SUPREME COURT OF QUEENSLAND

CITATION:	***Muller v Nebo Shire Council*** **[2002] QSC 313**
PARTIES:	**SHANE MULLER** (Plaintiff) v **NEBO SHIRE COUNCIL** (Defendant)
FILE NO:	S127 of 2002
DIVISION:	Trial Division
DELIVERED ON:	9 October 2002
DELIVERED AT:	Rockhampton
HEARING DATE:	15, 16 July & 2 August 2002 in Mackay
JUDGE:	Dutney J
ORDERS:	**Judgment for the plaintiff against the defendant in the sum of $305,810.88**
CATCHWORDS:	PERSONAL INJURIES – QUANTUM – whether plaintiff had spinal weakness which made him more susceptible of injury
COUNSEL:	Mr DV McMeekin SC for the Plaintiff Mr P Land for the Defendant
SOLICITORS:	Macrossan and Amiet for the Plaintiff HBM Lawyers for the Defendant

[1] The plaintiff in this action was injured on 11 December, 1997. At the time he was working for Nebo Shire Council as an apprentice diesel fitter on placement from his employer, Mackay Region Apprentice Employment Ltd.

[2] In the course of his work, the plaintiff was holding onto a 200 litre drum of scrap steel which was being loaded onto the back of a truck. The drum was on the tynes of a fork lift. As the forklift reversed the plaintiff was endeavouring

to pull the drum off the tyres and onto the back of the truck. As he did so, the plaintiff experienced a tearing crack in his back.

[3] The plaintiff continued to work for about 15 minutes. While kneeling down to work on an air conditioning pump he collapsed from pain in his lower back. The plaintiff described the pain in his legs as intense. He fell over backwards and could not feel his legs.

[4] After recovering sufficiently to stand, the plaintiff ceased work for the day.

[5] On Monday 15 December the plaintiff attended Dr McNaught at the Paul Hopkins Medical Centre in Mackay. He was advised that he had suffered a muscle strain and was provided with a certificate to remain off work until 17 December. He was prescribed anti-inflammatory medication and advised to have physiotherapy which he did.

[6] The plaintiff was cleared to return to work from 18 December, 1997. He continued to suffer discomfort in his back and periodic spasms. The plaintiff continued taking anti-inflammatory tablets and had holidays in January.

[7] On 5 February, 1998 in the course of his employment the plaintiff was tightening nuts on the bull bar of a motor vehicle when he suffered severe pain in his lower back. The work was not particularly strenuous. The pain was similar to that on the occasion of the earlier incident.

[8] The plaintiff went back to the doctor where he was again diagnosed with a muscle strain and recommended to physiotherapy. He was put on light duties.

[9] The plaintiff continued receiving physiotherapy.

[10] In April 1998 the plaintiff was moved from Nebo Shire Council to Carlisle Tractors. The work at the new location was heavy and strenuous. The plaintiff continued to suffer back trouble. Ultimately, in November 1998 the plaintiff consulted a Dr Schneider who recommended a rehabilitation

programme. He also consulted a Dr Cherry who suspected an L5-S1 disc lesion. The plaintiff was placed on restricted duties until March 1999. When he returned to normal duties the plaintiff was unable to cope. By June 1999 Carlisle Tractors were unwilling for the plaintiff to continue to be placed there. For some time the plaintiff underwent a variety of forms of treatment before a return to work with NS Komatsu on 8 November, 1999.

[11] After review in December the occupational therapist managing the plaintiff recommended that he seek lighter work. In May 2000 the plaintiff's apprenticeship was terminated by consent prior to the commencement of the fourth year.

[12] The plaintiff applied unsuccessfully for a number of positions as a sales person, bar attendant, hose fitter, labourer, factory hand and mechanic. After revealing his history of back complaint and the workcover claim, prospective employers were not interested. The plaintiff commenced an engineering degree at central Queensland University in the Autumn term of 2001 but found difficulty with Maths and typing assignments and deferred further study.

[13] The plaintiff became depressed at his inability to find work. He did some unpaid work experience as a bar attendant at Eungella Chalet. He has also worked as a casual yardman at the Eungella Hotel for which he earns $14.00 per hour.

[14] Apart from work, the plaintiff has had to give up basketball and motor cycling because of back pain. He has difficulty bending or sweeping and cannot maintain a fixed position either standing or sitting for extended periods.

[15] Liability was not in issue. The central dispute in the trial was whether the plaintiff's back condition was degenerative or brought about by the trauma on 11 December, 1997. The medical evidence was divided on the issue. The defendant's submission derives support from Drs Martin, Blue, Gibberd and Shaw and from a CT scan report dated 1 April 1999 which reports degenerative change at three levels in the plaintiff's spine. It was common

ground that degenerative change present in April 1999 must have predated the initial trauma in December 1997. The difficulty with the CT scan was that the actual films had disappeared and none of the orthopaedic specialists had seen them. The observations of the radiologist were not apparent on any of the x-rays or MRI's for which films were availiable.

[16] The plaintiff relied primarily on Dr White and Dr Cook. Not surprisingly both doctors considered the likelihood of observable degenerative change in the spine of a 19 year old to be remote unless there had been some specific trauma. The defendant's doctors agreed that such change was unusual but considered it possible.

[17] I was most impressed with the evidence of Dr Martin who was able to demonstrate to my satisfaction from X-ray films the presence of a disc narrowing and retrolisthesis at L5-S1. This is apparently a misalignment of the discs which represents a weakness and consequently an area susceptible of damage. It also appears to be the site from which the plaintiff's problems emanate. This does not, of course, mean that the radiologist report which describes the missing CT scan films is necessarily accurate when it talks of observable degeneration.

[18] On balance I am satisfied that the plaintiff did have a spinal weakness at L5-S1 which did make him more susceptible of injury. I am not satisfied however that the plaintiff's present complaints were inevitable as a result of that or any existing degeneration. I do not accept that without the incident with the drum he would not have completed his apprenticeship and would not be either working or qualified to work as a diesel mechanic. I accept Dr White's evidence that degeneration, much less weakness does not of itself necessarily result in pain or disability. I do not accept his evidence that young, and particularly very young, men with no history of traumatic injury cannot have degenerative change in their backs. This latter opinion seems to be at odds with the bulk of the medical opinion before me. The greater susceptibility of the plaintiff however should be reflected in a greater discount for life's contingencies when assessing economic and other anticipatory losses.

[19] I accept the predominant medical view that the plaintiff cannot return to heavy work including work as a diesel mechanic but is suitable for lighter duties. He thus retains a substantial residual earning capacity. I accept that the potential for earning as a diesel mechanic is, however, higher than in lighter occupations. Despite the medical evidence suggesting a substantial residual earning capacity there is no evidence from which I am able to assess what that is. Since the evidence establishes that a diesel mechanic of the plaintiff's age can earn at least $750 per week and up to $1600 or more net for an experienced diesel mechanic I propose to allow a conservative $250 per week for the reduction in earning capacity.

[20] Applying these findings to the present case I assess damages as follows:

Pain & Suffering	50,000.00
Special damages paid by WorkCover	12,140.08
Tax paid by WorkCover	1,360.65
Special Damages paid by the plaintiff[1]	5,065.60
Past loss of income[2]	41,890.69
Past loss of superannuation at 8%	4,592.99
Interest on past loss of income[3]	9,546.80
Future loss of income[4]	167,550.00
Future loss of superannuation at 9%	21,111.30
Future Medical Expenses[5]	15,481.35
TOTAL	328,739.46
Less WorkCover refund	22,927.58
TOTAL	**305,810.88**

[21] In addition to the amounts I have allowed, a claim was made for future care representing the cost of lawn mowing and car servicing. The plaintiff does not

[1] pp24 – 25 of exhibit 1 (quantum statement).
[2] I have accepted the plaintiff's calculations up to the completion of the apprenticeship in May 2001. Thereafter I consider the amount should be limited to the amount allowed for future lost earning capacity to allow for his residual capacity and the uncertainty of the plaintiff, a young single man, immediately finding, commencing and continuing to work in his chosen trade. Because I have assessed the loss on the basis of residual earning capacity, actual earnings need not be deducted. The plaintiff's wage calculations will become exhibit 31 in the trial.
[3] $57,412.40 less $8,506.70 (Centrelink) & $9,127.35 (WorkCover) x 5% x 4.8 years
[4] $250 per week for 37 years (893.6) discounted by 25%
[5] GP $1.77 per week on basis of 2 visits per year and physiotherapy $3.08 per week based on 4 visits per year for 58 years discounted by 30% for contingencies.

presently have a need to mow the lawn. He may never have such a need. In any event the level of his disability is such that without time constraints as he would be in mowing his own lawn or servicing his own car I do not accept that he could not do either activity and thus the need is not proven to my satisfaction.

[22] I give judgment for the plaintiff against the defendant in the sum of $306,111.38.