SUPREME COURT OF QUEENSLAND

CITATION:	*Hughes v Tucaby Engineering Pty Ltd* [2011] QSC 256
PARTIES:	**Phillip William Hughes** (Plaintiff) **v** **Tucaby Engineering Pty Ltd** (First Defendant) **And** **North Goonyella Coal Mine Pty Ltd** (Second Defendant)
FILE NO/S:	SC 65 of 2010 & 165/09
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	24 August 2011
DELIVERED AT:	Bundaberg
HEARING DATE:	27, 28 July 2011.
JUDGE:	McMeekin J
ORDER:	**Judgment for the Plaintiff in the sum of $550,128.11**
CATCHWORDS:	DAMAGES – CONTRIBUTORY NEGLIGENCE – Whether Plaintiff was contributorily negligent in deciding to step over a low slung chain. DAMAGES — Measure and remoteness of damages in actions for tort — Measure of damages — Personal injuries — General principles — Future Economic Loss – Future Treatment Costs *Coal Mining Health and Safety Act* 1999 (Qld) *Law Reform Act 1995* (Qld), *Anodising & Aluminium Finishers v Coleman* [1999] QCA 467 *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649

Bathis v Startrack Express & Ors [2009] QSC 331

Bugge v REB Engineering Pty Ltd [1999] 2 Qd R 227

Corkery & Ors v Kingfisher Bay Resort Village Pt Ltd & Anor [2010] QSC 161

Craddock v Anglo Coal (Moranbah North Management) Pty Ltd [2010] QSC 133

Husband v Hikari (No 42) Pty Ltd [2010] QSC 398

Jaensch v Coffey (1984) 155 CLR 549

Linsell v Robson [1976] 1 NSWLR 789

Malec v JC Hutton Pty Ltd (1990) 169 CLR 638

McLean v Tedman (1984) 58 ALJR 541

Pollard v Baulderstone Hornibrook Engineering Pty Ltd [2008] NSWCA 99

Reck v Queensland Rail [2005] QCA 228

Thomas v O'Shea (1989) ATR 80-251

Vandeloo v Waltons Ltd [1976] VR 77

Van Velzen v Wagener (1975) 10 SASR 549

COUNSEL: R Whiteford for the Plaintiff

P Cullinane for the Defendant

SOLICITORS: Taylors Solicitors for the Plaintiff

DLA Phillips Fox for the Defendant

[1] **McMEEKIN J:** Mr Phillip William Hughes suffered an injury to his left arm on 19 August 2006 in the course of his employment with the defendant, Tucaby Engineering Pty Ltd. North Goonyella Coal Mines Pty Ltd was his host employer and the occupier of the site where his injury occurred. He brings action against both entities alleging breach of duty both at common law and under statute[1] and claiming damages. On the pleadings the liability of both defendants and the quantum of damages are in issue, and there are contribution proceedings between the defendants.

[2] Mr Cullinane, for the defendants, explained at the commencement of the trial that the two defendants had reached some accommodation, and at the end of the evidence conceded that the plaintiff had made out his case on liability. By the end of the trial the only issues of significance were:

(a) Whether, and if so to what extent, the plaintiff should be held contributorily negligent; and

(b) In what amount damages for pain, suffering and loss of amenities of life, future economic loss and future treatment costs should be assessed.

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1 *Coal Mining Health and Safety Act* 1999 (Qld)

CONTRIBUTORY NEGLIGENCE

The Accident

[3] The plaintiff was employed as a fitter. He had just commenced his shift. He was located in the mechanical workshop at the North Goonyella Mine site. He went to step over a low slung chain hanging across a wide doorway used to bring machinery into the shed. In doing so a small hook on a sign located at the mid point, and low point, of the chain that he had not previously observed caught up in the spats that he wore over his boots. He tripped and fell heavily onto his left elbow. The plaintiff gave evidence that he believed that he had not grounded his right foot when he commenced to lift his left foot – he effectively did not break stride in crossing the chain.

The Defendant's Contentions

[4] The defendant contends that the plaintiff was contributorily negligent for three reasons:

(a) the plaintiff failed to use an alternative and available means of egress from the workshop namely a door available for pedestrian access;

(b) there were other obviously safer means of egressing through the machinery doorway, namely by lifting the chain off the hook where it was attached to the wall or alternatively ducking under the chain;

(c) the plaintiff's method of stepping over the chain in not breaking stride, which led to him both failing to clear the hook and not grounding his right foot before lifting his left, was not reasonable given the obvious hazard.

The Relevant Principles

[5] Mr Whiteford, for the plaintiff, referred me to *Pollard v Baulderstone Hornibrook Engineering Pty Ltd* [2008] NSWCA 99 where McColl JA discussed the principles that apply to the task of determining contributory negligence in the employment and non-employment situations in terms which meet the present case:

> "13 At common law, a plaintiff is guilty of contributory negligence when the plaintiff exposes himself or herself to a risk of injury which might reasonably have been foreseen and avoided and suffers an injury within the class of risk to which he or she was exposed: *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 (at [16]) per McHugh J.
>
> …..
> 15 The appellant was not the respondents' employee. Different considerations arise in the case of contributory negligence on the part of such persons: *Thompson v Woolworths (Queensland) Pty Ltd* [2005] HCA 19; (2005) 221 CLR 234 (at [40]). In an employment situation a court is required to take into account, in determining whether a plaintiff has been guilty of contributory negligence, the fact that the employer had failed to use reasonable care to provide a safe system of work, thereby exposing the plaintiff to unnecessary risks. In such a case, the question is whether, in the circumstances and under the conditions in which the worker was engaged, the worker's conduct amounted to mere inadvertence, inattention or misjudgement or to negligence rendering him responsible in part for the damage: *Bankstown Foundry Pty Ltd v Braistina* [1986] HCA 20; (1986) 160 CLR 301 (at 310).

> 16 The circumstances which attract particular consideration when a person is injured in an employment situation may also be relevant, however, when the question of contributory negligence arises in a non-employment context. A finding of contributory negligence turns on a factual investigation of whether the plaintiff contributed to his or her own loss by failing to take reasonable care of his or her person or property. What is reasonable care depends on the circumstances of the case. Contributory negligence focuses on the conduct of the plaintiff tested against that of a reasonable person in the plaintiff's position. The duty owed by the defendant is one of the factors that must be weighed in determining whether the plaintiff has so conducted him or herself as to fail to take reasonable care for his or her safety: *Astley v Austrust Ltd* [1999] HCA 6; (1999) 197 CLR 1 (at [30]) per Gleeson CJ, McHugh, Gummow and Hayne JJ."

[6] I would add a reference to *McLean v Tedman* (1984) 58 ALJR 541 at 545 with its acknowledgment that the employer must bring into account, in formulating a safe system of work, the possible distraction of an employee engrossed in his task.

Further Relevant Facts

[7] I am satisfied that each witness was doing his best to accurately answer the questions asked of them.

[8] The incident happened at about 7 pm or a little thereafter. There was no suggestion that the lighting was not adequate.

[9] At the relevant time Mr Hughes was intending to access a machine parked at the entry to the shed just outside the doorway where he tripped. He was intending to move the machine into the mechanical workshop - effectively to the next door bay in order to assist a young tradesman who had only recently commenced employment. Mr Hughes was the leading hand on the night in question. He said that he was pre-occupied with the task that he had set himself.

[10] It is common ground that the chain was affixed at a height of about four feet off the ground on each side of the doorway, that is at about waist height, and that it hung to a height of about 18 inches at its lowest point where Mr Hughes tried to step over it. Mr Hughes is 187 cms or 6 foot 3 inches in height.

[11] Further it was not in contention that Mr Hughes had not seen the hooks holding the sign either on that day or any previous day.

[12] It was common ground that there was an alternative means of access available through a side door appropriate for pedestrian traffic, but it was a little out of Mr Hughes' way.

[13] It was common ground that there was painted on the floor of the workshop green areas where tradesmen were intended to walk when machinery was being worked on in the shed. One such painted area led to the side of the doorway where the chain was affixed to the wall. It was not in issue that it was a simple matter to lift the chain off the place at which it was there affixed and walk through. Nor was there any difficulty in simply lifting the chain up and walking underneath it

[14] The defendant did contend that Mr Hughes must have seen the chain hanging in place previously. It had been there for some months before the day of the accident. Mr

Hughes said he had no recollection of ever having seen the chain before this occasion with which these proceedings are concerned. Whilst he worked at the workshop from time to time, and reasonably regularly, it was not his designated workplace. He was usually underground. It is possible that on previous occasions the chain had simply been down on the ground when he had come to the workshop. Apparently the point of the chain was to prevent machinery being driven into the workshop unexpectedly and when workers might be present there. So it would have been down through significant periods of the working day. I see no reason to disbelieve Mr Hughes.

[15] In the incident report completed shortly after the event Mr Hughes' supervisor described the low hanging chain, accurately enough, as a "temptation" to workers to step over it.

[16] There was no evidence that either defendant had ever issued any warning about stepping over the chain nor any instruction to workers that they ought not do so, or that workers ought to use the side door in preference to the machinery door, or that the workers should lift the chain in some way and go under it rather than over it. Mr Hughes said that he had not received any such instruction.

[17] Immediately after the accident steps were taken to remove the tripping hazard presented by the chain. The chain was drawn tight that night so that the temptation to step over it was removed. It was replaced shortly after the accident by a concertina device

Discussion

[18] Obviously Mr Hughes' actions in failing to clear the small hook protruding from the chain or sign was of significance, causally, in his accident. That of course is relevant.

[19] There is no absolute rule in life or in the workplace that it is inherently and unreasonably unsafe to step over something, whether it be a chain or otherwise, at about the height of the chain here. I have no doubt that this happens every day in our society in many and varied situations, and without injury. It is of course foreseeable that in stepping over an obstruction one might clip it and trip and fall. But while foreseeability of the risk in question is certainly necessary it is not a sufficient condition to ground an obligation to act or refrain from acting. The question is not generally discussed in the context of contributory negligence as foreseeability is established on the plaintiff's case but see the discussion regarding foreseeability by Gibbs CJ in a different context in *Jaensch v Coffee* (1984) 155 CLR 549. It is necessary then that the defendants point to something, other than an everyday risk that is commonly avoided, as justifying a finding of contributory negligence.

[20] First, there was no reason, absent some express warning, why Mr Hughes should have been particularly wary of the chain. He appreciated that it was there to keep machinery out, not workers such as him in.

[21] In these circumstances I cannot see that it was unreasonable for a worker to use the shortest and most direct route to access machinery so that he could go about his employer's business. It is commendable that a worker conscientiously sought to go about his tasks efficiently. The submission that it was unreasonable for Mr Hughes not to use the side door, which would have taken him a short distance out of his way from the time he decided to access the machine, is not made out.

[22] Here the defendants accept that the plaintiff was exposed to an unnecessary risk – it was not simply that the chain was low slung but that there were poking through it small hooks capable of catching on clothing, or in this case spats, and of which the plaintiff was unaware. It is not that the plaintiff failed to clear the chain that caused his fall but rather that he did not clear the small hook protruding that crucial margin out from the chain.

[23] It is against this background that the plaintiff's actions need to be judged. The decision to step over the chain was not done in any conscious way. The plaintiff simply did not think of the alternatives. There was no deliberate weighing up of the risks and rewards of lifting the chain or stepping over it. Stepping over was the simpler of the two methods by a small margin.

[24] As the defendants contend it was a simple matter to raise the chain, and raising the chain would have obviated the risk of tripping over the chain, but neither feature compels a finding that the chain ought to have been raised rather than stepped over. As it happens, Mr Hughes was unfamiliar with the method by which the chain hung and so not aware of how simple it might be to lift it off its fixing point – if he had thought about it he probably would have appreciated that it was a simple matter. He certainly would have appreciated that it was a simple matter to just lift the chain above his head.

[25] But the issue really is – was he obligated to pause, consider and carefully weigh up the issue? I cannot see that the exercise of reasonable care requires that much. There first needed to be some trigger to make him realise that he ought to pause and weigh up things before simply stepping forth. The defendants had not thought to issue any instruction to workers concerning the chain as a particular hazard. Why should that reasonably be expected to occur to a worker in the course of his working day and when engrossed in his task?

[26] There was no direction that workers must at all times stay within the green painted areas which instruction would have had the effect of keeping workers away from the chain at its low point and so prevent them from crossing over it there. The painted areas were there for a different purpose, namely to keep men and machinery separate when machines were present. Hence it is not immediately apparent why a worker ought to have thought that it was unsafe to go outside the painted areas when no machinery was present and none were imminently likely to be present.

[27] The defendants were aware, by their employees, that the hooks were there – Mr Hughes was not. No feature of the evidence suggests that it ought to have occurred to Mr Hughes, as he went about his work, that this seemingly innocuous step was more fraught with risk than it appeared. In my judgment Mr Hughes was not negligent of his own safety in deciding to step over the chain.

[28] The final suggestion is that the plaintiff failed to execute the step in a safe manner. Here the line between inadvertence and misjudgement on the one hand and carelessness amounting to negligence on the other is a very fine one. Had Mr Hughes tripped on the chain itself he would have some difficulty in persuading me that he should not bear a significant proportion, if not all, of the blame for the accident. But it is common ground that it was not the chain but, to him, the unseen and unknown hooks that brought him down. The real problem was that the chain was so low as to appear to be an easy hurdle to clear. There was a hidden danger. Given his reasonable distraction with the task at hand and the apparent innocuousness of the low slung

barrier, I cannot accept that Mr Hughes was negligent in failing to identify that danger and avoid it.

[29] The defendant submitted that the decision in *Reck v Queensland Rail* [2005] QCA 228 provided some guide to the approach I should take here. I did not find the analysis there of any great help. Generally, decisions on one fact situation rarely assist in determining another, particularly on questions of contributory negligence. That is so with the comparisons sought to be drawn here with the situation in *Reck.* There the plaintiff locomotive driver fell a distance of about two meters out of the door of his locomotive whilst trying to alight. He had performed that task hundreds, if not thousands of times before. The majority in the Court of Appeal (McPherson JA and Holmes J, as she then was) upheld the finding of contributory negligence of 25% referring to the "dangers of falling such a distance and the severe consequences of doing so"[2] as being obvious to the plaintiff. Those considerations are not present here.

[30] Despite the causal significance of his decision to step over the chain, in my judgment it is not just or equitable to reduce the damages recoverable by the plaintiff.[3] I reject the defendants' submissions and find the plaintiff was not guilty of contributory negligence.

DAMAGES

[31] The plaintiff was born on 1 September 1963. He was therefore 42 years of age at the date of the accident. He was aged 48 at the time of the trial.

The Injury and its Aftermath

[32] Mr Hughes fell onto his elbow but suffered immediate pain in his left shoulder. He described the initial pain in his shoulder as "horrendous"[4].

[33] Mr Hughes came under the care of Mark Shaw, Orthopaedic Surgeon. On 23 August 2006 Dr Shaw performed an arthroscopy on Mr Hughes' left shoulder. This identified a "massive tear of supraspinatus and infraspinatus tendons with tearing of long head of biceps and superior boarder subscapularis".[5] Dr Shaw performed a left shoulder rotator cuff repair. He described the repair as "difficult". Mr Hughes underwent a regime of physiotherapy and exercise. That continued until he returned to work on the fifteenth of January 2007. On his return to work he felt that his shoulder was weak but he had little pain. He felt that he gradually improved until his condition plateaued.

[34] Mr Hughes was offered permanent employment with the North Goonyella Coal Mine in around July 2007 and accepted that offer. He has continued to work as a fitter since that time without any formal moderation of his duties. However he reports that his shoulder has gradually worsened over time.

[35] During 2008 Mr Hughes noticed that he commenced to get pain in his shoulder and weakness. He found that he needed assistance with work above shoulder height.

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2 At [7]
3 *Law Reform Act 1995* (Qld), s 10(1)(b)
4 T1-20/28
5 Ex 1.1

[36] Ultrasound examination carried out in July 2009 demonstrated that the surgical repair of the supraspinatus tendon carried out by Dr Shaw had been "a complete failure".[6]

[37] Dr Cook, Orthopaedic Surgeon, explained the significance of the failure of the surgery in the development of the symptoms: "Because of the absence of the supraspinatus tendon over the head of the humerus as part of the Rotator Cuff allows the head of the humerus to migrate upwards so that the subacromial space is reduced and with movement the proximal end of the humerus either articulates with, or impinges on, the under surface of the acromion. This results in the onset of degenerative changes in the joint initially with osteophyte formation and later with loss of joint space, more extensive osteophyte formation, deformity of the bones around the right shoulder and bone sclerosis."[7]

[38] Dr Cook explained that these problems were responsible for intermittent shoulder pain, locking and decreased range of movement, all of which Mr Hughes reports as occurring in the injured shoulder. In 2009 Dr Cook expected those symptoms to gradually worsen over the years ahead.

[39] Mr Hughes says that Dr Cook's prediction has come to pass. He claims that his shoulder has become much worse over the intervening period with "a lot more pain in the joint."[8] Mr Hughes complains that his shoulder has become "a lot weaker" and that he has less movement especially above shoulder height or away from his side. He says that the left arm in its present state is effectively useless for overhead tasks.[9]

[40] Dr Cook has assessed the extent of the impairment using the AMA Guides (5th edition) as at about 17% to 18% of the shoulder and 10% to 11% of the whole person.[10]

[41] Despite his continued employment in the underground mine as a fitter Dr Cook opines that the plaintiff is not suited to that work. The plaintiff maintained that he continued in that employment only with the assistance of his work mates. Dr Cook expressed the view that the plaintiff could not pass a Coal Board medical – a pre-requisite to maintaining employment in the mining industry – without several significant restrictions that would make him unattractive as an employee.[11]

[42] In November 2009 Mr Hughes saw Dr Ken Cutbush, an Orthopaedic Surgeon, specializing in shoulder and upper limb problems. Dr Cutbush, he says, advised that "apart from a tidy up of the joint" there was nothing that could be done for him. In a report to solicitors[12] Dr Cutbush explains that he discussed two alternative procedures with the plaintiff – an arthroscopic debridement of the shoulder and a latissimus dorsi transfer. His report gives no clue as to whether he recommended either form of surgery, what if any was his preferred treatment, or the reasons that might cause the plaintiff to prefer one form of surgery over the other, or whether both are required.

[43] Dr Cook has suggested that a complete shoulder joint replacement is likely and within 5 to 10 years. It may require revision.[13] Following such a procedure, assuming it to be

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6 See report of Dr A.E Cook. Exhibit 1.7 at p 5
7 *Ibid*
8 See exhibit 1.30 at para 53
9 T1-23/25
10 See the reports Ex 1.8 pp 5-6 and 1.9 p4
11 See eg Ex 1.8 at p 5; Ex 1.11
12 Ex 1.13
13 Ex 1.7 at p 6

successful, the impairment rating would be higher (24% of the shoulder and 14% whole person), but presumably the extent of the pain experienced would then be less.[14]

[44] There is moderate wasting of the muscle bulk of the shoulder and shoulder girdle.

[45] Mr Hughes says that he is in pain "most of the time". His current problems are extensive. He cannot drive a manual car safely, he cannot sleep on his left side, he cannot swim, a recreation he used to enjoy, nor play golf beyond nine holes and then only with pain. Effectively he says that he cannot use his left arm above shoulder height. When he must he lifts his left arm with his right hand. He complains of difficulties with dressing and undressing. He cannot enjoy activities with his young grandchildren.

General Damages

[46] Damages fall to be assessed under common law principles. The defendants contended for an assessment of $55,000 and the plaintiff for $75,000.

[47] Neither side referred me to any comparable decisions.

[48] I bear in mind that the injury is to the plaintiff's non dominant arm.

[49] The impairment assessments that Dr Cook has advised are relatively high. Nonetheless some moderation is called for. Whilst the problems that Mr Hughes experiences are significant – and he faces further surgery – he has managed to maintain employment in a physically demanding occupation. Indeed an oddity in the case is that Mr Hughes' immediate superior, Mr Wayne Peters, who works with him regularly, was unaware of Mr Hughes having any restriction in the use of his left arm. Mr Peters was an impressive witness. I doubt that he would miss any substantial overt problem. The only explanation that occurs to me is that Mr Hughes can manage better than he supposes.

[50] That being so I am inclined to think that the defendants' submission better reflects the level of damages appropriate under this head.

[51] A review of recent assessments of damages at around this level – albeit in respect of differing injuries - confirms me in that view.[15]

[52] I assess the damages at $55,000.

Future Economic Loss

[53] The significant debate centred on future economic loss. The plaintiff submitted that his damages ought to be assessed at $574,032 and the defendants submitted at $250,000. The defendants' approach was to urge that a global sum be adopted. The plaintiff assumed he would lose his well paid employment at the mine in a years' time, would

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[14] Ex 1.7 at p 7

[15] *Bathis v Startrack Express & Ors* [2009] QSC 331 per Byrne SJA - $65,000 for an injury to a hand – 30% impairment of the arm; *Corkery & Ors v Kingfisher Bay Resort Village Pt Ltd & Anor* [2010] QSC 161 per P Lyons J - $60,000 for a significant back injury. My own decisions: *Husband v Hikari (No 42) Pty Ltd* [2010] QSC 398 - $55,000 for a back injury; *Craddock v Anglo Coal (Moranbah North Management) Pty Ltd* [2010] QSC 133 - $60,000 for an injury to an ankle with a prospective impairment of up to 52%.

then have a residual earning capacity of about $750 per week, and then discounted 20% for contingencies.

[54] The key issue is whether the plaintiff is likely to maintain well paid employment past the next Coal Board medical due in July 2012. The evidence from Dr Cook, and there was none to put against it, was that Mr Hughes could not meet the "critical functional job demands" of a fitter's position.[16]

[55] The argument pressed by the defendants was that while the plaintiff may have difficulties in maintaining his employment as a fitter he has other skills and would be well suited to other work still within the mining industry and hence well paid.

[56] There is some force in that point – the plaintiff has followed a variety of occupations in his life, he is certainly far from unintelligent, and he is capable of manual work provided that it is carried out below shoulder height. There was no direct evidence, however, of the plaintiff's prospects of getting any such position. The plaintiff has not thought to take any such enquiry yet. There was an evidentiary onus on the defendant to demonstrate such residual earning capacity[17] and I would have thought that the defendant was in a better position than the plaintiff to advance evidence of his prospects of employment in the mining industry, but outside his position as a fitter. In the absence of such evidence I assume that the prospects are far from certain.

[57] The plaintiff said that he had made enquiries of the Mackay Regional Council and thought that he could carry out labouring work they require, for example at the water treatment plant.

[58] The evidence strongly favoured a finding that the plaintiff would be unlikely to pass his next Coal Board medical. Dr Cook had experience with the requirements of these medical assessments, as one might expect given his practise in the Mackay area over three or more decades, and he thought that the plaintiff would inevitably have significant restrictions placed on his continued employment in a mine as a fitter.

[59] There is little doubt in my mind that the plaintiff faces a very uncertain economic future. There is little room for optimism that he will successfully pass a Coal Board medical and it is very likely that he will be an unattractive employee, at least in his role as a fitter, thereafter.

[60] The global sum advanced by the defendants has the considerable disadvantage that it makes scant provision for the plaintiff's probable loss if he does not pass the Coal Board medical and is unable to retain a position in the mine. If one adopts a retirement age of 67 years, as the plaintiff urges, then the defendants' approach assumes a residual earning capacity in the order of $1400 net per week[18] which strikes

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16 See Ex 1.11 for the opinion and Ex 1.15 for the requirements

17 *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649 at 657 per Barwick CJ; *Van Velzen v Wagener* (1975) 10 SASR 549 at 550 per Bray CJ; *Linsell v Robson* [1976] 1 NSWLR 789 at 253-254 per Hutley JA; and at 254-255 per Glass JA; *Baird v Roberts* [1977] 2 NSWLR 389; *Vandeloo v Waltons Ltd* [1976] VR 77; *Thomas v O'Shea* (1989) ATR 80-251 at 68,701 but noting the qualification on that decision in *Bugge v REB Engineering Pty Ltd* [1999] 2 Qd R 227 per Chesterman J and approved in *Anodising & Aluminium Finishers v Coleman* [1999] QCA 467; [2002] 1 Qd R 141

18 $250,000 divided by the relevant multiplier (595) provides a loss of $420 per week. The present net wage is $1938. The residual capacity is the difference but I have allowed for a 20% discount for contingencies.

me as very unlikely. Adopting a more modest retirement age of 60 years, as the defendant submitted, still requires an assumption of a certain residual capacity in excess of $1,140 net per week, again an improbable assumption.

[61] The plaintiff's submission effectively assumes that the plaintiff fails to pass the Coal Board medical set for next July, then loses his present position and is unable to regain any well paid position in the mining industry, but assumes immediate employment in a reasonably well paid position such as that with the Mackay Regional Council giving him a residual earning capacity in the order of $750 net per week. As I have said the plaintiff assumes a retirement age from the mining industry at 67 years. The figures are then discounted by 20% for contingencies. Subject to two matters those assumptions are all realistic.

[62] The two matters that the calculation ignores are these: first, the plaintiff does have a chance of obtaining work within the mines. He has long experience in the industry, and contacts, and there are positions such as operator that do not require overhead work. It is notorious in the community that there is presently a strong demand for employment in the mining industry. In reaching a view as to hypothetical future events, I am required to assess the degree of probability that the event might occur and adjust the award of damages to reflect the degree of probability: *Malec v JC Hutton Pty Ltd.*[19] The discount suggested of 20% does not adequately reflect that chance that the residual earning capacity might be higher than assumed.

[63] Secondly, the assumption of working through to age 67 years is a generous one. The statistics in evidence show that few work to that age. There are presently only five employees aged over 60 years in the second defendant's employment out of a workforce of 216.[20] The oldest is aged 63 years. Only one is a fitter. He is aged 61 years. The next oldest fitter at the mine is aged 54 years. Thus only 2% of the current workforce work past age 60. The union records show a greater number of older employees but without identification of their roles. Not all work in coal mines.[21]

[64] The plaintiff spoke of a wish to have children - despite being nearly 49 years of age and a need to engage the IVF procedures - and an intention that he work on then as long as possible to provide the necessary support. The prospect of having further children is far from certain. And whether one works on in the relatively difficult conditions that pertain in the mining industry depends on more than a desire to do so. Attitudes can change over time as can one's tolerance of the physical demands of such work.

[65] I am conscious that the union will be pressing for a 5% increase in wages at the next enterprise bargaining negotiation, and that a 5% increase has been obtained at other mines. Some part of that is likely to reflect productivity improvements and similar issues rather than inflation and hence it is legitimate to bring the chance of increased wages into account.

[66] I propose allowing the loss submitted by the plaintiff of $1,188 through to age 60 years with a 30% discount for contingencies and then for a further 5 years with a 90% discount. That latter discount makes some allowance for personal factors justifying a chance over and above the average that the statistics suggest.

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19 (1990) 169 CLR 638

20 Ex 1.25 – my count and I treat that as an approximation.

21 T1-66/20-55

[67] I will allow $343,000.[22]

[68] The plaintiff also claims $10,680 for the loss of the income he receives from the CFMEU as remuneration for his work as treasurer of the North Goonyella lodge. He will lose that position if he loses employment at the mine. The claim reflects a loss of $60 per week for four years delayed one year. There needs to be some discounting of the claim. As I have said, there is a prospect that Mr Hughes might retain his employment at the mine albeit in a different capacity and so retain the position. As well, presumably the continued holding of the position is a matter for the members of the Lodge and so not dependant solely on Mr Hughes' willingness to carry on. I will allow $8,000 under this head of loss.

Future Treatment Costs

[69] The competing submissions were that the plaintiff should be awarded $75,000 approximately from the plaintiff's side and $39,550 from the defendants' side. The resolution of the debate turns largely on how many times the plaintiff is likely to undergo surgery, its probable outcome, and what form that surgery will take. The onus, of course, lies on the plaintiff to establish his loss.

[70] The plaintiff's submissions assume that he potentially might have the two types of surgery that Dr Cutbush spoke of as well as the shoulder replacement that Dr Cook spoke of as well as a substantial amount for medication and significant time off work.

[71] Dr Cook's opinions as to future treatment are set out in his reports – his views remained unchanged from his first report and that is that there would probably need to be a shoulder joint replacement undertaken within 5 to 10 years. There was the possibility of revision. He was not asked to comment on the effect on his estimated time for the surgery he thought appropriate – or indeed if it would be necessary at all - if the debridement that Dr Cutbush spoke of was undertaken. The surgery that Dr Cutbush contemplated was mentioned by him as possibilities only, and without recommendation, so far as his reports show. The correlation between that surgery and the surgery that Dr Cook spoke of was not explored in evidence. Whether they are likely to be each required is unknown.

[72] The prospect that three different types of surgery would be required seems improbable.[23] Dr Cook was the only orthopaedic surgeon called by the plaintiff and no evidence was led from him touching on these matters when I would expect the plaintiff to do so if his opinions favoured the three types of surgery. The plaintiff has not made out the need for each of the three different forms of surgery.

[73] As to the need for medication there was no evidence about the likely level of pain following successful surgery. As I have mentioned, I understand the usual purpose of such surgery is to relieve pain and discomfort, with the downside being greater limitation in use reflected in the increased level of impairment. Obviously there is the chance of a failure of the surgery but no evidence was led as to the likelihood of that.

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22 (($1,188 x 393) x 70%) + (($1,188 x 136) x 10%)

23 Although I note the opinions of Dr Dörgeloh in Ex 1.6 where he does advocate three types of surgery but different to those discussed by Drs Cook and Cutbush. Again his opinions were not the subject of submissions.

[74] The defendants have conceded two operations but with a longer deferral period for the second, a significant amount for medication, and an amount for time off work following surgery. I consider the defendants' approach to be more realistic and more in accord with the evidence so far as it goes. Presumably the debridement will assist in delaying the need for the shoulder replacement – which Dr Cook said should be delayed as long as possible to avoid the need for revision. The only legitimate criticism of their approach is that no allowance is made for the second period off work that will be required if that second surgery is undertaken, as the submission assumes.

[75] I will allow $45,000.

Loss of Superannuation Benefits

[76] It is agreed that this loss should be allowed at 9% of the amount allowed for past and future economic loss.

[77] I allow $31,590 for the future loss.

Summary

[78] The remaining heads of loss are agreed save that I will need to adjust interest.

[79] In summary I assess the damages as follows:

HEAD	AMOUNT
General Damages	$55,000.00
Interest on General Damages[24]	$2,723.70
Past Economic Loss	$34,447.00
Interest on Past Economic Loss	$1,956.45
Past Loss of Superannuation	$3,100.23
Future Loss of Earnings	$351,000.00
Future Loss of Superannuation Benefits	$31,590.00
Future Treatment Costs	$45,000.00
Special Damages	$1,773.90
Interest on Special Damages	$434.15
Special Damages paid by WorkCover Queensland	$12,502.68
Fox v Wood	$10,600.00
TOTAL	**$550,128.11**
WorkCover Refund	$49,648.33
Net Damages	**$500,479.78**

[24] I have adopted the defendant' approach which I think is appropriate – it attributes one half of the general damages to the past rather than the more customary one-third. See Ex 12. I have used a period of 259 weeks for all interest calculations.

Orders

[80] There will be judgment for the plaintiff against the first defendant in the sum of $500,479.78.

[81] There will be judgment for the plaintiff against the second defendant in the sum of $550,128.11

[82] I will hear from counsel as to costs.