SUPREME COURT OF QUEENSLAND

CITATION:	*Whittaker v Farnsway Mining Constructions P/L* [2004] QSC 160
PARTIES:	**DEWAYNE WILLIAM WHITTAKER** (plaintiff) and **FARNSWAY MINING CONSTRUCTION PTY LTD 010 562 713** (defendant)
FILE NO/S:	9987 of 2000
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	26 May 2004
DELIVERED AT:	Brisbane
HEARING DATES:	16, 17, 18, 19 February 2004
JUDGE:	Douglas J
ORDER:	**Judgment for the plaintiff for $831,958.96**
CATCHWORDS:	EMPLOYMENT LAW - THE CONTRACT OF SERVICE AND RIGHTS, DUTIES AND LIABILITIES AS BETWEEN EMPLOYER AND EMPLOYEE - LIABILITY OF EMPLOYER FOR INJURY TO EMPLOYEE AT COMMON LAW – GENERALLY - FORESEEABILITY OF INJURY - Duty to take reasonable care to avoid exposing an employee to an unnecessary risk of injury TORTS – NEGLIGENCE - DANGEROUS PREMISES - INJURIES TO PERSONS ENTERING PREMISES - WHO IS LIABLE – OCCUPIER – GENERALLY – Where the risk was not so obvious as to limit the content of the duty owed – Where there was no difficulty associated with removing the risk – Where the risk was caused by an uneven walking surface at a work site TORTS - PROOF OF NEGLIGENCE - ONUS OF PROOF – GENERALLY – Where there is an inference that the accident happened because of the defendant's act or omission leading to a breach of duty – Where the evidentiary onus rests on the defendant to point to other evidence suggesting that no causal connection exists

INDUSTRIAL LAW - INDUSTRIAL SAFETY, HEALTH AND WELFARE – QUEENSLAND - WORKPLACE HEALTH AND SAFETY LEGISLATION - AVAILABILITY OF A CIVIL ACTION UNDER ACT – Where there is a cause of action in damages arising from section 28(1) of the *Workplace Health and Safety Act (Qld)* 1995

Workplace Health and Safety Act 1995, s. 28(1)

Hamilton v Nuroof (Western Australia) Pty Ltd (1956) 96 CLR 18, referred to
Thompson v Woolworths (Q'land) Pty Limited [2003] QCA 551, referred to
Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479, referred to
Chappel v Hart (1995) 195 CLR 232, referred to
Schiliro v Peppercorn Childcare Centres Pty Ltd (No. 2) [2001] 1 Qd R 518, referred to
DNM Mining Pty Ltd v Barwick [2004] NSWCA 137, referred to

COUNSEL: S C Williams QC with him M J Burns for the plaintiff
J A Griffin QC with him C S Harding for the defendant

SOLICITORS: Paul Everingham & Co. for the plaintiff
O'Mara's Lawyers for the defendant

[1] DOUGLAS J: The plaintiff, Mr Whittaker, was injured at work on 11 January 1997 and again on 27 October 1997. The first accident occurred while he was descending from a dump truck at the Macarthur River Mine in the Northern Territory. It was treated as a moderately significant sprain of the left ankle and kept him away from work for about 8 weeks.

[2] In July 1997 he was transferred to Thalangar and then to the Pajingo Mine near Charters Towers in Queensland. At that site there was a metal grate consisting of walkway mesh placed over a drain at the bottom of some steps. On 27 October 1997 at about 2.00am Mr Whittaker was descending the stairs when he again injured his left ankle after stepping onto the grate at the foot of the stairs. The report of that incident dated 28 October 1997 identified the hazard that contributed to the accident as "bottom step uneven – needs to be replaced or removed" and described the incident as "stepped onto uneven surface, twisted ankle". Mr Whittaker had completed part of that report and signed it but another employee of the defendant completed the information I have just quoted. That employee was not called to give evidence nor was his absence explained. Other employees completed other sections of the report but none of them was called nor was their absence explained.

[3] Mr Whittaker's belief was that a section of the grate at the foot of the stairs was missing and that when he came to place his foot on the surface it was unevenly supported so that his left ankle rolled to its outside. Another possible explanation offered for the incident, based on the accident report, was that the top of the mesh

grate was approximately 20 mm above the soil surface and that Mr Whittaker's foot may have turned on the edge of the grate.

[4] The accident report expressed the view that the probable recurrence rate of the incident was "frequent" but, over optimistically as it turned out, described the "severity or loss potential" as negligible.

[5] The plaintiff's evidence of the cause of the accident has varied over time. For that and other reasons associated with his description of the event the defendant argued that Mr Whittaker had failed to establish that any defect in the grate or its positioning had caused his fall. Obviously, however, something caused him to twist his ankle and fall. The possibilities suggested by the defendant included that he was predisposed to twist his ankle by his previous injury or that he may simply may have rolled over on it as he descended the staircase. In my view the most probable explanation for the event is the uneven surface of the bottom step described in the almost contemporaneous report. The precise nature of the unevenness, whether because part of the grate was missing or because it was placed above ground level is unclear. The description in the accident report is more consistent with the type of unevenness described by Mr Whittaker and I believe that it is more probable than not that some defect in the grate of the nature he described did exist.

[6] To some extent I have been influenced in my conclusion on this issue by the medical evidence, for example of Dr Wearne, where he said that he would not expect a rupture of the lateral ligament if one landed on the flat surface of a step but if someone inadvertently stepped on the edge of a step and rolled over with his full weight on it, then that could rupture a ligament (T. 238 ll. 16-25). For reasons that will appear later I have formed the view that the evidence of Dr Sampson leads to the probable conclusion that the rupture of the lateral ligament happened in the second incident for a reason such as that suggested by Dr Wearne which is itself consistent with the bulk of the plaintiff's evidence of the events linked to the turning of his ankle in the second incident.

[7] It is in that context that the departmental head's comments in the accident report assume some significance. They were that the mesh grate needed to be removed and the area filled in. He referred to the grate being possibly 20 mm above the ground surface. The supervisor's comments in that report are less important. He said that the action needed to prevent recurrence was to make sure that all walkways, stairs and passageways were safe to walk on.

[8] The most probable effect of that evidence is that the grate, at least in relation to the soil on which it was placed, was uneven in such a way that its position could lead to frequent recurrences of an accident such as that suffered by Mr Whittaker. It was in a workplace used at night. Even if, as seems likely, the lighting was adequate, it is my view that the ease with which the problem could have been remedied leads to the conclusion that the accident happened because of the employer's failure to provide a better place or system of work. There was clearly a duty of care owed by the defendant to its employee on its mine site. The risk seems to have been obvious to those who prepared the accident report although not necessarily so to a worker using the staircase normally. Therefore it gave rise to a duty in the defendant to take reasonable care to avoid exposing the plaintiff as its employee to unnecessary risk of injury; *Hamilton v Nuroof (Western Australia) Pty Ltd* (1956) 96 CLR 18, 25. The defendant as an occupier of the property was also under a duty to take

reasonable care to avoid foreseeable risks of injury to the plaintiff; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479, 488. The risk was not so obvious as to limit the content of the duty owed, if that is a correct approach to the analysis of the issue; cf the reasons of de Jersey CJ with those of McMurdo J in *Thompson v Woolworths (Q'land) Pty Limited* [2003] QCA 551. Nor was there any difficulty associated with removing the risk.

[9] Neither the safety officer, the supervisor nor the department head who completed the incident report was called to give evidence. A Mr Rodney Thompson who was project manager at the time of the accident was called. He had been asked to turn his mind to the events only a few weeks before the trial. His recollection of the state of the grate at the time of the accident was limited. The unexplained absence of evidence from the safety officer, supervisor or department head and the corrective action taken by the defendant in removing the mesh and filling in the hole over which the safety officer said it had been placed has assisted me in reaching the conclusion that there was negligent conduct by the defendant leading to the plaintiff's injury. There is at the very least an inference that the accident happened because of the defendant's act or omission leading to the breach of duty that I have found occurred; see *Chappel v Hart* (1995) 195 CLR 232, 238-239 per Gaudron J at [8]. Alternatively an evidentiary onus rests on the defendant to point to other evidence suggesting that no causal connection exists; *Chappel v Hart* per McHugh J at 247 [34] and Kirby J at 273-274 [93].

[10] The defendant's conduct in creating and failing to remove the risk also amounts to a failure to ensure the workplace health and safety of the plaintiff at work in breach of s. 28(1) of the *Workplace Health and Safety Act* 1995, giving rise to a cause of action in damages; *Schiliro v Peppercorn Childcare Centres Pty Ltd (No. 2)* [2001] 1 Qd R 518.

[11] It then becomes necessary to consider which accident or accidents caused the condition from which Mr Whittaker now suffers. There was no fracture revealed by x-rays after either incident. He was treated in Mt Isa after the first slip consistently with his having suffered a strain. Dr Sampson, an orthopaedic surgeon gave him the treatment. He made an important clinical finding in his report of an examination on 23 January 1997, 12 days after the first accident. It was that "there was no particular pain or instability on stretching the lateral ligaments".

[12] By the time Mr Whittaker returned to work about March 1997 his physiotherapist reported that his range of movement was normal, his strength was good and his balance was good. He was supplied with an ankle brace for his own protection but went back to work on full duties. His evidence was that his ankle was not quite 100% by the time of the second accident. That evidence needs to be compared with his statement to the Territory Insurance Office ("TIO") dated 14 April 1998, ex. 8. There he said that the injury had not got any better by the date of that statement, 14 April 1998. That statement, after the second incident, was made when he appeared to have believed that the second injury was an aggravation of the first. When I take into account the medical evidence from those treating him of his recovery from the first accident that letter does not lead me to the conclusion that he had not improved before the second incident.

[13] After the second accident he had about two weeks' leave due and resumed work on light duties for about a week. He hoped that what was then diagnosed as a sprain

would resolve itself. It did not. His symptoms worsened and, eventually, in April 1998, after a CT scan he was diagnosed as having suffered an osteochondral fracture. He had surgery in November 1998 to excise a bone fragment, excise part of a ligament and a "brostrom" repair in an attempt to stabilise the joint. He had further surgery for a sub-talar fusion in May 1999 and in August 1999 for the removal of a screw. He was in plaster for a lengthy period at this time.

[14] There was some dispute among the medical specialists about the likely occasion when he suffered the fracture. It seems to me that Dr Sampson's evidence of his state 12 days after the first accident and his history of improvement between then and the second accident leads to the conclusion that the rupture of the lateral ligament and the fracture both occurred in the second incident. That seemed to be accepted by most of the doctors when Dr Sampson's evidence and that of Ms Kerr, a physiotherapist, was taken into account by them.

[15] In my view, therefore, his current condition stems very largely from the second accident. It seems likely that the residual disability of a minor nature described by Dr Sampson and Ms Kerr would have been resolved substantially if the second accident had not occurred. It is that accident that should be treated as having stopped him from working as a miner; cf. *DNM Mining Pty Ltd v Barwick* [2004] NSWCA 137 at [39]-[47].

[16] The plaintiff was born on 22 September 1967. At the time of the accident he was 30. He is now 36. His life expectancy is that he should live another 42 years. He was educated to year 12 standard in New South Wales and worked in his home town, Dubbo, for a number of years in unskilled positions before commencing work in the mines.

[17] Apart from the question of which incident was principally responsible for his current medical condition, the other main issues relevant to the assessment of his damages require an analysis of the true effect of his injuries on his employability, the period during which he would have continued to work as a miner and whether he had worked as a "jumbo operator" or would have continued to work in that position.

[18] A jumbo operator controls a machine used in hard rock mining to drill holes. Mr Whittaker claims to have been appointed to such a position and said that he would have continued working in that role for a further 10-15 years from the time of the accident in 1997 before leaving the mine and setting himself up in a business such as a shop or newsagency to allow him to be closer to his family. There was some dispute about the issue whether Mr Whittaker had been a jumbo operator. Mr Rodney Thompson, the project manager in charge of Mr Whittaker, believed he was a "level 3 jumbo operator" which means that he was "under training". While he had not trained Mr Whittaker himself, Mr Thompson said that the process of becoming a qualified operator took several years. Mr Thompson was not confident that Mr Whittaker would ever have become a qualified jumbo operator. He acknowledged that Mr Whittaker was a very good worker but believed he was lacking in the qualities of a team leader needed by such an operator.

[19] It does seem to be the case, however, that Mr Whittaker was working the machine as such an operator. Mr Williams QC also submitted that the failure of the defendant to prove through its records what the true situation was combined with

the fact that Mr Thompson was first asked to recall these events only weeks before the trial and about 6 years after the accident, should lead me to accept Mr Whittaker's evidence more readily that he was in fact operating a jumbo and to conclude from that that he would have been likely to continue to do so.

[20] In addition, he pointed to instructions apparently given to a psychologist engaged by the defendant that Mr Whittaker had progressed to the position of jumbo operator and to an assessment of him at his work site by Ms Barton of the Commonwealth Rehabilitation Service in ex. 24, apparently conducted in conjunction with at least one of his employer's representatives, that proceeded on the basis that he had been a jumbo operator.

[21] In those circumstances it is my view that, more probably than not, he was operating a jumbo and would have continued to do that but probably only for the 10-15 years of which he spoke. Mr Williams QC submitted that his client would not have saved enough, based on his history, to allow him to buy a small business at the end of that period, so that financial circumstances would have lead to him staying at the mines to support his lifestyle. Unfortunately for that argument, Mr Whittaker's evidence of his intentions and motives was clear. He thought he would want more time with his family after 10-15 year in the mines. Accordingly I propose to assess his economic loss on that assumption and on the basis that he would then have changed to lower paid work.

[22] He was dismissed from his work for the defendant in December 1998 because of the effect of his injuries. There is little doubt that he is now unable to work full-time. The Commonwealth Rehabilitation Service has attempted to rehabilitate him and place him in work but has remained unsuccessful in its attempt. He was initially keen to return to work and was frustrated that he was unable to do that. By the time of the trial, however, he had become more selective about what he was willing to do and was not attracted to the prospect of, for example, working as a lowly paid controller in a mine, both because of the lower pay and the prospect of being confined to a room for long periods. That assessment by him may well have been influenced by the generosity of his continuing payments from the TIO, attributed by that organisation to his first accident, but there seems little likelihood of him being offered employment on a commercial basis at a mine site with his injuries in any event.

[23] The fracture he suffered limits his mobility, agility and tolerance of weight bearing. He has also put on a great deal of weight and is limited in the range of sporting and other activities in which he formerly participated. It is clear that he cannot resume his earlier work nor is he able to perform clerical work full-time. He may, for example, be able to do telephone service centre work or, perhaps, to work as a driving instructor on a limited basis or to work in a supervisory role in his own shop or business. There are real limits, however, on his ability to sustain long working hours.

[24] There was video surveillance evidence of him performing a number of tasks that he admitted he was capable of. For example he was shown lifting a trail bike onto a trailer. That occurred in circumstances where it was clear that he was favouring his left leg and was able to use his upper body strength to do the lifting. Otherwise the video surveillance evidence did not appear to me to be significantly inconsistent

with the observations of the medical witnesses or the plaintiff's own evidence about the manner in which he favours his left leg.

[25] It is my view that he has some earning capacity. Mr Williams submitted that a reasonable allowance in the circumstances was $150.00 per week which is probably an appropriate assessment of his circumstances at least since early 2001. His condition seems to have become stable by mid 2000 and it would be reasonable to expect him to take some further time than that to try to get some part time work; see, for example, ex. 4 p. 120 and ex. 25.

[26] The assessment of his functional disability due to the second incident from Dr Pentis and Dr Thomson was in the region of 30% of his left leg. Dr Morgan's assessment was that his disability in that limb was approximately 22% which, initially in his report, he attributed notionally half and half to each incident. After his attention was drawn to Dr Sampson's evidence he conceded that the second incident was likely to be a more important cause of the disability. In the circumstances it seems to me that I should approach the assessment of general damages for pain, suffering and loss of amenities on the basis that Mr Whittaker's disability arising out of the incident of 27 October 1997 is in the region of 25% of the loss of function of his left leg. An appropriate award for that disability taking into account his age and the significant effect it has had on his enjoyment of the amenities of life is $60,000.00. I propose to assess interest on half of that amount as the past component.

[27] His past economic loss, on the assumptions I have made about his continuing ability to earn, his likely employment as a jumbo operator on figures similar to those used by Vincents in their scenario 3 and reducing the total figure by approximately 10% to reflect other possible contingencies, I assess at $194,000.00.

[28] His future economic loss I assess on the basis that he would have continued to work as a jumbo operator to about the end of the 2009-2010 financial year. That loss capitalised on the 5% tables is approximately $229,500.00. Thereafter I have assumed he would have suffered economic loss of approximately $500.00 per week for another 17 years which I calculate the present value of as approximately $224,900.00. I have reduced the sum of those two figures, $454,406.00, for other possible contingencies by 15% to arrive at a figure of $386,000.00 for his future economic loss.

[29] I was asked to make no assessment of the damages based on the decision in *Fox v Wood* until the parties had the chance to read this decision and make any submissions relevant to my findings dealing with the cause of his current disability.

[30] Taking into account the evidence of other components of his claim that were largely uncontroversial I assess his damages apart from the *Fox v Wood* component as follows:

Component	**Amount**
General Damages	60,000.00
Interest on $30,000.00 at 2% for 6.5 years.	3,900.00

Special Damages Paid by TIO[1]			
-	Medical Expenses	12,165.48	
-	Hospital Expenses	2,629.00	
-	Vocational Rehabilitation	7,747.40	
-	Rehabilitation	9,783.20	
-	Massage treatments	136.36	
-	Travelling	245.46	
-	Medical Investigations	7,326.64	
			40,033.54
Fox v. Wood			
Special Damages Paid by WorkCover[2]			623.62
Travelling Expenses			1,758.50
Interest at 5% for 6.5 years			571.51
Past Economic Loss			194,000.00
Interest at 5% for 6.5 years			63,050.00
Past Loss of Superannuation Entitlements			22,000.00
Interest at 5% for 6.5 years			7,150.00
Future Economic Loss			386,000.00
Future Loss of Superannuation Entitlements			34,740.00
Future Home Services			10,000.00
Future Medications and Aids			
-	Orthotics	3,403.85	
-	Pharmaceuticals	4,727.94	8,131.79
Total			831,958.96

[31] Accordingly I give judgment for the plaintiff in the sum of $831,958.96. I shall hear the parties as to costs and as to any *Fox v Wood* component.

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1 See: ex. 28.

2 See: ex. 23.