

SUPREME COURT OF QUEENSLAND

CITATION: *Brooks v Ticor Chemical Company Pty Ltd*
[2003] QSC 180

PARTIES: **RUSSELL DOUGLAS BROOKS**
(Plaintiff)
v
TICOR CHEMICAL COMPANY
(Defendant)

FILE NO: S312/99

DIVISION: Trial Division

DELIVERED ON: 17 June 2003

DELIVERED AT: Rockhampton

HEARING DATES: 6, 7 and 8 May 2003

JUDGE: Dutney J

ORDERS: **Judgment for the plaintiff against the defendant in the sum of Two Hundred and Sixty-Nine Thousand and Forty-Eight Dollars and Seven Cents (\$269,048.07)**

CATCHWORDS: EMPLOYMENT LAW – INJURY OF EMPLOYEE – CAUSATION – where plaintiff’s superior directed him or caused him to chase cattle over rough terrain – where plaintiff’s attention directed away from his foot placement – where plaintiff’s superior ignored the proper practice of telephoning the owner of the cattle to remove them from the plant area

DAMAGES – MEASURE OF - PERSONAL INJURIES – where plaintiff injured his left knee – where severe degenerative changes in both knees exist – where onset of symptoms attributable to incident in question – where onset of symptoms would have occurred in any event

Lanyon v Noosa District Rugby League Football Club [2002] QCA 163, distinguished

COUNSEL: G Crow for the Plaintiff
M Daubney SC for the Defendant

SOLICITORS: Kenny & Partners for the Plaintiff
Swanwick Murray Roche for the Defendant

Liability

- [1] Russell Brooks, the plaintiff, was employed by Ticor Chemical Company Pty Ltd (“Ticor”), the defendant, as a shift supervisor. His duties, in the main, consisted of controlling the operations of the Ticor chemical plant at Gladstone from inside a control room. He was injured at work on 6 December, 1996 chasing cattle in the area of the settling ponds at the Western end¹ of the plant site. Mr Brooks’ experience with cattle was negligible.
- [2] Ticor’s Gladstone chemical plant was involved in the manufacture of cyanide. The plant was situated on an enclosed portion of a much larger block owned by the company. The enclosure was by a chain wire fence. To the south west of the plant area was a double gate providing access to the dam from which water was provided to the plant. In the south east corner of the plant area was a small access gate. Both these entrances were kept chained and locked. Entry to the plant area from the car park and the highway was provided at the eastern end of the plant area by means of electrically controlled gates.
- [3] Mr Storey was employed as the groundsman for the plant. Some years before December 1996 he had obtained permission to graze cattle on Ticor’s vacant land surrounding the plant site to the south, west and north. On 6 December 1996 some one or more cattle presumably belonging to Mr Storey had gained access to the plant site and were grazing near the administration block in the south east. Mr Benjamin who was then the production and technical manager and Mr Brook’s immediate superior spotted the cattle in the region of the small access gate. He attempted to chase them through the small access gate

¹ Accurately or not, I have taken directions from the sketch map which is exhibit 1 and described the fence at the bottom of the sketch as being in the south, to the left as being in the west, to the right as the east and to the top of the sketch as the north.

but without success. As he was attempting to remove the cattle from the plant site Mr Brooks who had been smoking a cigarette nearby came across and was either enlisted to aid Mr Benjamin or volunteered to do so. In any event Mr Benjamin took advantage of his presence and the cattle were followed along the southern boundary of the plant site past a small pond referred to as the “goose pond” and to an area between the boundary fence and the settling ponds. As they reached the double gates, one of the two men unlocked and opened them. Both then proceeded to a position between the ponds and to the east of them where Mr Benjamin has marked “RB” in red on exhibit 1. Mr Brooks then proceeded between the ponds to the point he has marked on exhibit 1 as the scene of the accident. The intention was that he would chase the animal or animals around the southern pond to the west. Mr Benjamin would prevent the animals circling the pond to east and in that way they would be directed through the now open double gates. As he was jogging between the ponds after the cattle Mr Brooks put his foot in a hole or rut in the ground and fell, twisting his left knee. He felt pain immediately but was able to get back onto his feet and continue around the pond towards the double gates. There does not seem to be any contest that Mr Brooks fell at about the spot marked on exhibit 1.

[4] The area between the ponds was rough. It was often damp as a result of water and ammonia effluent being sprayed onto the ponds and blown by the wind onto the surrounds. The grass was thick and long between the ponds although it was kept short and mown in the area surrounding the two ponds. Photographs 2 and 3 of exhibit 16 show the contrast between the mown area around the ponds and the unmown portion of which the area between the ponds was part.

[5] The ponds were regularly inspected often by vehicle. As a result of vehicles being driven over the soft ground there were various wheel ruts and undulations. Mr Brooks was familiar with the area. Part of his duties included checking the pumps near the ponds and he was aware of the condition of the grass and the ground between them.

- [6] Mr Brooks was a big man. He said in evidence that at the time he was about 110kgs. His general practitioner weighed him between July 1996 and September 1996 variously between 119kg and 124kg.
- [7] The owner of the cattle, Mr Storey, was conscious of the need to keep them out of the plant area. Mr Storey lived close by the plant. He left his telephone number on a whiteboard at the plant so he could be contacted if any problem arose such as cattle straying into unsuitable areas. If, for any reason he was away from home for any period he arranged for the number of a contact person to be placed on the whiteboard. He could think of no reason why he would not have quickly come and removed the cattle himself if he had been asked to do so. He had been summoned to deal with cattle in the car park area on other occasions even though those cattle had turned out to be someone else's and not his.
- [8] The above account of the incident is taken in the main from the evidence of Mr Benjamin. Generally I found his version of how the accident happened more likely than Mr Brook's account of chasing the animal completely around the ponds and half way round again. In the end I do not think anything turns on which version is accepted. I also prefer Mr Benjamin's version of the cattle being herded through the gate to Mr Brook's account of putting them through a hole in the fence. I think it more likely that the cattle got in through the improperly closed gate and went out the same way. I accept Mr Storey's evidence that if a beast had gone through the hole in the chain wire fence which he repaired sometime after the accident the wire would be stretched by the animal's passage. There was no sign of any such stretching which Mr Storey was able to see. Again I do not think anything turns on whether the cattle went in or out of the gate as opposed to the hole in the fence.
- [9] One of the arguments pursued by the plaintiff at trial was that Ticor had been negligent in not taking more effective measures to prevent cattle straying into the plant area. There are three reasons why I reject this argument. First it was never explained to me why the mere presence of cattle in the plant area constituted a danger. It may well have done so but the plaintiff's counsel

could not tell me why. The main risk he could identify was to the cattle and to the reputation of Ticor if cattle were killed by the contamination in the ponds. This seems to me to have little relevance to a claim by a workman. Second, despite Mr Kahler's attempts to think of a failing on the part of Ticor in relation to excluding cattle from the plant area Ticor seems to have managed this task reasonably well. The placing of grids at entrance ways would themselves, in my view, have constituted a danger to workmen. The electric gate, despite sometimes being jammed by loose objects caught underneath it, was a perfectly proper form of enclosure. The chained gates were also adequate except where human error was involved in forgetting to shut them or not shutting them properly. The fence was a proper security fence. I accept Mr Storey's evidence that holes in the fence were rare and promptly repaired. Third, there was a system in place to remove cattle which strayed into the plant area which did not involve risk to workmen. The system was to telephone Mr Storey who would remove them. In any event I prefer the evidence that the presence of cattle was a very rare event in the plant area as opposed to the car park outside the eastern gate.

[10] Despite this conclusion I am satisfied that the defendant is liable for Mr Brooks' injuries.

[11] In enlisting Mr Brooks to assist him to chase cattle around the plant area Mr Benjamin was ignoring the proper practice which was to telephone Mr Storey.² Whether Mr Brooks was asked to assist or volunteered his services is immaterial. Mr Benjamin took advantage of his availability to undertake a task which was not part of his duties and for which he had no skill or experience.

[12] The fact that Mr Brooks was injured in an area he was familiar with and knew to be rough is also not to the point. Mr Brooks was not inspecting pumps. Were he doing so he would be expected to be treading carefully having regard

² See Casey-Ransom at transcript page 129, line 1; Daniels at transcript page 281, lines 35-51; Castles at transcript 283, line 58 to 284, line 4; Watkins at transcript 290, lines 10-35; Storey at transcript page 312, lines 15-50.

to the terrain. Mr Brooks was running after a large animal or animals with which he was not familiar. It is not to be expected that Mr Brooks would be concentrating on his foot placement. I would expect his concentration to be on the animal he was endeavouring to herd. This is not a case like *Lanyon v Noosa District Rugby League Football Club*³ where the plaintiff was required to accept a degree of unevenness in the ground when carrying on a familiar activity and where reasonable precautions had been taken to minimise the risk of injury. Here there was the practical and established alternative of contacting Mr Storey. That course involved no risk to Mr Brooks. This is a case where the negligence of Mr Benjamin, Mr Brooks' superior, in directing or causing him to chase cattle on foot across rough ground has caused Mr Brooks' attention to be directed away from the surface over which he was running. It is thus foreseeable that he might fall and injure himself in just the way he did. The directions of Mr Benjamin or his acceptance of Mr Brooks offer of help involved Mr Brooks in an unsafe system of work. Ticor is vicariously responsible for the negligence of Mr Benjamin in using Mr Brooks for this activity which although in the course of employment was one quite out of the scope of Mr Brooks' normal duties and which neither participant should have been undertaking. I find that that this negligence was the cause of Mr Brooks falling and suffering the injury to his left knee.

Quantum

[13] The principal injury suffered by the Mr Brooks was to his left knee. There seems to be general agreement between the orthopaedic surgeons that he requires a total left knee replacement. There is disagreement, however, as to the extent to which the injury suffered on 6 December, 1996 is responsible for the present condition of Mr Brooks' left knee.

[14] Mr Brooks said that his knee soreness dates from the accident. This is not altogether consistent with the records of Dr Bird, a general practitioner whose notes reveal a complaint of a painful knee as a result of a fall with twisting on 7 October, 1996. Which knee was sore on that visit is not disclosed. In his

³ [2002] QCA 163

quantum statement (exhibit 14) Mr Brooks said that this injury was to his right knee and was caused by a fall when emptying a Robo trailer on or about 7 October 1996. In cross examination it appeared that, in fact the injury to which Mr Brooks referred in his quantum statement was suffered in July 1996 as appeared from an accident report form filled out by Mr Brooks and which became exhibit 36.

- [15] I am prepared to accept that Mr Brook's left knee symptoms first became apparent at the time of the accident on 6 December, 1996. Despite this he appears to have severe degenerative change in both knees. A report of Dr Boland dated 24 December, 1997 refers to moderate osteoarthritis being present in his left knee at that stage.
- [16] A report of Dr McMeniman of 6 November, 1998 found arthritic changes in both knees although slightly more advanced in the right knee.
- [17] Both Drs McMeniman and Dr White attribute the onset of symptoms to the incident in December 1996. Dr White says that the left knee condition might never have manifested itself in symptoms if the incident had not happened while Dr McMeniman opined that it almost certainly would have been symptomatic well before trial. While not able to say positively that the knee would be symptomatic either by trial or ever, Dr McMeniman was of the view that the condition of his knees was such that Mr Brooks' daily activities would eventually have triggered symptoms in any event even if he had not fallen in December 1996.
- [18] While accepting the force of Dr White's opinion it seems to me that on the balance of probabilities and having regard to Mr Brooks' size, work and the level of degeneration he would eventually have had symptoms. Just when that would be is an arbitrary decision.
- [19] A second major issue between the parties at trial was whether Mr Brooks tendered his resignation from his employment with Ticor on 20 January 1997

as a result of his injury and its interference with his capacity to carry out his work or for unrelated reasons.

[20] At the time he was injured Mr Brooks was acting in the role of production co-ordinator. This was a temporary placement which all four shift supervisors were sharing on a trial basis. Mr Brooks was to have returned to his regular position as shift supervisor about 20 January 1997. He gave evidence that on the Friday before 20 January (17 January) he had had a discussion with his immediate superior, Mr Benjamin. Mr Benjamin told Mr Brooks that his rotation as production co-ordinator was up and he would be returning to his usual position as shift supervisor. As shift supervisor Mr Brooks would be required to walk up and down a large number of steps in the plant on a daily basis. Mr Brooks told Mr Benjamin that because of his knee problem he could not perform those duties. Mr Benjamin responded that there was no other job available at the plant. As a result of this discussion Mr Brooks said that he considered he had no choice but to resign from his employment.

[21] Mr Benjamin denied having had the discussion with Mr Brooks about which Mr Brooks gave evidence. His basis for denying it, as opposed to simply having no recall, was that Mr Brooks was on sick leave on 17 January 1997 as appears from exhibit 34. Mr Brooks was given the whole week off to undergo a biopsy in Brisbane. The defence case was that he could not in those circumstances have spoken to Mr Benjamin on the Friday. In response, Mr Brooks said that he had in fact attended the plant on the Friday afternoon to check what matters were in store for him when he returned on the Monday. The biopsy had been carried out on the Wednesday. He was discharged on the Thursday with no ill effects and was in fact well on the Friday. It was on the Friday afternoon that he had the conversation.

[22] On balance I accept that Mr Brooks was at the plant on the Friday and did have a conversation generally in the terms he alleged with Mr Benjamin.

[23] Mr Brooks relationship with Mr Benjamin was a poor one. The ill feeling seemed in part at least to stem from a close relationship between Mr Brooks

and the general manager, Mr Dean. Mr Dean took Mr Brooks into his confidence on a number of matters in advance of revealing his intentions to people like Mr Benjamin who were higher in the company hierarchy. I have the impression that Mr Benjamin believed that Mr Brooks was “too big for his boots”. Mr Dean left the company in mid 1996. After that date Mr Brooks seemed to have been of the view that Mr Benjamin was “settling the score” to a degree. A performance review in relation to Mr Brooks was carried out by Mr Benjamin and dated 3 December 1996. In the midst of a very negative review the only strong point noted by Mr Benjamin was that Mr Brooks had a “generally good attendance record”.

[24] Mr Brooks had earlier been given a formal warning over a safety issue which Mr Brooks disputed. Mr Brooks was directed to undertake some additional training which he never attended to. These seemingly petty issues appear to have poisoned the relationship between the two men.

[25] Despite all this Mr Brooks says that but for the injury he would have stayed with Ticor until retirement. Mr Benjamin has since become general manager of the plant which, had Mr Brooks remained with Ticor, might have affected this intention.

[26] Mr Brooks general disgruntlement with Ticor after Mr Dean’s departure is also illustrated by his applying for an alternative job at the Boyne Island smelter prior to leaving Ticor. The job did not pay as well as Ticor and Mr Brooks did not pursue the matter. Mr Brooks told me and I accept that the money aspect was of particular importance to him. Ticor payed better than most employers. I accept that this might have caused Mr Brooks to remain with Ticor despite a level of unhappiness which might have caused him to resign from a less well paid job.

[27] One co-employee of Ticor, a Mr Bennett, gave evidence that Mr Brooks showed him a hand written letter which Mr Brooks said was his letter of resignation. Mr Bennett did not read the document. The time at which the document was spoken about is unclear but was apparently about the time Mr

Brooks was acting as production co-ordinator. It was spoken of in the context of general discussion about both men's poor relationship with Mr Benjamin.

- [28] Exhibit 18 is a letter from Rodney Robertson & Associates to Mr Brooks dated 8 January 1997. Rodney Robertson & Associates conducted an operation known as the Mitsubishi Motorcade. This was a touring display of new Mitsubishi motor vehicles. It went to various country centres where Mitsubishi dealers were not large enough to carry a range of display models so that customers could see the current range. Mr Brooks had taken part in the motorcade at some time in the past. He gave evidence that he had contacted Rodney Robertson & Associates with a view to taking part in the Queensland portion during leave from Ticor. After he resigned he went to work for the motorcade full time for a period.
- [29] Exhibit 18 refers to Mr Brooks contact with the motorcade organiser and suggests he was inquiring about a full time position. The letter offers to transport him to Adelaide on Thursday 13 February 1997 to commence training and gives details of salary and allowances. Mr Brooks denied ever receiving the letter. I do not accept this denial. The letter of resignation dated 20 January, assuming the reference to a month's notice is intended to be four weeks would have taken the notice period to 14 February, 1997. This corresponded almost exactly with the commencement of training for the motorcade. Assuming the letter from Rodney Robertson & Associates which was dated on a Wednesday was promptly posted and received in the ordinary course of post it would have been received by Mr Brooks on either Friday 10 January or Monday 13 January. Because he was on sick leave from 13 January, Mr Brooks next working day after he might have been expected to receive the letter was 20 January which was in fact the date on which he resigned.
- [30] Having considered all of the above I conclude on the balance of probabilities as follows. Following Mr Dean's departure from Ticor Mr Brooks became increasingly unhappy largely as a result of his poor relationship with Mr Benjamin. He made enquiries concerning alternative employment and in

particular with the Boyne Island smelter and the motorcade. Mr Brooks was primarily concerned with the amount of his remuneration. His inquiries revealed that he was not likely to match his Ticor income with any other employer. As a result I find that he would have remained with Ticor for much longer than he in fact did although I suspect that eventually and particularly with Mr Benjamin's elevation to general manager his position would have become unacceptable to him.

[31] Had he not suffered the injury on 6 December, 1996 I find that Mr Brooks would have stayed at Ticor for at least a few years longer until either he found working for Mr Benjamin intolerable or his degenerating knees in fact became symptomatic. After the injury in December 1996 the combination of pain limiting his ability to carry out his duties, particularly as they related to stair climbing and his unhappiness at work made it impossible to continue. I accept that Mr Brooks had originally intended to accept the job with the motorcade only in relation to the Queensland portion which he could do during ordinary leave. The offer he received was to accompany the motorcade full time. I find that the availability of the alternative job enabled Mr Brooks to resign from Ticor and retain an income. I find, however, that he would have been forced by his injury to leave Ticor in any event within a few years as his leave entitlements and employer's patience were exhausted.

[32] Mr Brooks was 51 when injured. But for the injury and subject to his degenerative knees and the normal vicissitudes of life he might have been expected to work until about age 65. In my view the loss of the opportunity to work a full span which the accident brought about can be reflected by calculating his past loss and earning potential to age 65 on the basis of his continuing with Ticor and discounting the period by a substantial amount to reflect the probability of suffering work-life shortening symptoms in any event. I consider that this prospect can be properly reflected by discounting the nominal working life of 14 years from the date of accident by two-thirds to reflect the probability rather than possibility that his working life would, in any event, have been cut short. Having regard to the condition of Mr Brooks' knees I find that the probabilities are that his left knee would have become

symptomatic nearer to the accident than to age 65. Discounting 14 years by two-thirds gives a notional working life without the injury in December 1996 of 4.67 years. I have assessed damages on the basis that Mr Brooks would have left the employ of Ticor in about August 2001 and that his loss of income or earning capacity after that date is not causally related to the incident in December 1996. The exception relates to the knee replacement operation to which I refer below. As a result of his knee condition Mr Brooks is unfit for any moderate to heavy work and as a partly disabled worker of almost 60 years of age Mr Brooks is unlikely to be offered any significant work over and above what he is doing now in transporting new vehicles and escorting large loads on highways.

[33] As a result of symptoms appearing when they did Mr Brooks needs a knee replacement now and I accept that he intends to have the procedure done when his claim is settled and he can afford it. As a result of having the operation done now Mr Brooks will need a second replacement operation at some time in the future. This second operation is an additional cost which I consider has been occasioned by this event. I accept he would eventually have needed one operation in any event.

[34] In relation to past and future gratuitous care it was effectively conceded by the defendant that the claim of 2 hours per week was reasonable subject to the causal connection between the incident in December 1996 and the disability being established.⁴ Consistently with the approach I have taken the effects of the December 1996 incident would have been exhausted after 4.67 years and thereafter the disability from which Mr Brooks suffered would have been a disability caused by the general degeneration of his left knee. This amounts to 2 hours per week at an agreed rate of \$13.00 per hour. The claim for gratuitous care in future should be limited to the extra care relating to the additional knee replacement. I accept that the amount proposed by the defendant is appropriate.

⁴ see transcript page 100, line 30 to page 101, line 20.

[34] In the light of the above discussion I assess Mr Brooks damages as follows:

Pain and suffering	30,000.00
Interest @2% for 6.5 years ⁵	3,900.00
Past economic loss ⁶	160,770.42
Interest on that sum less \$22,477.06 for 6.5 years @ 5%	44,945.34
Past loss of superannuation at 7%	11,253.93
Future economic loss ⁷	2,400.00
Loss of future superannuation @ 9% ⁸	Nil
Past gratuitous care	6,313.84
Interest on past care @ 4% for 6.5 years	1,641.60
Future gratuitous care ⁹	2,500.00
Special Damages (Paid by WorkCover)	6,202.16
Special Damages paid by plaintiff ¹⁰	4,000.00
Interest on special damages @5% for 6.5 years	1,300.00
Future medical expenses	Nil
Future surgery	20,000.00
Future pharmaceutical	2,500.00
<i>Fox v Wood</i>	6,396.73
SUBTOTAL	304,124.02
Less WorkCover refund	35,075.95
TOTAL	269,048.07

[35] I give judgement for the plaintiff against the defendant in the sum of **TWO HUNDRED AND SIXTY-NINE THOUSAND AND FORTY-EIGHT DOLLARS AND SIXTY THREE CENTS (\$269,048.07).**

⁵ As the discount of two thirds globally for the likelihood the plaintiff would have a symptomatic knee condition in any event results, in effect in a compensable period expiring before trial interest is awarded on the whole sum.

⁶ This figure is derived as follows. I have added the net figures from exhibit 40 up to and including the 1999-2000 financial year together with one-sixth of the amount for 2000-2001. This represents 4.67 years from 1 January 1997. The total is \$174,173.59. I have deducted the earnings for the same period from page 7 of the quantum statement (not including sums attributed to WorkCover or arrears from Ticor). I have included in earnings one-sixth of the Pilot Escort Services sum from the 2000-2001 financial year but excluded Eagles Cranes as it falls wholly outside the period of 4.67 years from 1 January 1997.

⁷ This represents approximately three months loss of income from Pilot Escort Services while recuperating from the knee replacement operation.

⁸ Mr Brooks is and is likely to remain self employed. Superannuation is not a factor.

⁹ A global sum to cover the period of rehabilitation from knee replacement.

¹⁰ The claim in the quantum statement is exaggerated. It is agreed Coversyl and Norvasc should not have been included in the pharmaceuticals. I allow a global sum.