

SUPREME COURT OF QUEENSLAND

CITATION: *Mossop v Hague & Ors* [2003] QSC 233

PARTIES: **JEREMY MOSSOP**
(Plaintiff)
v
ANTHONY ROY HAGUE
(First Defendant)
and
NARELLE TOWERS
(Second Defendant)
and
NOMINAL DEFENDANT
(Third Defendant)

FILE NO/S: S.191 of 2003
D.225 of 2000

DIVISION: Trial

PROCEEDING: Application for Damages

ORIGINATING COURT: Supreme Court at Townsville

DELIVERED ON: 25 July 2003

DELIVERED AT: Townsville

HEARING DATE: 16,17,18 July 2003

JUDGE: Cullinane J

ORDER: **Judgment for the plaintiff against the defendant in the sum of \$306,590.**

CATCHWORDS: TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – APPORTIONMENT OF DAMAGES – where plaintiff was injured in a collision – where plaintiff is now affected by physical injuries and psychiatric condition – whether defendant is liable in damages for both

COUNSEL: S Durward SC for the plaintiff.
C Newton for the defendant.

SOLICITORS: Vandeleur & Todd (Innisfail) for the plaintiff.
Gadens Lawyers (Cairns) for the defendant.

- [1] The plaintiff who was born on 27 July 1968 was injured when a vehicle driven by him was, while stationary, struck from behind at an intersection in Townsville on 4 June 1998.
- [2] According to the plaintiff the force of the collision was such as to force his seat backwards and cause it to collapse. It was necessary for him to kick open the door in order to extricate himself.
- [3] The cause of action is admitted.
- [4] According to the plaintiff he felt pain to his neck and lower back. He was taken to the Townsville General Hospital where x-rays were taken but he was not admitted. He says that following this his neck and back were very stiff and sore. He returned to Perth where he was living, going back there approximately one week after the accident.
- [5] It is his case that he suffers a disability of the upper and lower spine as a result of the accident and, associated with this, headaches. It is also his case that he suffers psychiatric consequences as a result of the accident.
- [6] The plaintiff was educated to Grade 10, finishing his schooling in 1984. He is a fitter and turner by trade.
- [7] The plaintiff has a history of sporting activity. Whilst working as a fitter and turner he commenced training as an aerobics instructor and by the time of the accident was deriving his income from this.
- [8] The plaintiff commenced running in triathlons when he was about 21, competing in this event regularly in North Queensland. It is clear that as a result of his activities, he maintained a high level of fitness.
- [9] It was contended on behalf of the defendant that the plaintiff should be regarded as a generally untruthful person whose evidence could not be relied upon. Indeed at one point in the cross-examination the words "pathological liar" were used. This submission was based upon, amongst other things, the contents of a report from the Mills Street Centre at Perth where he was admitted following an apparent suicide attempt. He says that he has no recall of being at the Centre, which is also referred to as Belmont. There is some information in the nature of personal details included in the report which the plaintiff acknowledges is plainly incorrect. The circumstances in which the information was obtained are not entirely clear. In the absence of such evidence and evidence of the plaintiff's condition at the time (if he was in fact the source of the information) I would not be prepared to reach any conclusion adverse to the plaintiff on this general issue upon the basis of the contents of the report.
- [10] There was also evidence from Dr Reid, a neurologist, who said that the plaintiff had denied that he had ever been married. This is plainly incorrect and such denial would, it seems to me, be a rather pointless one. I do not know what to make of this evidence and wonder whether there may have been some misunderstanding.
- [11] Dr Graham, an orthopaedic surgeon, says that the plaintiff told him that he (the plaintiff) was a professional triathlete. Whilst the plaintiff was very heavily

- involved in triathlons at the time, he was not a professional. I accept that the plaintiff told Dr Graham this.
- [12] As will be seen I think in relation to some of his complaints he has overstated them. Nonetheless neither the evidence of Dr Reid or Dr Graham would in my view justify the conclusion that the plaintiff, in a general sense, was a person whose evidence could not be relied upon.
- [13] I am satisfied that the plaintiff, at the time of the accident, was a very fit man who placed a great store upon his personal fitness and I accept his evidence and the evidence of Mrs Hansord, a friend of his, that at the time of the accident he was engaged in aerobic instructions at a number of different fitness centres.
- [14] In evidence before me he gave the impression of being a somewhat listless man, something which is very much at odds with his own evidence of his pre-accident life and very much at odds with the way he was described by Mrs Hansord and also Miss Batterham, who had known him prior to the accident and had attended his classes and with whom he subsequently formed an association for a period. Mrs Hansord knows him well and indeed was in the vehicle with him at the time of the accident. He currently lives with her and her husband.
- [15] The plaintiff had moved to Perth in 1995, about a year or so after the breakdown of his marriage. Apart from a period of some disruption following the breakdown of his marriage he has a good work history. When he arrived in Perth he worked for a period as a fitter and turner before commencing to earn his income as an aerobics instructor.
- [16] The taxation returns do not, I accept, disclose all of his earnings as an aerobics instructor. He said, and I think it is correct, that he received some income in cash which he did not disclose. It is difficult to accept, as the defendant's counsel conceded, that he would have worked for the rate that he disclosed in the tax returns when he could have earned significantly more than that in his trade.
- [17] I am satisfied that at the time of the accident the plaintiff was a very fit, active and highly motivated man making his living as an aerobics instructor. He, it would seem, attracted people to his classes and was a popular figure with his students. I think it likely that he would have continued in this field for the foreseeable future, always having the option to return to his trade if he wished.
- [18] It is common ground between the orthopaedic surgeons who gave evidence that the plaintiff has soft tissue injuries to the cervical, thoracic and lumbar regions as a result of trauma sustained in the accident. Dr Graham, whose evidence I accept, says that this constitutes a seven per cent impairment of the spine overall. Dr Nutting gave evidence on behalf of the defendant and was in broad agreement with Dr Graham as to the disability, although he expressed it in somewhat lesser percentage terms.
- [19] The plaintiff complains of regular and constant headaches since the accident and at one time suggested that he had severe disabling headaches (which he called migraines) daily.
- [20] I heard evidence from Dr Reimers and Dr Boyce, both neurologists on behalf of the plaintiff and Dr Reid, a neurologist on behalf of the defendant.

- [21] Both Drs Reimer and Boyce thought that the plaintiff sustained headaches as a result of the injury to his cervical spine and both thought that these would be permanent. Dr Boyce described them as “episodic neurological impairment” and regarded them as constituting a twenty per cent loss of function of the whole person. He says that the exact aetiology of headache and whiplash is not known but it is clear that there is an association. Each recorded the plaintiff as suffering headaches “virtually daily” with severe headaches more irregularly.
- [22] Dr Reid emphatically rejected any link between the headaches which the plaintiff claims and the accident. I prefer the opinions of Dr Reimers and Dr Boyce to that of Dr Reid who, I thought, was inclined to be somewhat argumentative.
- [23] Whilst I think the plaintiff’s statement that he at all times suffers from headaches and each day suffers from migraine headaches exaggerates the situation, I am satisfied that he does suffer from chronic headaches with severe headaches from time to time, and this is a significant disability which has, together with his spinal disabilities, limited his activities.
- [24] Mrs Hansord records the plaintiff as complaining to her after the accident of headaches as does Miss Batterham.
- [25] The plaintiff, following the accident and his return to Perth, attempted to resume his aerobics classes but found that he could not physically perform the workouts involved. He says that he was anticipating that the pain would get better but in fact it got worse. He started trying to teach classes without actually participating or demonstrating the activities involved. This, according to the plaintiff’s statement, is something which the centres who provide the classes frown upon and it became necessary, he says, to give the more high impact classes to other instructors to take over. He persevered with what he describes as the lower impact classes for some months but had to give those up also. It is common ground that he is not capable of performing this work.
- [26] He returned to his trade working as a foreman fitter and turner for a firm in Perth. This work was heavy and the work conditions were hot and noisy. He says that he suffered pain in the neck and back and suffered severe headaches which required him to take pain killers to get relief. He worked for the firm from late June 1999 until 31 August 2000. He then obtained work as an advertising sales consultant with a newspaper in Perth and then for another paper in a similar position. Both of these positions were for very short periods and he says that he lost the latter position because he couldn’t meet the sales target. In the case of the former position the newspaper was merging with another business and, in the face of obvious redundancies to come, he left.
- [27] The plaintiff says by this time he was suffering financial problems.
- [28] He has since worked as a fitter and turner between January and May 2001. This work involved working on rebuilding electrical motors of large tip trucks used on mine sites. He was there for some 15 weeks but was put off, being told there was insufficient work. The plaintiff says that he thought he was able to perform that work reasonably well as the duties involved were somewhat lighter than most fitting and turning positions. He then obtained employment with another firm as a fitter and turner. This position was obtained through his brother and he was there

for some three weeks and says that he suffered constant anxiety and lack of confidence in his ability whilst performing that work.

- [29] His only other employment has been some casual work for a kitchenware shop (Obsessions) obtained through a man who he had become friendly with. He received some cash for this work which Mr Ottaviano, the principal, estimates at about \$400 and the plaintiff a somewhat greater amount. The plaintiff says that he had trouble coping with the work and with maintaining a reasonable relationship with customers.
- [30] The plaintiff had formed a relationship with a woman which had encountered difficulties by about mid 2000. In late 2000 the plaintiff left the house and it would seem his attempts to effect a reconciliation were unsuccessful. It was in these circumstances that he says that he attempted suicide by taking sleeping tablets which resulted in his admission to the hospital which has been referred to.
- [31] He had consulted, not long before his admission, a psychiatrist, Dr Kostov. Dr Kostov saw him first on 6 December 2000 and has seen him on a number of occasions throughout 2001 and into 2002. He has also seen him recently.
- [32] Dr Kostov gave evidence. He thought that at the time he first saw him the plaintiff was showing signs of anxiety and of depression. His assessment was of an adjustment reaction with dysthemia, that is, low moods. He thought that the plaintiff had a highly organised obsessional or perfectionistic personality.
- [33] The plaintiff is being treated by anti depressant drugs by Dr Kostov, who thinks that these have had a good effect. He thinks the medication should continue. When he saw the plaintiff recently he says this was one of the worst presentations, caused by what he describes as “the pending issues which have to be resolved” which I take to be a reference to the litigation.
- [34] Dr Kostov provided a report which is very brief and which makes it clear that he has treated the plaintiff only in relation to the psychiatric consequences of the events which occurred at about the time of the break up of his relationship and what followed. He says that he has not at any time addressed legal issues and in evidence said that he has refused to do so, notwithstanding that he has been approached by both parties. He was aware of the motor vehicle accident and accepted in cross-examination that it was possible that this had had a major impact upon the plaintiff’s life. However as I have said, he was at pains to make clear what his interest was. To use his words, “the circumstances that immediately led him to me was (*sic*) the issues of the breaking up of the relationship and the complexities and problems that were associated with it at the time”.
- [35] One would expect in the course of such treatment an assessment would have been made as to the causes of the plaintiff’s condition but Dr Kostov was, it seems to me, ultimately not prepared to express any opinion about these and in particular any role the motor vehicle accident might have played, except to concede that it may have had a significant impact upon his life.
- [36] Apart from the psychiatrist (Dr Piirti) who was the admitting psychiatrist upon the plaintiff’s admission to the Mill Street Centre, and who has not seen him since that time and who was not asked to express any opinion as to his present position, the only psychiatrist who has seen him is Dr Morkell, a psychiatrist of Perth who has seen him on two occasions.

- [37] It is Dr Morkell's opinion that the plaintiff suffers a major depressive disorder and that there is a clear connection between this and the motor vehicle accident in 1998. According to Dr Morkell, following the accident the plaintiff underwent a significant change in his life functioning, moving from what he saw as his ideal occupation back into an area which was not where he had intended to earn his living in the future. In addition he suffered ongoing symptoms of pain in the spine and headaches. This significantly impacted upon his perception of himself. He refers to the plaintiff as suffering "narcissistic injury of not being active and as physically capable as he previously was". He says that he will have to continue with psychotherapy.
- [38] It would appear that when he was a child, and following the break up of his parents' marriage, the plaintiff attempted suicide. Nonetheless Dr Morkell expresses the view that he had no prior psychiatric history nor was there anything in his history that could be regarded as constituting a particular predisposition to develop major depression.
- [39] There is some difference between Dr Kostov and Dr Morkell as to the plaintiff's psychiatric condition but I do not think that anything significant turns upon this. Dr Morkell thinks that his symptoms warrant the description of a major depressive disorder whilst Dr Kostov describes his condition as an adjustment reaction with dysthymia, that is, low moods. Each involves depressive symptomatology and he is receiving anti depressant medication.
- [40] It was the defendant's case that the plaintiff's psychiatric problems are to be ascribed to the break up of his relationship. Dr Morkell says that the accident was the precipitating cause of his depression which developed over a period of time. He thinks that the events of late 2000 can be regarded as an acute episode arising out of particular circumstances but that the condition already existed and had been precipitated by the accident.
- [41] The evidence on the subject is not entirely satisfactory. The plaintiff, it would appear, consulted a general practitioner a number of times in Perth and there is a claim which is admitted in relation to these attendances. Neither party saw fit to place the evidence about the plaintiff's complaints during this period before the court.
- [42] Miss Hansord and Miss Batterham both gave evidence of the plaintiff appearing to be in a depressed state. However both of them had only relatively minor contact with the plaintiff following the accident over a relatively short period and their observations largely, but not entirely, relate to the period following late 2000. Nonetheless they were asked about the period when the plaintiff had attempted to return to aerobic classes and their evidence in relation to that is that there was a marked change in the plaintiff's personality.
- [43] Although not entirely without some hesitation I cannot in the end result see any good reason why Dr Morkell's evidence, which is the only evidence from a psychiatrist on this subject, should not be accepted. As I have said, Dr Kostov's evidence does not seem to me to be in conflict with this and Dr Piirti did not give evidence touching on this subject except to say that the team of which she was a member did not think that he had a psychiatric condition at the time of the admission in late 2000.

- [44] I accept therefore that the psychiatric condition which the plaintiff suffers from (which as I have said is described somewhat differently by Dr Kostov on the one hand and Dr Morkell on the other) is a consequence of the motor vehicle accident sustained by him.
- [45] Dr Kostov thinks that if he continues on the medication his condition should be a stable one although there will be the risk of flare-ups in the condition from time to time. He thinks that, generally speaking, the plaintiff's capacity to earn an income would be determined by any physical limitations rather than psychiatric problems, although on my understanding of the evidence it may be that his psychiatric problems will constitute a disadvantage to him in the workplace and may create difficulties if and when any such flare-ups occur.
- [46] Turning to the assessment of damages, the plaintiff's spinal disabilities are significant but are of a soft tissue nature. He has and will continue to suffer significantly from headaches and he has the psychiatric difficulties that I have referred to. There has plainly been a substantial impairment of his capacity to enjoy life and of his activities generally.
- [47] It was common ground between the parties that in the event I ascribe the psychiatric problems to the defendant's negligence an appropriate award of general damages will be \$50,000 and I accept this. I assess the plaintiff's general damages in the sum of \$50,000. I allow interest in the sum of \$25,000 for 5.1 years at two percent producing a figure of \$2,575.
- [48] So far as past economic loss is concerned the plaintiff claims this at the sum of \$443 per week. This is a significantly greater sum than what was disclosed in his tax returns but was based upon the plaintiff's own evidence. I think it likely, and the defendant was not inclined to dispute this, that the plaintiff would have been unlikely to have continued working for \$300 per week as the tax returns disclose. Any claim based upon undisclosed income necessarily falls to be approached with some scepticism. Nonetheless there is evidence from Mrs Hansord which provides some support. Obviously she would not be in any position to confirm the precise details which the plaintiff swears to of the number of hours that he worked at each particular club, but she does speak of seeing him in a number of different clubs taking classes during this time. She speaks of being surprised at his ability to carry out such concentrated programs at the various clubs to which she refers and which involved, on her estimate, not less than 20 classes per week.
- [49] I propose to allow a loss of income in the sum of \$400 per week for 265 weeks. This produces a figure of \$106,000. The plaintiff has since that time earned some income from the various employers to whom I have referred. There is some doubt about how much he received when working at Obsessions and there is some evidence from Miss Batterham which suggests that he may have performed some limited aerobics work during the time they were together. Doing the best I can I assess his earnings until the present at a figure of \$53,000 leaving an amount of \$53,000 which I allow for past economic loss. The plaintiff has in addition to the income received also received some \$32,386.60 by way of Social Security. I allow interest on the difference between \$53,000 and \$32,386 (\$20,614) at 5% for 5.1 years producing a figure of \$5,256.
- [50] I allow superannuation on past loss of income at seven per cent resulting in a figure of \$3,710.

- [51] So far as the future is concerned, I accept that the plaintiff has significant limitations upon his capacity to earn an income arising from the physical disabilities that Dr Graham refers to. However I think it is clear from what Ms Purse, an occupational therapist says, and I infer from what Dr Graham says, that the plaintiff has a residual earning capacity in other areas which would involve lighter work and which would not expose him to the pain and discomfort in his lower back or from which his headaches would be likely to preclude him. There must also be taken into account of course that the plaintiff's psychiatric problems may from time to time interfere with his capacity to work but generally I accept from what Dr Kostov has said that provided he continues to take his medication, this should enable him to function reasonably well.
- [52] Thus whilst he must be regarded as having a substantial impairment of his earning capacity having lost the capacity to engage in what was plainly his preferred area and also the area in which he has trade qualifications, he nonetheless has a significant range of employment open to him.
- [53] I think that the work of an aerobics instructor is work that the plaintiff is not likely to have pursued during the whole of a working life given the intense physical effort involved and I think it also likely that he may have ceased the heavy work of a fitter and turner and perhaps moved into other areas if he had returned to his trade, such as supervisory work and any lighter work available in the field. He may be able to do, as Dr Graham suggested, supervisory work, but absent the capacity to perform the ordinary work of a fitter and turner at this time he would be deprived of one of the avenues by which people generally move from the hard physical work of a tradesmen to supervisory work, namely experience and length of service.
- [54] After taking into account the various contingencies and vicissitudes involved and applying appropriate discounts for these I allow the sum of \$220 per week for 25 years producing a figure by reference to the discount table of a sum of \$163,759.
- [55] I allow superannuation in respect of future economic loss at nine percent on \$145,000 producing a figure of \$13,050.
- [56] There is a claim described as out of pocket expenses. These are in my view established in the sum of \$6,747 and I allow interest at five per cent on these, producing a figure of \$1,993.
- [57] The remaining claims relate to future medical and pharmaceutical expenses. There is little dispute between the parties about this. I think the defendant's slightly lower figure is to be adopted as some allowance ought to be made for a reduction in psychiatric consultations in the future. I allow \$6,500 under this head.
- [58] The total of damages then is \$306,590.
- [59] I give judgment for the plaintiff against the defendant in the sum of \$306,590.