SUPREME COURT OF QUEENSLAND

CITATION:	***Hladky v Mackay City Council*** **[2003] QSC 307**
PARTIES:	**ANDRE WOLFGANG HLADKY** (Plaintiff) v **MACKAY CITY COUNCIL** (Defendant)
FILE NO:	S130 of 2002
DIVISION:	Trial Division
DELIVERED ON:	18 September 2003
DELIVERED AT:	Mackay
HEARING DATE:	29 and 30 July 2003
JUDGE:	Dutney J
ORDERS:	**Judgement for the plaintiff in the sum of One Hundred and Fifty-Seven Thousand Four Hundred and Twenty-Seven Dollars and Ninety-Nine Cents ($157,427.99).**
CATCHWORDS:	NEGLIGENCE – WORKERS' COMPENSATION - SAFE SYSTEM OF WORK – LIABILITY – where a system of work in place – where defendant made no attempt to make the existence of the system known to the plaintiff – where the plaintiff in fact did not know about the system – where injury foreseeable NEGLIGENCE – WORKERS' COMPENSATION - SAFE SYSTEM OF WORK – QUANTUM - where back pain experienced by plaintiff before the accident – whether back injury accident related or a pre-existing condition aggravated by the accident *WorkCover Act* 1996, paragraphs 312(1)(a), (c), (e), (f) and (g)
COUNSEL:	Mr BA Harrison for the Plaintiff Mr RC Morton for the Defendant

SOLICITORS: McKays Solicitors for the Plaintiff
HBM Lawyers for the Defendant

[1] Andre Wolfgang Hladky is a 50 year old fitter and turner formerly employed by the Mackay City Council. He was born on 11 August, 1953.

[2] Mr Hladky was injured in a work accident on 29 May, 2000. He was working under a slasher when the slasher moved causing him injury.

[3] Immediately prior to the incident in which Mr Hladky was injured the slasher was supported above the ground at the front and rear. The front end was connected to the tractor. It was attached to the hydraulics of the tractor which were raised. Two tripod based jacks supported the rear. An apprentice had been working on the gear box of the slasher. That work was complete and the gear box was being re-fitted. The gear box was positioned on top of the slasher but was connected by bolts which came up from underneath and also held the slasher blades. Mr Hladky was attending to the bolts.

[4] The evidence discloses that the hydraulics on the tractor slipped causing the front of the slasher to drop a certain distance. This sudden movement altered the point of pressure on the jacks under the rear end of the slasher and they fell out from the rear of the slasher causing that end to fall onto Mr Hladky and cause him injury.

[5] The system for supporting the slasher was not the system usually employed by the council. Mr Hladky himself had little experience with slashers. He ordinarily worked on maintaining equipment at the water treatment plant and sewerage works.

[6] Mr Hladky came to be under the slasher in the following way. On the morning of the incident he had been working on the fountain pump at the memorial pool in South Mackay. On his return to the workshop he saw the slasher jacked up in the manner I have described blocking the entrance to the

workshop.

[7] Mr Hladky's supervisor was a Mr Norm Waterhouse. Mr Waterhouse was working on a lathe inside the workshop. He directed Mr Hladky to go to the sewerage treatment works to look at a pump and take the apprentice, Kurt, with him. At that stage the apprentice was working on the gearbox of the slasher. When told of the direction Kurt told Mr Hladky that he could not go to the sewerage treatment works until he had replaced the gearbox and blades on the slasher. Hearing this, Mr Hladky returned to Mr Waterhouse for further directions. Mr Waterhouse told Mr Hladky to help Kurt finish on the slasher and then take him to the sewerage treatment works.

[8] Mr Hladky slid under the slasher to help with the tightening of the bolts. Mr Hladky had never received any instruction on how to secure a slasher before working underneath. He had worked under slashers on a very few occasions before. On each of those occasions the slasher had been outside at the back of the workshop. At that location there was a ramp with a sloping side up which the slasher could be backed and a straight vertical edge over which the slasher would protrude if backed far enough. In that position the tractor hydraulics were lowered to the ground so that the slasher was braced on the ground at the tractor end. Connecting arms from the slasher to the tractor rendered the slasher immoveable. Mr Hladky had only seen the slasher raised in the workshop on one occasion. Then it had four jacks under it – one at each corner. Again it was immoveable.

[9] For work in the field each slasher was provided with a detachable support which was stored on the top plate and which could be bolted onto the rear end of the slasher to serve the purpose of a jack. When bolted to the slasher it was incapable of being dislodged by any movement of the tractor hydraulics. Mr Hladky was unaware of this device. He had never received any instruction in its use. He had never seen it used. No evidence was called by the defendant to contradict any of this evidence given by the plaintiff. I accept this evidence.

[10] The operator of the slasher and the tractor to which it was attached was a Mr Bickey. He gave evidence. Mr Bickey had been driving the particular tractor exclusively for about 14 to 16 months. He said that he had observed a noise associated with the hydraulics when tractor was turned off in the past. When the tractor was turned off he would hear a creeping noise and the hydraulics would drop. He assumed this was because of the loss of hydraulic pressure when the pump which controlled the hydraulics was switched off. A few days before Mr Hladky's accident he had reported this occurrence to the health and safety officer. The nature of his complaint was that the hydraulics on this particular tractor were falling down. Mr Bickey did not pass this information on to the workshop staff on the day of the accident.

[11] Under cross examination Mr Bickey confirmed that the creeping noise and the drop in the hydraulics occurred almost immediately after the tractor was turned off. The noise lasted for a few seconds.

[12] Mr Bickey was also under the slasher assisting to position the bolts when it collapsed. Immediately before it fell he heard the creeping noise he associated with the fall in the hydraulics. Mr Bickey lost consciousness in the incident.

[13] Mr Bickey also gave evidence about the use of the ramp to work under the slasher. When the slasher was reversed over the edge of the ramp the hydraulics were lowered so that the end of the slasher on the ramp was braced on the ground. The overhanging end was supported by a fixed pole on the fly-wheel arm so that it was also effectively supported on the ground. No part of the slasher was supported by the hydraulics in those circumstances.

[14] I accept Mr Bickey's evidence as set out above.

[15] No evidence on liability was called for the defendant.

[16] The defendant's case on liability was that it had made a genuine and reasonable attempt to put in place an appropriate system of work to guard against injury arising out of events that were reasonably, readily foreseeable.

That system involved the use of the fixed support available to bolt to the rear of the slasher which would have rendered the rear entirely stable. The plaintiff was alleged to be aware of the system and failed to use it.

[17] While there was indeed a system provided by the defendant to secure the rear of the slasher and which would in all probability have prevented the accident occurring, I am satisfied that the defendant made no attempt to make the existence of the system known to the plaintiff. I also find that the plaintiff did not in fact know of the system. When he slid under the slasher to assist the apprentice, Mr Hladky was obeying a direct instruction from his superior. That superior was responsible for the slasher being supported in the way it was. When Mr Hladky commenced to assist the apprentice the decision to support the slasher in the way it was had already been made and implemented independently of him.

[18] I am satisfied that it is reasonably, readily foreseeable that if the tractor, and particularly the pump that operates the hydraulics is turned off there could be a reduction in hydraulic pressure over time. This reduction in hydraulic pressure could result in a sudden drop in the height of the of the attached slasher. Such a sudden drop could cause a loose support such as a jack to fall out, leaving the rear unsupported and unstable. Since it was known that there were such sudden drops when the tractor was first turned off it does not seem to me to be unforeseeable that there might be subsequent drops caused by gradually reducing hydraulic pressure after the motor had been turned off for some time. The system of bolting the support provided with the slasher to the fly wheel arm seems to contemplate precisely such an eventuality.

[19] The defendant relies on a number of the provisions of s312(1) of the *Workcover Act* 1996. In particular it relies on paragraphs (a), (c), (e), (f) and (g). The findings I have made dispose of all of these.

[20] The requirement that the employer make a genuine and reasonable attempt to put in place an appropriate system of work to guard the worker against injury arising out of reasonably foreseeable events, must be a system applicable to

the particular worker and the particular event. It is not enough that the employer create a system capable of preventing the injury, as is the case here, if the worker is not informed about it and it is not employed in the particular case. A system about which the relevant person is not told and which is not in use when the worker is asked to perform the task which results in the injury is no system for the purposes of s312(1)(a).

[21] I am satisfied that Mr Hladky had no knowledge that the slasher might collapse nor any reasonable means of knowing. On the evidence, he knew nothing relevant about slashers or the propensity of the tractor hydraulics to slip if the engine was turned off. He received no instruction. The slasher was set up before he was asked to work on it. I am satisfied that in the circumstances he had no reasonable means of knowing that the actual and direct event giving rise to the injury might happen.

[22] It was not reasonable for Mr Hladky to use a support arm about which he was unaware. I am thus satisfied that Mr Hladky did everything reasonably possible to avoid sustaining the injury.

[23] I am satisified for all the reasons I have traversed that the injury was not solely the result of inattention on Mr Hladky's part, whether momentary or otherwise.

[24] I am satisfied that the injury was caused by the negligence of the defendant in setting up the tractor and slasher in such a way that it was foreseeable that a person working under it might be injured in the way Mr Hladky was, and in failing to use the fixed support provided for the purpose. I further find that it was negligent of the defendant, Mr Waterhouse, to direct Mr Hladky to work under a slasher which was neither supported in accordance with the defendant's own system nor securely supported. I do not consider this finding relates to the system of work but to a specific direction to Mr Hladky to perform an unnecessary, dangerous act when the risk of his suffering injury was foreseeable.

Quantum

[25] As a result of the incident Mr Hladky suffered fractured left ribs, a haematoma in the lower small bowel and a suspected haematoma adjacent to the liver. He was admitted to Mackay Base Hospital for three days. He received morphine for pain relief. At the time of the event Mr Hladky believed he would die by being crushed by the weight of the slasher. His breathing was restricted by the weight. He was pulled from under the machine and had to wait about 20 minutes for a ambulance. His breathing difficulty continued during this time and he experienced severe chest pain, presumably because of the rib injury. While in hospital Mr Hladky commenced to feel a burning sensation in his left anterior thigh. After being discharged he continued to notice numbness in his left upper thigh. At times he had sensation as if a hot iron had been placed on his leg. He continued to have abdominal pain, problems passing wind and night sweats. The sensation in the left thigh has continued but does not affect the function of the leg.

[26] Mr Hladky experienced pain in his lower back about a month after the accident. It commenced as pins and needles in his feet and became intermittent pain. By trial it was constant. The first post incident manifestation of the back problem was noticed while Mr Hladky was jogging.

[27] One of the critical issues in the trial in relation to quantum concerned this back pain. The pain is now quite debilitating and would prevent Mr Hladky performing the work he was doing when injured.

[28] Mr Hladky had experienced back pain before the incident. Before the incident from time to time Mr Hladky had suffered "real sharp pains" in the same area of his back which causes him trouble now. Mr Hladky sources the commencement of these symptoms to an occasion when he and another worker were lifting a heavy gearbox with a crow bar. That event was about six months before the slasher incident. Thereafter he suffered intermittent pains. After the first occasion the pain could be triggered by quite trivial events such as bending over and washing his hands. The pain might occur a

couple of times in a day and then not for a period of days. The issue that arises in light of this evidence is whether the plaintiff's back injury is accident related or whether it is the inevitable and gradual progression of a pre-existing condition, albeit aggravated to some degree by the slasher incident. The plaintiff's case was that he suffered a discrete injury to the sacroiliac joints in the incident.

[29] The preponderance of the orthopaedic evidence does not support any permanent, discrete injury to Mr Hladky's back in the slasher incident. Drs Blue and Bendeich both rejected that suggestion. Dr Bendeich specifically tested Mr Hladky's sacroiliac joint and found no evidence of pain. Dr Blue did not specifically test for sacroiliac pain presumably because he did not consider such a test indicated. Dr Blue commented, however, that if the sacroiliac joint had been injured there would have been pain when Dr Bendeich made Mr Hladky hop during the examination. Dr Blue saw Mr Hladky on 7 August 2000. Dr Bendeich saw him on 29 May 2000.

[30] Dr Cook who saw Mr Hladky in September 2002 took the contrary view. He considered the mechanics of the incident would have resulted in soft tissue injury to the capsule and ligaments of one or both sacroiliac joints as well as aggravation of the existing degenerative change which Dr Cook considered mild for a man of Mr Hladky's age. Dr Cook attributed a 5% disability to the sacroiliac joint pain.

[31] Having regard to the description of the onset of symptoms in Mr Hladky's back about which he gave evidence and the absence of symptoms consistent with sacroiliac joint damage in the examinations of the first 2 orthopaedic surgeons, I am not persuaded that there is in fact any accident related condition in relation to the sacroiliac joints at least of a degree which would affect Mr Hladky's ability to work.

[32] That finding does not resolve the issue of Mr Hladky's severe level of disability. Mr Hladky claims that he also suffers from a post traumatic stress

disorder ("PTSD"). Again the existence of this condition is disputed.

[33] The evidence disclosed some concern about Mr Hladky's level of alcohol consumption. The defendant's submission was that I would be satisfied that the plaintiff's present psychiatric condition is a result of substance abuse. Mr Hladky suffers from Hepatitis C. His history in the 1970's includes intravenous heroin use in the Netherlands and later in that decade on his return to Australia, snorting of heroin. He was also a marijuana user in that same period. Mr Hladky denies use of illegal substances since the late 1970's. Since that time his use of alcohol has been sufficiently high to induce his general practitioner's concerns to be noted in the medical records.

[34] Mr Hladky's first post accident psychiatric referral was to Dr Alroe on 10 October 2000. Dr Alroe saw Mr Hladky at the request of WorkCover in relation to a possible return to work. The information provided to Dr Alroe suggested the incident was a relatively minor one – certainly not life threatening. He was accordingly not concerned to look for any symptoms consistent with PTSD. He did not detect such symptoms although he conceded that had he been aware of the potential life threatening nature of the incident he would have looked for them. The next psychiatrist chronologically to examine Mr Hladky was Dr Athey on 18 June 2001. He diagnosed PTSD. Between Drs Alroe and Athey Mr Hladky's general practitioner, Dr Ferguson, had also diagnosed PTSD but both parties asked me not to place any weight on Dr Ferguson's opinion.

[35] Mr Hladky was next referred to Dr Lawrence on 15 October 2001. Dr Lawrence did not accept that the plaintiff suffered PTSD. At most she thought he might have an "adjustment disorder with anxious mood" but I have the impression she does not really believe he even has that.

[36] After Dr Lawrence the plaintiff was examined by Dr James. Dr James also thought he was suffering PTSD. After this number of examinations, however, I have concerns that if Mr Hladky was not presenting genuinely he would be sufficiently experienced to give an account of the type likely to give the

impression he was suffering a condition he was not. The defendant's counsel urged this finding on me particularly in light of some difference in the description of the intrusive dreams Mr Hladky claimed to be having.

[37] Because of my overall impression that the plaintiff was being genuine I am persuaded that I should prefer Dr Athey to Dr Lawrence. The plaintiff seemed to me to be willing to make a number of concessions against interest particularly in relation to his back pain and I thought he was being truthful. I dismiss Dr Alroe's report because he was misled as to the nature of the incident and did not relevantly investigate PTSD as he readily conceded.

[38] One of the factors influencing Dr Lawrence was an apparent inconsistency between Mr Hladky's stated recent abstinence from alcohol at the time of the interview and the results of testing. The test results might however have been consistent with a binge drinking episode some few weeks before followed by the few weeks of abstinence about which Dr Lawrence was told. The apparent inconsistency was a significant factor in Dr Lawrence ultimately rejecting the reliability of Mr Hladky's reported PTSD symptoms and thus rejecting the diagnosis. There was evidence which would have supported the innocent explanation in relation to the test results.

[39] Because of my general acceptance of Mr Hladky's genuineness I consider some comfort can be taken from Dr James' confirmation of Dr Athey's diagnosis. On balance, I accept that the plaintiff is suffering from PTSD.

[40] The evidence of Drs Athey and James is that the PTSD renders the plaintiff unfit for work as a fitter and turner. The back injury has a similar result but was on my findings only temporarily aggravated by the incident. Both conditions are permanent on the evidence. Neither condition renders Mr Hladky unemployable. Both result in a restriction on the range of activity open to him. Bearing in mind Mr Hladky's age and the fact of the double disability I consider that he is practically unemployable in that he is unlikely to find an employer willing to take him on even in an occupation he is physically

and mentally capable of performing.

[41] There was some debate about why Mr Hladky ceased work with the defendant. I accept that he could not competently work as a fitter and turner doing the work he had done before the accident. I accept he could have done another job with the defendant for which he was qualified at the water treatment plant but no position was available. He had become something of a figure of fun in the workshop where workmates would creep up to him and make noises to frighten him.

[42] I accept that Mr Hladky remained at the council out of financial necessity until he received an incapacity payout. He was then able to leave. I accept that he was in fact unable both physically and psychologically to properly do the work for which, until then, he was being paid. I accept that if he had not been injured he would still have been forced to resign because of his degenerative back condition. I am not satisfied he would necessarily have resigned as early as he did if he did not also have the psychiatric problems of PTSD and the difficulty with workshop environments. How much longer he would have stayed is purely conjecture. For that aspect I propose to allow a global figure roughly equivalent to 3 months wages. Thereafter Mr Hladky's absence from the council cannot be blamed on the incident in view of his back condition. The psychiatric condition which is incident related does and did, however, at least partly ensure he is not re-employed. It is at least partly responsible for lost wages to trial and for lost future earning capacity. A fit Mr Hladky had an earning capacity of above $600 net per week to age sixty-five. I assess that either disability, singly, would have reduced his earning potential to one half of his fit level bearing in mind his age and the general reluctance to employ older and particularly unfit older workers. I consider the double disability reduces that residual capacity by at least half to not more than one quarter of his uninjured earning capacity. This equates to a loss of $150 per week. The psychiatric injury makes employment in a workshop environment unviable. The vocational assessment commissioned by the Commonwealth Rehabilitation Service ("CRS") and attached to the quantum statement indicates light workshop duties would otherwise have been suitable. There is

no suggestion Mr Hladky is suitable for clerical or office work. I propose to allow the sum of $570 per week from the date of the accident until three months after the cessation of work to which I referred above. This is 92 weeks at $570 per week. I will also allow a global sum for the period out of the workforce because of the accident from 3 months after Mr Hladky resigned from the council to judgement based on the figure of $150 per week for 78 weeks. From this should be deducted $18,560.42, being $33,420.84 income earned by Mr Hladky to date, less $14,860.42 contributed by Local Government WorkCare to that income and which has to be refunded. The $570 is the net income Mr Hladky earned as at the accident and does not take account of subsequent rises.

[43] Other disputes concern past and future gratuitous care. Since I am not satisfied the back condition is accident related and the need for assistance is brought about by the back condition I disallow this claim. The CRS refund is based on the incapacity to continue at work. This is partly accident related and should, in my view be allowed. The recurring expenses at annexure "AWH14" to the quantum statement are also back related to a significant degree. I allow $2,000 for the part related to the psychiatric condition.

[44] In the result I award the following:

Pain and Suffering	$ 30,000.00
Past Economic Loss	45,579.58
Interest on $30,719.16 @ 5% for 3.27 years	5,022.58
Past loss of superannuation @ 8%	3,646.37
Future Economic Loss ($150 per week x 555 x .85)	70,762.50
Future loss of superannuation @ 9%	6,368.63
Special Damages met by Local Government WorkCare	8,818.16
Fox v Wood component	3,700.00
Special Damages paid by plaintiff	2,500.00
Interest @ 5% for 3.27 years	408.75
CRS refund	6,000.00
Future Recurring Expenses	2,000.00
Total	184,806.57
Less refund to Local Government WorkCare	27,378.58
TOTAL	**$157,427.99**

[45] I give judgement for the plaintiff against the defendant in the sum of **ONE HUNDRED AND FIFTY SEVEN THOUSAND FOUR HUNDRED AND TWENTY SEVEN DOLLARS AND NINETY NINE CENTS ($157,427.99).**