

SUPREME COURT OF QUEENSLAND

CITATION: *Strachan v Beresforde & Suncorp Metway Insurance Ltd* [2003] QSC 410

PARTIES: **WAYNE ANDREW STRACHAN**
(Plaintiff)
v
ROY JAMES BERESFORDE
(First Defendant)
and
SUNCORP METWAY INSURANCE LTD
ACN 075 695 966
(Second Defendant)

FILE NO: S77 of 2003

DIVISION: Trial Division

DELIVERED ON: 5 December 2003

DELIVERED AT: Mackay

HEARING DATES: 2-3 December 2003

JUDGE: Dutney J

ORDERS: **Judgement for the plaintiff against the second defendant in the sum of One Hundred and Seventy-Seven Thousand Six Hundred and Seven Dollars and Fifty-Four Cents (\$177,607.54).**

CATCHWORDS: NEGLIGENCE – MOTOR VEHICLES – DAMAGES – QUANTUM – where liability not in issue – where plaintiff suffered neck injury as a result of a motor vehicle accident – where plaintiff an industrial spray painter - where plaintiff had consulted a chiropractor on several occasions in the six years before his accident – whether pre-accident neck and back pain significant

COUNSEL: GF Crow for the plaintiff
DVC McMeekin SC for the first and second defendants

SOLICITORS: Macrossan & Amiet for the plaintiff
Grant & Simpson for the first and second defendants

- [1] The plaintiff suffered a “whiplash” style injury to his neck in a rear end motor vehicle collision at the intersection of the Peak Downs Highway and Bruce Highway on 6 October 2000. He is now aged 38 having been born on 1 April 1965.
- [2] Liability is not in issue.
- [3] The plaintiff consulted Dr Allan Cook, an orthopaedic surgeon, on 20 December, 2000. Dr Cook’s diagnosis was as follows:
- “There would be no doubt that this man sustained a generalised musculo-ligamentous injury to his upper spine as well as injury to the left side facet joint at C6/7 as a result of the accident that occurred while on his way to work on 6 October 2000.”
- [4] Dr Cook’s prognosis was for continued slow improvement of symptoms over the succeeding months with possible help from anti-inflammatory drugs. If symptoms persisted after two years from the date of the accident they could be considered permanent.
- [5] The plaintiff saw Dr Cook again on 5 February 2001 still complaining of persistent intermittent pain in the back of his neck at about C6/7 level. He suffered this pain watching movies and looking up. The pain eased with movement.
- [6] Dr Cook next saw the plaintiff on 24 April 2002. He was told by the plaintiff that his neck had been good until about January 2002 but had been aggravated by a period of heavy work.
- [7] The plaintiff’s normal occupation was as an industrial spray painter and sandblaster. In the course of this work he had to wear a large heavy helmet. The helmet covered his whole head and neck region. A cape was attached to the helmet which covered the whole of the wearer’s upper body. An air hose came out of the helmet and was attached by a waist band to the wearer’s waist. The helmet weighed about 3 kg and was wholly supported on the top of the

wearer's head. The attachment of the air hose to the wearer's waist meant that in some body positions the hose pulled on the helmet placing the weight at awkward angles.

- [8] As at April 2002 the plaintiff was complaining of cramps in his neck in the mornings which could take a minute or two to abate. Other than the cramps the plaintiff was little changed from his previous visit.
- [9] Dr Cook considered that the plaintiff's condition was then stable and would be unlikely to change significantly. Dr Cook estimated the level of the plaintiff's impairment as 5% to 6%.
- [10] Dr Cook last saw the plaintiff on 16 September 2003. The plaintiff's subjective assessment was that his condition was little changed from the previous visit. He had muscle spasm in the neck which required massage after long drives and after work. He was avoiding sandblasting work so that he would not have to wear the helmet. Dr Cook thought that if not for the accident there was no reason the plaintiff could not have continued indefinitely as a spray painter and sandblaster. The plaintiff's ability to continue in his chosen occupation would be dependent on his tolerance to the continuing pain in his neck, particularly if he had to wear the helmet.
- [11] The plaintiff was also examined by Dr Gregory Nutting, orthopaedic surgeon, on behalf of the defendants. Dr Nutting's opinion did not differ greatly from that of Dr Cook, save that Dr Nutting believed that a regular, muscle specific exercise programme might sufficiently increase the strength of the neck muscles to result in relatively pain free activity.
- [12] The medical debate focussed on this opinion. Dr Cook was less enthusiastic about the exercise programme. He considered the work being done by the plaintiff was sufficiently strenuous to have the desired exercise effect without additional exercises. The plaintiff had been given an exercise programme by a physio-therapist on one occasion but had not persisted with it for more than a few days because he said it hurt his neck. Dr Nutting thought that work

activity was an unsatisfactory substitute for specific exercises and that the previous programme was at too high a starting level for the plaintiff. Even if an exercise programme were devised specifically for the plaintiff, however, Dr Nutting would not guarantee a successful recovery.

- [13] At present, the plaintiff complains of inability to sleep causing grumpiness and affecting his relationships with his children and wife. His ability to play with the children is limited. He suffers as a result of working and needs time off to recover.
- [14] Since the accident the plaintiff has continued to work as a spray painter/sand blaster or trades assistant. Even though working as a trade's assistant he is still nominally employed as a spray painter. In practice, he mainly does trade's assistant work.
- [15] The plaintiff is considering giving up work as a spray painter/sand blaster or trades assistant for something lighter but has not done so yet. The work he is doing is well paid and he works only three days a week
- [16] The plaintiff is married with three young children aged 5 years, 30 months and 18 months. He left school at 15 after grade 10 at Traralgon in Victoria. He worked for a number of years as a haul out driver/harvester in the cane harvesting season and has worked as a labourer. He has otherwise been a spray painter/sand blaster. He has no other relevant experience.
- [17] The plaintiff's case was that if he had not been injured he would have pursued mining industry work and earned \$1000 net per week. In fact, his quantum statement shows he has only worked in the mining industry on one project for about 15 months. His pre-accident net weekly earnings have been \$464.54 in 1997/1998; \$747.50 in 1998/1999 and \$1038.83 in 1999/2000. This is an average of \$750 per week. The high earnings in the 1999/2000 year include the mining industry project. While the plaintiff was working on that project, his wife resided at Moranbah with their then only child who was a few months

old when the project started. Mine work would involve either lengthy periods away from home or regular movement around mining towns.

- [18] In his evidence in chief, the plaintiff said that his present two or three days a week suits him because he can spend time with his family.
- [19] Even outside the mines, good wages can be earned by spray painters and sand blasters at Hay Point. A Mr Herrigan gave evidence and produced his group certificate and a recent weekly pay slip from work at that location. This showed earnings of \$884 net per week during 2002/2003.
- [20] Evidence was produced that the plaintiff had consulted a chiropractor on several occasions in the six years before his accident. The complaints reported were in relation to both neck and lower back pain. When his history was taken by the two doctors whose reports were tendered, he reported that he had no prior history of neck or back pain. His explanation for the difference was that the earlier incidents were trivial and he had forgotten them. While I doubt that he had in fact forgotten them I am not satisfied that the earlier incidents were significant. The visits were once only in relation to a particular complaint. The plaintiff did not go back for follow up treatment. The visits were widely spaced. He was employed in doing heavy manual work and periodic back and neck complaints would be expected. Dr Cook was untroubled by the earlier history. It was submitted that the visits showed a propensity to premature departure from the industry. I do not agree. The X-rays the doctors saw did not disclose any unusual rate of degeneration in the plaintiff's back or neck. There is, on the evidence, a departure of men from the spray painting and sand blasting industry generally from their late forties onwards although it is not uncommon to find men well into their sixties. It is not surprising that as men age they would look for less arduous work. This relatively early departure of many men from the industry is reflected in the discount from future economic loss.

- [21] The plaintiff's position is unusual. Apart from the immediate aftermath of the accident he has taken no medication and sought no treatment. He has been back at work throughout the subsequent period.
- [22] Since the accident the plaintiff's net earnings have been \$650 per week being the total in paragraph 36 of the quantum statement divided by the 164 weeks since the accident.
- [23] I do not accept that the plaintiff would have pursued mining work. My impression of the plaintiff was that his commitment to his family life was such that he would have been more likely to do the type of work he has in fact done since the accident or take a position similar to Mr Herrigan's. I accept that work as a spray painter/sand blaster is plentiful in the Mackay region. Since the accident I find that the plaintiff's average weekly earnings have declined by \$167 per week compared with what he might otherwise notionally have earned. To determine what the plaintiff might otherwise have earned I have taken his average earnings for the three years prior to the accident and the earnings of Mr Herrigan for 2002/3 and averaged those figures.
- [24] For the future the plaintiff is not medically incapable of continuing to do what he has been doing. His limiting factor is the neck pain. I accept Dr Nutting's evidence that a proper exercise programme might relieve much of that pain. If it does not, the plaintiff may need to find lighter work in the medium term. As a storeman, the *Storeworkers and Packers' Award – Northern and Mackay Divisions 2003* discloses gross weekly award rates of pay between \$478.80 and \$543.10. The average is \$510.95. After tax this would amount to about \$421.00.
- [25] Since the likelihood of the plaintiff leaving the industry as a result of the accident depends on his response to the exercise programme and is therefore uncertain, I consider that for the purpose of calculating future economic loss I should assume a reduced level of future income comparable to that being earned at present. This covers the situation where the exercises might relieve his symptoms to the degree that he might suffer no ongoing loss or conversely,

he might need to seek other work. The plaintiff would also be entitled to the cost of a physiotherapist supervising the exercise programme for about a year to regulate the exercises and monitor progress.

[26] In the result I assess damages as follows:

General damages	\$35,000.00
Interest on \$20,000 @ 2% for 3 years	1,200.00
Past economic loss (164 weeks at \$167 per week)	27,388.00
Interest @ 2.7%	739.48
Loss of past superannuation @ 8%	2,191.04
Future economic loss (\$167 for 22 years ¹ less 15% discount)	99,932.80
Loss of future superannuation @ 9%	8,993.95
Special damages (paid by plaintiff)	846.27
Interest on \$200 @ 2.7% for 3 years	16.00
Future medical (physiotherapy)	1,300.00
TOTAL	\$177,607.54

[27] I give judgement for the plaintiff against the second defendant in the sum of ONE HUNDRED AND SEVENTY SEVEN THOUSAND SIX HUNDRED AND SEVEN DOLLARS AND FIFTY-FOUR CENTS (\$177,607.54).

¹ Multiplier at 5% is 704.