PARTIES:	TIMOTHY GERARD McAULIFFE v VOGLER, Jamie Neil ROBERTS, Mark Andrew
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	CIVIL JURISDICTION
FILE NO/S:	No 390 of 1987
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JUDGMENT OF:	Angel J

CATCHWORDS:

Damages - Assessment - Quantum - Motor vehicle accident - Personal injuries - Plaintiff aged 24 at accident, 28 at trial - Whether frontal lobe damage to brain - Minor closed head injury - Fractures to upper and lower jaws and nasal bones - Severe facial lacerations - Extensive tissue loss to right upper eyelid - Loss of four teeth - Facial scarring - Weepiness of right eye - Numbness of upper gum and teeth and of skin under the chin - Tenderness at skin graft sites down the side of left arm and right hip - Loss of earnings ($3600.00) - Interest on loss of earnings at 12% ($2360.00) - Future medical and dental expenses ($18000.00) - Pain and suffering and loss of amenities of life ($30000.00) - Interest on past damages for non-economic loss at 4% ($3450.00) - Total of $57410.00

REPRESENTATION:

Counsel:

Plaintiff:	C.C. Branson QC, R. Wood
Defendant:	M. Maurice QC, J. Tippett

Solicitors:

Plaintiff:	Mildrens
Defendant:	Cridlands

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 390 of 1987

BETWEEN:

TIMOTHY GERARD McAULIFFE
Plaintiff

AND:

JAMIE NEIL VOGLER
First Defendant

AND:

MARK ANDREW ROBERTS
Second Defendant

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 29 May 1992)

This is an assessment of damages for personal injuries sustained by the plaintiff in a motor vehicle accident which occurred on 8 August 1986. At the commencement of the trial liability was in issue, but liability was admitted in the course of the hearing on the afternoon of 5 February 1991.

The vehicle in which the plaintiff was a passenger struck a light pole at the junction of Stuart Highway and Geranium Street, Stuart Park. The vehicle was travelling in

a southerly direction along Stuart Highway at speed, and upon impact the vehicle partly disintegrated. The engine was torn from its mountings. The vehicle forward of the dashboard was demolished and the floor of the car ripped open. After what was left of the vehicle came to rest, the plaintiff was observed with his head jammed between the floor of the vehicle and the bitumen. The floor of the vehicle had opened up where the transmission had been. Counsel for the plaintiff emphasised the severity of the vehicle's impact with the light pole and the plaintiff's position in his submissions, but I think it would be surmise to conclude anything as to the plaintiff's post-accident medical state one way or the other arising from this. Looking at the photographs of the wreckage, one wonders how its occupants survived at all.

The observable injuries sustained by the plaintiff were: unconsciousness, facial lacerations, particularly involving his right upper and lower eyelids and fractures to the nasal and facial bones. The plaintiff was unconscious for some time. He had sustained a direct blow to the front of the face, mainly on the right side. The plaintiff sustained fractures to the upper and lower jaws. The plaintiff also sustained dental injuries.

Although I shall elaborate on the plaintiff's disabilities in more detail later, the non-controversial disabilities which the plaintiff has sustained as a result

of the accident are: scarring to his nose, face, right eyelids and chin, numbness under the chin and weeping of the right eye, particularly in windy dry and dusty conditions. The contentious area of this action concerns the plaintiff's alleged closed head injury of a severe kind, and injury to the brain or its structures - in particular to the frontal lobe area. It is the plaintiff's case that he suffers intellectual and cognitive deficits, psychological disturbances, a severe personality change, paranoid psychosis and reactive depression, all resulting from a severe closed head injury and damage to the frontal lobe of the brain. The principle issues for determination are as to the nature and extent of the head and brain injuries sustained by the plaintiff, the nature and extent of the intellectual cognitive psychological and psychiatric sequelae from the head and brain injuries and the measure of the plaintiff's inability to earn any livelihood, both in the past and in the future, arising from the head and brain injuries said to have been sustained by the plaintiff.

For the plaintiff, it was contended that as to the head and brain injuries, I should have regard to the following evidence:

"(i) The severity of the impact between the motor vehicle and the light pole;

(ii) The fact that the Plaintiff was rendered unconscious for about 90 minutes;

(iii) The immediately observed symptoms at the Darwin Hospital including his lack of awareness of the time and the place where he

was;

(iv) The nature of the operative procedures carried out on 8 August and 19 August at the Darwin Hospital.

(v) The Plaintiff's amnesia for events immediately preceding the motor vehicle accident, the accident itself and his post-traumatic amnesia consisting of somewhere between 24 hours and 3 days.

(vi) The Plaintiff's symptoms during the weeks and months following the trauma namely:-

(a) Headaches
(b) Dizziness
(c) Insomnia
(d) Nausea."

Emphasis was placed upon the plaintiff having suffered post-traumatic amnesia. There is evidence before me as to certain responses of the plaintiff to directions from ambulance officers whilst conveying him to the Royal Darwin Hospital, and responses whilst in hospital. There was medical evidence, which I accept, that instances of the plaintiff performing some purposeful activity are not of themselves significant, but rather the question of post-traumatic amnesia is a question of the plaintiff being able to interpret, record and recall events and circumstances as they occur during the period immediately following severe trauma; that is, it is one thing to respond, it is another to remember the response. Amnesia is not synonymous with being unconscious.

There is a large body of divergent expert medical and psychiatric and neuropsychological evidence before me. There is some common ground between the experts. There was

common ground that the plaintiff did suffer a closed head injury and that closed head injuries can cause frontal lobe damage to the brain. It is also common ground that the sequelae of frontal lobe damage includes intellectual cognitive psychological and psychiatric deficits or impairments.

The principle disagreements between the experts are as to the severity and extent of the head and brain injuries sustained by the plaintiff, whether there has been a change in the plaintiff's personality and attitude since the accident, if there has, its cause, and what was the effect, if any, of the plaintiff's experience in the Australian Regular Army upon the progression of the disabilities from which he was suffering.

Counsel for the plaintiff submitted that the following findings should be made:

"(i) That the Plaintiff's pre-accident personality habits and attributes are:

1.1 It is submitted that prior to the motor vehicle accident the Plaintiff was a young man aged 24 years who whilst he had not realised his intelligence potential nevertheless received a reasonable standard of education and had spent a majority of the time between when he left school at the end of 1978 and August 1986 in various types of employment mainly of a manual kind.

1.2 He was in all respects an average person for someone that had grown up in a small country town and did not possess any special or unusual attributes.

1.3 Moreover, the Plaintiff came from a sound stable and supportive family who had quite normal interaction; indeed, he had a particular attachment to one of his nephews, the son of his brother Clem.

1.4 It would seem that the Plaintiff was perfectly capable of making good friendships including those with Mr Stafford (whose father was the Principal of the Tumbarumba Primary School).

1.5 He had done mainly manual work, as noted above, and was in all respects fully fit and did not have any mental or physical disabilities as at 8th August 1986.

(ii) That the plaintiff sustained a severe closed head injury and damage to the frontal lobe of his brain;

(iii) That as a result of the head and brain injuries the Plaintiff suffers from the intellectual and cognitive deficits and certain psychological and psychiatric conditions, viz:

9.1 <u>Intellectual & Cognitive Deficits</u>

(a) Loss of concentration and ease of distraction;

(b) Memory lapses;

(c) Inability to organise and plan; that is, difficulty in handling information; and,

(d) Irritability and rising easily to anger.

9.2 <u>Personality Change</u>

(a) Loss of self-esteem and integrity;

(b) Feeling of inadequacy and uncertainty;

(c) Tendency to be a loner and a drifter;

(d) Inability to accept regular work environment;

(e) Estrangement from family; and,

(f) Inability to form lasting friendships with

persons of either sex.

9.3 Paranoid Psychosis

(a) Persecution feeling;

(b) Lack of trust;

(c) Use of aliases;

(d) Dependence upon or excess use of alcohol and/or narcotics; and,

(e) Delusions associated with thought insertion and astral travel.

9.4 Reactive Depression

(a) Anger and frustration when confronted with unfamiliar situations;

(b) Inability to comprehend why difficulties (not experienced beforehand) presently encountered; and,

(c) Feeling of hopelessness and/or negative attitude towards present state of affairs.

(iv) That by reason of the Plaintiff's above disabilities the Plaintiff has been since 8 June 1990 and will remain until age 65 unsuitable for regular full-time employment."

St Johns Ambulance officers who attended the scene of the accident, and who subsequently conveyed the plaintiff to Royal Darwin Hospital, found the plaintiff apparently conscious, orientated, and obeying commands. The plaintiff appeared to consciously push oxygen away during transportation to the hospital. The plaintiff can recall awakening for a short time in the ambulance on the way to hospital. At 4.30am on examination by the registrar at the hospital, the plaintiff appeared orientated to person but not to place or time. He was responsive to verbal commands,

answered questions and had equal pupils. The plaintiff had sustained multiple facial lacerations, together with fractures of the nasal bones, upper jaw, and of the lower jaw. He was also suffering damage to his teeth. He was taken to theatre, where, under general anaesthesia, the lacerations were cleaned and repaired in co-operation with the Ophthalmology Department; and after manipulating the nasal bones to correct their position, the oro-maxilla facial specialist at the Royal Darwin Hospital, Doctor Hanan, placed an external facial frame to stabilise the upper jaw. One lower front tooth had to be removed, together with a small piece of attached bone.

Following this, satisfactory progress was made and the plaintiff returned to theatre on 19 August 1986, where, again under general anaesthesia, an area of skin loss involving the right upper eyelid was grafted by the Ophthalmology Department and the mandibular fracture was dealt with by means of wiring the teeth together into correct occlusion and packing bone graft taken from the right hip around the fracture to speed its union. The fracture site was exposed by means of an incision beneath the chin. The upper jaw was firmly united by this stage and the opportunity was taken then to remove the facial frame and also three badly decayed teeth. Again, satisfactory progress was made and the plaintiff was allowed home on 23 August 1986. The plaintiff returned as an outpatient on 26 and 28 August and finally on 9 September 1986, by which

time all the wires had been removed, and although the facial fractures were firmly united in good positions, some of the facial scars were at that time most unsightly and it was at that time considered likely that scar revision would be necessary at some later date.

On admission the plaintiff had severe lacerations to the right superior and inferior eyelids. These were repaired at the same time that he underwent the initial reduction of his facial fractures under general anaesthetic. The lacerations were multiple and ragged and despite careful reposition, it was not possible to get closure because there had been a considerable amount of skin loss from the upper eyelids. On 19 August 1986, Doctor Mazzetti, the senior specialist ophthalmologist, performed a skin graft to the right upper eyelid, taking a piece of skin from the inside part of his left upper arm. The graft took satisfactorily and allowed closure of the eye. Doctor Mazzetti was of the view there was no real injury to the eyes as such and that injury to the eyelids was all superficial, consistent with lacerations and some skin loss.

The plaintiff has residual scarring from the treatment to the eye and it has apparently become much less obvious with the passage of time. The plaintiff may require further skin graft on to his top eyelid. The plaintiff's right lower eyelid remains somewhat distorted, though this can be cured with either a small skin graft or minor plastic

his mother in Wagga who was upset and crying and this further depressed the plaintiff. This did not interfere with his good progress and upon discharge from hospital his progress was described as having been rapid and uneventful. There is no mention in the hospital records of any skull fractures or headaches or dizziness.

Counsel for the plaintiff submitted that it was clear that the plaintiff was unconscious for at least 90 minutes. I am unable to make such a finding. The plaintiff remembers awakening in the ambulance on the way to hospital. At one time he remembered a police officer at the scene asking him whether he was the driver of the vehicle (D39).

The question of post-traumatic amnesia is complicated by the plaintiff's treatment at the hospital. He was given a powerful pain killer or pain killers and was operated upon under general anaesthesia.

I think the contemporaneous hospital records as to the state of the plaintiff's orientation are more reliable than the plaintiff's own account at the trial some years after the events as to what he could and could not remember and his state at the time.

The extent of his retrograde amnesia is also a matter of difficulty. On one account the last thing he could recall is climbing into a taxi. The vehicle involved in the

accident was not a taxi. Another account is the last thing he remembered was drinking Tuborg beer. A further account is the plaintiff remembered being in the vehicle involved in the accident. On all the evidence I am only able to find that the plaintiff was knocked unconscious and sustained concussion, that he has no recollection of the accident itself, and that he suffered some post-traumatic amnesia and some retrograde amnesia of short duration.

I have already related that on the question of whether the plaintiff suffers from damage to his frontal lobel area of the brain, there is a substantial conflict in the medical, psychiatric and neuropsychological testimony. I have considered all the evidence both lay and expert. One of the plaintiff's experts, Doctor Jolly, said that this is a complicated case to assess. I certainly agree with that, but having considered the evidence, I have finally concluded that the plaintiff has not made out his case, on the balance of probabilities, that he sustained the severe closed head injury and damage to the frontal lobe of his brain that he alleges.

The plaintiff was born on 28 July 1962. In the years 1975-1978 he attended Tumbarumba High School. There he had an average scholastic record. He did not receive firsts in any subject. His best result was a second in English. Since about the age of 14 the plaintiff has always had a passion for reading. He has read constantly both before and

after the accident. His constant reading sits somewhat uncomfortably with his evidence that he is now forgetful and unable to concentrate. When interviewed by a number of the experts, the plaintiff gave an untrue account of his scholastic abilities at school. He also gave a false account of his abilities to the army. He said amongst other things that he had firsts in English and History, and a second in Maths. That was not true. His school report was pressed for in the course of his cross-examination and the plaintiff was reluctant, to say the least, to produce it. When it finally surfaced, it bore little resemblance to what he had told a variety of people. The plaintiff in evidence gave an unsatisfactory explanation for the discrepancy. He said he honestly believed he had a first in English. I am unable to accept that answer. One might readily understand errors of a minor nature, in a general account of one's school record, but I find quite unacceptable that the plaintiff honestly believed he had a first in specific subjects when he had never achieved anything of the sort in any subject.

Both the plaintiff and the defendant led certain evidence concerning the plaintiff both before and after the accident. It is a matter not without significance in this case that the plaintiff, a member of a large family from Wagga did not call any member of his family, other than his older brother Clem, who, having regard to the obvious importance of the "before and after" evidence in this case,

I can only assume was the only member of the family whose evidence could support the plaintiff.

The plaintiff's own evidence was unsatisfactory in a number of respects. Both the plaintiff's performance in the witness box and other evidence before me, shows the plaintiff to have always been egocentric and somewhat vain. There is an element of self-pity about him too. He is prone to exaggerate, brag and to "big note". He is readily critical of others but resents the criticism of others, even close members of his family. He told Mr Rawling that he had suffered frontal skull fractures, though there is simply no other evidence of this. He told experts that he had passed a military exam and was told his marks were sufficient to go to Duntroon Royal Military College. This was untrue. There was no army entrance exam and he had been told no such thing. He said he acted on a long held intent in joining the army. This was untrue. He told workmates that he had settled his personal injury claim for $160,000. This was untrue. He told Mr Rawling he had pursued a number of sporting interests before the accident. This was not true. He gave evidence of continuing headaches since the accident, but the first recorded complaint of a headache was on 15 May 1989, when he complained of having had left-sided headaches since 10 May 1989, when he was struck on the left side of the head accidentally by another member of the army in a swimming pool. On this occasion he informed the army authorities that he had had multiple fractures of the skull

in 1986, and that he had been well since. Precautionary x-rays taken by the army on 17 May 1989 proved normal.

Counsel for the plaintiff submitted that before the accident the plaintiff was a normal, well-adjusted person of his age. However, I think the evidence is to the contrary. The witnesses Rowbotham and Galloway regarded the plaintiff as different to any other normal 21 year old. He was said to be different in lots of ways, though they found it hard to explain precisely why. They said it was the way he acted, his odd sense of humour; Rowbotham said the plaintiff was "a sort of over the top sort of person". I accept these witnesses' evidence as to the plaintiff's pre-accident state.

As I have said, the plaintiff read widely both before and after the accident. He mainly read science fiction and fantasy novels and has a reasonable vocabulary. Some of the witnesses he impressed with his articulation. Regrettably his reading appears to have led to a certain intellectual arrogance on his part. It appears he does not read scholarly works. His reading habits and relationships with fellow workers and his family bring to mind the words of Emlyn Williams (Beyond Belief, Pan (1967) at 148):

> "A little learning is indeed dangerous: halfway between the educated and the uneducated, there are the talkers. Half-baked pickers-up of unconsidered truisms, just sharp enough to acquire surface knowledge and a run-of-the-mill vocabulary, these layers-down of the law are heard in pub and club, in plane and train ..."

I do not suggest these words befit the plaintiff. In my judgment, with self-discipline, a little humility and a more mature approach to things, there is no reason to suppose the plaintiff can not achieve much more than he has in the past.

Both before and after the accident, the plaintiff drank to excess. Galloway thought the plaintiff drank excessively when he first started to work for him. Often when the plaintiff was collected for work he stank of alcohol. Both Galloway and Rowbotham described the plaintiff as aimless and unambitious. Of course, in itself there is nothing wrong with this, but it indicates a degree of immaturity and conflicts with accounts given subsequently by the plaintiff to certain experts that he had long-term plans to join the army and contemplated a tertiary education in Engineering and Science. The plaintiff further gave accounts that he was interested in sport, but I accept the evidence of Rowbotham and Galloway that in fact the plaintiff had an antipathy towards sport, particularly contact sport. Rowbotham gave evidence:

> "He [the plaintiff] certainly didn't like Rugby League Football or Rugby Union, or anything like that ... He thought Rugby Union players, which was relevant to Paul [Galloway] and I, he believed they were a bunch of homosexuals running around after a bit of leather, which is not the case, and he used to quite often give Paul and I a hard time about showering after the game, which you have to do."

After his discharge from hospital and attending as an outpatient, the plaintiff, returned to Wagga. In November

1986, he commenced working again for Galloway. He remained in that casual employment until January 1989. Neither Galloway nor Rowbotham noticed any marked change in the plaintiff. The evidence of these two witnesses is significant. I accept the observations the witness Galloway made about the plaintiff before the accident, namely that the plaintiff was self-centred, did not have steady relationships with girls, appeared to have no close friends, was immature and was temperamental, "stroppy". Save that Galloway noticed that the plaintiff had a weepy right eye and was somewhat self-conscious about his physical appearance after the accident, Galloway noticed no change in the plaintiff at all. He noticed no change in the plaintiff's ability to get on with others; he noticed no memory problems; he noticed no difficulty in understanding instructions. Occasionally the plaintiff complained of headaches, but this coincided with occasions when Galloway smelt alcohol on the plaintiff's breath when collecting him for work in the mornings. The plaintiff never complained to Galloway that the accident had affected him otherwise than in regard to his physical appearance and his problems with the weepy right eye. Galloway gave evidence, which I accept, that the plaintiff's drinking habits after the accident were still excessive. The plaintiff spoke as to his use of marijuana to Galloway in similar terms before and after the accident. In April 1989, when seeking to enlist in the army, the plaintiff told Captain Detering he had only experimented with marijuana "once" before. This was untrue;

the plaintiff was a user of marijuana at the time and had been for some years.

Galloway and the plaintiff gave differing accounts of the circumstances in which the plaintiff's employment with Galloway was terminated. I accept Galloway's account of what happened and think that the plaintiff's pride was severely wounded, and that he, out of vanity, did not accept Galloway's offer to have his job back. Galloway expressed the view that he was surprised when he heard the plaintiff intended to join the army as he did not consider the plaintiff would be able to handle the discipline that goes with the army. As subsequent events proved, Galloway's judgment was sound in this. His evidence about the plaintiff having no difficulty relating with other people in a general sort of way is significant evidence. It is part of the plaintiff's case that, as a consequence of brain injury, he is now unable to relate to people. When interviewed by Captain Detering on 24 February 1989, seeking entry into the army, the plaintiff was obviously struck by Captain Detering's attractive appearance. Captain Detering is an army psychologist. She said that the plaintiff presented "as a larrikin-type and thus had no difficulty relating." She also said the plaintiff did not display a positive attitude to working, that is, he would only work if it interested him. She predicted difficulty adjusting to demands of discipline and self-motivation required in army service being fulfilled by the plaintiff and passed the

plaintiff as a borderline entrant. At the time the plaintiff saw Captain Detering he had already passed a general medical examination for application to join the army.

The plaintiff enlisted for the army on 19 April 1989, successfully undertook his training as a recruit at Kapooka, spent two months at Puckapunyal doing a course, completed another course and from July to November 1989 was stationed at Puckapunyal training with the Army Transport Corps. In early November 1989, he was transferred to No. 2 Headquarters Military District Victoria Barracks Sydney with the rank of Private.

It is unnecessary to catalogue the plaintiff's woes in army service. He was convicted of a number of breaches of discipline, including use of marijuana, and was undoubtedly victimised whilst in the army. One of the breaches of discipline involved smoking marijuana with a girl on a beach outside limits. On 15 February 1990, the plaintiff was sentenced to 16 days detention in the Defence Services Corrective establishment at Ingleburn. In May 1990, the plaintiff suffered a nervous breakdown resultant upon his incarceration and he was admitted to No. 1 Army Hospital Ingleburn where he remained for three weeks. He was discharged from the army on 8 June 1990.

Whilst in the army, the plaintiff had three

consultations with Doctor AT Williams, the most senior psychiatric consultant to the three armed services. Doctor Williams was an impressive witness. He saw the plaintiff on 27 March 1990, following the plaintiff's third military conviction on 15 February 1990, for using cannabis. It was only when this latter charge was pending and because of it, that the plaintiff developed anxiety related symptoms, notably insomnia. The plaintiff also saw Doctor Williams on 15 May 1990. This time, the plaintiff had suffered an acute stress reaction in Ingleburn Military Prison, where he had been sent to serve a nine day sentence for being late for work. Doctor Williams saw the plaintiff again on 29 May 1990 as a follow-up consultation to the one a fortnight earlier. Doctor Williams on interview found no evidence of intellectual impairment, effective disturbance or underlying psychosis. Doctor Williams gave evidence that there is nothing which indicated to him that the plaintiff might possibly be suffering from frontal lobe syndrome, or from brain damage of any sort, nor did he think the plaintiff was suffering from any effective disorder, underlying psychosis or intellectual impairment. He expressed the view, which I accept, that the plaintiff displayed no indications that he might possibly be suffering from frontal lobe syndrome or brain damage of any sort.

There can be no doubt that Doctor Williams saw the plaintiff at a time when the plaintiff was severely stressed. Doctor Williams was asked his view as to the

source of the plaintiff's problems, and he said that he came to the conclusion that the plaintiff was not suffering from any significant psychiatric disorder, and that he, Williams, saw it in terms of the plaintiff's personality, his life-style, the way he coped or failed to cope with things. He said that the plaintiff's life-style of moving about a bit and being a loner and the plaintiff's over indulgence in drink were the areas where the plaintiff's problems lay.

As I have said, Doctor Williams' evidence was impressive. He is a very experienced psychiatrist with an extensive experience with the casualties of military life. He assessed the plaintiff as someone who could not cope with military life, as opposed to the numbers of people who suffer frank psychiatric breakdowns as a consequence of military life. The medical history of the plaintiff whilst in the army did not disclose evidence of brain damage. Mr Rawling, a neuropsychologist called by the plaintiff, said that the plaintiff's personality and psycho-social deficits would be apparent to any competent psychiatrist. I am satisfied that the plaintiff, in the state he was in when he saw Doctor Williams, would have displayed features of frontal lobe damage had he in fact been suffering from it, and that this would have been detected by Doctor Williams.

Doctor Williams also expressed the view, which I accept, that it would be very surprising if someone with frontal lobe syndrome could complete the army recruit

training at Kapooka, which the plaintiff completed. Doctor Williams saw the victimisation that the plaintiff suffered in the army as a reality, not as evidence of paranoia, and he saw the plaintiff's inability to cope therewith as unremarkable. He has experience of such matters unmatched by other experts called in this case. Mr Rawling and Doctors Jolly and Shand treated the plaintiff's complaints of victimisation in the army as evidence of paranoia and the plaintiff's inability to cope as evidence of brain damage. I prefer the evidence of Doctor Williams as to this.

I agree with the submission of counsel for the defendants that one does not have to go beyond the plaintiff's pre-accident personality as described by Galloway and Rowbotham and the plaintiff's army experiences and the influence of this litigation upon the plaintiff to find explanation for the striking features of the presentations the plaintiff began giving to his medico-legal consultants just before the case began and during the early stages of his appearances in the witness box. The symptoms of the plaintiff, which are now at the heart of his claim for damages, only came to light more than four months after his discharge from the army and less than two weeks before the case was due to begin.

The plaintiff, in the course of the hearing, was subjected to a searching cross-examination. At one stage I halted the cross-examination as it appeared to me that the

plaintiff lacked concentration and was not giving answers which assisted me. Shortly following that episode, he was seen within the Supreme Court building by Doctor Radeski, a psychiatrist called by the defendant. I accept Doctor Radeski's evidence that the plaintiff on that occasion gave no indication of any psychiatric or underlying disorder. Whilst giving evidence before me in Sydney, the plaintiff slumped within the witness box. I asked him to sit up in the witness box and he did so. His evidence following that incident demonstrated that he was quite able to deal with the questions in cross-examination and indeed he appeared to enjoy what he perceived to be the mental gymnastics involved in the questions and his answers.

In the context of the plaintiff's case that he has a worsening personality change consequent upon the accident, I note the opinion of the neurosurgeon Doctor JJ Skapinker, who saw the plaintiff on 13 December 1990, and who, having said that the plaintiff did not clinically display any signs of permanent brain damage, and that a full neurological examination proved to be within normal limits, and that the plaintiff presented with a reasonable intellectual capacity, and answered questions well, and that the plaintiff's memory of events was excellent, said:

> "It is well known that personality changes which may occur after an accident (ie part of a post-concussional syndrome) are characterised by the fact that the condition is reversible, ie the usual picture is for post-concussional syndrome symptoms to improve with the passage of time. He (the plaintiff) states that he thinks his emotional problems are "getting worse". This does not fit in with neurological damage."

Doctor Skapinker also said that it was of significance that the plaintiff was able to return to the swimming pool work in Wagga during approximately October or November following the accident, which work continued until 1989. He said, "This is certainly not a picture of a man suffering from any chronic type of brain injury or brain syndrome."
Doctor Skapinker concluded that any mild cerebral contusion of the plaintiff would be highly unlikely to have resulted in permanent impairment. He also said that only careful observation of the plaintiff over some period and comparison with previous behaviour can give a clue as to personality disorder. It is for this reason that the evidence of Galloway and Rowbotham is so important. Those witnesses had an extensive opportunity to mix with the plaintiff, as the swimming pool work involved them and other employees travelling around country areas in New South Wales, working and living together. I have previously indicated that I accept the general tenor of those witnesses' evidence.

As I have said, the plaintiff's allegations of frontal lobe damage came reasonably late in the piece.

The plaintiff's first consultation with a psychologist was with Doctor Lindford (PhD) on 13 April 1989. The assessment was requested by the plaintiff's solicitor. Lindford records (Ex 22) that the plaintiff had "not noticed any auditory, olfactory, tactile or verbal perturbations other than minor tactile insensitivity over the areas of his

face which have been grafted". He found nothing to suggest that the plaintiff was suffering any thought disorder or delusional experiences.

The first time the plaintiff reported extraordinary experiences to anyone was when he spoke to Mr Rawling on 26 October 1990, less than two weeks before the trial of this action began and more than four years after his accident. Mr Rawling records (Ex 3) that "he believed that he had some kind of heightened extra-sensory powers that allowed him to read other people's thoughts and to influence their thoughts". He gave an example of being on a bus the day before and seeing a young school girl whom he 'knew' had lost her virginity that very day. In addition, he told of an incident when he had put a 'ringer' in the head of an employer whom he resented. Mr Rawling accepted this as evidence of the plaintiff's mental deterioration.

Unfortunately, the plaintiff grossly exaggerated his pre-accident achievements and potential, failed to offer his best performance on several of the psychometric tests Mr Rawling administered to him, and misled Mr Rawling in other ways. Mr Rawling was told and assumed the plaintiff suffered post-traumatic amnesia for three days. Mr Rawling's opinions largely rested on such misleading information. There is no reason to believe the plaintiff was not attempting to mislead Mr Rawling when he spoke to him of these experiences; indeed, his misleading others

suggests as much. The plaintiff unsuccessfully tried to mislead Corinne Roberts, the neuropsychologist called by the defendant. I accept her evidence that whilst bad results can be faked, good results cannot, and that the plaintiff's behaviour and functioning and his test results could not be explained on the basis of head injury and were probably not indicative of head injury. I preferred her evidence to that of Mr Rawling; she appeared to me to be more careful with her opinions and more guarded at drawing conclusions. She was careful not to contradict Mr Rawling and was less dependent upon the plaintiff's accounts of things.

Doctor Jolly saw the plaintiff for the first time on 23 October 1990, two weeks before the trial of this case began. He was the first psychiatrist to see the plaintiff for the purposes of this case.

Doctor Jolly's final views were undoubtedly affected by Mr Rawling's findings as to cognitive defects which conclusion rested upon a history which was seriously misleading.

Mr Rawling's report was accepted by Doctor Jolly, who changed the opinion he had formed some three days before Mr Rawling saw the plaintiff. In his written report (Ex 4), Doctor Jolly stated that the plaintiff did not "experience delusions of influence or hallucinations of any type and his presentation is not characteristic of a schizophrenic

illness."

Doctor Jolly assessed as "pathological" the plaintiff's statement that marijuana "makes you feel a bit more real". I am unable to accept that assessment: young people express the effects of drugs upon them in all sorts of ways.

There is little doubt that when the plaintiff saw Doctor Jolly, he was feeling down, his self-esteem was very low and he was at odds with the world for understandable reasons. He expressed himself in melodramatic terms. Doctor Jolly reached his conclusions in the absence of evidence from any other source to verify the plaintiff's account to both Mr Rawling and Doctor Jolly of his life since the accident, or the possibility that there were other explanations for his behaviour and thinking. Doctor Jolly had no proper account of the plaintiff's post-accident work history or pre-accident circumstances.

In his three interviews with Doctor Williams, the plaintiff never once suggested that he was having any problem coping with the kind of work he was being given to do by the army, or with pressures of work. All his complaints to Doctor Williams were about his inability to cope with army life. Nowhere in his extensive army medical records is there any complaint recorded of the plaintiff experiencing any difficulty managing his work, let alone a difficulty which could be said to be consequent upon brain

damage or its sequelae.

Doctor Shand, a psychiatrist called by the plaintiff, and who treats him to this day, did not see the plaintiff until 26 November 1990, that is, after the plaintiff had given his evidence in chief.

The plaintiff misled this doctor. To Doctor Shand the plaintiff said he had been suffering severe sleeping difficulties and headaches, in effect, ever since his accident. This was not the fact.

Without an understanding of the pre-morbid personality, one cannot make a diagnosis of cause and effect. Doctor Shand, like both Mr Rawling and Doctor Jolly, took the plaintiff at his word for being, prior to the accident, a mature, well balanced young man with above average school results and who had no history of alcohol or substance abuse.

A determination of the weight to be attached to Doctor Shand's conclusions can only be made after a comparison between what appears in his original report about the plaintiff's army experiences and what is now known about them from the plaintiff, from the army records (including Captain Detering's material) and from Doctor Williams.

In his report (p5), Doctor Shand concludes that "from

the history obtained from the patient he suffered a substantial ... brain injury from the accident". His opinion rests, amongst other things, upon the plaintiff's own account of things and that account, as I have said, does not accord with the facts.

Doctor Shand acknowledged in cross-examination that if the plaintiff's employer had said that there had been no change in the plaintiff's personality after the accident, that would be quite different to the picture he had been given. Doctor Shand also acknowledged, in effect, that if the plaintiff had been able to hold down a job for two years after the accident, that would have been different to the story he was told and was of significance.

Doctor Shand's opinion about the plaintiff having suffered brain damage is founded essentially upon Mr Rawling's reports and the misleading information of the plaintiff. Doctor Shand could not himself discern any evidence of intellectual deficit.

Doctor Shand founded his opinion about the plaintiff's paranoid thinking upon the plaintiff's melodramatic verbalisation of his thoughts and feelings about others. The plaintiff must be treated as an unreliable when it comes to self-reporting. More importantly, perhaps, his feelings of persecution are directly related, as Doctor Williams' evidence demonstrated, to his army experiences, a fact

nowhere acknowledged or recognised by Doctor Shand in his report.

For his diagnosis of psychosis, Doctor Shand relied upon the plaintiff's accounts of "extraordinary experiences". However, I am of the view the plaintiff's elaboration of such 'experiences' should not be treated as having the delusional character which Doctor Shand was disposed to attribute to them. I prefer the evidence of Doctor Radeski on this. The plaintiff gave me no sense of his being deluded in the witness box.

The picture painted by the plaintiff to Doctor Shand and others of being a loner unable to relate to other people, particularly women, is not borne out by the evidence. The plaintiff gave no evidence about difficulties in his sex life or relationships with women. The plaintiff's first offence during this army service was committed in pursuit of a woman. The incident on Coogee beach which led to his being expelled from the army occurred in the company of a female. His account of how he came to meet a hairdresser and began taking her out is not that of a man who is having difficulty in his relationships with women. Just before he came to Darwin to give his evidence in November 1990, the plaintiff had been taking out another girl, whom he had met at the backpackers' hostel in Sydney. As with the others, there is no mention of any difficulty in his relationship with this girl. At his interview with

Captain Detering on 24 February 1989, the plaintiff so impressed her with his ability to relate that she had recorded that he was a larrikin type who would have no difficulty relating to others. Just before he gave evidence in April 1991, the plaintiff had been camping and bushwalking with a girl and two other male persons. The plaintiff's evidence, on the whole, suggested he is a person who has no difficulty meeting and making friends. Before the accident the plaintiff did not make permanent friends.

In reaching his diagnosis of paranoid psychosis, Doctor Shand accepted the plaintiff's explanation for wandering in Queensland using aliases and "escaping from unseen and unidentified potential persecutors ...". The plaintiff's movements following his army experience have a much readier explanation than Doctor Shand's diagnosis implies, namely his inability to otherwise cope with the disgrace and shame he not unnaturally felt consequent upon his discharge from the army and his desire not to face himself, his family and friends back in Wagga. I do not accept the evidence of Doctor Shand that the use of assumed names is evidence of paranoia; I prefer the evidence of Doctor Radeski on this. In the army medical records (Ex 35, p20) it is recorded: "When he (the plaintiff) gets out of the army he wants to go somewhere where no one knows him and build swimming pools". Given his circumstances at the time and his previous history, I am unable to accept that this is evidence of paranoia, much less evidence of an inability to

plan and organise his life. It is the same notes in the army medical records which record that the plaintiff "thinks he made a full recovery" from his motor vehicle accident. At times since the accident, the plaintiff has lived independently of others. This indicates some ability to organise himself. I accept Doctor Radeski's opinion that psychotics almost inevitably come to the notice of the authorities, often because of an inability to attend their own needs, such as hygiene. It is not suggested the plaintiff ever experienced such problems or came to the notice of authorities.

It appears that Doctor Shand had been informed little of the plaintiff's interest in the occult and his prolific reading habits with their long-standing bias towards science fiction and fantasy. The plaintiff had read Ron L Hubbard's "Decology" before his motor vehicle accident (despite some dissembling, I think the plaintiff does know much more about Hubbard's books and scientology than he was prepared to admit). Doctor Shand appears to know little about the phenomenon known as astral travel, or that the plaintiff had read "serious" books on the subject. Doctor Shand does not regard the plaintiff's beliefs and experiences of astral travel as an extension of normal; he treats them as a psychotic phenomenon. In this I think, with respect, he is mistaken. "Astral trip" is to be found in the Macquarie Dictionary 2nd edition, where it is defined as meaning "an extra-sensory experience of travelling out of the tangible

world". According to Doctor Jolly, many people, psychologists and psychiatrists amongst them, believe out-of-body experiences are a reality, including astral travel. Doctor Jolly saw no link between astral travel and being psychotic. I do not accept Doctor Shand's conclusions about the plaintiff, preferring as I do, the conclusions of Doctors Radeski and Skapinker.

The plaintiff called the witness Stafford. Stafford is a truck driver. He is an old school friend of the plaintiff's; they went to Tumbarumba Primary School together. In about 1983, they shared a flat together in Wagga for four months. After that Stafford got a job out of town and was required to work most weekends. In 1983 he became involved with a girl whom he subsequently married so that he saw less of the plaintiff than before - he saw him about once every six weeks. Then, in 1984, Stafford joined the army and he really saw nothing of the plaintiff for the next 18 months.

Stafford saw the plaintiff at the beginning of 1986, some eight months before the accident; he observed that the plaintiff was "more or less the same but very edgy". In other words, he is describing a change which can have nothing to do with the accident.

At this time the plaintiff made no complaint to Stafford about headaches or sleeping difficulties.

Stafford does not appear to have seen much, if anything, of the plaintiff in the ensuing three years; he was transferred to Townsville in June 1986 for 2 1/2 years, then to Sydney; his interests during this period were the army and his wife.

Stafford gave evidence, which I accept as honest, of experiences with the plaintiff since he left the army. It is not uncommon for two young friends to grow apart. I think Stafford now finds that his schoolmate of earlier years has not grown up as he would have expected. Stafford and the plaintiff have had divergent paths of development since their earlier friendship. Stafford's success in the army indicates that he was and is an altogether different personality to the plaintiff, a much maturer person. It is hardly surprising in light of the plaintiff's experience in the army that the differences between the two become apparent after Stafford returned home from his four year stint in the army.

The evidence of the two entirely disinterested witnesses, Galloway and Rowbotham, who had extensive intimate contact with the plaintiff from 1983 to the beginning of 1989, I find preferable to the evidence of Stafford and the plaintiff's brother Clem. Apart from the quality of disinterestedness, Galloway and Rowbotham's evidence is supported by contemporaneous written records. The same records cast doubt on the evidence of Stafford and

Clem.

Clem McAuliffe's evidence is at odds with contemporaneous records of medical practitioners seen by the plaintiff at the request of his solicitor solely for the purposes of this case. I accept the plaintiff's admissions against interest as recorded by skilled observers, as more reliable than the evidence of the plaintiff's brother. His evidence is contrary to the tenor of the evidence of Galloway and Rowbotham. No other member of the plaintiff's family was called to corroborate his evidence. The circumstances of collecting Galloway from Darwin Airport prior to giving evidence leaves me with misgivings and without confidence in his impartiality.

After considering all the evidence - and I will not encumber these already lengthy reasons with further reference to it - I am not satisfied on the balance of probabilities that the plaintiff has suffered the frontal lobe damage, sequelae, and resultant permanent loss of earning capacity alleged.

The plaintiff suffered fractures of the upper and lower jaws, nasal bones, extensive lacerations with a requirement for further revision of scarring associated not only with the trauma but with surgical procedures associated with that trauma. The plaintiff has already undergone a period of hospitalisation and faces the prospect of further

hospitalisation associated with the revision of his scarring and further dental work. He suffers numbness under the chin. His right eye weeps, particularly in windy, dry and dusty conditions, though this will cease with further surgery. He suffered a minor closed head injury with loss of consciousness and concussion and shock. He suffered severe facial lacerations including extensive tissue loss to the right upper eyelid and other multiple facial lacerations and contusions. He has lost four teeth. There is scaring associated with bone and skin grafts. I take into account the pain and discomfort associated with the surgical procedures experienced and to be experienced. There was a bruising injury to the chest and a laceration to the right leg. The plaintiff suffered shock anxiety and emotional trauma as a consequence of the accident.

The plaintiff has facial scarring, in particular to the bridge of the nose, around the root of the nose, to the right upper and lower eyelids, scarring beneath the jaw, scarring beneath the left eye, weepiness of the right eye, numbness of the upper gum and teeth, numbness of the skin under the chin, tenderness of the skin under the right eye, general weakness of the jaw, and loss of teeth. He suffered some stress, anxiety and loss of confidence consequent upon cosmetic disability but there is no residue of this. There is tenderness at the skin graft sites down the side of the left arm and right hip.

For pain and suffering and loss of amenities both past and future, I award $30,000. The plaintiff's counsel submitted the appropriate apportionment between past and future general damages for non-economic loss is 50 per cent past. I see no reason to disagree with that. The appropriate rate of interest applicable to that part of the past damages for non-economic loss is 4 per cent and it is not inappropriate to allow interest for the whole of the period, namely 5 3/4 years; cf *M P A (SA) Pty Ltd v Gogic* (1990-91) 171 CLR 657.

Out of pocket expenses are agreed at $3760 (paid).

There needs to be provision for future medical expenses as follows:-

(a)	Surgical revision of scarring	
	Doctor Olbourne (Ex P20)	
	14 days hospitalisation	$5600.00
	Surgical and anaesthetic fees	$9000.00
	Theatre fee	$1000.00
(b)	Dental	
	Doctor Gordon Saggers (Ex P21)	$2272.00

I assess the plaintiff's damages as follows:

1.	General damages for pain and suffering and loss of amenities	$30000.00
2.	Interest on 50 per cent thereof at 4 per cent per annum for 5 3/4 years	$3450.00
3.	Provision for future medical and dental expenses (rounded off)	$18000.00
4.	Past loss of earnings (during period of hospitalisation and convalescence, in all, say, 18 weeks at casual barman's rate (net) $200 per week	$3600.00
	Interest thereon at 12 per cent (rounded off)	$2360.00
		$57410.00

There will be judgment for the plaintiff in the sum of $57410.00. I will hear the parties as to costs.