SUPREME COURT OF QUEENSLAND

CITATION:	*Cousins v Palmer* [2004] QSC 358
PARTIES:	**WILLIAM ANDREW COUSINS** (Plaintiff) v **DAVID JOHN PALMER** (Defendant)
FILE NO/S:	4816 of 2004
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court, Toowoomba
DELIVERED ON:	15 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	13 – 14 September 2004
JUDGE:	Moynihan J
ORDER:	**Judgment for the Plaintiff for $195,167.90**
CATCHWORDS:	DAMAGES – GENERAL AND SPECIAL DAMAGES – components for general damages and future economic loss
COUNSEL:	Mr P Goodwin for the Plaintiff
	Mr R Morton for the Defendant
SOLICITORS:	Carswell & Company for the Plaintiff
	Corrs Chambers Westgarth for the Defendant

[1] On 29 May 1998 the plaintiff was employed by the defendant as a farm manager. On that day while carrying out his duties he was knocked over by a bulldozer which ran over his legs and the lower part of his body. He now sues the defendant for damages.

[2] Liability is not in issue and nor are damages save in respect of the quantum of the plaintiff's general damages and of his damages for future economic loss. It is therefore necessary for me to assess those components.

[3] The plaintiff was born on 27 July 1961. He left the Winton State High School and commenced work as a station hand and farm labourer and he followed that line of occupation up to the time of his injury on 29 May 1998 when, as I have said, he was employed as a farm manager.

[4] The work involved the plaintiff in cattle work, irrigation, fencing and the use of farm equipment for ploughing and other agricultural activities. He was in constant work, competent, hard working and well thought of by his employer, the defendant.

[5] The plaintiff moved to Chinchilla in 1980 and has resided there ever since subject to events I will mention in due course. He commenced building up a portfolio of rental properties in the town and was in a relationship but not married at the time of the accident.

[6] There was little in dispute about the medical evidence. Reports by Drs Spork (a urologist), van de Walt, Morris and Bendeich, (orthopaedic specialists) were admitted into evidence by consent and none were called to give evidence or for cross-examination. There is also a report of the usual kind by an occupational therapist also admitted by consent.

[7] The plaintiff seems to be of a fairly stoical disposition. After the accident the dozer operator asked the plaintiff "what do you want me to do?" The plaintiff said, "Back it off me" so he backed it off. The ambulance came some time after the incident. The plaintiff was given immediate treatment and then taken to the Princess Alexandra Hospital in Brisbane where he was admitted.

[8] The plaintiff suffered:

- An open book fracture of the pelvis;
- A fracture of the right tibia in the distal third
- A fracture of the right tibia
- Multiple abrasions and contusions including to his feet, his right thigh and the quadriceps
- Tissue injury to the left knee
- A fracture of the transverse process of L5 probably consequent on the accident
- An extraperitoneal rupture of the bladder
- Soft tissue injury to the left knee

[9] On 29 May 1998 the plaintiff underwent a compound scrub and debridement of both lower legs. His fractured pelvis was externally fixed and his tibia stabilised by the placement of a tibial nail. Post operatively he had a long sustained paralytic ileus which was treated conservatively and he was discharged on 1 July 1998 with the external fixator still in place.

[10] After he was released from the Princess Alexandra Hospital the plaintiff spent some time in the Chinchilla Hospital before he was discharged in a wheel chair and with crutches.

[11] After he was discharged the plaintiff saw his local doctor on a number of occasions about his pain and discomfort. The doctor told him that not much could be done for him and the plaintiff appears to have accepted that and got on with his life.

[12] On 8 March 1999 the plaintiff was readmitted to the Princess Alexandra Hospital for a hypertrophic non union of the right tibia fracture.

[13] He was last seen at Princess Alexandra Out-Patients on 28 September 1999 where he was found to be doing well but needed increased physiotherapy for strengthening

his quadriceps. X-rays showed that his right tibia was united but that he may need to have an anterior cruciate ligament reconstruction in the future and possibly the nail removed.

[14] Dr Robin Spork, a urologist, examined him on 25 June 2001. He reported that the plaintiff had had an in dwelling catheter for about six weeks and was left with a problem of urgency of micturition. There was no doubt that he was left with a scarred bladder and an increased likelihood of urethral stricture in the future. I will deal with his orthopaedic injuries later.

[15] The plaintiff gradually improved although he continued and continues to suffer pain especially associated with the injury to his right leg. As his convalescence progressed the plaintiff continued to be troubled by his right leg "where it was broken,...in the knees" and in his pelvic area. He got a lot of leg cramps.

[16] It was apparent that the plaintiff could not resume his previous occupation so in November 1999 he went to work in a steel yard at Stapleton, near Beenleigh, which was part of a business conducted by the defendant which involved the importation and distribution of steel, notably for agricultural fencing. The business has of the order of 100 staff and offices in Melbourne, Darwin, Fremantle and Roma.

[17] The relationship to which I have previously referred broke down under the stress caused by the plaintiff's injuries and there was a property settlement.

[18] In those circumstances, it suited the plaintiff not to live in Chinchilla full-time for the time being. He therefore commuted making the approximate 4 hour drive to Stapleton on Monday morning so as to arrive at work around about 7 or 8 a.m. He went back to Chinchilla on Fridays leaving early if the work allowed.

[19] There was a building which had formerly been a domestic dwelling associated with the steel yard which was used as an office. The plaintiff lived there in Spartan conditions, he worked long hours.

[20] The plaintiff's work at Stapleton involved driving a forklift to move steel from storage areas on to trucks for delivery to satisfy orders. This involved him ensuring that the steel matched the order and securing the load.

[21] The plaintiff said that he had a lot of trouble climbing up and down out of the forklift or on the trucks to inspect or secure a load where that was required. The pain was mainly in his right leg with pain also in the knees and pelvic area. He was uncomfortable while sitting. I accept his evidence about his difficulties.

[22] The plaintiff attended an attempt to resolve the action by mediation on 6 October 2003. I accept the evidence of the defendant and of Mr Meertens, the defendant's administration manager that the plaintiff expressed disappointment and resentment that he would not get a decent payout "because he was a worker not a bludger."

[23] On 1 November 2003, the plaintiff purchased a courier business at Chinchilla. One of the attractions was he would not be working the hours he was at Stapleton. On 17 November 2003 he gave notice of termination of his employment by the defendant to take effect from Friday 21 November 2003, stating that because of ongoing ill health he could no longer perform the tasks to fulfil the position.

[24] I do not doubt that at the time he resigned the plaintiff had determined to return to Chinchilla. He had lived there for many years and regarded it as his home. It had suited him to leave when he did for reasons I have already canvassed. Had the accident not occurred the plaintiff probably would never have left Chinchilla.

[25] When the plaintiff determined to return to Chinchilla the issues relating to his past relationship had been resolved. He had formed a new relationship with a woman who lived and worked in the town; they married in April 2004.

[26] I accept the plaintiff was generally having the difficulties he described in carrying out his work at Stapleton. His changed circumstances made him less inclined to tolerate the long hours and the living conditions.

[27] He was probably going back to live in Chinchilla sooner or later in any event and disappointment with the unsuccessful settlement endeavours may possibly have contributed to his disinclination to push himself to work as a courier but essentially I am satisfied that he is genuine about his complaints and their consequences.

[28] The defendant responded to the plaintiff's resignation by letter of 20 November 2003 expressing his disappointment at the plaintiff's resignation after they had worked together for so many years. He referred to offers previously made for "training in the yard with the longer term view of bringing you into the office to the dispatch desk" or management of one of the defendant's other offices in Roma or Darwin.

[29] The plaintiff did not take up any opening which this may have offered. He had decided to return to Chinchilla for reasons I have already canvassed.

[30] The plaintiff bought the carrier business on 1 November 2003 for $12,000 and on 12 March 2004 he sold it for $18,500.

[31] When the plaintiff purchased the business the wife of the vendor worked with him for a month to show him the ropes and then as a casual employee up to the sale of the business. The contract may have contemplated casual assistance.

[32] The plaintiff's evidence was that he disposed of the business because he was unable to do the work without assistance, the additional cost of which would have made the business unprofitable.

[33] I accept the plaintiff's evidence that the pain and discomfort associated with his fractured legs and pelvis was exacerbated by climbing in and out of the vehicle, lifting loads and the like. He was not prepared to tolerate this pain and discomfort, put the business on the market and took the opportunity of selling it at a profit.

[34] Disappointment with the unsuccessful settlement endeavours may have contributed to the plaintiff's disinclination to push himself but essentially I am satisfied that he was genuine about his complaints and their consequences.

[35] The plaintiff has a residual working capacity. He can work in occupations which involve fairly light physical activity, e.g. a forklift driver, particularly if he can work at his own pace. His mobility, agility and gross body position and tolerance of many physical activities is, however, limited. Climbing in and out of vehicles,

working in confined or awkward spaces, repetitive lifting of light loads and heavy lifting will exacerbate his pain and discomfort.

[36] The plaintiff has limited clerical skills and experience although his work at Stapleton was not restricted to forklift driving and associated activities. The defendant thought well of him and thought he had potential, developed by training, to work in the despatch area of the defendant's business. There is little evidence of the availability of work of this kind in Chinchilla.

[37] In short, the plaintiff has made a remarkable recovery from his serious injury but he has permanent partial disabilities as a consequence of the injuries to his pelvis and legs. He has weaknesses in his right leg as a consequence of fracture and ruptured muscles there.

[38] The major disability troubling the plaintiff is the pain in his knees. He had, it is clear, pre-existing degenerative arthritic changes in the knees at the time of the accident. His pain and disability is, to a significant extent, due to this. Dr Morris is of the view that the accident accelerated the onset of the consequences of his arthritic condition of the order of five years. Dr Bendeich has a similar view. Dr Van der Walt is more optimistic, the onset may have taken longer.

[39] It has to be borne in mind that the plaintiff's disability is not simply as a consequence of his degenerative knees. The effect of his other injuries have to be taken into account. It is difficult, however, to do this with any precision.

[40] Excepting acceleration of the degeneration in the knees, particularly the right knee, of the order of five years does not necessarily have the immediate consequence that the plaintiff would have been disabled to the same extent as he is now five years after the accident. The effect of his other injuries has, for example, to be taken into account.

[41] I turn now to the contentious components of the plaintiff's damages, general damages and damages for future economic loss. Counsel agreed that the evidence is such that these were matters of judgments rather than calculation.

[42] So far as general damages are concerned the plaintiff has made an outstanding recovery from potentially serious injuries. There is no doubt that he suffered considerable pain in the immediate aftermath of the accident. He suffered the complication of an embolism, had a painful convalescence and he had a lot of physiotherapy. He has continuing disabling pain associated with the fractures and particularly in the knees. I take into account the effect of his pre-existing condition which I have already considered. I allow $60,000 by way of general damages.

[43] So far as future economic loss is concerned had he not been injured the plaintiff would have in all probability continued to reside in Chinchilla and to work for the defendant as a property manager. At some stage, the degenerative changes in his knees would have begun to cause him pain and discomfort and at some later stage have restricted his earning capacity. It is impossible to say when this might have occurred with any degree of precision

[44] A convenient approach, subject to the qualifications I've mentioned is counsel for the plaintiff contended for an order of $200,000 future economic loss. This was

arrived at by taking a net wages (excluding rent) income of $867.63 per week in the last financial year before the plaintiff resigned and postulating a $500 per week residual earning capacity. The difference of $360 a week which at 5 per cent over 20 years less 15 per cent for contingencies gives around $200,000. On this approach I think the allowance of 15 per cent for contingencies, taking into account the pre-existing condition and its potential consequences is low although the $500 residual earning capacity is probably not unreasonable. In the circumstances I allow $150,000.

[45] I therefore give judgment as follows:

General damages	$ 60,000.00
Past economic loss (Agreed)	$ 36,128.80
Out of pocket expenses (Agreed)	$ 19,793.95
Future economic loss	$150,000.00
Lost superannuation contribution	$ 13,500.00
Total	$279,422.75
Less refund	$ 84,254.85
Total	$195,167.90

[46] I give judgment for $195,167.90.