[2003] WASCA 318

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE FULL COURT (WA)
CITATION	**:**	TRAN -v- CLAYDON [2003] WASCA 318
CORAM	**:**	STEYTLER J MCLURE J JOHNSON J
HEARD	**:**	21 OCTOBER 2003
DELIVERED	**:**	18 DECEMBER 2003
FILE NO/S	**:**	FUL 21 of 2003
BETWEEN	**:**	NGOC LAM TRAN Appellant AND NIGEL CLAYDON Respondent

Catchwords:

Tort - Personal injury - Assessment of damages - Duty to give reasons - Sufficiency of reasons - Turns on own facts

Legislation:

Motor Vehicle (Third Party Insurance) Act 1943 (WA), s 3A, s 3B, s 3C, s 3D, s 3E

Result:

Appeal allowed
Judgment set aside
Matter remitted to District Court for rehearing

Category: B

Representation:

Counsel:

Appellant	:	Mr I L K Marshall
Respondent	:	Mr J P T Olivier

Solicitors:

Appellant	:	S C Nigam & Co
Respondent	:	Talbot & Olivier

Case(s) referred to in judgment(s):

Beale v GIO of New South Wales (1997) 48 NSWLR 430
Bennett v Minister for Community Welfare (1992) 176 CLR 408
Chappel v Hart (1998) 195 CLR 232
Charleston v Smith [1999] WASCA 261
Garrett v Nicholson (1999) 21 WAR 226
Rosenberg v Percival (2001) 205 CLR 434
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247

Case(s) also cited:

Abalos v Australian Postal Commission (1990) 171 CLR 167
Brunskill v Sovereign Marine & General Insurance Co Ltd (1985) 62 ALR 53
Devries v Australian National Railways Commission (1993) 177 CLR 472
Gamser v Nominal Defendant (1977) 136 CLR 145
Miller v Jennings (1954) 92 CLR 190
St George Club Ltd v Hines [1962] ALR 39
Warren v Coombes (1979) 142 CLR 531

Wilks v Bradford Kendall Ltd [1962] NSWR 1303
Wylde v Arriaza (1997) 25 MVR 539

1 **STEYTLER J**: I have had the advantage of reading the reasons for decision of McLure J. I agree with them and with her Honour's conclusion that the appeal should be allowed, the judgment entered by the trial Judge set aside and the proceedings remitted to the District Court for rehearing on the assessment of damages.

2 **McLURE J**: The appellant appeals from the decision of H H Jackson DCJ to enter judgment in his favour in the sum of $38,918.14 in respect of his claim for personal injuries arising out of a motor vehicle accident. The appellant claimed a sum of in excess of $480,000 in addition to general damages.

Background and Findings

3 The appellant was injured in a motor vehicle accident on 14 April 1999 ("accident"). The car being driven by the appellant was struck by a vehicle that turned across the appellant's path of travel. The respondent admitted liability. The case came before the trial Judge on an assessment of damages. The hearing extended over some six months because of what the trial Judge described as over-optimistic listing of trial dates and the consequential unavailability of medical witnesses.

4 It was accepted by the trial Judge that the appellant was suffering from two separate low back problems, one emanating from the L5/S1 area of the spine and the other from the sacroiliac joints. An issue in contention at trial was whether these low back injuries were caused by the accident.

5 It was also accepted that the appellant suffered neck, shoulder and other minor injuries ("upper body injuries") as a result of the accident. The issue in contention at trial was whether the upper body injuries acknowledged to have been caused by the accident had resolved by no later than December 1999.

6 Another issue in contention was whether the appellant was capable of returning to work by December 1999. The focus on December 1999 is related to a videotape showing the appellant's activities on 20 December 1999. The appellant was filmed secretly in a number of locations. The trial Judge described the contents of the video tape as follows (at [19]):

> "The videotape shows the plaintiff moving quite freely, get into and drive his car, then later lean freely over an open car engine, pull a garden hose, get into another vehicle and drive away, close a vehicle boot, and later at a swimming complex move

> easily looking in various directions, move about in the pool, walk freely, climb stairs without apparent concern, dive head and arms first into a waterslide emerging freely at the other end, stand up and walk freely then again freely climb stairs, later again moving freely in the pool immersing his head with a quick backwards motion and later jump on one leg and then on both and again on one as if freeing water from an ear, walk and sit freely, turn his head sharply and freely to both sides, and twist his torso. Finally he gathers together his family and possessions, freely twisting, bending and lifting light objects and leaves carrying a towel, flippers and overarm bag, opening the car boot, getting in freely and driving off. He is then shown at a bank ATM from which he walks freely away, gets into his car and drives off and later again getting into his car and driving off."

7 The trial Judge said that while symptoms may vary over time, given the reported symptoms described to and reported upon by medical practitioners who gave evidence at trial it would be most unlikely that the appellant would be both able and willing, to risk symptoms by engaging in the activities shown on the videotape. He regarded the appellant's presentation in court as consistent with what was reported by the medical practitioners but inconsistent with that shown on the videotape. The trial Judge found that the appellant's presentation and account of his symptoms and incapacities were "very significantly exaggerated" and that the upper body injuries caused by the accident had resolved by December 1999. The trial Judge also concluded that he was not satisfied that the low back injuries and symptoms were caused by the accident.

8 The trial Judge then made findings in respect of the claimed heads of damage. In relation to general damages he noted the restrictions imposed by ss 3A to 3E of the *Motor Vehicle (Third Party Insurance) Act 1943 (WA)* ("*MV Act*") pursuant to which the maximum amount of damages that could be awarded for non-pecuniary loss was $240,000. The trial Judge placed the appellant's case at not more than five per cent of an extreme case which equated to $12,000. As a result, and by force of s 3C(4) of the *MV Act* the appellant was not entitled to an award of general damages.

9 As to past economic loss, the trial Judge concluded that it should be effectively limited to the period up to December 1999 by which time the appellant, on the evidence including that in the videotape, was no longer incapable of returning to work by reason of accident caused injuries. He

expressly noted that although the appellant suffered some, albeit exaggerated, low back symptoms he was not able to find that they were causally related to the accident in which case they could not be taken into account. The trial Judge accepted that the upper neck injury may have limited his capacity to do some manual work for some time and he allowed $17,000 as a global sum for seven months loss of wages plus interest and loss of superannuation.

10 The appellant claimed economic loss to age 65 on the basis of total and permanent incapacity for work by reason of the injury sustained in the accident and the appellant's limited command of English. The trial Judge said (at [125]):

> "None of the medical evidence, even that called by the [appellant] himself even approaches supporting these claims. Filing schedules of such extravagance simply erodes confidence in the rest of the [appellant's] claim and invites costs orders in favour of the [respondent].

11 As a result of a concession by the respondent that there may be some loss of capacity to do heavy manual labour, the trail Judge allowed $5,000 for future economic loss.

12 In relation to the appellant's claim for gratuitous services quantified at $40,314, the trial Judge found that the evidence in support was vague and given his general findings, likely to be exaggerated. He said that he was not satisfied that any award under this head would exceed $5,000 in which case no award could be made by virtue of s 3D of the *MV Act*.

13 In relation to future medical expenses the appellant claimed general practitioner and specialist consultations periodically until age 65 and for physiotherapy twice weekly for two years. Given the trial Judge's findings concerning the resolution of the accident caused injuries, he made no allowance for this claim.

14 The trial Judge made an award for special damages where they had been agreed between the parties which totalled $16,918.94.

Grounds of Appeal

15 The grounds of appeal are lengthy and repetitive. They can be categorised as follows. The trial Judge erred:

1. in concluding that the low back symptoms were not accident caused, alternatively that he was not satisfied that

the low back symptoms were accident caused and in failing to give any or adequate reasons for the finding (grounds 5 and 9);

2. in giving undue weight to the videotape evidence, failing to take into account specified medical evidence and treatment and in finding that the accident caused injuries were resolved by December 1999 (grounds 3, 4 and 6);

3. in failing to give any, or any adequate, reasons to support his finding that the appellant's presentation and account of his symptoms and incapacities was very significantly exaggerated (ground 8);

4. in his assessment of general damages, damages for past and future economic loss, gratuitous services and future medical expenses (grounds 1, 2, 7, 10, 11(iv) and (v), 12 and 13);

5. in his approach to and criticism of the appellant's schedules of damages (ground 11(i), (ii) and (iii)); and

6. in failing to give adequate reasons or make any findings in relation to the psychiatric evidence (ground 14).

Low Back Injuries – Evidence

16 The appellant adduced a range of medical evidence. In the period between 15 April 1999 (the day after the accident) and 30 April 1999 the appellant attended on Dr Cheung. A report by Dr Cheung dated 27 May 1999 was tendered in evidence by consent. There was no reference in that report to complaint, or identification, of low back symptoms. On the same day that Dr Cheung certified the appellant as unfit for work for one week, the appellant consulted another general practitioner, Dr Tan. The appellant complained to Dr Tan of pain in his low back and down his left leg which, according to the appellant, came on about two weeks after the accident. The appellant also called Mr S Narula, a neurosurgeon, Mr M McCallum, an orthopaedic surgeon, Mr R Goodheart, a consultant neurologist, Professor Harper, an occupational physician and Mr F Ng, a psychiatrist.

17 Messrs Narula, McCallum, Goodheart and Harper gave evidence on the question of whether the low back pain was caused by the accident. This question became linked with the two week delay in the onset of low back pain. Mr Narula was of the opinion that the appellant was suffering a disc protrusion at L5/S1 and a sacroiliac injury caused or contributed to

by the accident. However, he did not regard himself as being an expert on sacroiliac joints and injuries and was not qualified to give evidence about when pain consequent upon a sacroiliac joint injury would manifest itself.

18 In response to a question concerning the two week delay in the onset of pain going down the left leg, Mr Narula said "It's not too uncommon. It's a little bit atypical. It's not the classical, I should say, but it's not unheard of". His subsequent answers suggest that he thought a person in the appellant's position would suffer low back pain immediately and leg pain could come later. In cross-examination he was asked about the delay in manifestation of any pain (low back or leg pain). His response was that delay is not typical of a disc injury.

19 Mr McCallum first saw the appellant on 10 January 2001. In his opinion, the leg pain described by the appellant was not related to the L5/S1 problem but rather to a sacroiliac injury. He accepted that most of the appellant's pain came from the L5/S1 spinal segment but that those problems were degenerative. Mr McCallum was of the opinion that very significant trauma was not required to produce the sacroiliac injury and that immediate symptoms would not be apparent because the problem was one of gradually developing instability and gradual development of muscle weakness. He accepted that his opinions differed from most neurosurgeons and were controversial.

20 Mr Goodheart's opinion was that the appellant was suffering from predominately soft tissue symptoms with respect to the lumbar spine and left leg which had been caused by the accident. In his opinion, the delay in the onset of the low back pain and the lower leg pain was not significant. However, he agreed with the respondent's expert, Mr Vaughan that if a tear or split developed in the L5/S1 disc giving rise to protrusion later then that would have caused immediate pain but that he did not think that there was a split disc in this case but rather a soft tissue injury.

21 According to Professor Harper, there was radiological finding of a herniated disc at L5/S1 consistent with radiating leg pain. It was his view that the development of back and leg pain within three weeks after the accident was consistent with the injuries being accident caused. An accident may cause back injury which may become symptomatic subsequently. His experience was that there can be a significant gap, not only three weeks but three months or more, between a back sprain and the onset of disc herniation. There can be initial fissuring that occurs in a disc that slowly changes over time or perhaps suddenly gives way at a

particular event subsequent to the initial injury and causes disc herniation. He was not able to say whether the appellant had pre-existing spinal degeneration but said it was common and often asymptomatic with persons aged in the thirties and he agreed that herniation may occur with "absolutely minimal circumstances".

22 The respondent adduced expert evidence from five medical practitioners, Mr J Hayes, a consultant rheumatologist, Dr J Rosenthal, Mr R Vaughan, a neurosurgeon, Mr M Bowles, an occupational physician and Mr Z Mustac, a consultant psychiatrist.

23 Mr Hayes was of the opinion that the appellant had a posterior disc protrusion at L5/S1 but did not believe there were any sacroiliac problems. He was asked about the delay in onset of low back symptoms as follows:

> " … the first complaint of low back pain seems to have been at least two weeks after the accident?---Yes.
>
> Does that indicate anything to you?---That certainly is well recognised in motor vehicle accidents. People tend to be aware of their neck symptoms initially, which invariably are present within 24 hours, whereas low back symptoms can often be delayed – often for several weeks.
>
> If there were a serious traumatic injury to a sacroiliac joint when would you expect that to be manifest?---That would occur almost instantaneously.
>
> With the trauma?---With immediate pain."

24 Mr Hayes attributed the low back pain to the accident either as a result of a pre-existing condition being further damaged and made symptomatic or the accident causing the injury.

25 Dr Rosenthal reports were tendered by consent. He did not give oral evidence and he did not address the question whether the low back pain was caused by the accident.

26 Mr Vaughan first saw the appellant in January 2002. His evidence was that because of the delay between the accident and the onset of symptoms, the low back injuries or pain had not been accident caused. He accepted that there were pathologies in the sacroiliac joints and that there was a small disc protrusion at L5/S1. He was of the view that they

developed spontaneously (meaning without any known or proven cause). If there had been a tear or split in the L5/S1 disc giving rise to protrusion later that would have caused immediate pain. Further, significant force would be required to cause the injury to the sacroiliac joints and there would have been an immediate onset of serious symptoms. He was not aware of any pathology that would develop "significantly later following a crash without there being an immediate onset of symptoms".

27 Mr Bowles was also of the opinion that there was no causal connection between the accident and the appellant's low back pain. He referred to research to the effect that 60 per cent of people had their first attack of back pain undertaking everyday activities and for one third of that 60 per cent, the pain began spontaneously without any apparent precipitating event. Back pain is a frequent predicament faced by the general population from time to time and can be, and most often is, spontaneous in nature with no need for trauma or any event to set off an episode.

28 Thus, the issues and conflicts of medical evidence included whether:

(a) the delay in onset of the acknowledged sacroiliac related pain was inconsistent with injuries caused or contributed to by the accident. On this issue there was a conflict of evidence between Mr McCallum (no) and Messrs Hayes and Vaughan (yes).

(b) the delay in onset of low back pain connected with the protrusion at L5/S1 was inconsistent with injuries caused or contributed to by the accident. On this issue there was a conflict of evidence between Mr Goodheart, Professor Harper and Mr Hayes (no) and Messrs Vaughan and Bowles (yes). Mr Narula was equivocal. The divergence of view may be connected with whether or not the protrusion at L5/S1 developed from a tear or split or was another type of soft tissue injury.

(c) the injuries were caused by the accident or by an unrelated trigger or were spontaneous. There may be an issue concerning whether Messrs Vaughan and Bowles applied a scientific rather than legal test of causation.

Trial Judge's Reasons and Findings on Low Back Injuries

29 After setting out a summary of the medical evidence adduced by both parties, the trial Judge summarised the cases for the appellant and the respondent.

30 In summarising the appellant's contentions, the trial Judge noted that in essence the appellant relied on evidence of the appellant's pre-collision history of no neck or low back problems, the facts of the collision, the temporal onset of symptoms and the medical evidence including that of Professor Harper, Mr Goodheart, Mr Hayes, Mr Narula and Mr McCallum. In the course of describing the appellant's submissions the trial Judge interposed that the onus is on the appellant to establish on the balance of probabilities that the low back problems were accident caused. He then referred to the respondent's case on whether the low back pain was accident caused. He stated (at [103]-[106]):

> "The [respondent] denies liability for any injury in the area of the lower back on the basis that any such injury is not established to be the result of the collision. The onus is on the [appellant] to show not that the injury was possibly the result of the collision but that on the balance of probabilities the collision resulted in the injury and loss claimed: ***St George Club Ltd v Hines*** … It is not sufficient merely that the collision is followed by the injury. The [respondent] accepts that there is evidence that the [appellant] suffers both low back and sacroiliac problems but says they are not accident caused.
>
> In this case the medical evidence clearly differs on this issue.
>
> It is clear that the [appellant] first complained of low back or lumbar symptoms not earlier than two weeks or 16 days after the collision …
>
> The [respondent] accepts that a minor even trivial trauma may render symptomatic the L5/S1 disc area. Although the evidence does not make clear whether the protrusion established in that disc pre-dated the collision the [respondent] says the symptoms therefrom are not established to be the result of the collision merely by the coincidence of occurring about two weeks thereafter especially given that such symptoms may be caused by any one of a wide range of minor events and that symptoms would be expected earlier. As to the sacroiliac area the [respondent] says the evidence of Mr Vaughan and Mr Hayes is

> that injury to such joints requires major forces producing immediate significant pain should be accepted and that such injuries would not produce symptoms for the first time two weeks after the event. Mr Hayes and Mr Vaughan rejected Mr McCallum's diagnosis of accident caused sacroiliac injury. Mr McCallum concedes both that his diagnosis and his treatment is controversial and not accepted by most medical practitioners."

31 After dealing with the videotape and issues associated with his finding that the appellant greatly exaggerated his symptoms and capacities, the trial Judge returned to the question of whether the low back symptoms were accident caused. He said "I am not satisfied that the low back symptoms are accident caused".

32 Thus, the trial Judge summarises the medical evidence, summarises the contentions for the appellant and the respondent, notes on two occasions that the appellant bears the onus of proving causation and then states his conclusion that he was not satisfied that the low back problems were accident caused. When dealing with economic loss he repeats that he accepted the appellant had suffered some, albeit exaggerated, low back symptoms but as he was not able to find they were causally related to the collision, he could not take them into account against the respondent when dealing with economic loss.

33 It was submitted for the respondent that it can be inferred the trial Judge accepted the evidence of Mr Vaughan. I disagree. He does not expressly or impliedly accept or prefer the evidence of any expert on the question of causation of the low back injuries. The trial Judge does not make any positive factual finding on causation. He resolved the question of causation by applying the onus and concluding that the appellant had not discharged his onus of proving that the low back problems were accident related.

34 As the trial Judge did not make a positive finding of fact on causation the question is not, as formulated in the grounds of appeal, whether the trial Judge's finding was open on the evidence. The question is whether this is a case of a failure of a Judge to be satisfied in circumstances where he should have been satisfied. That issue was not addressed by the parties. For myself, I do not understand why the trial Judge was unable to resolve the conflict and make a positive finding on causation. There was no dispute that the appellant had L5/S1 and sacroiliac problems and that associated pain manifested itself

approximately two weeks after the accident. To that extent the resolution of the conflict in expert opinion was unrelated to the content or reliability of the factual basis for the opinion evidence. However, as it was not argued, I express no concluded opinion on whether the trial Judge erred in failing to make a positive finding on causation. The next question is whether the trial Judge failed to give adequate reasons for his decision.

The Duty to Give Reasons

35 Ordinarily, it is the duty of a Judge to state his or her reasons for decision and failure to do so may constitute an error of law: ***Garrett v Nicholson*** (1999) 21 WAR 226 per Owen J at 248. In determining whether in a particular case there is a duty and the extent of that duty, regard should be had to the function to be served by the giving of reasons: ***Soulemezis v Dudley (Holdings) Pty Ltd*** (1987) 10 NSWLR 247 per Mahoney JA at 270.

36 Where there is a right of appeal, the function of reasons is to allow an appeal court to determine whether the decision was based on an appealable error. In addition to securing a right of appeal, the obligation to give adequate reasons is an aspect of procedural fairness to a litigant who is entitled to know why it is that he or she has been successful or unsuccessful. Thus, it is sufficient if the reasoning process which led to a result is disclosed with sufficient certainty to enable a litigant to know why it is that the result ensued and to ensure that the statutory right of appeal has been secured: ***Garrett v Nicholson*** (*supra*) per Owen J at 248. If that is achieved there is no additional requirement that every fact relevant to the ultimate decision or the detailed chain of reasoning be set out or every submission be addressed: ***Soulemezis v Dudly Holdings Pty Ltd*** (*supra*).

37 In determining the sufficiency of reasons, it is necessary to look at the reasons as a whole, and if necessary in the context of the evidence, to see if they give the sense of what was intended in a way that achieves the required function and purpose: ***Garrett v Nicholson*** (supra) per Owen J at 248; ***Charleston v Smith*** [1999] WASCA 261 per Malcolm CJ at 15.

38 As noted by Meagher JA in ***Beale v GIO of New South Wales*** (1997) 48 NSWLR 430 at 443, the content of the obligation is not the same for every judicial decision and no mechanical formula can be given for determining what reasons are required. Meagher JA went on to give a useful description of the fundamental elements of a statement of reasons. He said (at 443-444):

> "However, there are three fundamental elements of a statement of reasons, which it is useful to consider. First, a judge should refer to relevant evidence. There is no need to refer to the relevant evidence in detail, especially in circumstances where it is clear that the evidence has been considered … Where conflicting evidence of a significant nature is given, the existence of both sets of evidence should be referred to.
>
> Secondly, a judge should set out any material findings of fact and any conclusions or ultimate findings of fact reached … Where one set of evidence is accepted over a conflicting set of significant evidence, the trial judge should set out his findings as to how he comes to accept the one over the other. But that is not to say that a judge must make explicit findings on each disputed piece of evidence, especially if the inference as to what is found is appropriately clear: …
>
> Thirdly, a judge should provide reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts found. Those reasons or the process of reasoning should be understandable and preferably logical as well."

Whether a Breach of Duty to Give Reasons

39 Insofar as the causation issue related to whether the delay in the onset of the low back pain was inconsistent with accident caused damage, that was primarily a factual issue requiring the resolution of a conflict of evidence. Insofar as it related to the range of potential triggers, that is a question of mixed law and fact. The High Court has in a number of recent decisions considered what is required for a plaintiff to make out a *prima facie* case of causal connection: ***Bennett v Minister for Community Welfare*** (1992) 176 CLR 408 per Gaudron J at 420-421, per McHugh J at 428; ***Chappel v Hart*** (1998) 195 CLR 232 per McHugh J at 244; ***Rosenberg v Percival*** (2001) 205 CLR 434 per Gummow J at 461.

40 Gaudron J said in ***Bennett v Minister of Community Welfare*** (*supra*) at 420-421:

> "… generally speaking, if an injury occurs within an area of foreseeable risk, then, in the absence of evidence that the breach had no effect, or that the injury would have occurred even if the duty had been performed, it will be taken that the breach of the

> common law duty caused or materially contributed to the injury."

41 Having regard to this formulation of principle, it would be relevant to consider and make findings concerning the appellant's pre-accident condition, the nature and force of the collision and whether the injuries occurred within an area of foreseeable risk.

42 However, the trial Judge made no positive factual findings on, or in relation to, causation. He gave no reasons as to why he was unable to make any factual findings and made no reference to relevant recent decisions on the legal principles governing causation in tort.

43 It is not in dispute that the trial Judge owed a duty to give reasons. The issue is one of sufficiency. In my view, it is not possible from a consideration of the trial Judge's reasons as a whole and the relevant evidence relating to causation to discern why the trial Judge reached his conclusion on causation. In particular, there is insufficient in his disclosed reasoning for this Court to determine whether the decision on causation in relation to the appellant's admitted low back injuries was based on an appealable error or why the result on that issue ensued. Accordingly, the trial Judge breached his duty to state his reasons, which breach constitutes an error of law.

Resolution of Injuries by December 1999 (Grounds 3, 4 and 6)

44 By grounds 3 and 4, the appellant contends that the trial Judge gave undue weight to the videotape evidence, failed to take into consideration medical evidence of ongoing symptoms after December 1999 and the pain relief therapy undertaken by the appellant in July and August 1999 and on three occasions after December 1999. These matters can only be relevant to the trial Judge's findings that the upper body injuries had resolved by no later than December 1999 and that the appellant's presentation and account of his symptoms was very significantly exaggerated. This latter finding is relevant to the appellant's capacity for work and the quantum of his general damages.

45 Although the videotape evidence was a factor on which the trial Judge relied in making his finding relating to the resolution of the accident caused upper body injuries, the appellant did not point to any medical evidence to the effect that those injuries had not resolved by December 1999. The focus of the medical evidence on which the appellant relied related to the pain and symptoms resulting from the low back injuries.

46 Accordingly, the trial Judge referred to the videotape evidence and the medical evidence of post December 1999 symptoms in the context of addressing the respondent's submissions in relation to the low back injuries. They were to the effect that the low back injuries were not accident caused, alternatively the symptoms were embellished or feigned to a significant extent. In support of its alternative submission, the respondent relied on the videotape and medical evidence from Dr Mustac, Dr Rosenthal and Mr Hayes. Each of those practitioners had given evidence to support the findings of exaggeration and embellishment. The trial Judge had in his summary of evidence noted that Mr Hayes had seen the appellant four days before the videotape was taken and he described the appellant on physical examination as showing "grossly restricted and painful" forward flexion only to about mid-thigh level although the neck was not a major problem. Thus, the appellant's presentation to Dr Hayes was inconsistent with his presentation on the videotape and there was evidence that the appellant had not received pain injection treatment in the period between August 1999 and January 2001.

47 The trial Judge dealt with the respondent's alternative submission first. Responding directly to the respondent's submission on embellishment and feigned symptoms, the trial Judge concluded in effect that the appellant's presentation and description of his symptoms to medical practitioners and to the Court was inconsistent with his activities revealed on videotape. It is apparent from the context that the trial Judge accepted the expert evidence of embellishment referred to by the respondent. That the trial Judge was mindful of all of the medical evidence and treatment is directly reflected in his conclusion that the appellant had greatly exaggerated his symptoms to medical practitioners which would in turn affect the reliability of their assessment of the appellant's condition. There is no merit in the appellant's claim that the trial Judge failed to take into consideration the medical evidence and treatment of the appellant. Further, it was clearly open to the trial Judge to give great weight to the videotape evidence and to make the related findings referred to above. I would dismiss these grounds of appeal.

Exaggeration of Symptoms and Incapacities – Reasons (Ground 8)

48 This complaint of failure to give adequate reasons for the finding that the appellant significantly exaggerated his symptoms and incapacities is linked with the grounds of appeal that the trial Judge gave undue weight to the videotape and failed to take into consideration the medical evidence of continuing symptoms after December 1999 and his pain injection treatment.

49 This ground is also without merit. The grounds for the trial Judge's factual finding are sufficiently clear from his reasons when considered as a whole. He placed great weight on the videotape evidence, accepted the medical evidence referred to in the respondent's submission and rejected medical evidence to the contrary because it was based on the appellant's greatly exaggerated presentation and description of his symptoms.

Assessment of Damages (Grounds 1, 2, 7, 10, 11(iv) and (v), 12, and 13)

50 The gravamen of the appellant's complaints relating to the assessment of damages are directly or indirectly linked with the failure of the trial Judge to make any allowance for the appellant's low back injuries. So much was conceded by the appellant's counsel who acknowledged that the outcome of the appeal depended upon whether the trial Judge's conclusion in relation to the low back problem could be sustained. Accordingly, it is unnecessary to address these grounds of appeal.

Appellant's Schedules of Damages (Grounds 11(i), (ii) and (iii))

51 It is said the trial Judge erred in commenting that the quantum of the appellant's claims "erodes confidence in the rest of the [appellant's] claim and invites costs orders in favour of the [respondent]". It is suggested, *inter alia*, that the trial Judge erred in drawing an adverse inference against the appellant for the conduct of his solicitors. Assuming without deciding that the quantum of the claim was on any view of the evidence unsustainable, I see no error in principle in the trial Judge's approach. The schedules were relied on by the appellant as setting out the quantum of his claim. They were prepared for and on the appellant's behalf by his duly authorised agents, his solicitors. In the absence of evidence to the contrary, it is appropriately inferred that the solicitors are acting within the scope of their authority.

Psychiatric Evidence (Ground 14)

52 The appellant pleaded in his statement of claim that his residual disabilities arising from the accident included "psychological depression". The appellant called Mr Ng who gave evidence that the appellant suffered from a chronic adjustment disorder with depressed symptoms which arose "as a result of the accident, the sequelae of the accident including constant pain, and loss of functioning, and a frustration with the loss of functioning and pain, and his grave fears that his condition will deteriorate over time".

53 Mr Mustac interviewed the appellant and, with his consent, taped the interview. He concluded that the appellant was not suffering from any mental disorder. He also concluded that the appellant's claims of markedly impaired concentration and attention was not consistent with, *inter alia*, the clinical examination in which the appellant was able to answer questions asked of him by Mr Mustac. The trial Judge said in his reasons "I have listened to the tape which, in my view, supports Mr Mustac's assessment of the conversation made in his written report". I infer that is a reference to whether the appellant had impaired concentration. Other than that comment, the trial Judge makes no express findings on whether or not the appellant was suffering from accident related depression. However, as stated earlier, it is clear in context that the trial Judge accepted the evidence of Messrs Mustac, Rosenthal and Hayes in finding that the appellant had significantly exaggerated his symptoms. The factual basis for Mr Ng's opinion was thus undermined. It is sufficiently clear that the trial Judge preferred the evidence of Mr Mustac to that of Mr Ng. I would dismiss this ground of appeal.

Conclusion

54 I have concluded that the trial Judge had a duty to give reasons for his conclusion on causation of the low back injuries and that the reasons he gave were inadequate so as to constitute an error of law because they do not disclose with sufficient certainty why the result ensued and do not adequately secure the appellant's statutory right of appeal

55 This is not a case in which this Court is entitled to decide the matter. If the only conclusion open on the evidence available at trial was the conclusion reached by the trial Judge then notwithstanding the inadequate statement of reasons, the matter need not go back to a new trial: ***Beale v GIO of New South Wales*** (*supra*) at 444. In this case the trial Judge's conclusion on causation was not the only conclusion open on the evidence. Further, this Court cannot resolve the conflict of expert evidence because it has not seen or heard the witnesses.

56 It would also be inappropriate to simply remit the proceeding to the trial Judge for delivery of reasons, the trial Judge having heard the evidence between March and September 2002. The appropriate course is to remit the matter to the District Court for a rehearing. The rehearing should be on all issues because the causation finding affects (or may affect) all findings on the quantum of damages. I would order that the appeal be allowed, the judgment entered by the trial Judge be set aside

and the proceedings be remitted to the District Court for rehearing on the assessment of damages.

57 **JOHNSON J**: I have had the advantage of reading, in draft, the reasons to be published by McLure J. I agree with those reasons, but would add the following comments to the reasons for dismissing grounds 11(i), (ii) and (iii).

58 It is not in every case where the evidence adduced at trial falls short of that required to prove the quantum claimed that an inference adverse to a plaintiff should be drawn. In my view, such an inference should only be drawn in cases where there is a marked and unexplained disparity between the evidence and the quantum set out in the schedules. In this case, the adverse inference was drawn in the context of a finding that "none of the medical evidence, even that called by the [appellant] himself even approaches supporting these claims".

59 When preparing schedules of damages, solicitors should be constantly mindful of the fact that they are acting as the agent of the client and it is the client who will bear the consequences of any attempt to claim damages for which there is no *prima facie* evidentiary basis. Schedules should not be in the nature of an "ambit claim".