

SUPREME COURT OF QUEENSLAND

CITATION: *Hannah v Barellan Bobcat Hire Pty Ltd* [2011] QSC 241

PARTIES: **BRADLEY JOHN HANNAH**
(plaintiff)
v
BARELLAN BOBCAT HIRE PTY LTD
(defendant)

FILE NO/S: S6431 of 2010

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 24 August 2011

DELIVERED AT: Brisbane

HEARING DATE: 18 and 19 July 2011

JUDGE: Martin J

ORDER: **The claim is dismissed. I will hear the parties on costs.**

CATCHWORDS: TORT- TRESPASS – TRESPASS TO THE PERSON – ACTION FOR DAMAGES – where the plaintiff’s claim arises out of an altercation at the workplace – where the defendant is a company, which at the relevant time, engaged in the hiring out of a bobcat and operator – where the plaintiff claims that he was assaulted and suffered injuries as a result of the altercation and seek damages – where the plaintiff pleads that the altercation was occasioned by the negligence and/or breach of duty and/or breach of contract and/or breach of statutory duty of the defendant – whether the defendant should be liable for damages

TORT- TRESPASS – TRESPASS TO THE PERSON – ACTION FOR DAMAGES – QUANTUM –where the plaintiff’s claim arises out of an altercation at the workplace – where the defendant is a company, which at the relevant time, engaged in the hiring out of a bobcat and operator – where the plaintiff claims that he was assaulted and suffered injuries as a result of the altercation and seek damages – where the plaintiff suffered a right thumb injury – where the plaintiff has made a claim for psychiatric injuries - what is the appropriate quantum of damages in the circumstances

COUNSEL: R W Trotter for the plaintiff

A S Mellick for the defendant

SOLICITORS: Shine Lawyers for the plaintiff
Dibbs Barker for the defendant

- [1] This claim arises out of an altercation on 8 July 2008 which involved the plaintiff, Derk Houwen and his mother, Karen Houwen. The plaintiff claims that he was assaulted, and that he suffered injuries as a result of the altercation and seeks damages.

The parties

- [2] The defendant (Barellan) is a company which, at the relevant time, engaged in the hiring out of a bobcat and operator.
- [3] The company had 200 issued shares. Reinder Houwen, the husband of Karen Houwen, held 100 of those shares and Karen Houwen held the other 100. (I will, for convenience, use the given names of the members of the Houwen family when necessary.)
- [4] Reinder was the sole director and Karen was the secretary of Barellan. It employed three people, Karen, Derk and the plaintiff.
- [5] The plaintiff had commenced employment as a plant operator with Barellan in April 2008.

The plaintiff's claim

- [6] In his amended statement of claim the plaintiff alleges that, on 8 July 2008, he was "involved in [an] incident during the course of his employment".
- [7] He alleges that, at the relevant time he was in the office of Barellan and was being admonished by Karen when Derk arrived at the premises and walked into the office. He alleges that Derk told him to "sit down" and then pushed him backwards. The plaintiff says that he told Derk to go home as this has nothing to do with you. Derk then rolled up his sleeves and moved to within less than a metre of the plaintiff and the plaintiff pushed Derk on the chest with one hand. Derk then lunged forward and put the plaintiff into a headlock and as the plaintiff struggled to release himself he and Derk fell to the ground. While the plaintiff and Derk were wrestling on the ground, Karen repeatedly struck the plaintiff with a golf club on the back of his head, his back and his right hand and, or alternatively, Derk or Karen applied force to his head, his back and his right hand.
- [8] The plaintiff pleads that the actions by Derk and Karen in: pushing the plaintiff backwards, putting the plaintiff in a headlock, struggling with the plaintiff and falling to the ground, and either striking the plaintiff with a golf club or applying force to his head, back and right hand, were all intentional and unlawful acts.
- [9] It is then alleged that those acts of Derk or Karen or both of them were batteries and trespasses to the plaintiff's person.
- [10] The plaintiff, though, does not seek relief against either Karen or Derk but against Barellan. To that end, the plaintiff pleads that Barellan is liable for the acts of Derk

and Karen “who, at all material times, represented the directing mind and will of the corporation”.

- [11] In addition to, or in the alternative, the plaintiff pleads that the incident referred to above was occasioned by the negligence and/or breach of duty and/or breach of contract and/or breach of statutory duty of Barellan. It particularises those breaches as being:
- (a) A failure to provide and maintain a safe workplace including a safe system of work which provided adequate supervision and training;
 - (b) Exposing the plaintiff to a risk of injury which could have been avoided by the exercise of reasonable care;
 - (c) Failing to direct Derk to leave the office before the altercation occurred when, in all the circumstances, a reasonable person in Barellan’s position would have done so;
 - (d) Failing to ensure that Derk left the office before the altercation ensued when, in all the circumstances, a reasonable person in Barellan’s position would have done so; and
 - (e) Failing to discharge its obligations with respect to the plaintiff’s workplace health and safety pursuant to s 28 of the *Workplace Health & Safety Act 1995*.

- [12] I turn to consider the events which occurred on the day in question.

8 July 2008

- [13] On 8 July the plaintiff had been sent to Eagle Farm to perform work at a building site. His instructions at the site were, presumably, given to him by someone there as no one from Barellan was on the site. While working there he encountered some type of mechanical problem with the bobcat. He believed that the machine was under warranty and so, without seeking any instructions from Barellan, he loaded it onto his truck and took it to Case, the distributor and repairer of these machines. He says that he had another reason for doing this. In his evidence he related two incidents in which he had “crossed swords” with Karen. On each occasion it concerned mechanical problems with the truck he was driving.
- [14] The first occasion concerned a problem with an accelerator cable. The plaintiff said that he took the truck back to the office and told Karen what the problem was. He said that she attacked him verbally, calling him stupid and telling him that he showed no initiative and that he should have taken it to a mechanic for repair. All that was put to Karen about this was whether she remembered a truck accelerator cable giving trouble. She did not and said that the mechanical side of the business was for Reinder to deal with. Nothing else was put to her about the conversation alleged to have occurred.
- [15] The second related by the plaintiff once again concerned a problem with the accelerator of the truck and it occurred on the Centenary Highway. He related a conversation which he had with Karen and which mostly concerned the use of mobile telephones. He said that she swore at him and that she was his “fucking boss” and that he would do as he was told. None of that was put to Karen.
- [16] On the day in question, it was the bobcat which experienced mechanical problems. Both the plaintiff and Karen agree that she rang him when he was at Case. She says

that the conversation was mostly concerned with her asking why he had taken the machine there without seeking a direction from her. He says that she was very aggressive and that she was only concerned with why he had not told anyone about what he was doing.

- [17] The plaintiff returned to the office of the defendant and it is at that point that the account by each side differs markedly. The version by the plaintiff is essentially that he was the victim, that Derk had been the aggressor from the beginning, and that Karen had joined in by in some way applying pressure to him or hitting him with a golf club. The plaintiff said, in examination-in-chief, that Derk had placed him in a headlock. In cross-examination he referred to it as a bear hug. He said that he was facing away from Karen and that he did not see her using a golf club to hit him but he felt some blows and drew a conclusion from the fact that as he had seen her holding a golf club that that was, in fact, what happened.
- [18] Much of the cross-examination of Karen was taken up with an extensive and intensive series of questions relating to the telephone calls that she and others made on the afternoon in question.
- [19] For the purposes of some other proceeding, Karen had made a statutory declaration in which she annexed what she said were the telephone records for the telephones owned or controlled by the defendant. She was taken through those in some detail. She was asked about telephone conversations that took place immediately following what must have been a very disturbing set of events (whoever was at fault) and asked to recollect what was said and by whom in those conversations. It was also put to her that, in a statement which she gave to a third party for other purposes that she had lied when she said that she had called the police and Reinder after the particular events in question. It was put to her that she did not call the police. She replied "I did. I called them twice." It was then put to her "I suggest that's two lies?"
- [20] The phone records do not appear to disclose a call to a particular police station and Karen Houwen could not, in the witness box, identify such a call from the records. That is not a matter that goes to her credit. It would be most unlikely that anyone could recall with any precision a series of conversations which took place on that afternoon. More tellingly, though, is that the police record of events (which was unchallenged) discloses that the police did receive a telephone call from her as she said.
- [21] Derk Houwen gave evidence of the sequence of events. He said that when he returned to the office he could hear yelling coming from the office. This is consistent with his mother's account. He saw the plaintiff leaning across his mother's desk. This is consistent with Karen Houwen's account. He noted that his mother appeared to be stunned or distressed and he went into the office and asked the plaintiff to calm down. He says that the plaintiff said to him "You're not my boss. You can't tell me what to do". The plaintiff agreed that words to that effect were said. The plaintiff agreed that Derk did say words to the effect "Let's sit down and talk about this".
- [22] In cross-examination, Derk Houwen did not have put to him any of the particular events involving physical violence which had been drawn from the plaintiff in examination in chief. None of the matters which were opened or led from the

plaintiff with respect to the physical confrontation between him and the plaintiff were put to Derk.

- [23] A close examination of the evidence of Reinder, Karen and Derk Houwen discloses inconsistencies in their recollections of when they spoke to each other by telephone and what was said. I do not regard this as reflecting upon the credibility of any of them. Karen Houwen, in particular, was asked to recount quite detailed matters concerning telephone conversations and the order in which they took place. In any event, the telephone records do not appear to be a completely accurate account of the telephone calls which were made as they do not appear to record the call to the police.
- [24] It is appropriate that I take into account some other matters which are relevant to the issues of credibility of the various witnesses.
- [25] The plaintiff had, for the purposes of this action, been examined by two psychiatrists. Each of them asked him whether he had engaged in illicit drug use. He was untruthful when he told each of them that he had not used such drugs. He attempted to explain this by saying that he thought that if he told the doctors about his drug use that they would only concentrate on that for their analyses. The plaintiff had told his general practitioner on more than one occasion of his drug use. When he lied to the psychiatrists about his drug use he knew that their reports were to be used for the purposes of litigation. I regard his explanation as nothing more than a flimsy self-justification designed to evade the consequences of his dissembling behaviour.
- [26] The plaintiff's account of his conversations with Karen in which he said that she verbally abused him (this was not put to Karen) had an air of unreality to them. Given the police report which disclosed that the plaintiff had been abusive in a telephone conversation with a police officer concerning this matter I think it is more likely that Karen's account of her conversations with the plaintiff is correct.
- [27] In the light of the above I do not accept the plaintiff's version of events.
- [28] I do not accept the plaintiff's evidence when he says that he had conversations with Karen Houwen on two earlier occasions concerning the mechanical condition of his truck and what should be done. Her evidence was that that was the province of her husband and in the absence of these events having been put to her I accept her evidence. Similarly, I accept the evidence of Derk Houwen as to the events of the afternoon. I accept that it was the plaintiff that head-butted Derk Houwen and split his lip. I accept that it was the plaintiff who pushed Derk Houwen back onto a plan desk and that both ended up on the floor with Derk Houwen holding the plaintiff in an attempt to protect himself. I accept that the plaintiff bit Derk Houwen on the ear. The photographic and medical evidence which was called did not establish to my satisfaction, in the face of her denials, that Karen Houwen had hit the plaintiff with a golf club. I accept that she was holding it at some stage and that she did threaten to hit the plaintiff with it but I do not accept the plaintiff's reconstruction of what occurred.
- [29] I find that it was the plaintiff who instigated the altercation by pushing Derk Houwen backwards and then wrestling with him until they fell to the floor. I find that the injuries suffered by the plaintiff were a consequence of his own actions and

that Derk Houwen was only doing that which was necessary to protect himself. I have already found that the plaintiff was not assaulted with a golf club or in any other way by Karen Houwen.

- [30] In the light of those findings it is neither necessary nor desirable that I consider the legal issues raised in the pleadings. I will, though, consider the question of quantum.

Quantum

- [31] It is not disputed that the plaintiff suffered a right thumb injury.
- [32] There is a claim for psychiatric injuries – an adjustment disorder with mixed anxiety and depressed mood. On this issue I cannot find that the plaintiff has established such an injury. Dr Larder said that the failure by the plaintiff to be truthful on his use of illicit drugs “raises the question of doubt in my mind about the accuracy or veracity of the history obtained”. He also said that the use of the drug “complicates and aggravates and confuse[s] a psychiatric disorder or illness which may have been present before or that arises separately from the use of cannabis.”
- [33] Whether the injuries suffered by the plaintiff contributed to any psychiatric injury or not, it was Dr Atkinson’s opinion that by November 2008 he had recovered and the psychologist, Mr Konig, noted that the plaintiff himself reported that he was “going well” in March 2009. Further, according to the history that the plaintiff gave the psychiatrists, any injury he had has been continued, perhaps aggravated, by conduct not alleged against the defendant.
- [34] On the issue of general damages, the plaintiff has been left with a one to two percent whole person impairment by reason of the right thumb injury. There is some possibility that he will require further surgery but that is likely to be well into the future. In the light of the awards given in *Healey v Farrell* [2007] QSC 252, *Hunter v New Fishing Australia Pty Ltd* [2009] QSC 229, and *Bathis v Star Track Express Pty Ltd* [2009] QSC 331, the appropriate award for general damages for this injury is **\$20,000**.
- [35] Special damages are agreed at **\$21,811.43** with interest accruing with respect to travel expenses of **\$1,019.75**.
- [36] With respect to future expenses the only items which were dealt with were the possibility of a need for surgery and the use of analgesics. No evidence was given as to the cost of the analgesics. If the surgery was performed today it would cost \$4,538. It may not be necessary; if it is, then the plaintiff may not undergo it for at least two decades. An allowance for both the possibility of future surgery and analgesics **\$2,500** is appropriate.
- [37] *Fox v Wood* damages of **\$6,140** are admitted.
- [38] With respect to past economic loss there was a paucity of evidence. The defendant refers to the plaintiff’s average weekly income after tax in the years prior to the injury and arrives at figures, which I accept, of an average annual weekly income of \$628, \$743 and \$655 for the preceding three years. It is not in dispute that the plaintiff was not in work for some time. It is accepted by the defendant that he would have sought work. Doing the best I can in the absence of more detailed evidence, I assess damages under this head at **\$35,000**.

- [39] With respect to future economic loss, I do not accept that the plaintiff should give up his present employment. He was particularly careful to demonstrate that his current employer accommodates whatever concerns and problems he has with his physical health and allows him to work in a way which does not increase any pain he might suffer. I do not accept the evidence of Ms Stevenson who provided a report without having had any particular regard to the opinions of the specialists who had examined the plaintiff. Further, the recommendations of Ms Stevenson with respect to a treatment regime and the provision of certain aids was not supported by the medical evidence, nor was there any evidence from the plaintiff that he would either buy or use those aids.
- [40] At most, the plaintiff could claim for some amount to act as a resource should his condition worsen and his capacity to earn be diminished. If that occurs, then it is not likely to occur for some time. I award **\$25,000** under this head.
- [41] The summary of the plaintiff's damages are set out below.

General damages	\$20,000.00
Interest on \$10,000 at 2% for 3 years	600.00
Special damages	\$21,811.43
Travel expenses	\$1,019.75
Interest on \$1,019.75 at 5% for 3 years	152.96
Future surgery etc	\$2,500.00
<i>Fox v Wood</i> damages	\$6,140.00
Past economic loss	\$35,000.00
Interest on \$4960 being \$35,000 less net workers' compensation benefit of \$30,400 at 5% for 3 years	744.00
Past superannuation at 9%	3150.00
Future economic loss	25,000.00
Future superannuation at 9%	2250.00
Sub-Total	\$118,368.14
Less Workcover refund	\$56,610.16
DAMAGES	\$61,757.98

Conclusion

- [42] The claim is dismissed. I will hear the parties on costs.