TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF QUEENSLAND No 85 of 1990

CIVIL JURISDICTION

CULLINANE J

GLYN ALBERT EVANS Plaintiff

and

CB SAND & GRAVEL PTY LTD Defendant

and

SUNCORP INSURANCE AND FINANCE Third Party

TOWNSVILLE

..DATE 15/04/96

JUDGMENT

HIS HONOUR: In this matter, the third party proceedings I have been told have been resolved.

The plaintiff, who was born on 20 May 1946, was employed by the defendant as a project supervisor. He had been employed by the defendant since early 1982 and generally supervised what was described as the sand operations of the defendant. The various activities that he has performed whilst working for the defendant appear in Exhibit 1, which is the statement of the plaintiff.

On 27 May 1987, another employee of the defendant, one Tettmar, who was employed in what is described as the mining operations part of the defendant's business, was

operating a machine, the nature of which appears in Exhibit 10. It is described as an integrated tool carrier. At the time, Mr Tettmar was using the machine to place a load on a loader. The item which was being moved was a switchboard about 500 kilograms or more in weight. A co-employee, one Mollenhagen, was assisting him in doing this.

I am satisfied from the evidence that the tool carrier, whilst enabling the load attached to it to be manoeuvred, did not provide the same degree of manoeuvrability that would have been provided by a crane. The tool carrier had its arm extended to the point which Mr Tettmar marked on Exhibit 10.

It appears that as he attempted to place the switch box on the trailer in a somewhat congested area, it became stuck. The plaintiff was in the vicinity and saw what was happening, and got up onto the back of the trailer, standing in the position which he describes in evidence, and attempted to assist the other employee to move the switch box clear of whatever it was caught on so that it could be put in its place on the trailer.

There is some confusion as to precisely what occurred immediately prior to the load falling. Mr Tettmar, in evidence, said that Mr Mollenhagen and the plaintiff were on the back of the low loader and at that point, he had taken the tension off the chains. He said that one or both of them were shaking the load endeavouring to get it free, and he himself was, to use his words, “jiggling the load around”.

As I understand the effect of his evidence, he, whilst keeping the load under tension, attempted to move it free and that he would, in the course of doing this, release the tension to see whether the load would fall free onto the trailer. I also understand him to say that the plaintiff and Mr Mollenhagen were assisting also to try and move the load free and that in the course of this activity, the load suddenly fell. He was asked at one time:

> "Was somebody shaking it?-- Well, I was shaking it with the crane to start with, then we stopped and they, or one of them, must have been Russell - that is, Mollenhagen was shaking it to get it in or whatever, but it was like I say, I let the weight off and all of a sudden it went. Whether they were shaking it or not, it was all over and done with".

I asked him:

> "You let the weight off and it went?-- Yeah, well whether I let the weight off the crane and they were sort of looking at it, and whether someone pushed it or kicked it or what, and it just all of a sudden went and Glyn went up the side and people running round to see if he was all right and that was it."

He was asked:

> "How long had there been people, if you like, around - jiggling around with this load before it went?-- Oh, it would have been only a few minutes.
>
> And did you let the weight off while they were doing that?-- Well, yeah, I think so, yes, otherwise it wouldn't have moved it you had the weight on it".

My attention was drawn to another passage where he said:

> "Well, we were letting it down and as you're letting it it would stop, but I was still coming down so there was no weight on the chains and they shoved it, or one of them shoved it and it went".

The plaintiff, who I am satisfied has little clear recall of precisely what happened at the time the load became free said, and I accept this, that the chains when he observed the load weren't just lying on top of it. He said he thought that it would probably drop two or three inches. I asked him:

> "You thought there was sufficient tension on it, did you, to prevent it dropping all the way down?-- All the way down".

However, he acknowledged he did not have any clear recall of what the position was.

The allegations against the defendant are to be found in paragraph 10. They can be summarised as follows. Firstly, there is an allegation that Mr Tettmar, who I am satisfied was an employee of the defendant, failed to exercise proper control over the integrated tool carrier and let the load drop at a time when he ought to have realised that it was dangerous to the plaintiff and Mollenhagen to do so.

There is also an allegation that the defendant was guilty of a breach of duty to the plaintiff in using the integrated tool carrier to lift the electrical switchboard cabinet when it was not suited to the job.

As I have said, whilst I am satisfied the evidence does suggest that it did not have the high degree of manoeuvrability as a crane, it is, I think, not possible to reach any conclusion adverse to the defendant on that issue on the state of the evidence which essentially comes from Mr Tettmar. There is no doubt that there was a level of manoeuvrability although not as extensive as that of a crane. It is not possible to conclude that the use of a crane would have avoided the incident, and I am not prepared to make a finding on this basis.

However, it does seem clear to me that Mr Tettmar was guilty of negligence. He ought to have realised that it was clearly dangerous to the plaintiff and Mr Mollenhagen for him to have the tension off the load at the time whilst they were jiggling the load free, at least to the extent of enabling the load to fall. He should have waited until he was given some type of signal that the load was free and that it could be released.

I find that the defendant was negligent because of the failure by Mr Tettmar to exercise reasonable care in the management of the integrated tool carrier in the respect that I have just mentioned.

I think that it is a reasonable inference, given the evidence of Mr Tettmar as to what he observed and the plaintiff's evidence that, as a result of the sudden falling of the load, the plaintiff either was struck some sort of glancing blow by the load, or that he lost his balance, or in some other way the sudden falling of the load caused him to fall and sustain an injury.

There are allegations of contributory negligence. These were pressed upon me upon the basis that the plaintiff, having a position of responsibility with the defendant, and having some degree of responsibility within the ambit of his position for safety matters, should not have got onto the back of the trailer and assisted in the task.

As I have said, I am satisfied that the employees who were carrying out the work were from a different part of the defendant's operations, and that the plaintiff endeavoured to assist them when he observed the difficulty that they had encountered.

His evidence was, and I accept, that he simply did this without adverting to the risks associated with the task. I have already found that it was as the result of Mr Tettmar's failure to keep the load under tension so as to prevent it dropping to the surface of the trailer that the plaintiff was injured. I think that a distinction has to be drawn when considering questions of contributory negligence between what does in fact constitute a failure to take reasonable care for one's own safety and what amounts to inadvertence, inattention or misjudgment on the other hand.

In this case, the plaintiff saw co-employees having difficulty, and endeavoured to assist. The situation was one which arose on the spur of the moment, and I am satisfied that the plaintiff did not really turn his mind to any risks including, of course, the risk which realised itself and it does not seem to me that the defendant has made out the allegation of contributory negligence.

As I have said, the plaintiff's conduct might be characterised as inadvertent, but it does not, in my view, amount to a failure to take care for his own safety, and I find against the defendant on this issue.

The plaintiff was born on 20 May 1946. His employment history is set out in Exhibit 1. He was employed at the time of the accident as a project supervisor and had worked with the defendant since early 1982. In the course of that employment, he had performed a number of tasks including driving machinery and operating plant.

In the accident, he sustained a fractured odontoid peg. A halo was applied and kept in place until the fracture united. The plaintiff now complains of restriction of movement in the neck and of pain and also associated headaches. He demonstrated in the witness box what he said were the restrictions of movement of his cervical spine.

Whilst giving evidence before me, he sat with his head in a normal position and there was no apparent difficulty with his neck or movements of the cervical spine, however, the impression I have, which is reinforced by the evidence of Dr Douglas, is that within the range of movement that he has, he is able to move his neck freely and without pain.

After the removal of the halo, he wore a cervical collar for about two months. Upon his return to work, he originally performed light work until about October 1987, when he returned to the sand plant and resumed his normal work. He says that initially he could not do a good deal of this work, and was restricted because he could not sit in machines for very long or climb into plant and machinery.

Early in 1988 and March 1989, the plaintiff, at the request of his employer, made a number of trips to gold mining sites in Papua New Guinea. The details of these are set out in a schedule to Exhibit 1. I had evidence from Mr McPherson that the plaintiff was regarded as a valuable employee, and that it was only when necessary that he was asked to go to Papua New Guinea because of his value to the

defendant here. Mr McPherson was the manager of the defendant at all relevant times.

The workload on the mining sites was a good deal heavier than that in which the plaintiff was engaged in Townsville because it was necessary for him to attend to anything that was required at any time, although the evidence suggests that nationals of Papua New Guinea were required to be employed to drive and operate plant and machinery.

In March of 1989, the plaintiff, who had been scheduled to return home and who had arranged with his wife to go on holidays, was told that he had to remain at one of the sites. This, not surprisingly, led to some unhappiness on his wife's part, and an argument between the plaintiff and his employer.

The plaintiff says that at that time, he was finding the work heavy going and he says that the constancy of it was having some effect upon his health. Upon his return, he was not asked to go back to Papua New Guinea, although he said that he would have gone if asked.

In 1989, the defendant's sand operations were taken over by CSR Limited, and plaintiff at that time became an employee of CSR and has remained there since. The plaintiff has what can be described as an excellent work record, having had virtually no time off work apart from the period following his accident and until his return.

The plaintiff had, many years ago, sustained serious injuries in an accident which involved a collision with a train. He had multiple fractures to the lower part of his body, back, legs and feet, and a bruised lung. He says that although he had occasional lower back pain, the consequences of this accident did not interfere with his capacity to work, something which I think is borne out by the evidence, notwithstanding that it would appear he did from time to time make some complaints about his difficulties in that regard. I have an affidavit of Mr

McPherson which was tendered and which is Exhibit 13 which refers to this.

He is described as a plant manager with CSR Limited, but says that his responsibilities include a lot of external supervision including attention to environmental aspects of the operation. He says that this means that he is out and about and on site much more than he had to be previously. He says that he has difficulty bending over a desk or performing any task which involves bending.

He makes some complaints to doctors of some involvement of his arm, but the evidence, in my view, does not bear out any relationship between this and injury sustained in the accident. I had evidence from him as to the pain and restrictions which he suffers as a result of certain activities, and the limitations that these impose upon him generally.

I heard evidence from Dr Watson, a specialist in rehabilitative medicine, and I also had evidence from Dr Douglas, Dr Lewis and Dr Low, all of whom are orthopaedic surgeons. Dr Douglas was called by the defendant.

I was shown some videos in which the plaintiff was engaged in activity which included attending generally to the detailing of a vehicle, apparently preparatory to its sale, and also performing some work in the garden. On some of these occasions, the movement of his cervical spine appears to be somewhat freer than what the plaintiff described in evidence here, and what the medical evidence as to the limitations observed would suggest. On occasions, he is shown as turning his head somewhat further than I had understood he could, and on one occasion, he is shown as looking up and to the side somewhat sharply.

I am satisfied that the plaintiff is a man who endeavours to do the best he can within his disability, and endeavours to live life as normally as possible. I accept the evidence of Dr Douglas that the videos would suggest that the range of the plaintiff's cervical movements are

somewhat greater than he had been led to believe. However, overall I generally formed a favourable impression of the plaintiff's veracity, and I accept the evidence of Dr Douglas that he has significant restrictions of cervical movement, although, as I have said, not quite as great as he had previously claimed.

I accept that these restrictions would exclude him from performing work which involved either wholly or substantially the driving or operation of plant and machinery or other strenuous work.

There is some evidence of degenerative changes at the level of C6/C7, and there is some dispute between Dr Watson and Dr Douglas as to the appropriate interpretation to be placed upon x-rays taken in 1987 compared with x-rays taken now. Dr Watson suggests these show degenerative changes having progressed in the meantime, and that this is a result of the accident. However, in relation to this, I prefer the evidence of Dr Douglas that they do not reveal any change. I also accept the evidence of Dr Douglas that the plaintiff's cervical condition resulting from the accident will not deteriorate, and that to the extent that there has been any increase in symptoms in the last 18 months as the plaintiff suggests, this is as a result of other causes.

The evidence would suggest that the plaintiff will be able to manage the work which he presently performs until a normal retirement age. However, the plaintiff has lost the capacity to engage in occupations which he previously could engage in. If he lost his present employment, this would significantly limit what he could do, and on the evidence, I think it fair to conclude that he has probably lost an advantage he may otherwise have had within his present employment to perform heavy and strenuous work.

The evidence suggests that the defendant and the present employer carry out work in remote areas on mining sites. The plaintiff has been able to perform this work for the defendant, and I am satisfied that the primary reason

for his ceasing to do so was because of the problems it gave rise to in terms of the family relationship.

Nonetheless, I think it would be unreasonable not to make some allowance for the fact that, where work of this kind is involved involving strenuous activity and significant driving of machinery, the plaintiff would not be able to do it, or at any rate, would not be able to do it as well as he previously could. The extent to which this would be a disadvantage would, of course, depend upon the extent to which this sort of activity would be required of him. The evidence on the subject is quite sketchy, and the best I think that can be done is to make some modest allowance for any disadvantage which the plaintiff suffers in this regard.

It seems to me, the significant problem which the plaintiff suffers so far as his capacity to earn an income is concerned is that he would be excluded from some of the employments which he has previously engaged in in the event it became necessary for him to seek employment, and I think that some significant allowance has to be made for this.

In my view, the plaintiff is a man with a good work record and could be expected to work longer than the average employee, and I take this into account when I come to make an assessment of future economic loss.

I assess the plaintiff's general damages in the sum of $40,000. Of this, I ascribe some $20,000 to the past. I allow interest at the rate of two per cent per annum for six years, producing a figure of $2,400.

I have before me figures which are the basis for the claims in respect of past and future economic loss. It is difficult, I think, to identify any basis upon which, so far as the past is concerned, any mathematical approach can be adopted.

There is agreement that the sum of $3,071.98 should be allowed as representing loss of income in substitution for

which he received payments from the Workers' Compensation Board.

As I have said, I think that some modest allowance should be made for the disadvantages that I have already referred to within the employment with the defendant firstly, and with the present employer. It is impossible to do anything more than allow a modest figure in the state of the evidence as it presently stands.

I allow for the sum of past economic loss, including the sum of $3,070, the sum of $7,500. I allow interest on the sum of $4,430 for three years at six per cent per annum producing a figure of $797.40.

So far as future economic loss is concerned, I have already referred to the factors which are relevant to this. No mathematical calculation is possible. The plaintiff has to be compensated for the loss of capacity to engage in some occupations because of his limitations. At present he is in secure employment. The assessment will reflect the fact that the plaintiff is now almost 50 and I think it reasonable to assume that, but for the accident, his work activities would have tended as time went on, to the lighter rather than the heavier.

Nonetheless, allowance has to be made for the loss of opportunity to earn income in these capacities and also for the disadvantage which I have already referred to and which I think the evidence identifies but for which, on the state of the evidence, only a modest allowance should be made.

I assess the plaintiff's future economic loss in the sum of $40,000. I allow special damages in the sum of $1,347.15, and I allow a component of $40 by way of interest on this. There is a claim for future pharmaceutical expenses, but the evidence that I have accepted would not permit the plaintiff to recover that from the defendant.

I am told the parties have agreed upon the sum of $3,080 as representing an entitlement for care and assistance in the past.

The total of these sums is $95,164.40. From this has to be deducted the sum of $3,966.96 being the amount paid to the plaintiff by the Workers' Compensation Board.

There will be judgment for the plaintiff against the defendant in the sum of $91,197.44.

MR DREW: Your Honour, I would like to make a submission on costs.

...

HIS HONOUR: I do not propose to deprive a plaintiff of any part of his costs upon the basis of the offer which was made on the Wednesday before Easter and said to be open to the end of Thursday before Easter, that is the following day, in respect to this matter which was to start on the Tuesday before Easter. I am not persuaded in the circumstances of this case that it would be just or appropriate to do so.

...

HIS HONOUR: I give judgment for the plaintiff against the defendant in the sum of $91,197.44, with costs to be taxed. I order that such costs be calculated on the same scale as would have been applicable if the action had been instituted in the District Court.
