsuccessfully sought to persuade the workers compensation insurer to pay for another such procedure.

[73] In November 2006, Dr Stephenson, an orthopaedic surgeon, discovered a "fairly appreciable loss of active movement and use of the right hand". He agreed with Dr Rowe that the disability represented a 30% permanent impairment of the arm below the elbow.

[74] The hand continued to cause substantial problems at work and at home. There were residual limitations and symptoms, especially pain for extended periods. The lack of strength and agility restricted the things the plaintiff could do and contributed to other injuries.

[75] Mrs Bathis notices that if the plaintiff bumps his hand, it swells. When he comes home from work his hand looks "puffy". It is often swollen. When in pain, the plaintiff is moody and irritable: "like a bear with a sore head". He takes medication for pain relief and to cope with swelling.

[76] The defendant contends that the plaintiff failed to mitigate his loss by not spending money – in particular, proceeds of a house sale – on procedures to alleviate his pain: another procedure of the kind Dr Todhunter had twice performed or else the more expensive, but longer lasting, thoracoscopic sympathectomy.

[77] The plaintiff rejects the idea that he was "supposed to neglect family and neglect all my bills to pay for a nerve block". And his decision to commit his limited financial resources to support his family rather than undergo pain-relieving procedures is not shown to be unreasonable.

[78] Once the damages are paid, however, the plaintiff will have surgery. It will alleviate pain for at least five years. That should improve his domestic situation as he becomes less irritable.

[79] In respect of pain and suffering, and loss of enjoyment of the amenities of life, past and prospective, the defendant proposes $55,000; the plaintiff $65,000. The latter is a modest award in the circumstances and will be allowed. Interest should be awarded on half.

Economic Loss

[80] After repeating two years, and at the comparatively advanced age of 17, the plaintiff completed Grade 10.

[81] Soon afterwards, the plaintiff began work in his brother's business in Melbourne. He drove a truck, delivering furniture. After about a year, he got another job as a removalist. At 23, he returned to Albury to work as a removalist for a year or so.

[82] The plaintiff next worked as an interstate truck driver. He did so for more than one employer before moving to T R Transport Services ("T R Transport") in October 1999 to drive large, freight carrying vehicles between Wodonga and Brisbane. He sustained the hand injury in that job. Three and a half months after the incident, the plaintiff returned to work with T R Transport.

[83] By the end of 2000, less work was available. This reduction coincided with the employer's discovering that the plaintiff was investigating a damages claim. That employment ceased in February 2001. Soon afterwards, the plaintiff got other work. Since then, various employers have retained him to drive trucks.

Pre-Trial

[84] It is difficult to quantify the economic loss to trial.

[85] Certainly, the plaintiff lost income in the three and a half months of his post-injury recuperation. He also hurt himself because of his hand, which caused him to lose at least eight weeks work. This much is clear: the 14 week recuperation period loss of about $11,200 is not the full extent of pre-trial economic loss. Beyond that, there is not a lot of information revealing the extent to which he has been financially disadvantaged by his injury.[3]

[86] In the plaintiff's Statement of Loss and Damage in March 2007, his economic loss was expressed as: $20,750, calculated as the loss of nett weekly wages of $1,000 from the accident, less income earned. Such a claim is not easily reconciled with records showing that the plaintiff had not earned as much as $1,000 per week before the accident. The nett weekly income was:

> 1998 - $599.50; 1999 - $738.54; 2000 - $754.79; 2001 - $802.96;
> 2002 - $642.40; 2003 - $626.63; 2004 - $666.92; 2005 - $744.81;
> 2006 - $899.30; 2007 - $941.30; 2008 - $1,076.77.

[87] The plaintiff would not now be working as an interstate driver had he not been injured. His wife's supplications would have had him working closer to home in any event. But the hand injury and its effects accelerated "by a good five years", as the plaintiff testified, a choice he would eventually have made to abandon interstate driving in favour of local work.

[88] There may be loss of income associated with the move to forestry cartage at the end of 2004. Although that change did not involve lower pay at the time, subsequent increases in remuneration in that work appear not to have matched rises in earnings of interstate truck drivers. The plaintiff now earns about $1,250 nett weekly. Mr Hogan, an interstate driver, earns about $1,500 nett weekly averaging two trips a week between Maryborough and Sydney.

[89] More to the point, the tax returns disclose a markedly lower income in the 2002, 2003 and 2004 financial years than in the two years of and immediately preceding his injury. By 2005, the plaintiff's income had not returned to the level of the year in which his hand was crushed. Those reductions seem mainly attributable to two causes.

[90] First, the plaintiff suffered fresh injuries because of his hand. There were four such episodes. They resulted in lost wages, although he probably received workers compensation for them as they happened at work. However, the evidence lacks detail. Asked to explain why he was financially worse off as a result of the injury, he referred to injuries at work caused by his hand "just letting go", adding "certain things that you would like to accomplish you can't because of it" and "it's just…put me in a big downer, put me behind." A second reason for the diminution in wages is related to the inability, at times, to drive interstate as far as he would otherwise have done. Hours with T R Transport were reduced, especially towards the end of that employment. Had he driven farther, that would have increased his pay. After he left that job, he could have driven more interstate kilometres with new employers but for the condition of his hand. Again, however, the evidence lacks detail.

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[3] On 21 December 2002, the plaintiff signed a Notice of Claim prepared by his solicitor. It included the statement that he "does not have any loss of income…". The document was prepared hurriedly at a time when "paperwork" was not available. It is not in contest that the plaintiff lost income in the three months or so immediately after his accident.

[91] There can be no pretence to precision in evaluating pre-trial economic loss.

[92] All considered, $30,000 presents as fair compensation. Interest and foregone superannuation should also be awarded.

Diminution in future earning capacity

[93] On the plaintiff's work capacity, in April 2004, Dr Rowe wrote:

> "He has capacity for employment at the moment in a modified duties position and he is able to cope. He drives freezer trucks or container vehicles, and provided he is not involved in tying down, changing tyres, loading and unloading he can cope with that sort of work. It is under sufferance and with difficulty, but he works 12-16 hours a day, and he has been doing that for the last two years or so, and certainly since this injury took place and he returned to work. He therefore has current work capacity but may not be able to return to the work that he did at the time of the injury. His only experience since leaving school is as a truck driver."

[94] So far as employment prospects were concerned, in September 2004, Mr and Mrs Ravagnani wrote:

> "He reports ongoing difficulties with steering the truck, getting in and out of the truck, loading and unloading, road side maintenance and climbing on the back of the truck. From an ergonomic point of view, this sort of work could not be considered suitable for Mr Bathis and it is highly unlikely that he will be able to continue in the longer term…Mr Bathis is clearly unfit for his pre-injury work. He requires further education and training…"

[95] The Ravagnanis, who thought that the plaintiff's minimal education would be a barrier to employment were he to compete for occupations beyond his experience, made this assessment of his vocational capacity:

> "Mr Bathis continues to work as an interstate truck driver, however he does so at significant personal cost. Although his job ostensibly involves driving refrigerated vans only, he is still required to load and unload on occasion. He no longer changes tyres and if he experiences severe pain, he stops his truck and rests. This had led to tension with his employer when he is late for a delivery of perishable goods. He stated that he is not prepared to hurt himself again and is "not too proud to ask for help". Mr Bathis appears to be coping at the moment by undertaking selected duties, transferring physical activities to his left hand and in effect, "toughing it out". Unfortunately, this cannot be seen as a long-term proposition, especially if he develops physical problems in his left arm and hand.
>
> Additionally, Mr Bathis' productivity has been compromised by his injury in that he is unable to undertake a full range of duties and has a reduced work speed as compared to his pre-injury performance. He may be viewed as an occupational health and safety risk in some

> work environments. He would present poorly to a potential employer when competing with fitter job applicants who are able to undertake all duties required of them."

[96] At the time of the Ravagnani assessment, the plaintiff was driving interstate, covering 6,000-8,000 kms weekly. He was home one night per week. He had been trying to find local work even though he anticipated that switching to local driving might well mean lower wages.

[97] In November 2006, Dr Stephenson was impressed that the plaintiff was driving a logging truck despite his disability, although he had been "very fortunate in finding a sympathetic employer". Were the plaintiff to become "disemployed from this suitable employment he could well require…further education and training with suitable redeployment…".

[98] Dr Anderson, an occupational physician, is not so pessimistic about likely employer reaction. He reported in November 2006 that:

> "Whilst [the plaintiff] is able to continue with his job [carting logs], he would not be able to carry out many other driving jobs which necessitate loading, unloading, and some general maintenance of the vehicles…
>
> At present he has no capacity for physically arduous work for the right upper limb…He is just able to hold his own as a driver. Nevertheless there have had to be some modifications as to how he does this…He finds that there are many tasks that he cannot do at home.
>
> Just about any activity which necessitates gripping with the right hand is severely compromised…this will remain."

[99] Dr Anderson does not agree with the Ravagnani assessment of work function. He considers that, as the plaintiff has managed to return to work as a truck driver, making adaptations to carry out his job, "he is therefore able to manage the job satisfactorily…The only issues of concern with working as a driver would include loading and unloading the vehicle and any possible emergency events…".

[100] The plaintiff cannot grip the steering wheel of a truck with his right hand. He uses his right forearm to assist in steering.[4]

[101] Dr Anderson does not accept that using the right forearm in steering is dangerous. It would, he accepts, be "very difficult" for the plaintiff to change a tyre or work under the vehicle. He acknowledges, however, that the plaintiff is "significantly compromised" in comparison with an able-bodied truck driver in his ability to work as such.

[102] The plaintiff has never had an accident while driving. However, Mrs Ravagnani regards his method of driving– in particular, not gripping the wheel with the right hand – as unsafe. "Driving takes two hands, particularly driving a truck", she explained.

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[4] He can also use a device that fits over his hand which he made because of difficulty in pulling ropes.

[103] Mr Ravagnani testified about employment prospects on the assumption that the pain would be relieved through surgery, leaving restrictions of function (as, for example, inability to grip a steering wheel). The difficulties the plaintiff confronts in driving would present as an occupational safety risk to a prospective employer: his unusual operating style could "be of great concern".

[104] The views of the Ravagnanis concerning the plaintiff's driving style, the dangers inherent in it, and the likely reaction of prospective employers are acceptable. Their evidence is preferable to Dr Anderson's. The Ravagnanis have more relevant experience: and their opinions better accord with contemporary approaches to workplace safety.

[105] In April this year, Mr Ravagnani reported:

> "According to the figures from the Transport Industry (State) Award, the weekly pre-tax wage for a transport worker (Grade 8) is $766.50 with an additional allowance of $0.33 per kilometre for long distance work. By undertaking long distance work it is possible for a long haul truck driver to earn substantially more than a local driver because their gross wage is supplemented by $330.00 for every 1000 kilometres driven.
>
> Another method of approaching this is to compare wages for delivery drivers and truck drivers. According to the Australian Government's Job Outlook database, the median earnings figure for truck drivers (all ages and levels of experience) is $1000.00 per week and the job outlook is good. The median earnings figure for delivery drivers is $700.00 per week with an average outlook. Whilst individual wages cannot be determined from these figures, there is a clearly a wage differential between truck drivers and local delivery drivers.
>
> From the medical information provided Mr Bathis appears to be presently coping with a less exertional (and less remunerative) truck driving role which is still physically taxing. However, his occupational future is by no means assured. The transport industry, like many others, is highly sensitive to economic conditions. Should his employer lose a contract or embark on a new direction Mr Bathis may find himself unemployed. To his credit, he has been able to maintain work to date however there are no guarantees that this situation will continue. His physical limitations and difficulties with many of the core duties of a truck driver will make him a less desirable job applicant, especially when competing with drivers who have no prior injuries or restrictions. His barriers to employment will be compounded by employer fears related to further injury or reduced productivity."

[106] The plaintiff has worked with his current employer since December 2004, driving large vehicles carting logs from Victorian forests located no more than an hour's drive from Albury. The forestry tracks are "pretty trying". Driving on them presents dangers. In an emergency, the plaintiff could not grab the steering wheel with both hands.

[107] Mrs Bathis is worried, justifiably, about her husband's safety. She has encouraged him to try something else. But truck driving is all he knows. She has asked him to take the invalid pension. He does not want to do that because he does not want to "let us down", she said. Even so, Mrs Bathis cannot imagine that her husband will work beyond 50 in any capacity.

[108] The plaintiff's determination to support his wife and children motivates him to continue despite the risk to his personal safety and the pain at day's end. As he said:

> "It get's hard. Some nights you go home [and] you cry yourself to sleep… But because of my boys and my wife, I won't give up yet."

[109] The plaintiff is uncomfortable with drawing a pension. With remarkable fortitude, he has striven mightily to go on working under challenging circumstances. However, even after thoracoscopic sympathectomy, in all likelihood, eventually he will accept that he cannot persist in the longer term with what he now does. Indeed, the plaintiff is coming to accept such a fate. He expects to continue in his work for no more than five years. That estimate may be too optimistic. He remains at risk of further injury. Economic circumstances could also lead to earlier termination. Bushfires in Victoria have destroyed timber resources. As a result, less work is available for forestry truck drivers.

[110] As the evidence of the Ravagnanis in particular reveals, the plaintiff is significantly disadvantaged on the open labour market. His limited educational attainments and that his work experience has been confined to driving trucks limit employment prospects. So do the restrictions of his disability. As examples, his capacities are severely constrained when it comes to lifting gates on trucks and working with ropes, tyings and curtains.

[111] It was argued for the defendant that the plaintiff could work other than as a truck driver: in particular, as a forklift operator. However, the evidence of Mr Shayler,[5] who has considerable experience with forklift drivers, shows that it is highly unlikely that anyone would employ the plaintiff to do such work.

[112] The defendant proposes that compensation for future economic loss be assessed on the assumption that there is a loss after five years for the 20 years that would remain until the plaintiff turns 65. On this approach, discounting for delayed receipt, and using a weekly loss of $300,[6] the sum yielded is $156,643.20.

[113] It is well on the cards that the future will not be so rosy.

[114] Mr Morton posited a range of possibilities and financial consequences,[7] including these. If, in five years time, the plaintiff stops driving trucks and immediately secures other work paying $800 nett per week, a weekly reduction in wages of $450.00 to age 65 means a loss of about $235,000. If he stops now and gets another job paying $800 nett weekly, the figure rises to about $339,000. If he leaves his

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5 Mr Shayler testified that about 20 forklift drivers are employed at the defendant's depot. He has worked at the depot for more than 16 years and has never known of a forklift driver there who was permanently unable to use the dominant hand.

6 The 2009 Ravagnani report canvasses the prospect of a weekly loss of this order.

7 All figures in the examples, I gather, discount only for present receipt and not for adverse contingencies.

current job in ten years and never works again, the loss is about $425,000. It rises to about $643,000 if he ceases work altogether after another five years in his present job. These examples by no means exhaust the possibilities.

[115] There is no escaping a rough and ready assessment; but the exercise must reflect a substantial chance that, after age 50, the plaintiff may not work much if at all.

[116] Approaching the matter globally, as both sides accept is inevitable, and discounting not only for present receipt but also for the usual sorts of vicissitudes, $300,000 is awarded for diminution in future earning capacity, to which should be added 9% for superannuation foregone.

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[117] During the three and a half months the plaintiff was off work immediately after the injury, his wife helped him with eating, getting dressed, showering and other daily activities. He estimates that she cared for him for about six hours a day in that period.

[118] When the plaintiff was away driving his truck interstate, friends helped his wife by doing things the plaintiff would otherwise have done before leaving on his journey.

[119] Mrs Bathis still assists her husband with things he used to do for himself. He cannot hold a jug to pour hot water into a cup. He drops things. He cannot use an ordinary can opener. He needs help with small buttons. He can no longer do his own cooking, washing or ironing. Mrs Bathis makes the bed. Mostly, she has to do the lawns and the whipper-snippering, although he can push a lawn mower with one hand. Sometimes, friends help with gardening.

[120] Mrs Bathis said that she spends, at most, about two hours a day attending to tasks which her husband attended to before the injury. The plaintiff estimates that others spend about two hours a day doing things for him that he used to do himself.

[121] In Dr Stephenson's November 2006 assessment, activities around the house with fine tools or instruments would be difficult. Assistance was needed with gardening, lawn mowing and the "rougher components of work around the house and garden". The plaintiff's impairment was such that, in Dr Stephenson's opinion, two hours weekly assistance "would be required in the future on a long-term basis".

[122] The plaintiff and his wife are honest people. Their evidence about what Mrs Bathis and friends have done and continue to do because of his injury is acceptable. However, their impressions of the time devoted to such activities are questionable.

[123] No record, it seems, has been kept of the hours committed to gratuitous care. Moreover, the time estimates of the plaintiff and his wife substantially exceed the September 2004 Ravagnanis' assessment of assistance needed for domestic tasks, home maintenance, gardening, car cleaning and maintenance. They put the need at 136 hours yearly. That broadly accords with Dr Stephenson's identification of a two hours per week need.

[124] The defendant accepts that in the three and a half months the plaintiff was recuperating, two hours a day should be allowed. That seems appropriate. Since then, and for the future, 136 hours annually is allowed.

[125] Between the injury and June 2001, Home Care Service of New South Wales charged $25.20 hourly, Monday to Friday, more on weekends, to provide "domestic assistance/respite care/home maintenance". The rate then increased to $29.70. It rose to $31.90 from mid-December 2002. No information is available about the rate after 2003. But there is no reason to suppose that it has fallen.

[126] Until September 2004 when the Ravagnanis reported, the rate I shall allow is $25.00 per hour, which is all that is sought. The rate for the period since is $31.90 per hour.[8]

[127] The plaintiff's life expectancy is another 39 years. The calculation for future care is therefore to assume 136 hours per year at $31.90 per hour for 39 years, discounted on the 3% tables.

Agreed Specials

[128] The following components of special damages are agreed:

Past pharmaceuticals	$3,200.00
Past travel to attend medical practitioners	$ 450.00
Refunds:	
Medicare	$ 95.70
QBE	$6,633.96
CRS	$1,053.00

Future medical and pharmaceutical

[129] The defendant proposes that $15,000 be awarded for future medical care and pharmaceuticals.

[130] The plaintiff seeks almost $40,000 for periodic radio frequency sympathectomies. The two procedures so far have cost, on average, $2,600 each. Another such procedure would be efficacious for about 15 months. Assuming repetitions every 15 months, projected over life expectancy, and allowing for one treatment immediately, the cost is $38,680, on Mr Morton's calculations.

[131] The plaintiff, however, will undergo thoracoscopic sympathectomy, which affords long-term pain relief. One such procedure might do, although it may need to be repeated every five years or so. $20,000 will be allowed for three.

[132] The relief of pain through the procedure should largely obviate a need for pharmaceuticals. Nonetheless, a small allowance should be made for such expense: periodically, there will be such a need. $5,000 should do.

[133] Accordingly, $25,000 is awarded for future medical treatment and pharmaceuticals.

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[8] Mr Kelly contended for no higher rate than that demanded by someone in the "cash market" for such services - $16 per hour. Such a person, it seems, charges less than the cost of retaining a qualified person employed or selected by a reputable agency and does so because this service provider has in mind evading income tax. No authority was cited for the proposition that the damages should be calculated on the assumption that a plaintiff will retain someone who is cheaper because that person expects to evade tax. In any event, Mrs Ravagnani, whose evidence on this point was not challenged, would never recommend engaging such an individual to render domestic assistance.

Disposition

[134] The few calculations can be left to the parties.

[135] I will hear any argument on the form of order and costs.