

SUPREME COURT OF QUEENSLAND

CITATION: *Giles v Bell & QBE Insurance Pty Ltd* [2007] QSC 356

PARTIES: **ANTHONY DAVID GILES**
(Plaintiff)

v

SUZANNE BELL
(First Defendant)

and

QBE INSURANCE LIMITED
(Second Defendant)

FILE NO: S5/2007 (Rockhampton)

DIVISION: Trial Division

DELIVERED ON: 30 November 2007

DELIVERED AT: Rockhampton

HEARING DATES: 9,10 & 11 October 2007 (Rockhampton)

JUDGE: Dutney J

ORDERS: **1) Judgment for the plaintiff against the second defendant in the sum of \$452,010.85**

CATCHWORDS: DAMAGES – PERSONAL INJURIES – MOTOR VEHICLE ACCIDENT – QUANTUM – plaintiff injured in a motor vehicle accident – liability admitted by second defendant – assessment of damages pursuant to the *Civil Liability Act 2003* (Qld)

CASES: *Medlin v State Insurance Commission* (1995) 182 CLR 1, cited

LEGISLATION: *Civil Liability Act 2003* (Qld)
Civil Liability Regulations 2003 (Qld)

COUNSEL: Mr R Morton for the plaintiff
Mr G Mullins for the second defendant

SOLICITORS: Morton & Morton for the plaintiff
Quinlan & Miller & Treston for the second defendant

- [1] The plaintiff, Anthony Giles, claims damages for personal injuries suffered as a result of a motor vehicle accident which occurred on 31 August 2004.
- [2] Mr Giles was born on 24 October 1952 and was 51 years of age at the time of the accident.
- [3] At about 9.35am on the day of the accident, Mr Giles was driving a semi-trailer south along the Bruce Highway. The first defendant who was driving in the opposite direction, veered onto the incorrect side of the road, into the path of Mr Giles and collided with his front wheel. Mr Giles lost control of his semi-trailer and veered off the road to the right where the cabin rolled down an embankment.
- [4] Mr Giles claims to have suffered injuries to his neck, back and arm. As a result of the injuries he resigned from his work in April 2005. He no longer works and his ongoing symptoms interfere not only with his return to work but also with looking after his rural property.
- [5] Liability has been admitted.

Pain and Suffering

- [6] Immediately following the accident, Mr Giles felt pain in his left shoulder and a pinching sensation at the rear of his throat. He also suffered acute pain when he touched his windpipe. He was driven to the Maryborough Medical Centre by a fellow employee.
- [7] Mr Giles gave evidence that he still has difficulties undertaking everyday tasks such as picking up a hot water jug or turning a screwdriver. He plays one game of pool on a Wednesday night and finds that he wakes up on a Thursday in pain and occasionally needs to make himself a sling to protect his left arm.
- [8] Mr Giles said that the most severe pain is usually at the base of his skull over his left ear in the temple region and in his left arm. He said that the level of pain in his left arm varies between a feeling of dullness on good days to pain each time he moves his head when the condition is at its worst.
- [9] Mr Giles was examined by Dr Van der Walt, an orthopaedic surgeon, on 2 November 2005. On examination, Mr Giles complained of pain affecting his neck and radiating into his left arm. The arm pain was aggravated by turning his neck to the left and extending the neck. Mr Giles claimed to develop acute pain in his shoulder joint on reaching forward.
- [10] Mr Giles had suffered low back pain for some time prior to the accident. This pain had been treated with acupuncture and chiropractic manipulation. The chiropractic treatments had alleviated the symptoms. This pain appears to have been associated with degeneration at the L5/S1 and L4/5 levels.
- [11] Radiology also revealed degeneration in Mr Giles cervical spine both before and after the accident.
- [12] Dr Van der Walt observed some restriction in rotation and extension of the spine. He also observed atrophy in the left upper arm which was 2 cm smaller than the right.

- [13] In Dr Van der Walt's opinion, Mr Giles suffered an injury to his cervical spine resulting in significant radiculopathy, as evident by unilateral muscle atrophy. If an MRI had been possible, Dr Van der Walt considered that it would demonstrate a herniated disc in the neck. An MRI was not able to be performed because of a metal fragment in Mr Giles' eye socket. The magnetic nature of the imaging might result in a movement of the metal with serious consequences.
- [14] Under cross-examination, Dr Van der Walt said that if he was in error in his diagnosis of a herniated disc as a result of the accident he nevertheless considered that the present symptoms suffered by Mr Giles were related to the accident. Unless Mr Giles had ongoing symptoms at the time of the accident as a result of general degeneration in his cervical spine, it was not possible to say that those symptoms from which he now suffers would ever have developed. I accept this.
- [15] On 6 February 2006, Mr Giles saw Dr Morris, an orthopaedic surgeon. Dr Morris disagreed with the opinion expressed by Dr Van der Walt. Dr Morris concluded that Mr Giles had suffered a soft tissue injury. The symptoms complained of were consistent with that diagnosis. Dr Morris did not consider there was any relevant pre-existing condition. He did not consider that the injuries would preclude him from working as a truck driver. Dr Morris accepted that the degeneration in Mr Giles' cervical spine, evident on CT scans, would not necessarily have become symptomatic if the accident had not intervened.
- [16] Dr Staines, a neurologist who examined Mr Giles on 22 November 2006, did not find evidence of significant radiculopathy and doubted the existence of a herniated disc. He considered that Mr Giles had suffered a musculo-ligamentous injury to the neck but did not assess any permanent impairment.
- [17] Dr Saines did not accept that any musculo-ligamentous injury to the neck could result in permanent symptoms.
- [18] A report was also tendered from Dr Redmond. Dr Redmond did not give oral evidence. Dr Redmond was a treating doctor to whom Mr Giles was referred by his General Practitioner. Dr Redmond considered Mr Giles had a cervical spondylosis.
- [19] The defendant relied on a chart prepared by or on instructions from Mr Giles when he attended a chiropractic clinic in February 2004. Asked to identify areas where he had experienced pain, Mr Giles noted, *inter alia*, his left arm and fingers and his cervical spine.
- [20] Mr Giles said that he was asked to nominate every area he had ever suffered pain. He had a problem with his left arm and fingers some time before and had a spot in his cervical spine which had given him a problem on an occasion. These conditions had been related to a particular vehicle he had driven at one period. When he changed vehicles, the pain disappeared and did not recur.
- [21] I accept this explanation. In giving evidence, Mr Giles appeared to be concerned, almost obsessively, with providing as precise details as possible. If he was asked if he had ever suffered pain in a particular area, I accept that he would have taken this request literally and included all aches and pains however fleeting. It is clear from the balance of the chiropractic documents that Mr Giles did not seek treatment for his left arm, left hand or cervical spine.

- [22] I am satisfied that the symptoms from which Mr Giles now suffers are related to the accident.
- [23] While I am not persuaded that there is sufficient evidence to conclude that Mr Giles suffers from a herniated disc, I am satisfied that his symptoms were not present prior to the accident and their onset was a direct consequence of it. If the accident had not intervened I am not satisfied that Mr Giles would necessarily, or even probably, suffered similar symptoms in any event.
- [24] I accept the evidence of Dr Van der Walt and Dr Morris that musculo-ligamentous injuries do not always recover and I find that Mr Giles is one of those persons whose symptoms have become chronic.
- [25] Applying the *Civil Liability Regulation* 2003 (Qld) to these findings, I assess Mr Giles general damages component for pain and suffering under item 88 for “moderate cervical spine injury – soft tissue injury” at 9. Having regard to s 62 of the *Civil Liability Act* 2003 (Qld), this results in an award of \$9,800.

Past and Future Loss of Earnings

- [26] Mr Giles did not complete his senior certificate. Having left school, he enjoyed a brief working holiday until joining the army for a period of six years. In 1977, Mr Giles left the army and began working in the computer industry in Sydney. It was in this industry that he established a business in which he was involved for 18 years. In the mid 1990s, the business was sold. Mr Giles remained as a consultant to the business for a further period of 18 months.
- [27] After taking 15 months to work on building a yacht, Mr Giles began working with heavy machinery in the wheat harvesting industry. In 2000, he moved to the central Queensland area to establish a property and found a job working for a labour hire company driving trucks for an entity called Sunchip Transport (“Sunchip”). The work involved hauling logs from forest areas to saw mills. From 1 July 2003, Mr Giles was employed directly by Sunchip and it was during his employment here that he was involved in the motor vehicle accident.
- [28] Mr Giles gave evidence that when he commenced driving for Sunchip, he suffered a level of pain in his shoulder, neck and upper back. He attributed this to the truck supplied by his employer. After Mr Giles was directly employed by Sunchip he was provided with a newer and better designed truck and his symptoms disappeared.
- [29] Mr Giles received acupuncture treatment from his general practitioner for the pain in his lumbar spine. He did not find these treatments to be of much assistance. The last treatment was about 8 months prior to the accident. As a result, Mr Giles engaged the services Bay Chiropractic Centre (“the chiropractor”) in late February 2004. This treatment did provide some relief. This pain was probably associated with the degenerative changes in Mr Giles’ lumbar spine to which I referred earlier.
- [30] None of Mr Giles’ pre-accident complaints resulted in time off work.
- [31] Following the accident, Mr Giles had a few days off work. He was then placed on light duties for a couple of weeks before returning to driving.

- [32] Upon returning to normal duties, Mr Giles felt pain when he moved his neck and arm while driving. Examples given included looking into the external rear view mirrors, adjusting controls on the overhead console in the cabin and changing gears. Mr Giles also had a feeling of anxiety driving in traffic which had not previously existed.
- [33] Mr Giles ceased working for Sunchip on 15 April 2005.
- [34] Two weeks prior to ceasing work, Mr Giles had taken a fortnight leave and investigated the possibilities of working in the mining industry. He undertook a generic induction course. He said he had always harboured an intention to work in the mines however following the induction course he came to the realisation that his injuries would preclude his ability to ever do so.
- [35] Upon returning to Sunchip after the induction course, Mr Giles found he could not cope physically with the pain from his injuries in his role as truck driver and resigned. In addition to facing this reality, it was about this time that Mr Giles was engaged in a pay dispute with Sunchip. He did not state in his resignation letter that his injuries were a reason for his resignation rather, he attributed his departure to a feeling of alienation since returning to driving. While he undoubtedly had been made to feel uncomfortable at work due to his pay dispute, I accept that his decision to leave was also attributable to his physical symptoms. Besides one day of volunteer work, he has not worked since 15 April 2005.
- [36] For the defendant it was submitted that Mr Giles has not made any serious attempt to find employment since leaving Sunchip. Part of the criticism of Mr Giles was based on the fact that while on the Newstart allowance he applied for jobs which his injuries would have precluded him from doing. I am not sure this is necessarily remarkable for an injured man who is required to make a certain number of job applications in order to continue receiving the Newstart benefit.
- [37] Doctors Saines and Morris both considered that the injuries Mr Giles suffered should not have prevented him from driving a truck.
- [38] Dr Saines, of course, did not consider a soft tissue injury could become chronic, a proposition which I have not accepted.
- [39] Dr Morris conceded that subjectively, driving a truck might have caused Mr Giles pain but did not see any particular physical reason for Mr Giles not to drive. Levels of pain tolerance vary between individuals. While it might not be usual for the injuries Mr Giles suffered to cause sufficient pain to cause the sufferer to give up work, I accept Mr Giles' evidence that in his case the pain was sufficient. The defendants must take the plaintiff as they find him even if his pain tolerance is lower than might be otherwise expected.
- [40] Of course, it is not suggested by any of the experts that Mr Giles is unable to work at all.
- [41] I am also conscious that Mr Giles considered himself physically capable of sailing with a friend from New Zealand to Australia over a 10 to 12 day period earlier this year. I accept, however, that the boat was capable of being sailed by one person and that Mr Giles was present essentially as navigator. I also accept that the trip was

unsuccessful in that in the end, as a result of bad weather, Mr Giles participated only in a short sail and suffered considerable physical discomfort from the experience.

- [42] I accept the evidence of Mr Hoey, the occupational therapist who assessed Mr Giles.
- [43] Mr Hoey observed paravertebral spasm in Mr Giles lower cervical spine and postural insufficiency of the deep neck flexors. These observations are consistent with Mr Giles complaints and with a soft tissue injury.
- [44] Mr Hoey distinguished between a capacity to work and employability. The latter involves the subjective reluctance of employers to engage a person with a history of work related injury and the difficulties of a person with limited capacities competing with an able bodied applicant.
- [45] Mr Giles is unlikely to be able to return to the computer industry. He has no formal qualifications and his practical experience is now 10 years out of date.
- [46] As a 55 year old man, now out of the workforce for more than 2 years and seeking employment for which he has little or no previous experience, Mr Giles will have extreme difficulty finding a suitable job.
- [47] Counsel for Mr Giles submitted that a figure of \$135,000 for past economic loss was appropriate. This figure is based on a weekly loss of around \$1000.00 based upon the hours and rates of pay earned at Sunchip. Conversely, the defendant's counsel submitted that because of the pay dispute, Mr Giles' intention to go and work in the mines and his failure to express in his letter of resignation that he felt his injuries impacted upon his ability to work, Mr Giles had accepted that his time at Sunchip had come to an end and that he was going to leave this employment in any case. The defendant also submitted that the amounts claimed by Mr Giles for past economic loss cannot be substantiated and that in any case, Mr Giles failed to mitigate his loss because he did not seek out alternate employment or attempt the employment opportunities that were suggested to him.
- [48] As the defendant suggests, Mr Giles indeed gave evidence that he believed that he would not be remaining with Sunchip much longer. However, he explained that the reason he formed this conclusion was because he was having great difficulty in performing his job as a result of his injuries. Despite the pay dispute that might have been taking place at about the time Mr Giles resigned, I am satisfied that the reason Mr Giles resigned was the effect of the injuries he suffered in the accident. I do not view the letter of resignation as a barrier to his claim for past economic loss.¹
- [49] As to the failure to mitigate, Mr Giles was offered a position as a mechanics offsider with a company called Highway One. Mr Hoey gave evidence that in light of his injuries, this position would have been inappropriate for Mr Giles. There was also evidence that Mr Giles was offered two truck driving jobs in the mines but did not take these as he felt he was not capable of undertaking the work. While Mr Giles could have made more of an effort to look for alternate positions, the reality is that the accident has reduced his capacity for work. Combined with the fact that Mr

¹ *Medlin v State Government Insurance Commission* (1995) 182 CLR 1

Giles does not have any qualifications, the prospect of him obtaining work had he looked for it was minimal.

- [50] The most complete record of hours Mr Giles worked at Sunchip was in the 2004 financial year. Counsel for Mr Giles presented three alternate economic loss calculations using firstly, the amount Mr Giles was actually paid, secondly, an amount pursuant to the relevant certified award and then thirdly, in accordance with relevant the federal award. I cannot see any reason to depart from using the hours worked in 2004 and the pay rates at which Mr Giles was actually paid to calculate an accurate award for past economic loss. Therefore, I award \$124,357.43 by way of past economic loss, past superannuation at \$11,192.16 and I award interest at \$7271.87. The amount of \$124,357.43 is in accordance with the document handed up by Mr Morton and which for convenience I marked "A" for identification.
- [51] Mr Hoey's ultimate conclusion was that because of his injuries, Mr Giles is not capable of full time work. I accept this conclusion.
- [52] A number of occupations were suggested for Mr Giles, the most appropriate positions given his injuries being either a telemarketer or a mail sorter. Mr Hoey was of the opinion that in any position of employment, Mr Giles is only capable of working 3 days a week. While Mr Giles is not restricted from commercial employment and has had some very relevant life experiences, he is a semi-skilled person whose injuries preclude him from engaging in the limited range of usually physically demanding occupations to which he would ordinarily have turned.
- [53] Despite this it is recognised that Mr Giles has a residual earning capacity which I estimate at \$300.00 per week having regard to all the difficulties to which I have referred. Accordingly, using a figure of \$1000 per week as a starting point, for the future I assess Mr Giles loss for 10 years to age 65 at \$700 per week using a multiplier of 413 and discounting by a further 15% for contingencies other than the difficulty of finding work at \$245,735.00. This leaves the figure for future superannuation at \$22,116.15.
- [54] Mr Giles gave evidence that he usually consumes a box of Panadeine every week and a box of Indocin and Brufen once every three months. Mr Giles claims \$10.00 a week for pharmaceuticals and medical expenses. He also claims \$10 per week for travelling to and from Maryborough for medical appointments. These seem to me to be reasonable claims on the evidence. For the past, that is an allowance of \$2,600.00. For the future, based on a life expectancy of 30 years and using a multiplier of 822 the figure is \$16,440.00.
- [55] It was submitted for Mr Giles that he will require assistance attending to his gardening and his boat. Mr Hoey gave evidence that Mr Giles will encounter difficulties with tasks such as hanging washing on the line and ironing clothes. Mr Giles' counsel submitted that a sum of \$10,000 is a proper reflection of future paid care and assistance. There does not seem to be any real dispute about this amount and I therefore allow it.
- [56] The claims for *Fox v Wood* and other refundables should be allowed as claimed.
- [57] Interest has been allowed at 2.95% based on a 10 year bond rate of 5.9% as at the date of trial.

[58] In the result I calculate damages as follows:

Pain & Suffering	\$9,800.00
Past Economic loss	\$124,357.43
Interest	\$7,271.87
Future Economic Loss	\$245,735.00
Past and Present superannuation	\$33,308.31
WorkCover Refund	\$248.44
<i>Fox v Wood</i>	\$167.00
Past and Present Expenses	\$19,040.00
Interest on past expenses	\$238.95
Future Paid Care	\$10,000.00
HIC Refund	\$1,843.85
TOTAL	\$452,010.85

[59] I give judgment for the plaintiff against the second defendant in the sum of **FOUR HUNDRED AND FIFTY TWO THOUSAND AND TEN DOLLARS AND EIGHTY FIVE CENTS** (\$452,010.85)