

SUPREME COURT OF QUEENSLAND

CITATION: *Mye v Queensland Rail* [2005] QSC 366

PARTIES: **PETER GLEN MYE**
(Plaintiff)
v
QUEENSLAND RAIL
(Defendant)

FILE NO: S39/2004

DIVISION: Trial Division

DELIVERED ON: 8 December 2006

DELIVERED AT: Rockhampton

HEARING DATES: 15-16 September 2005

JUDGE: Dutney J

ORDER: **Judgment for the plaintiff against the defendant for the sum \$398,053.00**

CATCHWORDS: DAMAGES – MEASURE OF DAMAGES – PERSONAL INJURY – where plaintiff injured sacroiliac joint at work – where liability for the injuries suffered is admitted by the defendant – whether the condition complained of was a result of the accident

COUNSEL: Mr G. Crow for the Plaintiff
Mr. R. Myers for the Defendant

SOLICITORS: Macrossan and Amiet Solicitors for the Plaintiff
McInnes Wilson Lawyers for the Defendant

- [1] Peter Mye was injured on 12 May 2001 when a tine on a track laying machine came down on him while he was working on a track laying gang for Queensland Rail at Aimes Crossing near Townsville. Mr Mye was pinned to the ballast on the track. Mr Mye was born on 25 July 1966 and was 34 when injured. He was educated until part of the way through grade 10.
- [2] Liability for the injuries suffered is admitted by Queensland Rail.
- [3] Mr Mye's principal complaint is of debilitating pain in his left buttock area. When asked to point to the site of his pain, Mr Mye indicated an area generally in the middle of his left buttock and covering an area somewhat larger than his hand.

- [4] Dr Cook later identified the area shown by Mr Mye to be roughly the position of the left sacroiliac joint.
- [5] The primary question was whether this condition was a result of the accident. To answer the question it is necessary to look more closely at the accident itself.
- [6] The accident occurred when the operator accidentally pressed the button which caused the tine on the track laying machine to move up and down. At that time Mr Mye was under a tine on the machine. The tine came down on Mr Mye while he was in a half seated position tending towards his right side. His left leg was out straight and his right leg was cocked at a 90 degree angle under his left leg. He was leaning forward, trying to hook the chain around a sleeper. The tine struck Mr Mye's left side from the buttock up to the shoulder. The impact of the tine was sufficient to shift the track ballast on which Mr Mye was lying to give an imprint of his body. The major force was on the left buttock which was the prominent protrusion.
- [7] The tine of the track laying machine was a large, flat piece of metal with a pointed end which was angled under existing sleepers to lift them clear of the ballast for replacement or relaying.
- [8] A number of eye witnesses to the incident were called. These witnesses all gave generally similar accounts of the event. Mr Wallace described the point of impact as being Mr Mye's hip. Mr Sabatino described the tine striking Mr Mye on the side and pushing him down flat on his front. He later saw marks on Mr Mye's body from the impact. The marks were from the top of the left buttock up to his back above the hip.
- [9] Mr Tomarra recalled the tine coming down on Mr Mye's left side. Mr Tomarra was the supervisor who accidentally pushed the button which lowered the tine.
- [10] Part of the dispute between the parties revolved around reports made by Mr Mye at various times of having suffered an injury to his back. Mr Mye presented as a shy, unsophisticated but essentially honest indigenous man. Often in the course of his evidence he made reference to having injured his back. Mr Mye referred to injury to his lower back interchangeably with references to injury to his left buttock area. More generally, he also referred to the injury in the region of his shoulder and side as being injury to his back. On several occasions Mr Mye showed the areas to which he was referring. It was plain that references to his back did not have any necessary connection to his spine. Not surprisingly for a layman, Mr Mye treated everything behind the midline of his side as being his back. Thus the point of impact with the tine described by all the witnesses as being on the left side but behind the midline of the side so as to force him face down on the track ballast was treated by Mr Mye as being an impact to his back.
- [11] The significance of this is illustrated by the evidence of Dr Shaw. Dr Shaw said that he could find no support for any complaint of low back pain being causally related to the accident. However, Dr Shaw did accept that Mr Mye suffered ongoing problems with his left buttock and left posterior hip which was causally related to the accident. Dr Shaw opined that nothing could be done medically about that pain. As a doctor, Dr Shaw would not describe those areas as constituting low back pain. Dr Shaw did agree that an impact to the left buttock area as described by

Mr Mye could aggravate pre-existing degenerative change in the lower lumbar spine.

- [12] The other orthopaedic specialist called by the defendant was Dr Licina. Dr Licina's evidence was of limited use. The information supplied to him for the purpose of preparing his report was that the impact of the tine on Mr Mye was limited to his upper trunk region. He was unaware of any impact with the hip or buttock area. Believing that the buttock area where Mr Mye was complaining of pain was not affected by the accident, it would have been surprising if Dr Licina did regard the pain and the accident as connected. Dr Licina did note that the main complaint of pain was in the area of the left sacroiliac joint.
- [13] Dr Licina also relied for his opinion on an absence of reporting of lower back pain or pain in the left buttock area at the time of the injury and on the fact that Mr Mye worked without difficulty for two years following the accident. Both of these would be significant factors if they were born out by the evidence. If the second of these assumptions was untrue, Dr Licina agreed that on the balance of probabilities the painful condition from which Mr Mye suffers and the accident would be related. As I shall shortly outline, the second assumption was contrary to the evidence I accept.
- [14] It is important in dealing with the evidence of Dr Licina and Dr Shaw that they were expressly asked to report on and assess the existence of a spinal injury. Mr Mye did not complain of such an injury at trial and has consistently reported to the orthopaedic surgeons where his pain was. That location has not altered in any material way since the accident. Both the defendant's doctors recorded reports of pain in that region.
- [15] Dr Cook, the plaintiff's orthopaedic surgeon did address the actual complaints made by Mr Mye. Dr Cook diagnosed an injury to the left sacroiliac joint. Although the MRI scan did reveal early degenerative change in Mr Mye's lumbar spine, Dr Cook considered that if that degeneration was symptomatic, the symptoms would be central in the lumbar spine region and would not explain pain in the left buttock region.
- [16] Dr Cook, like the other orthopaedic specialists, was asked to assess Mr Mye for spinal injury and did so. He differed from the others in that he identified and reported upon the condition from which Mr Mye actually complains. I found Dr Cook's evidence more helpful than the evidence of the other specialists for this reason.
- [17] Dr Cook considered that Mr Mye's symptoms in his left sacroiliac joint and soft tissue along the left side of his spine were permanent.
- [18] After the incident, Mr Mye was taken to the Townsville hospital. Examination there revealed an injury to the lower rib region but no other physical injuries. The rib injury caused pain on breathing.
- [19] I am not concerned by the absence of any report of the injury to the left buttock on this occasion. Common experience suggests that a rib injury is particularly painful. The buttock injury would not have been obvious to external observation and pain from it would be masked by the general aches and pains from the event and the overriding pain of the rib injury. On 31 May 2001, Mr Mye attended the Ayr

hospital with a complaint recorded as low back pain. The accident is referred to in the hospital notes. No witness was called from the Ayr hospital. As far as the notes can be interpreted, Mr Mye complained of low back pain and paraesthesia over the preceding 48 hours. I do not know what physical examination was conducted apart from a reference to straight leg raising. Brufen was prescribed. If the note of low back pain was as reported by Mr Mye, for reasons I have already given, it is as likely to be a reference to the left buttock area as to the spinal region. In any event, Dr Shaw doubted the accuracy of the hospital diagnosis and considered that what Mr Mye was suffering from was a soft tissue injury from the accident.

- [20] Mr Mye's visits to his general practitioner were infrequent and of little assistance in this case.
- [21] Mr Mye returned to work on 22 May 2001. He was on light duties. Mr Mye said that after the accident and until his employment with Queensland Rail terminated on 20 October 2003, he was mainly a machine operator, a position which relieved him of most of the physical labouring work. He was no longer able to shovel ballast as he had been able to do previously. Nor could he lift rails. Dr Cook thought he was unsuited to heavy work although he was fit for work of a much lighter nature.
- [22] The observations of other workers were mixed. Mr Sabatino described him as moving like an old man after the accident. Mr Tatow noticed a significant decline in the amount of physical work done by Mr Mye after the accident. He recalled Mr Mye complaining of his back being sore. Mr Perrin thought Mr Mye was much slower after the accident than before. He also had the impression that Mr Mye was essentially a machine operator after the accident. Mr Mye's wife described the changes since the accident. He is unable to work as he did. He complains of constant pain in his left rump area. Interestingly, Mrs Mye also described the pain in that area as low back pain.
- [23] Mr Tomarra was called by the defendant. He did not notice any change in Mr Mye's work. He said that Mr Mye's attitude to work had diminished and he was frequently absent. No records were produced to confirm these absences. It is inconceivable that Queensland Rail did not keep attendance records for workers. Mr Tomarra's diary did not support absenteeism to the extent described by Mr Tomarra. I doubt Mr Tomarra's evidence in relation to complaints of absenteeism. As a result, I am generally disinclined to rely on Mr Tomarra's evidence. Mr Tomarra seemed to be antipathetic to Mr Mye for reasons which were not clear to me. It may be related to the fact that Mr Tomarra's negligence was the cause of the injury and he was unwilling to acknowledge that he had caused a significant injury. However, that is mere speculation.
- [24] Mr Wells was also called by the defendant. He did not support Mr Tomarra's claims of absenteeism by Mr Mye. Although he did not notice any decline in Mr Mye's work capabilities he did say that Mr Mye spent most of his time as a machine operator after the accident.
- [25] The final worker called was Mr Tovey. Mr Tovey acknowledged that the work of a machine operator was much lighter than the work of a general track gang labourer. He also noticed that it was commonplace to see Mr Mye standing holding his left hip.

- [26] I am satisfied that following the accident Mr Mye returned to work as a track gang labourer with Queensland Rail. His duties were altered however to relieve him of much of the heavy work. Although capable of heavy work for short periods I am satisfied that Mr Mye was not able to perform such work consistently and spent most of his time as a machine operator. I am satisfied that this was a direct result of the injury he suffered to his left buttock area.
- [27] Mr Mye's condition appears to have continued to deteriorate since leaving Queensland Rail and his wife describes him as largely limited to sedentary work.
- [28] I accept Dr Cook's opinion that Mr Mye can no longer do heavy manual work. Due to his lack of education and lack of sophistication, his alternative work choices are limited. He is presently employed as a part time casual worker separating bulbs at a commercial nursery.
- [29] Mr Mye has suffered other back injuries in his working life. None of them were in the region affected by Mr Mye's present symptoms. I do not consider them relevant to the present claim.
- [30] On the medical evidence, the degeneration in Mr Mye's lumbar spine to which reference has been made is not more extensive than would be considered normal for a labourer of Mr Mye's age.
- [31] Mr Mye's work history prior to being employed by Queensland Rail was modest. He was intermittently employed in labouring and fruit picking jobs. He had several periods as a track layer with Austrak and Queensland Rail, the last commencing in September 1999.
- [32] Mr Mye aggravated his left buttock pain in several incidents after his return to work. These were related to occasions on which he performed physical labouring work. On 26 April 2002, he slipped while using a crow bar but had no time off work. On 1 August 2003, Mr Mye suffered a further aggravation while barring a rail at Yukan.
- [33] Mr Mye has difficulty sleeping. His level of pain is directly related to the activity he is doing.
- [34] Mr Mye has done labouring work since he left Queensland Rail. He worked for a time for Vassallo Construction. His work there included shovelling and spreading sand. The work aggravated Mr Mye's condition and after consulting Dr Khondaker in June 2004 he ceased that employment.
- [35] Mr Mye presently works at the nursery for about 20 to 30 hours per week. He is able to perform the greater portion of the work while seated.
- [36] There was a question mark in relation to Mr Mye being able to continue to work for Queensland Rail if he had not been injured. About the time Mr Mye ceased work, two track laying gangs were merged to form one because of a shortage of work. Preference was given to workers who were permanently employed. Most workers on short term contracts were not retained. Mr Mye was on a short term contract. Since then, worker numbers have been increased again with an increase in the work to be done. Whether Mr Mye would have been re-employed is somewhat

speculative. He was plainly not popular with his immediate supervisor, Mr Tomarra. On the evidence he was a good worker prior to being injured.

- [37] For past economic loss I accept the figures in the plaintiff's quantum statement prior 03 November 2003. Thereafter, Mr Mye would in any event, have been laid off by Queensland Rail. He actually obtained part time work for Vassallo Constructions for seven months commencing almost immediately upon being laid off by Queensland Rail.
- [38] Having regard to his spasmodic work history prior to the last period with Queensland Rail, it is not legitimate to assume that Mr Mye would have worked continuously after being laid off. Mr Mye did, however, like the track laying work and, if fit, was likely to have reapplied when further work became available. Despite his difficult relationship with Mr Tomarra, I consider it more likely than not that Mr Mye would have been re-employed sometime after the work picked up. The result of this, however, is that it is not realistic to assess past economic loss on the basis that Mr Mye would have been employed continuously by Queensland Rail from October 2003 until trial. The period between his contract ceasing and trial was two years. I consider it realistic to assume that Mr Mye would have been re-employed after about a year following the reduction in the numbers in the track laying gangs. The defendant has earned an average of \$446 per week from 1 July 2005.¹ The lost wages for the past have been calculated by the plaintiff at \$1,066 net. This equates to earnings at Queensland Rail. Calculating the lost income for 12 months gives \$55,432 less the amount actually earned which was \$4,399 to 30 June 2005 and \$446 per week for 23 weeks thereafter. This makes a net figure of \$40,775 plus \$850 for the week from 12 May 2005 until 18 May 2005 as claimed in the quantum statement.
- [39] Mr Mye's present income of \$446 although from part-time work is indicative of Mr Mye's earnings capacity having regard to his disabilities and personal antecedents. Mr Mye's education and background would make him unsuited to clerical or desk work. I have used \$500 in calculating future economic loss to bring the hours up towards full time work. For the future, Mr Mye's loss is calculated in the manner claimed by the plaintiff but using \$500 instead of \$350 as the residual capacity. The use of 20 years to age 59 as Mr Mye's working life, builds into the calculation a discount for Mr Mye's indifferent work history before being employed by Queensland Rail and his existing lumbar spine degeneration above the usual discount of 15%.
- [40] Superannuation for the past and the future is claimed at 10% reflecting the rate actually paid by Queensland Rail. It seems to me to be appropriate to use this figure for the past but not for the future. To use the figure for the future is to assume that the plaintiff would have effectively had a job for life with Queensland Rail. There is no basis for this assumption. In my view it is more appropriate to use the usual figure of 9%.
- [41] Damages are claimed for future services. In particular, paragraphs 149 to 151 of the quantum statement contain the assertion that Mr Mye may have to pay someone to do heavier tasks around the home in the future and that he may have to pay for car maintenance and repairs he might once have done himself. It is not a sufficient

¹ See Quantum Statement at page 26 (exhibit 16).

basis for a claim to make these unparticularised generalisations. The onus is on the plaintiff to establish a basis for assessing the claim. Without knowing anything of the nature of the tasks to which Mr Mye is referring I am not prepared to speculate on what might be involved. This claim is not allowed.

[42] In summary, I assess Mr Mye's damages as follows:

Pain & Suffering	40,000.00
Interest on \$25,000 @ 2% for 4.5 years	2,250.00
Past Economic Loss	41,625.00
Past superannuation @ 10%	4,162.50
Future Loss of Income ²	283,050.00
Loss of future superannuation @ 9%	25,474.50
<i>Fox v Wood</i>	245.00
<i>Griffiths v Kerkemeyer</i>	–
Special Damages (Paid by WorkCover)	761.00
Special Damages (Paid by Plaintiff)	485.00
Future Pharmaceutical Expenses as claimed	<u>1,620.00</u>
Sub-total	<u>399,673.00</u>
Less Refund to WorkCover	<u>-1,620.00</u>
TOTAL	<u>\$ 398,053.00</u>

[43] I give judgment for the plaintiff for the sum of three hundred and ninety-eight thousand, fifty-three dollars and twenty-one cents (\$398,053.00).

² (\$1,000 – \$500) x 20 years (multiplier 666) discounted by 15%.