SUPREME COURT OF QUEENSLAND

CITATION:	*Rossi v Westbrook and Anor* [2011] QSC 311
PARTIES:	**TENILLE BIANCA ROSSI** (Plaintiff) v **MARGARET WESTBROOK** (First Defendant) and **RACQ INSURANCE LIMITED** (Second Defendant)
FILE NO/S:	BS 551 of 2008
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	25 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	10-12 October 2011
JUDGE:	McMurdo J
ORDER:	**Judgment for the plaintiff against the second defendant in the sum of $22,144.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – where the plaintiff was in a car accident – where liability was admitted – where the plaintiff suffered an injury to her cervical spine and developed a traffic phobia – whether the plaintiff was exaggerating her symptoms – whether the plaintiff required gratuitous services – what was the appropriate award of damages *Civil Liability Act 2003* (Qld), s 59, s 61 *Civil Liability Regulation 2003* (Qld), Schedule 3 *HML v The Queen* (2008) 235 CLR 334, cited *Jones v Dunkel* (1959) 101 CLR 298, applied *R v Burdett* (1820) 4 B & Ald 95; 106 ER 873, considered
COUNSEL:	R Morton for the plaintiff

GC O'Driscoll for the defendants

SOLICITORS: Morton & Morton Solicitors for the plaintiff
Quinlan Miller & Treston for the defendants

[1] The plaintiff, Mrs Rossi, seeks damages for personal injuries suffered in a car accident on 4 September 2003. Liability is admitted.

[2] It is also admitted that she suffered an injury to her cervical spine and that she developed a traffic phobia which persists. It is common ground that this phobia can be successfully treated by a program of ten consultations at a cost of $210 each. The dispute is as to the severity of the injury to her cervical spine. Mrs Rossi says that from shortly after the accident, she has suffered symptoms of stiffness in the shoulders, a burning sensation from her shoulders up through her neck and a feeling that the neck is tightening up which then leads to headaches. She says that this gives rise to a need for domestic assistance and affects her earning capacity. The defendants say that she has no significant impairment in either of those respects, and that she is misrepresenting the existence or extent of her symptoms. As I will discuss, the proof of her case is effectively dependent upon her own evidence.

[3] Mrs Rossi was aged 18 at the time of this accident. She had left high school in year 11 and had worked in two shops in Gympie. She was not employed in the month or so prior to the accident, but she had accepted an offer of employment at a jewellery store. She was living with her then boyfriend, Mr Westlake, in a house occupied also by Mr Westlake's mother and her husband.

[4] Mr Westlake was driving the car in which she was a passenger when it was hit by the first defendant's car which had been driven through a red light. She remembers being flung back and forth in the impact and being pulled out of the driver's side door. An ambulance arrived but its crew attended to the occupants of the other car. Mrs Rossi went home without any treatment.

[5] On the following day she had symptoms of stiffness along her shoulders and up towards her neck and a pain along her back. She went to a general practitioner, who noted complaints of neck and upper back pain. She was referred to a physiotherapist but she did not undertake physiotherapy. She explained that this was because she could not afford it. To this day she has had no physiotherapy.

[6] She says that she began to take brufen for her pain but stopped doing so because it made her feel ill. Instead, she said, she took panadol and nurofen. She said that she has tried brufen a couple of times over the years but again it caused her to feel sick.

[7] She began work at the jewellery store within a couple of weeks of the accident. She said that this work, which required her to be on her feet most of the day, caused her to quickly develop headaches and affected "the extent of the pain and tightness".[1]

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1 T 1-15.

She said that a sympathetic manager allowed her to have extra breaks during the course of the day so that she could sit down. She says there was also a stool on which she could sometimes sit behind the counter.

[8] In 2004, the ownership of the jewellery store changed. It was purchased by Mrs Rossi's now husband and his then wife. When Mr Rossi and his then wife separated, their division of assets resulted in the jewellery store being owned by her. This left Mr Rossi with a service station in Gympie, which had a small residence attached to it. The plaintiff and Mr Rossi went to live there. She left her employment at the jewellery store and did some work behind the counter at the service station. She said she found the work in the service station difficult because she was having to stand up, as well as lifting things such as drink cartons. She described that this would make her pain worse and she would end up with a migraine from the tightening of her shoulders. She said that had she not been injured, she would have sought another job in a shop after leaving the jewellery store. Before long she stopped working behind the counter at the service station and confined herself to doing the accounts, which involved her working 15 to 20 minutes each night. She said that this was because of the problem she was experiencing with her neck. At no time did she receive any payment for work at the service station. Her tax returns for the 2003 and 2004 years are in evidence, but not any return for the 2005 year.

[9] Mr Rossi acquired another service station, this time in Maryborough. They moved to a house at the back of that business and she began to manage the Maryborough service station, with Mr Rossi managing the one at Gympie. But within a matter of weeks, she says, she found that the work load was too much and that it aggravated her neck and back pain. Consequently, Mr Rossi managed the Maryborough service station and employed other people at Gympie. She then performed the daily accounting work as she had done at Gympie. At some time in 2005, the Gympie service station was sold. The Maryborough service station was sold in February 2006.

[10] In early 2006, the couple began a signwriting business. The signs were designed by Mrs Rossi using particular software, and they were printed on stickers by a device called a cutter. Mr Rossi applied these to a wood or metal base and installed the completed signs. They acquired the cutter on eBay and she taught herself to use the software. Mrs Rossi's evidence was that the couple went into this business essentially because she needed some occupation in which she could work from home and, by being self-employed, she could limit her hours of work so as not to exacerbate her neck pain and headaches.

[11] Whilst she was learning to use the software, Mr Rossi was employed at a newspaper in Maryborough. When she began to build up a list of customers, he left that employment to work in the business. She said that the business was commenced shortly before the sale of the service station in Maryborough. I have the impression that Mr Rossi was not employed at the newspaper for long. She does not suggest that at any time it was intended that she alone would conduct this business. Nor did she refer to any other occupation of Mr Rossi after he left the newspaper until very recently. The apparent intention was that they would each be involved from the

time that the necessary software and equipment were acquired and there was work to be done. It appears then that the business was not acquired in order to provide Mrs Rossi with something to do which would not exacerbate her symptoms. The more likely position is that the couple decided to undertake this new venture having decided to leave the service station business.

[12] Mrs Rossi says that she began to work about four hours per day, five days a week. She says the business was not successful in its trading. Remarkably, she said that it was for this reason that the couple decided to grant franchises, firstly in Australia and later in New Zealand, for the conduct of such a business. About 10 franchises were granted, with the franchisees paying amounts ranging from $30,000 to $40,000, for which the franchisee obtained not only the right to conduct the business but also the necessary training, equipment and software. In this way the Rossis' undertaking was profitable, it would appear, because Mrs Rossi conceded that "[t]here was a certain amount [from moneys paid by franchisees] that I did use for groceries and that sort of thing …".[2]

[13] As the franchise network grew, so did her workload. Her hours increased to about 10 to 12 hours per day which, she said, made her symptoms worse. Before long, an agreement was reached with the franchisees at the Gold Coast and in Melbourne that they would assist with the training of and ongoing support for further franchisees. She said that this reduced her workload to about four hours per day.

[14] Mrs Rossi was involved in training of new franchisees. From about February to September of this year, she and Mr Rossi were working in New Zealand, with new and prospective franchisees there. At one stage this year, she was working about six hours per day. But she claimed that upon her return to Australia in September, she said to her husband that she could no longer work this hard. She claimed that the couple then decided not to continue the business and had closed it down. However, the web page for their business still exists and it represents that the business is alive and well. She says that Mr Rossi has found other work as a car salesman and she has not looked for other employment. Just what has been agreed with, or arranged for, the franchisees is not explained.

[15] The couple have one child, who was born in May 2007. During her pregnancy, Mrs Rossi was able to continue her work, but the medication for what she says were her symptoms was limited to panadol. She said that this meant that she could not manage her symptoms as well as when she could take nurofen. She said that this additional pain meant that she required further help in the house and that a girl who lived next door was paid to help her for about eight months. There is no evidence, documentary or otherwise, to support that statement. She said that the child was breastfed for about 14 months and that again during this time she was unable to use nurofen.

[16] Mrs Rossi says that she now uses panafen, to the extent of two to four tablets a day, and that her pain varies from day to day but sometimes it is so bad that she must

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2 T 1-26.

stay in bed. Even on a good day, she still experiences "a mild tightening or stiffness".[3]

[17] On this evidence, Mrs Rossi has been in constant pain, very often seriously enough to confine her to bed, since September 2003. Her symptoms have confined her work opportunities, limiting her to an unprofitable business to which she was unable to apply herself on a full time basis. Yet she has sought very little professional assistance. I mentioned that she saw a general practitioner on the day after the accident. According to what was tendered without objection as the relevant medical records, she next saw a general practitioner in May 2004 when she reported neck pain. She went to the same practice in July, August and October 2004 and also in March 2005. But in no case did the notes of those visits refer to any relevant pain. However, on 11 April 2005 she went to that practice complaining of a sore neck, headaches and vomiting. An examination revealed a general tenderness and she was referred for an x-ray and prescribed nurofen and paracetamol. On the following day she went to the Gympie Hospital complaining of pain over the head and neck and of a migraine over the past two days.

[18] The next relevant entry in the records is for 1 November 2005, when she saw a general practitioner in Maryborough. Symptoms of pain in her neck, shoulder and lower back were recorded. On the following day, she returned to that practice with the same complaints. That is the most recent of any record of treatment for the symptoms of which she has given evidence. There are a number of notes of consultations with a general practitioner during her pregnancy, but in no case was this pain noted. The same can be said about her visits to a general practitioner in June, September and October 2007.

[19] For the purposes of this case, she was seen by Dr van der Walt, an orthopaedic surgeon, on 18 April 2006. In his report, Dr van der Walt wrote that she presented with a normal posture, walked without a limp and could easily walk on her toes and heels. But on examining her cervical spine she showed restriction of movement in rotation, latro flexion, flexion and extension. X-rays taken of her cervical spine on 9 May 2006 showed no abnormality. Dr van der Walt wrote that she suffered soft tissue injuries to both her cervical and lumbar spine. Her claim in these proceedings had included one for an injury to her lumbar spine but this was not pressed at the trial. Dr van der Walt believed that her cervical spine injury had resulted in a 5 per cent whole person impairment. According to his evidence, people with this sort of injury usually recover within six months or so, but there is a percentage (about 3% to 5%) who develop a chronic problem which lasts indefinitely.

[20] Counsel for the defendants suggested to Dr van der Walt that Mrs Rossi may not have been applying herself in the testing of her range of movements. He rejected the suggestion and said that she seemed to be trying to do the exercises. He was referred to the evidence of subsequent testing by others, which showed no such restrictions in movement, and he was asked to provide possible reasons for the discrepancy. He said that if there was a long time interval between the examinations that could be an explanation, particularly from an improvement in the

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[3] T 1-29.

patient's condition. In turn, he agreed that an improvement in the range of motion could indicate some improvement in the patient's symptoms.[4]

[21] In a report by Ms Aitken, an occupational therapist called in the plaintiff's case, there is a table setting out the measurements of the relevant range of movements as undertaken by Dr van der Walt, by a Dr Morris in June 2006, by a physiotherapist, Mr Mitchell, in April 2008 and by a Dr Douglas in June 2009. Of those other examiners, only Mr Mitchell gave evidence. He was called in the defendants' case, as was another physiotherapist, Mr Hayter. According to the records of the measurements undertaken by each of these examiners (apart from Dr van der Walt), Mrs Rossi demonstrated effectively a full range of movement in all respects. Further, Ms Aitken wrote in her report that her own measurements taken on the day of her assessment (28 August 2009) corresponded with those taken by Dr Douglas in June of that year and that "[Mrs Rossi] displayed full neck movement in all directions". The difference between these several results and those upon Dr van der Walt's examination seems striking. Dr van der Walt has not seen Mrs Rossi since April 2006 and is unable to comment upon her present range of motion. Perhaps Mrs Rossi made a substantial improvement, as to her range of motion, after seeing Dr van der Walt, although it must be noted that Dr Morris reported a full range of movement on 1 June 2006.

[22] Mr Mitchell assessed not only her range of movements, but also other things such as her strength. None of these measurements support her case. But he noted also her own assessments of her pain, described as a number out of 10. Overall the numbers were relatively high, often seven out of 10. This caused Mr Mitchell to write in his report that the amount of actual movement which Mrs Rossi was able to achieve in the exercises did not correlate with the high level of pain which she said she was experiencing. He explained this as follows:

> "[I]t's based on looking at normal movement, range of motion, normal speed, end range stretch, that's where the person kind of bounces into the end of the movement, which you wouldn't expect someone to do if they were in a lot of pain, and a symmetrical movement pattern, and normal behaviour, no grimacing, no, you know, exclamation of pain or anything of that nature, and, yeah, there's a report of very strong or seven out of 10 pain as defined in our very first questionnaire that we filled in together. Seven out of 10 is a very strong pain. I don't think that correlates. Normal movement, normal speed, bouncing into the end of the range of the motion, a symmetrical movement, no outward sign of any pain, the report of seven out of 10, that's all."[5]

Mr Mitchell said that Mrs Rossi reported typically sitting for seven hours a day in her work and that he observed her to sit for about an hour during his assessment without any apparent discomfort.[6]

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4 T 1-80 to 81.

5 T 2-78.

6 His report dated 29 April 2008, exhibit 5, p 4.

[23] Similarly, Mr Hayter wrote that Mrs Rossi "reported moderate levels of pain" and "moderate levels of disability", "which correlated poorly with her demonstration of full functional range of motion".[7] His testing indicated to him that Mrs Rossi was able to work an eight hour day in an occupation of light-medium physical demand. In his opinion, she did not require assistance around the home, now or in the future and that "[s]he would benefit from increasing her physical activity around the house to assist with increasing her overall conditioning".[8]

[24] Mr Hayter, who saw her in May 2010, noted that she was then working in her own business, 50-60 hours per week as she had done from about October 2009. In her evidence, she explained that these were the hours during which the phone might ring for business, rather than the number of hours of constant work. But that explanation is difficult to reconcile with what she said to Mr Hayter, when it is seen in context. He wrote:

> "Ms Rossi reported that she initially worked approximately 12 hours per week on her own business when it began in February 2006. She stated that her hours have gradually increased since May 2007. She reported that she has worked 50-60 hours per week on her own business since about October 2009."[9]

Mr Hayter also recorded that "Ms Rossi reported that she has missed only four days of work when her daughter was born, since the motor vehicle accident". Mrs Rossi explained that as the business was conducted from home she was effectively always at work. Again, this is not a persuasive explanation and is difficult to reconcile with her evidence that on bad days, she is confined to bed.

[25] Ms Aitken assessed Mrs Rossi's capacity for work and her need for personal care and assistance. Ms Aitken produced a schedule described as "functional loss and past care requirements", which was divided into different time periods since the accident. The first of those periods was until the end of the calendar year 2003, during which she was living with Mr Westlake at his mother's house. On Ms Aitken's assessment, she had a requirement for care of 10.12 hours per week during this period. The second period was when Mrs Rossi was living in shared accommodation with another couple from the end of 2003 until November 2004. During some of this time Mr Westlake was living in the same house. It seems that their relationship ended in about March or April of 2004. During this period of about 11 months, according to Ms Aitken's assessment, she required assistance to the extent of 9.5 hours per week. As at the date when Ms Aitken saw Mrs Rossi (28 August 2009), she required care of seven hours per week, by her assessment. Ms Aitken wrote that Mrs Rossi was then working "…15 to 20 hours per week over seven days, averaging three to four hours per day between 9.00am and 4.00pm".[10] In her opinion, Mrs Rossi had a capacity to undertake her duties as graphic designer on only a part time basis to a maximum of 20 hours per week. Similarly, she said, Mrs Rossi had a capacity to work part time in a jewellery store.

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7 His report dated 22 June 2010, exhibit 6, p 7.
8 Ibid, p 11.
9 Ibid, p 3.
10 Her report dated 24 September 2009, p 7.

[26] As was conceded in the address by Mrs Rossi's counsel, these assessments by Ms Aitken are upon a factual premise, which is that Mrs Rossi was accurately reporting her symptoms and relating her experiences and difficulties in work and at home. The expertise of Ms Aitken was in translating those matters into an appropriate regime for work and domestic assistance. Her professional judgment does not significantly affect the determination of the core question, which is whether Mrs Rossi has exaggerated her symptoms. But the assessment that she required domestic assistance, during the period in which Mrs Rossi was living with Mr Westlake, is quite inconsistent with his evidence and that of his mother, each of whom was called in the defendants' case.

[27] In evidence in chief, Mr Westlake had no recollection of assisting Mrs Rossi with domestic activities after the accident or of seeing his mother do so. Nor did he recall any other person providing such assistance to her. The weight of this evidence is affected to an extent by the fact that Mr Westlake was asked only about a year ago to recall these circumstances. I accept that his recollection would be limited. Nevertheless, it is likely that he would recall providing substantial assistance, of the order of some hours per week, had that happened. He gave no indication of any hostility towards Mrs Rossi and I accept his evidence.

[28] Mrs Banfield professed a clearer recollection. She said she did not provide the plaintiff with any domestic assistance. She said that her son did things for Mrs Rossi around the house, but no more than he had done prior to the accident. She described Mrs Rossi as "just always lazy in the house".[11] Clearly, Mrs Banfield does not have a high opinion of Mrs Rossi.

[29] Possibly, Mrs Rossi needed some care after the accident, and that it was effectively for things which Mr Westlake had always done for her. The evidence of these two witnesses does not of itself disprove Mrs Rossi's case. But overall, it fairly demonstrates that the assessment by Ms Aitken, based as it is upon Mrs Rossi's version of things, exaggerates the need for care during the period in which Mr Westlake might have been the person to provide it.

[30] After Mr Westlake, it would be Mr Rossi who was the person likely to provide at least much of the care which is said to have been required. Remarkably, Mr Rossi was not called as a witness. For the defendants, it was submitted that it should be inferred that his evidence would not have assisted Mrs Rossi's case, on the subjects for which he could have given relevant evidence, being not only the need for care, but also her capacity to work.

[31] Mr Rossi has lived and worked with the plaintiff for at least seven years. According to her evidence, he has had to restructure businesses by engaging other people to do the work which she was unable to do. On her evidence, the decision to go into this signwriting business was made because of her impaired capacity to work. He was a party to that decision. And plainly, he would be able to give relevant evidence as to her need for domestic assistance. There is no explanation for the absence of this

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11 T 2-64.

evidence. For example, there is no suggestion of some recent discord between them.

[32] In *Cross on Evidence*,[12] the authors say that the rule in *Jones v Dunkel*[13] only applies where a party is "required to explain or contradict" something. That phrase comes from *R v Burdett*,[14] in a passage set out in *Jones v Dunkel* by Windeyer J.[15] The authors go on to say:

> "What a party is required to explain or contradict depends on the issues in the case as thrown up in the pleadings and by the course of evidence in the case. No inference can be drawn unless evidence is given of facts 'requiring an answer'. If there is no issue between the parties on a matter, there is nothing to answer; and if there is an issue between them, but the party bearing the burden of proof has tendered no evidence of it, the opponent is not required to answer."[16]

For the plaintiff, it is submitted that she is not required to explain or contradict anything for which Mr Rossi's evidence could have been relevant.

[33] In this case, the plaintiff must prove her alleged incapacities to work and to care for herself. These issues are at the heart of her case and she must explain why she is unable to do these things, although she has a full range of movement and, more generally, no objective signs to support her evidence of her symptoms. This requirement of the rule in *Jones v Dunkel* is plainly established.

[34] In my view, the defendants' submission based on *Jones v Dunkel* must be accepted. I infer that Mr Rossi's evidence would not have assisted her case. Of course, it is not to be inferred that his evidence would have been adverse to it.[17] In *Cross on Evidence*, the authors say that the rule "permits an inference that the untendered evidence would not have helped the party who failed to tender it, and entitles the trier of fact to take that into account in deciding whether to accept any particular evidence which relates to a matter on which the absent witness could have spoken …".[18]

[35] The failure to call Mr Rossi is not, of itself, determinative of the plaintiff's case. It does not mean that her evidence should be rejected. But the fact that his evidence would not have assisted her case is relevant to that question.

[36] I come then to the evidence of the success or otherwise of the signwriting business. According to the financial statements, this was a business conducted solely by Mrs Rossi. There is no reference to a partnership or to a company as the or a

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12 LexisNexis, *Cross on Evidence*, vol 1 (at 138) [1215].
13 (1959) 101 CLR 298.
14 (1820) 4 B & Ald 95; 106 ER 873.
15 (1959) 101 CLR 298 at 321.
16 LexisNexis, *Cross on Evidence*, vol 1 (at 138) [1215].
17 *HML v The Queen* (2008) 235 CLR 334 at 438.
18 LexisNexis, *Cross on Evidence*, vol 1 (at 138) [1215].

proprietor. Accounts prepared for that business were tendered. But the picture is far from complete.

[37] The most recent accounts are for the year ended June 2010. They show a net loss for the business of $17,238.74, after deducting overheads of $95,199.37 from a total income of $77,960.63 (the latter including the gross profit on trading of $25,870.02). In the year to 30 June 2009, the business made a net profit of $15,344.53, upon a total income of $114,552.69 which included a gross profit from trading of $54,242.59. The particular profitability or otherwise of this business is relevant, at least for Mrs Rossi's claim for past economic loss, because as her submissions accept, her income from this business should be deducted from what is said to have been her likely earnings as employed in a shop. But as I have said, the picture is far for complete. For example, the capital statements within the financial reports show capital contributions and drawings which are not explained by the evidence. Nothing is shown as income derived by Mr Rossi. One of the two franchise agreements which are in evidence refers to the franchisor as a company, Avanti Signs Pty Ltd.[19] It is dated August 2010. This indicates that more recently the business was conducted by a company. There are no accounts for the most recent 15 months of trading. It is impossible then to see what income was derived by Mrs Rossi during that period.

[38] More generally, the accounts are consistent with her evidence that this was a substantial business. She does not suggest that anyone else undertook the design work for the signs made by this business, as distinct from those made by the franchisees. On her own evidence, she was able to actively participate in this enterprise, most recently by living and working in New Zealand. And she was able to do so with the burden of a young child. She did not say that Mr Rossi gave any particular assistance in that respect.

[39] An extract from the website of the business, as searched on 5 October 2011, represents that this was a substantial business. It describes the business, called Avanti Signs, as "one of the leading designer and manufacturer of traditional and digital signage's" (sic).[20] The website also promotes the franchising of the business, stating that there are available areas in Australia, New Zealand and the United Kingdom. As one of the stated advantages for franchisees, it is said that there will be "head office support", through a head office which is "…also a call centre for franchisees needing help or advice on a job, with graphic designers and signage consultants on hand, to answer calls and emails every day of the week".[21] The head office is specified by reference to Mrs Rossi, and her postal and email addresses and phone numbers are shown. Now it is quite possible that the website is not carefully confined to the true facts in every respect. But it plainly gives the impression of an enterprise which is far beyond the notion of some occupation which Mrs Rossi created for herself, so that she could work part time and from home, because of an incapacity to work full time in a shop.

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19 Exhibit 14.
20 Exhibit 7.
21 Ibid.

[40] Relevant to her credibility is the disclosure of her own working background within a franchise agreement which she, as the franchisor, made in September 2008.[22] Her business experience was there described as having been the manager of each of the service stations as well as the manager of the jewellery store. In no case was that correct. When this was put to her in cross-examination, she claimed that she had neither written nor read that part of the document. It may be accepted that the document was compiled by another person, who had some understanding of the requirements for disclosure in a franchise agreement. But the fact that she signed on, amongst others, this very page of the document, hardly inspires confidence in her as a reliable and credible witness. Her business experience as the franchisor was important in that context and this was a serious misrepresentation of it.

[41] The plaintiff's case depends upon an acceptance of her evidence of the existence and extent of her symptoms. It has the support of the opinion of Dr van der Walt. But he saw Mrs Rossi more than five years ago and upon his examination, her range of movements was limited. That is in stark contrast to each of the many assessments of her range of movement which have been undertaken by others, including Ms Aitken.

[42] I accept the opinions of the physiotherapists as I have set about above. There is a poor correlation between what Mrs Rossi was able to do in the various tests (and her appearance in doing so) with what she claimed was the pain which she was then experiencing. Perhaps Mrs Rossi has a remarkable degree of fortitude in coping with the symptoms which she describes. Nevertheless, the evidence of the physiotherapists provides a significant indication that her symptoms are exaggerated.

[43] She is unable to establish her case by reference to her work history. Of course, she gave evidence of difficulties in working in the jewellery store, the service stations and in her own business. But there is no evidence to support any of those claims. She left the jewellery store because of particular personal circumstances. She cannot point to a single day off work during the time that she worked there. I do not accept that she would have taken another job in a shop but for her injuries. It is probable that instead she worked in the service station to assist Mr Rossi with that business.

[44] There is the further factor that she has not seen a doctor about these symptoms since November 2005. She has never taken up the suggestion of physiotherapy. There is only her own testimony as evidence of her use of medication.

[45] Her counsel submitted that there is much in her behaviour which is markedly inconsistent with the making of a false claim. For example, her performance at the various examinations (apart from that by Dr van der Walt) demonstrated a genuine attempt to engage in the exercises and assessments, rather than trying to pretend that she had some limitation upon her movement or in some other way. That submission is well made. But it does not follow that her evidence should be accepted. The

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22 Exhibit 8.

essential question is whether she suffers from pain and other symptoms of the severity as she has described. More specifically, there are questions as to whether her symptoms result in a need for domestic assistance and impair her earning capacity. As to that last matter, her counsel pointed to some correlation between her evidence about the number of hours she was able to work and Ms Aitken's opinion about that matter. Her evidence was not in the precise terms of Ms Aitken's opinion, but there was a correlation which, counsel suggested, could not have been the result of a lay person's attempt to make her evidence correspond with Ms Aitken's opinion. That submission was not persuasive. The opinion of Ms Aitken was the result of what Mrs Rossi had told her of her symptoms and circumstances and it is unremarkable that her account here would have some correlation with that opinion.

[46] Taking all these matters together, I am not persuaded to accept the substance of her evidence. It must be accepted that she suffered an injury to her neck and that there were some symptoms of the kind which she has described. I accept that there are some ongoing symptoms, but not nearly to the extent related by Mrs Rossi's evidence. I am not persuaded that, at any time, her symptoms would have been serious enough to require domestic assistance as she now claims or to affect her earning capacity. Upon those premises, I turn to the quantification of her damages.

[47] Because these injuries arose after 1 December 2002, general damages must be assessed according to an injury scale value (ISV) as referred to in s 61 of the *Civil Liability Act 2003* (Qld). Section 3 of Schedule 3 of the *Civil Liability Regulation 2003* (Qld) ('the Regulation') provides that where there are multiple injuries, the range of ISVs for the dominant injury is to be considered in assessing the ISV but that a higher assessment may be made for the circumstance that there are multiple injuries. It is common ground that the dominant injury here is that to the neck. The appropriate item of Schedule 3 of the Regulation is item 89, a "minor cervical spine injury", for which the range is 0 to 4. A mark-up is appropriate for her psychological injury. Ultimately, the defendants concede that general damages could be assessed at $11,000, which represents an ISV of 10. On my findings, it could be no higher than that. General damages will be awarded in that amount.

[48] Section 59 of the *Civil Liability Act* provides that damages for gratuitous services provided to an injured person are not to be awarded unless the services are necessary, the need for them arose solely out of the injury in question and the services were provided or are to be provided for at least six hours per week and for at least six months. Accordingly, the plaintiff must establish not only the need for such services but the fact of their provision. In this case, if the threshold level of services has not been provided to date, it could not be said it will be met in the future. I accept that her symptoms at some points may have created a need for some assistance. I would also accept that it is likely that she was provided with that assistance. However, I am not persuaded that there was a period of at least six months where they were provided to the extent of at least six hours per week. The evidence of Mr Westlake and Mrs Banfield indicates otherwise.

[49] As should be clear from the above, I am not persuaded to award any component for economic loss. Mrs Rossi's income when she was employed at the jewellery store

was unaffected by her injuries. It is not demonstrated that her work history after that point resulted in less income for her than would have been the case absent her injuries. Her claim is made upon the basis that she would have continued to work in some employment in a shop. She was able to do that during a period of most of the year from the accident, when her symptoms would be expected to have been most significant.

[50] It is common ground that she will need treatment for her traffic phobia at a cost of $2,100 and that will be included in her award.

[51] She claims the cost of medication up to the trial as $6,760 and claims $16,192 for the future. There should be some allowance but not to the extent of these amounts because they are based upon what I have found to be an exaggeration of her symptoms. I am prepared to allow an amount of $5,000 for the past and $3,000 for the future.

[52] The result is that her damages are assessed as follows:

General damages	$11,000
Future therapy	$2,100
Past cost of medication	$5,000
Interest on that sum	$1,044
Future medication cost	$3,000
Total	$22,144

There will be judgment for the plaintiff in that sum.