

IN THE COUNTY COURT OF VICTORIA

(Un) Revised  
(Not) Restricted

AT MELBOURNE  
CIVIL DIVISION

Case No.

VIRGINIA NEMBAMBIS

Plaintiff

v

PRINTLINX PTY LTD

Defendant

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JUDGE: HIS HONOUR JUDGE WISCHUSEN  
WHERE HELD: Melbourne  
DATE OF HEARING: 23 September 2008  
DATE OF JUDGMENT: 20 October 2008  
CASE MAY BE CITED AS: Nembambis v Printlinx Pty Ltd  
MEDIUM NEUTRAL CITATION: [2008] VCC 1249

REASONS FOR JUDGMENT

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Catchwords: s 134AB, injury to cervical spine, causation issue where compensability accepted, extent of loss of earning capacity.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr P Y Rattray QC with Mr G K Coldwell	Holding Redlich
For the Defendant	Mr D G Brookes SC with Ms C Boyle	Minter Ellison

HIS HONOUR:

- 1 By an originating motion dated 23 January 2008, the plaintiff seeks a determination pursuant to s.134AB of the *Accident Compensation Act* ("the Act") that she has suffered a serious injury within the meaning of paragraph (a) of the definition of serious injury contained in s.134AB(37). Further, the plaintiff seeks -

"An order granting leave to the Plaintiff to commence proceedings at common law pursuant to s 134AB(16)(b) of the Act to recover damages in respect of injuries suffered by her during the course of her employment with Printlinx Pty Ltd and in particular on or about 15 November 2000."

- 2 The plaintiff relies upon physical injury to her cervical spine. She seeks leave to bring a proceeding for the recovery of damages for both pain and suffering and loss of earning capacity.
- 3 The issues in dispute were, firstly, causation which, when explored, became an issue as to the manner in which the injury was sustained, rather than its compensability. Secondly, whether the consequences of the neck injury satisfy the statutory tests in respect of pain and suffering and loss of earning capacity. Only the plaintiff gave evidence. The parties tendered various documents and medical reports, including clinical records.
- 4 The plaintiff was born on 5 February 1964 and is 44 years of age. She is married and has two young children. She attended school until Year 11 and has spent her entire working life as a process worker in the book binding industry. In 1984, she commenced employment with J D Harris, the predecessor of the defendant in this proceeding. She worked at J D Harris' Collingwood premises until September 2000 when, at about the time J D Harris was taken over by the defendant, the business relocated to premises in City Road, South Melbourne. The plaintiff's work was heavy at times and required the handling of paper, glue and machine operation.

5 In 1991, the plaintiff was involved in a motor vehicle collision and suffered a whiplash injury to her neck. She may have had some weeks off work, although the evidence about this was not very clear, together with some medical treatment. She had been involved in other car accidents before that time, but no injury of relevance was sustained.

6 After 1991, the plaintiff had experienced occasional neck pain or stiffness whilst doing her work, but had no time off, sought no treatment and was able to cope with her moderately heavy work.

7 For a time, before 15 November 2000, the plaintiff experienced a niggling pain in her neck.

8 The plaintiff's account of the events of 15 November 2000 are set out in her first affidavit as follows:

"8. On 15 November 2000, I was working for Printlinx Pty Ltd at its South Melbourne premises. At the commencement of my shift I had to re-fill glue to the end papering machine. That required me to lift a drum of glue in a confined space and to tip it into another container from which it was drawn into the machine. Whilst lifting the drum of glue I had a feeling like a crack or crunch in my neck and I developed neck pain and stiffness and pain into my left arm ("the incident").

9. Following the incident I attended my family doctor, being Dr Gerzenstein. I was put off work for a couple of days, sent for an x-ray and given some medication.

10. After the initial incident and a few days off work, I returned to work. I was continuing to have pain in my neck and left arm, however so I was then referred to see an orthopaedic surgeon, being Mr Kudelka. I recall being advised by him to try some physiotherapy treatment and to take things easy for a while."

9 During her evidence-in-chief she gave the following account (Transcript, T 12):

"As part of your normal duties there did it involve decanting glue from that bucket we see in that photo into a smaller bucket?  
---Yes, yes.

Tell us what you were doing on 15 November 2000 when you were

injured?---Well I went to set the machine up so I went around the back of the machine to put the glue in the little bucket and I picked it up.

Just slow down there, which hand or which hands did – or did you use both hands to pick up the bucket?---The left hand was to pick it up and then the right hand was to pour it, to steady it and pour it.

Slow down, what was in the bucket?---Glue.

Was it full?---Yes.

Was it heavy or light?---Heavy.

What happened as you attempted to lift it and pour the glue into the smaller bucket?---Yes, yes

Yes what?---Yes I did.

But then what happened?---Sorry and then as I poured it, just this pain – rush of pain in my left side.

You are showing the left side of your neck down your left arm?  
---Yeah, all the way down here.

Did you then report the fact that you had hurt yourself to one of your superiors?---Yes I did. I went to my foreman.

Who was that?---His name was Steve Crook, I think it might have been.

Steve Crook?---Steven Crook, Steve Crook, I think. Steven Crook, yeah.”

10 The plaintiff reported the injury to the foreman, Steven Crook, and attended a general practitioner, Dr Gerzenstein, on the same day. She had a few days off work, was sent for x-rays and given medication. Dr Gerzenstein made a diagnosis of left brachialgia.

11 On her return to work, the plaintiff resumed her work as a book binder but performed lighter duties. She continued to work for the defendant until she resigned in the middle of 2001. Throughout this time, she was reviewed by Dr Gerzenstein and managed with Fiorinal, paracetamol, physiotherapy and Tofranil. By May 2001, Dr Gerzenstein was recording a restriction in mobility of the neck. She was last seen by Dr Gerzenstein on 2 August 2001, when

she gave a history of improvement in her symptoms since ceasing work, although she was still taking Vioxx and having physiotherapy.

12 In September 2001, the plaintiff found new employment with a company she had worked for as a teenager by the name of Quality Book Binding. Her sister was already working there. Her job there was also book binding work, but it was lighter work than at the defendant's because the binding was mostly brochures, as opposed to the diaries the defendant had manufactured.

13 In August 2001, she transferred her medical management to Dr Spargo for geographical reasons. Dr Spargo has continued to treat her until the present time.

14 In November 2001, Dr Spargo referred the plaintiff to Dr Paul Verrills, musculoskeletal physician, for further pain management. By that stage, she was complaining of some weakness and of dropping things with her left hand. Dr Verrills referred her for MRI and then to the neurosurgeon, Mr Greg Malham. Dr Verrills' diagnosis was of left C6 radicular pain and mild radiculopathy.

15 The plaintiff continued to suffer from symptoms. She performed lighter work at Quality Book Binding and she worked until a month or two before the birth of her first child in June 2003. Around September 2003, she returned to Quality Book Binding, working four days a week between the hours of 9am and 4.30pm. She took Mondays off to spend with her baby and, on the days that she worked, her parents or her husband looked after the baby. She worked in this way until the birth of her second child on 30 November 2004 - working up until, perhaps, October of that year. After the birth of her second child, she was off work until some time in March 2005 when she again resumed employment, four days a week from 9am to 4.30pm. It was the plaintiff's evidence that, but for the children, she would have been able to work five days a week in the lighter work at Quality Book Binding during this time.

16 In February 2007, the plaintiff's symptoms worsened. To cope with this, she reduced her hours of work at Quality Book Binding considerably, so that in the financial year ending 30 June 2008 her gross earnings from Quality Book Binding Services were \$13,158. There was evidence that in this financial year she had earned, on average, \$296 a week which, on an annual basis, would produce \$15,392 (CB54). It was the plaintiff's evidence that these hours represent the limit of what she can do. In paragraph 7 of her second affidavit, she deposed that in this work she is able to regulate the weights she handles, she takes five minute breaks now and then and, when she has attempted to work for longer hours, she has suffered for it, with an increase in her symptoms of such severity that she had to take time off work. The plaintiff also said that were she able to work for longer hours she would, because of difficult family and financial circumstances, be working on a full-time basis as she had before the injury. She said that, effectively, her present work is in a "sheltered" environment because of her friendliness with her present employer, her long association with him, and the allowances he makes on account of her neck condition. As to this last matter, her current employer corroborates her evidence in his affidavit (PCB 13).

17 Presently, the plaintiff continues to suffer from constant pain in her neck aggravated by changes in weather and by turning movements. She experiences constant pain in her left arm which extends as far as her thumb and fingers and which is always present but varies in intensity. The pain is aggravated by repetitive activities, twisting and carrying or lifting, and is accompanied by a feeling of weakness in the left arm. To a lesser degree, she experiences symptoms in her right arm. Despite these symptoms, she continues to perform her work duties, although they cause her increased pain. She does nearly all of her usual housework but with difficulty and discomfort. She takes regular medication and has had physiotherapy from time to time. Her sleep is interfered with by pain. She is frustrated by the difficulties she experiences in ordinary domestic activities and by the restrictions it places

upon her capacity to interact with her children. In addition to medication, she uses wheat bags (I presume heated) on her neck and, when allowed by the defendant's WorkCover insurer, she has further physiotherapy.

18 There is no real dispute between the parties as to the medical explanation for the plaintiff's symptoms. The defendant tendered only the medical reports of Mr Brownbill, Dr David Barton and Dr Gerzenstein. The plaintiff relied on the reports of neurosurgeons Malham, Klug and Brownbill, the report of the orthopaedic surgeon, Mr Michael Johnson, and the reports of Dr Spargo and Dr Verrills. None of the doctors were required to attend to be cross-examined.

19 Amongst these medical commentators, it was virtually common ground that the cause of the plaintiff's symptoms is the compression of the C6 nerve root arising from the aggravation of degenerative changes and, at least in Mr Brownbill's view, disc derangement and associated prolapse at the C5/6 level. It is also common ground that the work she might perform is restricted by the condition of her neck and that her complaints are consistent with the pathology identified on the imaging studies which have been performed over the years.

20 The causation issue raised by the defendant is that I should not be satisfied on the whole of the evidence that the plaintiff suffered the acute onset of left-sided neck and arm pain whilst lifting or pouring from the bucket on 15 November 2000.

21 The defendant's submission relies upon three matters which were put to the plaintiff in cross-examination. The first of them was the history given to Dr Gerzenstein. Dr Gerzenstein's report of 24 January 2001 (DCB59) included the following passage:

"According to records, Ms Nembambis stated that the pain had been present for some days but aggravated on the 15 November 2000 while working. She did not know 'what happened' to account for that aggravation."

22 A fuller history appears in Dr Gerzenstein's later report of 15 May 2006 (PCB15) where the history is recorded as:

"According to history Ms Nembambis was employed as a manual worker for a book binding business for whom she had been working for sixteen years. She described herself as right hand dominant. On the 15<sup>th</sup> November 2000 Ms Nembambis presented describing a pain in the left side of the neck radiating to the left arm of several days duration. The pain had worsened during that day while working she said. She was unable to describe or report an apparent cause and said 'I don't know what happened'."

23 Dr Gerzenstein's handwritten notes were tendered in evidence (Exhibit A) and it was agreed that they record the following:

"Problem: Sore left side neck, radiating left arm.

Started = been feeling it several days.

Today worsened while working says.

How: cannot describe says "I don't know what happened."

History had similar pain before feeling it for several weeks – no other time.

Right handed. Book Binding worker on same job 16 years."

24 When asked about Dr Gerzenstein's history, the plaintiff could not explain why she had given that history, but maintained that the cause was the bucket of glue.

25 The next document to come into existence at about that time was the plaintiff's claim form (DCB 9) which the plaintiff said she completed. In that form, it is recorded that her injury/condition was left brachialgia affecting the neck, shoulder, arm, back (shoulder blade) and that what happened to cause the injury was "working on end papering machine loading\unloading work, also lifting boxes", that the injury occurred "between 9 and 10am on 15 November 2000 while working on end papering machine". It further records that she reported the injury to Steven Crook, foreman, and left work to see the doctor. Pressed as to why it was that no mention of the event with the bucket appeared in that claim form, the plaintiff said she was in a lot of pain and so

was not really thinking about anything else but what she was feeling; again, maintaining that she knows it was the bucket and that she was sure, at the time of the hearing, that this was so “because – I guess you don’t forget something like this how – how it happened” (T 20).

26 The plaintiff was cross-examined as to the history she had given to occupational physician, Dr David Barton (DCB55). The plaintiff agreed that it was true that for several months before 15 November 2000, she had been aware of increasing cramping pain around the left side of her neck extending down towards the shoulder and that she was not aware of any change in work or accident that could have triggered those symptoms, although she thought they may have been due to the general nature of her work. As to the events of 15 November 2000, she agreed that she may have told Dr Barton:

“When her more severe pain began on 15 November she was not aware of any triggering factors for this particular problem. She may have been doing some extra lifting. She claims that she could not move and nearly fainted (sic). She was however able to drive her car to see her local doctor.”

27 On the basis of that evidence, Mr Brookes SC, who, with Ms Boyle, appeared for the defendant, submitted that plaintiff had failed to discharge the burden of satisfying me that her injury occurred in the way she had described and that therefore her application must fail.

28 In response, Mr Rattray QC, who, with Mr Coldwell, appeared for the plaintiff, submitted that the histories given, though not including a specific reference to the particular event with the bucket, were wide enough to include the activity the plaintiff described in her evidence. Particularly, as the use of the bucket in that way was simply part of her normal duties, a history that it occurred whilst performing normal duties was not inconsistent. Further, it was pointed out that the history of the problem with the bucket had been given as early as August 2001 when the plaintiff first saw Dr Spargo, and so was given at a time when no dispute or litigation was in contemplation and at a time when the

plaintiff had no motive for inventing a cause for an already accepted claim in respect of her neck injury. Further, it was submitted that, properly read, the handwritten history of Dr Gerzenstein did record that the pain came on while working, and read with the claim form, puts the injury in the right place – at the end papering machine and in a narrow time-frame, 9-10am. Dr Barton's history "that she could barely move and nearly fainted" was also said to be consistent with a sudden onset. Mr Rattray submitted that the plaintiff's evidence that she had reported the event to Steven Crook is not contradicted and that the description of the work activities, as set out in the claim form, is wide enough to encompass the event with the bucket.

29 Mr Rattray submitted that Mr Malham, seeing the plaintiff for the first time in July 2002, got a history of sudden pain in association with the requirement to bend and lift heavy drums of glue in an awkward space.

30 Mr Rattray further submitted that the defendant had admitted liability in respect of the claim for impairment benefits made on 19 October 2006 (DCB4) in which "from lifting drums of glue while bent over in a confined space to fill a machine" is given as the manner in which the injury occurred. He also pointed to the fact that the plaintiff's claim had been investigated and photographs of buckets of glue obtained by the defendant (PCB 55 and 56). He submitted that if, at that time, the defendant had misgivings about the manner in which the plaintiff claimed that the injury occurred, it could have disputed the claim, or at the very least introduced evidence in this proceeding that explained why it accepted it. He relied upon *Ansett v Taylor* [2006] VSCA 171 in support of this submission.

31 Mr Rattray argued that, in all other respects, the plaintiff's credit is simply not in issue and that, although the contemporaneous recording is, at the very least, puzzling, I should accept the plaintiff's account at face value. He also submitted that the plaintiff's responses may have been explained because she

was trying to give a cause of the sudden onset of symptoms rather than describe the activity she was performing when they came about.

32 I find that the plaintiff did experience the sudden onset of neck and arm pain whilst handling a bucket of glue as part of her normal duties on the end papering machine in the course of her employment on 15 November 2000. I find that she had experienced similar symptoms, but only at a milder level, for some days, perhaps weeks or even months, beforehand.

33 My reasons for these findings are that I found the plaintiff to be a straightforward though somewhat vague witness. I do not accept that she made any deliberate attempt to mislead the court as to the sequence of events as she remembered them. The recorded histories and the claim form describe activities which are broad enough to include the handling of the bucket of glue and, importantly, at a time when she had no reason (and none was suggested) to elaborate upon these events, that is, when she first saw Dr Spargo in August 2001, she gave the history at that time. She gave Mr Malham a similar history the next year. Further, she has subsequently given that history and made a claim based upon it which was investigated by the defendant. The defendant accepted the claim, including the assertion of the manner in which it occurred. Furthermore, though she swore that she reported it to her supervisor, and said as much in the claim form lodged soon after, the defendant called no evidence which might contradict the plaintiff's account.

34 In the course of submissions concerning the causation issue, Mr Brookes, by reference to passages from the judgment of Ashely JA in paragraphs 43, 45 and 47 of *Grech v Orica Australia Pty Ltd & Anor* [2006] VSCA 172, submitted that it was necessary for the plaintiff to prove not only compensable injury which satisfies the opening words of s.134AB(1) but also (as I understood it) to prove the precise manner in which work had caused the injury to occur. In response, Mr Rattray referred to paragraph 43 of Ashley JA's Judgment in

*Grech*, in the last dot point quoting Phillips JA in *Barwon Spinners* (2005) 14 VR 622, at 631-632:

“It is enough on any application under s.134AB(16)(b) for leave to bring a common law proceeding to show that the injury relied upon is injury within the ambit of sub-section (1) and that it is serious injury as defined.” (631-632)

Earlier in his Judgment, Ashley JA said at paragraph 34:

“It should be assumed, for the purposes of addressing this question, that the plaintiff needed to establish, to succeed in his application, that on or after 20 October 1999 he suffered an injury as statutorily defined, such injury arising out of or in the course of, or being due to the nature of his employment with the defendant, the consequences of that injury meeting the statutory definition as serious injury.”

35 As I understood the argument, it was not the defendant’s case here that the plaintiff did not, on 15 November 2000, suffer injury to her neck of the sort described in the many specialists’ reports in the case, which injury entitled her to compensation and so fell within the opening words of s.134AB(1). Rather, it was submitted that, in the absence of proof of a precise mechanism of the happening of the injury, the plaintiff was bound to fail. In my view, the submission is not supported by the authorities referred to.

36 In my opinion, the defendant’s submission seeks to add to the requirement of establishing compensable injury after 20 October 1999, a requirement to prove exactly how and in what way the employment caused the injury relied upon which, in this case, is admitted to be compensable. That is, despite acceptance of compensability, it was a necessary proof in proceedings of this type to establish which of the three conditions of compensability was in play. The submission appears to require me to read into the expression “injury” not only the physiological change but also (at least in this case) “the mechanical forces which produced it”. I can find nothing in *Barwon Spinners* or *Grech* which requires the section to be construed in that way. In para 54 of *Grech*,

Ashley JA, in explaining the use of the expressions “linked” and “referrable” in the judgment in *Barwon Spinners*, observed:

“It was a way of emphasising that the only injury which could give rise to a right to recover damages under s 134AB was an injury which met a condition of compensability on or after 20 October 1999. The plaintiff must first establish and identify such an injury, and then establish that its consequences met the statutory definition of serious injury.” (my emphasis)

37 I should mention in this context that it was not submitted that what had occurred here represented no more than the onset of symptoms, unaccompanied by physiological change giving rise to them (cf *Grech* para 77). Here, there is no real debate among the medical practitioners that the sudden onset of left-sided neck and arm pain on 15 November 2000 represented some physiological alteration in the status of the C5/6 disc and its relationship to the C6 nerve root, a sudden onset which has troubled the plaintiff ever since. That being so, and that physiological change being accepted by the parties to be “injury” as defined, and to have met one of the three conditions of compensability referred to in s 134AB(1), in my view, the plaintiff, in an application such as this, needs prove no more on the causation question. In any event, I find as a fact that the plaintiff suffered injury in the manner she described on 15 November 2000.

38 I now turn to the consequences of the injury sustained on 15 November 2000. In regard to the plaintiff’s evidence as to the difficulties her neck, arm and hands symptoms have created for her in her working and domestic activities, I accept her evidence. Her evidence on these matters was not challenged. Although the defendant has conducted surveillance of her activities and recorded them on surveillance videos, none were shown during the hearing. Further, her complaints are accepted by the many doctors who have examined her and, although there have been symptoms of depression and anxiety at times, there is no serious suggestion that the complaints have a psychological rather than physical basis.

39 In respect of the pain and suffering consequences of the injury and the loss of earning consequences, the weight of the medical evidence is that they are permanent and, though they fluctuate from time to time, there is no suggestion that they will ameliorate in future. If anything, they may worsen. At times, Mr Malham has recommended spinal surgery. The injury to the plaintiff's neck gives her constant pain in her neck and left arm extending as far as her thumb and forefinger. It interferes with her ability to work so that she is only capable of working reduced hours, performing lighter work in the employ of a considerate and understanding employer. Even the work she does presently causes an increase in her pain.

40 In addition, to her credit, she manages a complicated family situation. She has two young children, who are cared for by her parents when she is at work, and a husband who suffers from Type 1 Diabetes which, on occasions, causes his collapse. She has continued to work under great financial pressure and managed to do so with the assistance of medication, from time to time anti-depressants and other physical treatment.

41 The pain is at times severe, and although she manages to get through all her housework, she does it with difficulty and slowly. Were she uninjured, and having regard to her admirable efforts to remain in employment since the injury, I accept that she would by now have been working full-time, not least because of the financial pressures the family has been under.

42 She persists with her employment despite the pain because of concerns that, were she to lose that employment, there would be no other employer who would understand her disability as her present employer does.

43 I am satisfied that for the plaintiff the pain and suffering consequences of her injury satisfy the statutory test of being at least very considerable.

44 The dispute concerning the loss of earning capacity centred about the fact that, after her injury, and even after the birth of each of her two children, the

plaintiff admitted, in the candid way she gave all of her evidence, that but for the needs of her children, she would, in 2003, 2004, 2005 and 2006, have been able to work full-time in the lighter work at Quality Book Binding.

45 It was submitted on the defendant's behalf (and the evidence as to the plaintiff's earnings in that period puts it beyond argument) that her earnings in that employment would therefore have well-exceeded the 60% threshold required by the legislation. Next, it was said that her earnings in that period are the best measure, or most realistic measure, of her "after injury" earning capacity and, accordingly, leave should be refused to bring proceedings for the economic consequences of the plaintiff's injury. In support of this submission, I was referred to the opinions of Messrs Brownbill, Klug and Malham.

46 On the plaintiff's behalf, it was submitted that her evidence that her symptoms worsened in February 2007, to the point where she had to reduce her work to its present level, is unchallenged and that there is medical evidence which accepts that the plaintiff's present working hours are the limit of her capacity.

47 In regard to her work capacity, Dr Spargo reports that she continues with part time modified/lighter duties and needs to take time off from even this work when symptoms flare up. Mr Malham, the treating neurosurgeon, who last saw her in September 2006, thought then that she would be able to continue on reduced hours on a part time basis, noting that even that work would cause exacerbation/aggravation of her ongoing pain and disability. Even at that stage, he thought surgery a reasonable option. Mr Klug thought, in July 2008, that her current work was "well within her capabilities" and Mr Brookes pointed to "well within" as showing an ability to do more. Later in the same paragraph, as Mr Rattray pointed out, Mr Klug said "it is possible that she may be able to slightly increase her commitment but I believe that, based on her condition, it would be difficult for her to return to a full time appointment" (PCB 40). Mr Brownbill (DCB 19) said she would be capable of full time work in alternate

duties avoiding a range of activities and postures, noting specifically in relation to her work in November 2007 that she should be able to increase her hours (DCB 20). After his recent review of the plaintiff, Mr Brownbill, (DCB 13) opined that the restrictions of employment should continue indefinitely and, although specifically invited to comment upon whether the plaintiff had the physical capacity to increase her hours of employment, simply recorded, without comment, that she had told him she could not increase her hours because of the difficulties she was having with the hours she was already doing. Mr Michael Johnson, orthopaedic surgeon, recorded that she had been working for some time with difficulty and that he had the impression that she was working to her maximum capacity. (PCB 44,45)

48 The plaintiff has only ever worked in book binding. She is now 44 years of age. She has never been trained to work in any other field. Her efforts to remain in the workforce have been admirable and performed in difficult family circumstances. Despite medical evidence that the restricted work she has exacerbates her symptoms, she persists. No rehabilitation or retraining assistance has ever been offered to her. Combining her account of the difficulties she has working her present limited hours (which I accept) with the opinions of the surgeons, I find that the hours she now works are the best she can reasonably manage and, accordingly, I find that they fairly represent her "after injury" earning capacity. If anything, the medical opinions favour a deterioration with time, so the loss of earning capacity is likely to persist, at the least at the current level, for the foreseeable future.

49 The parties were in agreement that her "without injury" earnings, measured in accordance with the section by reference to the six year window there marked out, produces a "without injury" earnings figure of about \$29,400 per annum. Her earnings in the financial year ending 2008 were \$13,158. So far, in this financial year, her employment has produced an average of \$296 per week or approximately \$15,400 per annum. Sixty percent of \$29,400 is \$17,640 per

annum, so the plaintiff's earnings, which I have found accurately reflect her "after injury" capacity, measured at the time of the hearing, fall short of the 60% mark. Accordingly, I find the plaintiff has satisfied the requirements set out in s 134AB(38)(e)-(g).

50 The plaintiff's remaining earning capacity produces a loss of about 50 per cent of her pre injury earnings. As I have found, this loss is likely to continue for the foreseeable future. I find that for the plaintiff this loss of earning capacity has consequences which are at least very considerable. Accordingly, the plaintiff has satisfied the statutory tests in respect of loss of earning capacity.

51 For these reasons, I order that the plaintiff have leave to bring proceedings for damages in respect of the pain and suffering consequences and loss of earning capacity consequences of serious injury, that is, the impairment and loss of function of the cervical spine.