

# SUPREME COURT OF QUEENSLAND

CITATION: *Martin v Rowling & Anor* [2004] QSC 210

PARTIES: **JULANNE MARY MARTIN**  
(plaintiff)  
v  
**HELEN ROWLING**  
(first defendant)  
and  
**SUNCORP METWAY INSURANCE LIMITED (ACN  
075 695 966)**  
(second defendant)

FILE NO: S 3606 of 2000

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court Brisbane

DELIVERED ON: 9 June 2004

DELIVERED AT: Brisbane

HEARING DATE: 9, 10, 11, 12, 13, 20 February 2004

JUDGE: Douglas J

ORDER: **Judgment for the plaintiff for \$330,668.39**

CATCHWORDS: DAMAGES - Measure and Remoteness of Damages in  
Actions for Tort - Measure of Damages - Personal Injuries -  
Prevailing Standards of General Damages – In general –  
Whiplash injury to neck and associated injuries – Degree of  
persistence of symptoms

TORTS – Negligence - Essentials of action for negligence –  
Damage – General – Assessment of damage – Where there is  
no significant decrease in the plaintiff’s ability to work in an  
occupation for which she is well qualified

COUNSEL: Mr G R Mullins for the plaintiff  
Mr R V Hanson QC with him Mr R F King-Scott for the  
defendants

SOLICITORS: McInnes Wilson Lawyers for the plaintiff  
Dibbs Barker Gosling for the defendants

[1] **DOUGLAS J:** The plaintiff, Julanne Martin, was involved in a motor vehicle accident on 11 May 1998 where she suffered a whiplash injury to the neck with an associated injury to the brachial plexus. She also claims to have suffered injuries to

the right hip and pelvis, the right shoulder, the right scapula and collar bone, the lumbo-sacral spine, a major depressive disorder and a pain disorder arising out of the accident. The defendants' liability for the accident is admitted.

- [2] It was the type of injury that, in many circumstances, may have settled within 2 or 3 months. The controversial issues in this case are the extent to which a disability arising from her injuries still persists with Ms Martin and the effect it has had on her earning capacity. An associated issue is whether the cessation of her employment in the pharmaceutical industry with Merck Sharp and Dohme ("MSD") on 28 June 1998, shortly after the accident, was because of her injuries or because of dissatisfaction with her performance by her employer. Much of the evidence in the trial related to the latter issue. On the view I have taken, however, the resolution of that dispute does not affect the assessment of her damages to any great degree. It is clear, whether or not she was dismissed from MSD because of dissatisfaction with her work or because of the accident, that she has a very good work history and, in spite of the accident, retains a significant capacity to earn income. The main real issue is the continuing extent of her physical disability and its effect on her ability to work full-time.
- [3] Ms Martin was born on 7 May 1960, had just turned 38 at the time of the accident and is now 44. She completed year 12 in 1977 and worked in a variety of positions between then and the beginning of 1983 when she commenced studying for a diploma of teaching at the University of Southern Queensland. She completed that qualification by the end of 1985. During that period she worked part time as a waitress. She then worked for a year and half as a teacher and for slightly over a year for a publishing company until she commenced a long term career in the pharmaceutical business as a sales representative for MSD in October 1989. She stayed with them at that stage until March 1995 when she became the State Manager of a competitor, Sandoz Australia. In August 1995 she changed employers again and became the State Manager of Parke Davis Pty Ltd, another pharmaceutical company. She stayed with that employer until December 1996 and then returned to MSD as a regional field manager for a subgroup called "HeartCare". She stayed there until 28 June 1998.
- [4] Her employment history until her return to MSD was consistently impressive and marked by high praise from those who employed her and worked with her.
- [5] That attitude did not continue during the 18 months between January 1997 and June 1998 on her return to Merck Sharp and Dome. Her period there was marked by criticism of her management skills, personal criticism of her as being rude and intimidating and allegations that she lied or mislead people and misstated the facts. There was a significant degree of dissension among those supervised by her and with whom she worked about her abilities. This worried her superiors, particularly after a team building exercise conducted by the company in Bali in late 1997. She had her supporters and detractors but after that conference she was counselled by her superiors, particularly Mr Lawler and Mr Brightwell in November 1997. There was a review of her performance in February or March 1998 but little communication after then between her superiors and her about their concerns until she was dismissed.
- [6] It seems clear to me, however, that it was not her motor vehicle accident which precipitated her departure from the company but the accumulation of events

associated with MSD management's perception of her work and her relations with some of her fellow employees. Whether that related to personality problems or jealousy or suspicion of her, rather than a failure to perform by her, seems to me to be not particularly relevant to my task because of her subsequent work history and demonstrated ability to perform work at a high level except in so far as she is affected by her residual physical complaints.

- [7] She remained unemployed after the motor vehicle accident and her departure from MSD between 28 June 1998 and August 1999. On 16 August 1999 she commenced as a territory manager with Stryker Australia Pty Ltd ("Stryker Australia") and worked until 28 October 1999 as a sales representative with them marketing maxillo-facial implants. Between 1 July 2000 and 30 June 2001 she was a self employed consultant developing business plans for clients while she was completing a Masters degree in Business Administration that she had commenced in 1997 when working for MSD. From 12 March 2001 until 19 December 2003 she worked as a business consultant for a firm called Mercuri Urval and from January 2004 until the trial worked as a part owner of another business consulting firm called Odin Consulting.
- [8] The circumstances surrounding her departure from MSD were said to be relevant to her credit, particularly because of her complaints of continuing disability which were said not to be supported by the objective medical evidence. It was also admissible as relevant to her capacities as a manager. I gained little advantage, however, in assessing what the true effect of her accident was on her from trying to resolve disputed questions of fact about her behaviour and qualities as an employee of MSD during the 18 months before the accident. In other words, I am not satisfied that I should treat the plaintiff as an habitual liar in respect of the evidence about the difficulties she had at work or about her continuing physical disabilities. She may have been a manipulative manager, may not have been wholly truthful with her fellow employees and may have misstated the reasons for her dismissal from MSD. There is, however, sufficient evidence of possible jealousy and rivalry affecting her treatment and of other employees who continue to think well of her to lead me to the conclusion that any resolution of those collateral factual issues is unlikely to throw much light on the principal issues here.
- [9] Nor is the evidence of her career during the 18 months before she left MSD conclusive on the issue whether she was a good manager. The most I can conclude from that evidence is, as I have said, that she had significant difficulties with the team she was leading at MSD during that period but, otherwise, her performance both before and since that period has been described as excellent or outstanding. It does suggest, however, that she would have had difficulties in achieving a management role requiring great skill in managing and engaging the trust of her subordinates.
- [10] Let me turn then to the plaintiff's complaints about her injuries. She says that she wakes up with pain everyday and that this pain also causes her sleeplessness at night. She equates the low level pain from which she suffers to a scale of 3 out of 10. She also complains of high level pain at level of 8 out of 10 which creates a sharp stabbing pain through her shoulder and takes her breath away. She also says that she suffers from chronic pain when she writes, with her right arm, at a level of about 6.5 to 7 out of 10. She described it as "not sharp and stabbing it's just this

really deep, insidious pain that is in my shoulder that goes up into my head”; T63 ll. 30-32.

- [11] Dr Gillett gave evidence that Ms Martin had suffered musculoligamentous injury and scapular ligamentous injury involving the cervical spine and the right shoulder girdle. He also suggested that there may have been some injury to the brachial plexus. His view was that there is a percentage of people who suffer whiplash injuries of the nature suffered by Ms Martin who do not improve and develop long term problems. Inferentially he included Ms Martin in that group, did not expect her symptoms to improve and said that high pressure work and longer hours would increase those symptoms. In trying to estimate what her post injury working capacity was he said that he was reliant on what Ms Martin said but accepted that, if she worked to about 65% of her capacity that was within the capabilities of her injury; T261 ll. 21-27. Under cross examination, however, he accepted that she should be able to work 5 days a week at least at a desk job although she would have some pain and discomfort associated with that; T263 ll. 10-32.
- [12] Dr Tuffley found clinical evidence of mild supraspinatus tendonitis which he agreed was extremely common in the normal population but he could not find any strong evidence for a brachial plexus injury. He agreed that the degenerative change in the supraspinatus tendon could occur from a soft tissue injury to the right shoulder and that she had suffered a strain of the supporting structures of the cervical spine with some referred pain into the right upper limb. He also agreed that some people who suffered such injuries continue to suffer pain of the type described by Ms Martin but pointed out that it is not possible to measure that pain or test for it beyond taking into account what pain the patient says she has in the absence of other objective evidence consistent with continuing pain. He could not find any objective evidence of a significant cervical spine injury.
- [13] Dr Cameron accepted that she did suffer a soft tissue strain injury to her cervical spine as a result of the accident but thought that she should slowly recover. He also thought that she had a mild rotator cuff disturbance of the right shoulder. By 4 March 1999 he believed she had largely recovered with respect to her neck injury whilst still suffering symptoms related to her shoulder injury. He found no evidence that she had suffered a brachial plexus injury and believed that her subjective sensory symptoms in her right upper limb had largely resolved when he saw her in February 1999 along with her acute neck symptoms. By the time he saw her in April 2002 he could not offer any reason why her shoulder and hip pain persisted 4 years after the injury and suggested that there may be some pre-existing emotional factors contributing to her ongoing convalescence but could find no neurological impairment which he could relate to the injuries suffered in the accident. He believed that the pain in her right shoulder was orthopaedic in nature and would be better addressed by such a specialist. It was significant that he could not find any evidence of wasting or weakness in her upper or lower limbs.
- [14] Dr Cameron also said in his oral evidence that when he saw Ms Martin in April 2002 she had no neck problems. That led him to conclude that she had become better and was therefore not in the group of people described by Dr Gillett as those who do not get better or never get a resolution of pain; T279 ll. 15-42.
- [15] He did believe, however, that the pain she was experiencing was related to her shoulder problems which he believed were orthopaedic and involved different

pathologies from those for which he tested. He also said that many of the symptoms that Ms Martin now complains of seemed to be a new development from the history he took in April 2002 when she seemed quite well apart from shoulder pain; T280-281. Nor could he relate the symptoms of which she now complains to her initial injury apart from the shoulder problems; T282 ll. 21-23.

- [16] My own observations of the plaintiff under cross examination over two days support the submission made by Mr Hanson QC on behalf of the defendant that she showed no outward signs of pain or fatigue, apart from 1 or 2 occasions on which she rubbed her shoulder, and no lapse in concentration. Most of the many doctors who gave evidence assessed her as having suffered a whole person impairment in the region of 5%.
- [17] It is the shoulder injury, in particular, which appears to have contributed to her decision to leave the pharmaceutical industry. When she first attempted to return to it she found difficulty in carrying around some of the equipment which she was required to demonstrate to medical practitioners whom she visited. She has since then gone into the management field and claims to be limited to working up to 3 days a week instead of 5 because of her injuries.
- [18] On the evidence of Dr Cameron, which I accept, I do not believe that it is appropriate to attribute any significant limitations in her ability to sustain her current work to her accident. Dr Gillett's evidence to which I have already referred supports that approach. It seems to me that her continuing shoulder pain can be attributable to the accident but I do not believe, that it, by itself, would lead to a very significant decrease in her ability to work in the consulting role which she has now adopted and for which she is well qualified. I will make some allowance for that disability as I believe that it will have a limited effect on her ability to work from time to time.
- [19] Nor, if she had stayed in the pharmaceutical industry, was there a high likelihood of her ascending to the position of a national sales manager for a major company in the field. In part I have reached that conclusion on my assessment of the evidence of her last 18 months at MSD which suggested, at least, that her management skills were not universally admired. I have reached that conclusion, also, on an assessment that she would not have been willing to work or live interstate after the formation of the relationship with her partner early in 1998 which appears to have encouraged her to stay in Queensland. Nor were there many such positions likely to become available.
- [20] It is impossible to be precise, on the findings I have made, in calculating her past and future economic loss. The approach submitted by the defendants' counsel was to assume that she would have obtained employment after leaving MSD by about October 1998 at a rate similar to what she earned with Stryker Australia to the time when she commenced working for Mercuri Urval in March 2001, less what she earned at Stryker Australia, leading to a figure of \$116,250.00, which, they submitted, should be discounted significantly, by 30%, because she was able to complete her university degree during that time. There is some merit in that approach.
- [21] I believe that I should also take into account, however, the continuing disability in her shoulder and the effect that that would have had on her ability to work.

Accordingly I assess her damages for past economic loss at \$110,000.00. In assessing interest on that loss I will take into account the fact that she has been paid \$48,044.30 through Social Security or WorkCover benefits.

- [22] Her damages for future economic loss I have assessed principally on the basis that she continues to have some shoulder pain which may inhibit her capacity to work from time to time. It is not possible to assess precisely the likely effect on her working hours but she is in highly paid employment which will increase the likely result. In the circumstances I assess her loss of future earning capacity as \$75,000.00 including any component for the loss of future superannuation rights on the basis that she is likely to continue to be effectively self employed.
- [23] The defendants submitted that Ms Martin's damages for past and future care should be assessed on the basis that she needed 30 hours each week for 7 weeks after the accident, then 8 hours a week until 1 October 1998 and then 6 hours a week to April 1999 and thereafter 1 hour a week. On the findings I have made about the effect of her injuries this seems to me to be appropriate but I shall allow those figures at an average rate of \$21.00 per hour since the accident to arrive at a figure of \$15,540.00 for her past loss. For future care I allow an hour a week at the current rate of \$26.00 per hour for 21 years to arrive at a present figure of \$14,397.60.
- [24] The award for pain, suffering and loss of amenities I assess at \$35,000.00 on the basis that she has suffered a "whole person impairment" of about 5%. I have set out the other components of the damages below, allowing a minor discount in respect of her special damages because of the evidence suggesting that some of its components in respect of fares were inflated and for the non-recoverability of the WorkCover disability settlement:

General damages .....	\$35,000.00
Interest at 2% on \$25,000 for 6.08 years.....	\$3,040.00
Past economic loss .....	\$110,000.00
Interest on \$61,955.70 at 5% for 6.08 years.....	\$18,834.53
Loss of superannuation benefits on past economic loss at 9%.....	\$9,900.00
Future economic loss including future superannuation benefits.....	\$75,000.00
Past domestic care .....	\$15,540.00
Interest at 5% for 6.08 years.....	\$4,724.16
Future domestic care .....	\$14,397.60
Fox v Wood.....	\$15,716.10
Special damages .....	\$18,250.00
Interest on special damages.....	\$2,766.00

Future medication and treatment.....\$7,500.00

**TOTAL:**.....**\$330,668.39**

[25] Accordingly I give judgment for the plaintiff for \$330,668.39. I shall hear the parties as to costs.