

SUPREME COURT OF QUEENSLAND

CITATION: *Phillips v Everingham & Anor* [2010] QSC 374

PARTIES: **BEN PHILLIPS**
(plaintiff)
v
SAM JAMES EVERINGHAM
(defendant)
SUNCORP METWAY INSURANCE LIMITED
ACN 075 695 966
(second defendant)

FILE NO/S: S217 of 2009

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court Mackay

DELIVERED ON: 24 September 2010

DELIVERED AT: Mackay

HEARING DATE: 3, 4, 5, 6 August and 13 September 2010

JUDGE: McMeekin J

ORDER: **Judgment for the plaintiff in the sum of \$11,004.32.**

CATCHWORDS: DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – where plaintiff claimed damages for psychiatric injury as a result of a motor vehicle accident – where liability admitted – whether plaintiff was a witness of credit – whether there was an evidentiary basis to support the plaintiff’s claim for psychiatric injury

Midwest Radio v Arnold (Unreported, Queensland Court of Appeal, 12 February 1999, No 4010 of 1998)

COUNSEL: A. Philp SC for the plaintiff
G. Crow for the defendants

SOLICITORS: Shine Lawyers for the plaintiff
Grant & Simpson for the defendants

[1] McMEEKIN J: The plaintiff, Mr Ben Phillips, claims damages for personal injuries suffered on the 22nd of September 2006 as a result of a motor vehicle accident in which his sedan was struck by a large truck at an intersection. Liability is admitted. I am required to assess damages.

- [2] Mr Phillips was born on the 20th of August 1974 and so is presently aged 36 years. He was 32 years of age when injured.

The Plaintiff's Case

- [3] Mr Phillips suffered injuries to his neck and right wrist. Whilst symptoms were initially acute those physical injuries have resolved and did so relatively quickly. The dispute relates to a claimed psychological injury.
- [4] The plaintiff's evidence was that about three months after the subject accident, and following an incident with a truck at an intersection at Habana near Mackay, he commenced to experience insecurity and anxiety which steadily worsened. The three month delay in onset of any symptoms is plainly not right – the plaintiff saw a psychologist, Ms Fisher-Nusenu, who performed an assessment on 13 October 2006. That is within three weeks of the accident. There is no mention of the Habana truck incident. He is described as then presenting in a “very anxious state” and displaying “severe symptoms of anxiety”.
- [5] The plaintiff says that he subsequently developed a constellation of symptoms. They included the scratching of his skin whilst asleep to the point of drawing blood, excessive flatulence and faecal incontinence, urinary urgency, loss of libido and an inability to achieve an erection. He had poor concentration, irritability, restlessness, and recurrent thoughts of the accident. He became socially withdrawn and went out only when completely necessary. He developed what he describes as “obsessive compulsive behaviours”¹ that included “strange ritualistic patterns”² before his day could start, such as sweeping his flat from North to South and East to West. He would avoid driving on cloudy days when rain might be threatening, and avoided driving in congested areas. He drove only between 10am and 2pm “as there was better visibility”³ then. He would hear voices in his head and would count numbers. He suffered from broken sleep. His memory for both short and long term matters was affected.
- [6] Because of these symptoms the plaintiff sought assistance from psychologists and a psychiatrist.
- [7] As a result of his condition and particularly his loss of libido,⁴ a relationship of some three years standing with a young lady came to an end.
- [8] In mid 2009 he returned to live in Mackay with his mother and step father and found that his mental state improved “slightly”.⁵ He was then able to drive irrespective of the weather but restricted to streets with which he is familiar. He would only drive in a car driven by family members. He becomes “hot and sweaty” when he sees large trucks on the road.⁶ He has no wish to socialise.

¹ Ex 1 at paragraph 47.

² T1-12/2.

³ Ex 2 at p 11; report of Dr Chau 12 December 2007 at p 3.

⁴ Ex 1 at paragraph 53.

⁵ Ex 1 at paragraph 57.

⁶ Ex 1 at paragraph 58.

- [9] In support of his claim the plaintiff relied on the evidence of his mother, and a former employer and friend Mr Bizzaca. The latter spoke of his employment prospects if able to work.
- [10] The plaintiff's mother had noticed changes in the plaintiff's behaviour within days of the accident. She spoke of numerous phone calls when the plaintiff lived away from her seeking reassurance and indicating some distress.
- [11] Initially Dr Chau, a psychiatrist, diagnosed the plaintiff as suffering from a post traumatic stress disorder, generalised anxiety disorder, an obsessive compulsive disorder, and social and traffic phobias. She withdrew those opinions after viewing video surveillance evidence. The plaintiff contended that nonetheless her opinions accurately reflected his condition and the sequelae of the subject accident.

The Defendants' Case

- [12] The defendants contended that the plaintiff was a fraud and that the claimed psychiatric condition was an act. In support of those contentions the defendants submitted that the court should find that the plaintiff was not a witness of credit and in support relied on:
- (a) a past criminal history involving a serious drug offence, a breach of parole because of drug use, and a pending charge relating to possession of dangerous drugs in contravention of the *Drugs Misuse Act* 1986;
 - (b) false reporting to prospective employers and to health practitioners of his employment and injury history;
 - (c) exaggeration of the effects of past accidents, for example, claiming to be in a coma for 3 days following an accident when it is apparent from the hospital record that the plaintiff was functioning through that time;
 - (d) what were said to be fraudulent tax returns including so it was said grossly exaggerated claims for business deductions amounting to \$15,480 for an income earned of \$753 in his 2007 income tax return;
 - (e) the concerns expressed by a psychiatrist Dr King that she was sceptical of the plaintiff's claims, his presentation not fitting what she would have expected and he apparently being evasive in answering her questions;
 - (f) the plaintiff's performance in the witness box;
 - (g) covert video surveillance films of the plaintiff on 15 days over the period from 21 October 2008 to 26 June 2009 showing the plaintiff apparently enjoying normal daily activities;
 - (h) discrepancies between statements made to doctors and psychologists and the activities shown on the video films; and
 - (i) the lack of any support that he had a psychiatric condition from any psychiatrist or psychologist.

The Plaintiff's Credit

- [13] Thus at the heart of the dispute lies an assessment of the plaintiff's credit. Any psychiatric diagnosis depends on an acceptance of the presence of the significant symptoms of which he complains. If the plaintiff can be believed then he will make

out his case. If he is unreliable then it is necessary to consider whether his mother, his only supporting witness, fills the evidentiary gap.

- [14] Mr Phillips commences with the difficulty that he has a significant drug conviction. One can of course have a criminal history but nevertheless be a reliable witness. Here the circumstances of the conviction and his explanation raise some concern, not only about his character but about the accuracy of his reporting of his past. He gave his evidence in chief only by way of a statement. Presumably careful thought was put into its contents – it certainly cannot be said that any discomfort in the witness box is to blame for the information presented.
- [15] On 30 May 2003 Mr Phillips was imprisoned in NSW for three years for supplying a prohibited drug.⁷ He served 15 months before release on parole on 29 August 2004. In his statement he said that he obtained the drugs the subject of the charge from a “friend” to whom he had lent \$3000 and who unexpectedly repaid him in ecstasy tablets. He says that he did not know what to do with the tablets and so sent the ecstasy tablets to his sister in Mackay by courier. The drugs were detected by the authorities. His sister was arrested. On learning of this he attended at a police station and admitted his involvement.
- [16] The account raises a number of issues which his evidence did nothing to resolve. Few, perhaps, would have the sort of “friends” that repaid debts with 100 ecstasy tablets. Why accept them? Did he intend to sell them? If so, how was this to be done? The statement that Dr Larder attributed to him that he was caught on his first attempt at “drug dealing” and Dr Chau’s record that the plaintiff had been “jailed for 18 months for selling ecstasy tablets” may be indicative of his attitude to the supply to him.⁸ Whilst his description of his employment activities through this period was hardly precise it seems that he was employed as a personal trainer. Why would a young man on presumably a relatively modest income of a personal trainer be lending significant sums of money to such a “friend”? At one point in his cross examination the plaintiff asserted, apparently as his answer was not entirely coherent, that he did so to get into parties. That seems hardly credible. His account that the drugs were unexpectedly foisted on him, that he sent them off to his sister not knowing what to do with them, thereby suggesting no intent to on sell them, seems self serving.
- [17] He was pressed to name his friend to whom he lent \$3000. His evidence varied from knowing the name to not knowing the name to knowing a nickname of “like Spud” who was a bouncer. While I can understand a reluctance to name his supplier that is a simple matter to assert and he appeared initially to assert such a reluctance but then appeared plainly to prevaricate.
- [18] Mr Phillips criminal record does not end there. He breached his parole within a short time and was again imprisoned at the end of 2004. Again his account seemed to be a self serving one. He considered that he was “unlucky” that he had one puff

⁷ While I was unclear as to the precise charge from the evidence led, the public record is as I have indicated: see *R v Benjamin Phillips* [2003] NSWCCA 373.

⁸ Ex 2 at p 663/35 and Ex 2 at p 16 respectively.

of marijuana and was caught when drug tested by the parole authorities. He seemed to be blaming the parole officer for failing in her duty to him.⁹

- [19] Mr Phillips presently faces further drug charges relating to possession of ecstasy and amphetamines. They were not mentioned in his statement of his evidence in chief. He claimed privilege and declined to answer any questions regarding the outstanding charges save that in relation to each drug he had possession of .4 of a gram and that he was apprehended before he had used any of the drugs. He would have it that he had not used either drug since a date prior to his imprisonment in 2003 and that he purchased the drugs as he felt “suicidal”.¹⁰ The answer seemed to be adventitious. There appears to be no medical record supporting any such suicidal ideation.¹¹ Despite informing the Court in his statement that because of his anxiety he smoked more cigarettes and drank more coffee and coca-cola,¹² he omitted any mention of turning to these drugs.
- [20] Thus Mr Phillips would have it that on the first occasion he was involved with a significant quantity of ecstasy tablets he was apprehended, on the first occasion that he smoked marijuana after his parole commenced he was apprehended and on the first occasion that he obtained illicit drugs after that imprisonment he was again apprehended. All this could possibly be true but the coincidences are troubling.
- [21] Those coincidences have to be judged against a background of long term drug use. Again Mr Phillips’ evidence was not easy to follow on this subject. It is evident however that he has told medical practitioners that he has engaged in the consumption of marijuana, ecstasy, amphetamines and heroin through his life. It may be that Mr Phillips would deliberately mislead medical practitioners by exaggerating his past illicit drug use, but that certainly does not encourage any positive view as to his credit worthiness. His drug consumption started, it would seem, when he was aged about 15 years. It seems probable that at some time in his life his consumption of marijuana has been very high. That follows from the apparently independent recording by two medical practitioners of a history of smoking up to 20 cones per day.¹³ Mr Phillips denied that his drug consumption was at that level.
- [22] It was submitted that this coincidence of recording could be explained by the possibility that the second medical practitioner copied the history from the records of the first. There are three difficulties with that submission – first, the records of the second practitioner do not record the receipt of the records of the first but do record the receipt of records from another practice. The inference is available that in the usual course the receipt of records is noted. Second, the plaintiff did not call the second practitioner to prove the point and could easily have done so. Third, the two

⁹ At T1-38/30: “I said I feel like relapsing, and she never wrote it down, and the head of Mackay Parole Board said if the lady had written it down I wouldn't have got into trouble, but the parole officer did not write down that I felt like relapsing.”

¹⁰ T2-91/20.

¹¹ The plaintiff has seen a number of medical practitioners and one would expect such ideation to be recorded if present. Dr Cornwall’s account was that he was “upset” when he purchased the drugs, which is some way well short of suicidal: see Ex 2 at p237.

¹² Ex 1 at paragraph 51.

¹³ Dr Gover at p 149 of Ex 2 (entry for 28/08/07 at a Byron Bay Medical Centre: “has stopped smoking and cut out THC on 20 cones per day”) and Dr Cornwall at p236 of Ex 2 (entry for 31/07/09: “Marajuana (sic) 20 cones/day from 1989-2007). See the plaintiff’s evidence at T3-39/30 as this possibly being the most that he had ever smoked in one day.

histories, whilst they bear the same general information about the level of the daily drug consumption, are quite different in the particulars suggesting an independent taking of them.

- [23] It was plain that Mr Phillips regarded it as of no great moment that he consumes illicit drugs.
- [24] The defendants submitted that the plaintiff was simply dishonest in how he went about his life and that too should adversely impact on his credit on matters crucial to the assessment. For example, Mr Phillips failed to advise prospective employers of his past injury and criminal history and at least in one instance grossly misrepresented his past employment experience. That misrepresentation was quite marked.
- [25] In his application to TESA Mining, the plaintiff claimed to have worked on a cane farm from 1989 to 2004 for a company Stevenson's & Co operating harvesters, tractors, a dozer and four wheel drive vehicles.¹⁴ If his quantum statement is accurate, this bore no resemblance at all to his life or experience. The plaintiff finished his schooling in Grade 12 in 1991, worked for a year as a builders' labourer, attended at a drama course at James Cook University for a year – presumably in 1993, then travelled to Sydney performing casual jobs for a year in the hospitality and building industries. He then qualified at age 21 – so after August 1995 – as a personal trainer and worked in that capacity until imprisoned in 2003. No mention at all is made of working for Stevenson & Co or of any experience with heavy machinery of the type nominated.
- [26] In his cross examination he explained that he wanted to demonstrate to the prospective employer experience with heavy machinery and said:
- “I did work there [ie Stevenson & Co] on and off in between periods of working at other places on my father's farm. So everyone extends – I was advised by a mining professional to put this down so that I could get a start in the mining industry, sir. So it's – I did work, only a couple of weeks at a time, but in between those periods whether planting cane or helping in the crushing, or doing – shifting irrigation pipes in that period.”¹⁵
- [27] The reliance on the inaccurate reporting of his past injuries and criminal record to prospective employers as indicative of unreliability is a two edged sword in these cases. It is hardly novel to hear evidence of workers who do precisely that. I appreciate that such misrepresentations can indicate a very strong desire to work. However gross misrepresentation of past employment history to pretend to qualifications one does not possess indicates a disregard for any need to be constrained by the truth. His response when questioned about so misrepresenting himself was that “[e]verybody does”.¹⁶ The extent of the misrepresentation suggests that Mr Phillips will say whatever he needs to say to achieve his ends.
- [28] Mr Phillips' performance in the witness box did nothing to enhance my view of his credit. He was a singularly unimpressive witness. His manner of giving evidence and the contents of his responses did nothing to encourage any belief in his

¹⁴ See Ex 2.42 at p 361.

¹⁵ T2-10/15.

¹⁶ T2-9/50.

statements. He was argumentative and evasive. His responses suggested at times that he was uncaring about the accuracy of his answers.

- [29] I have borne in mind that if the plaintiff does have a psychological disorder then that might well affect the way that he portrayed himself both to the court and to practitioners. However that explanation does not explain some responses.
- [30] It is evident that Mr Phillips grossly exaggerated past events. Two examples were his account of a prior back injury and the effects of a buggy accident on Hamilton Island. In relation to the latter incident he claimed to be in a coma for three days where the medical records make it plain that whilst he was apparently rendered unconscious he was plainly not unconscious for very long. In relation to the former incident he asserted in his evidence that he suffered severe low back pain when he was required to work in a bent over position (which he demonstrated) working at ankle level for 8 hours.¹⁷ The contemporaneous WorkCover records indicate that he was working in a squatting position for about 45 to 55 minutes.¹⁸ While these exaggerations have no direct affect on the damages assessment they demonstrate an unreliability in his recounting of his past that again encourages no confidence in his reliability on essential matters.
- [31] Reference was made to his taxation returns and his evidence of his cash earnings. When acting as a personal trainer he proffered to his clients a reduced rate if paid in cash to avoid the impost of taxation. He appeared to be unembarrassed by this dishonesty.¹⁹
- [32] The defendants were very critical of the accuracy of the plaintiff's 2007 income tax return.²⁰ In that return Mr Phillips represented himself to the Deputy Commissioner of Taxation as being involved in a business of "health and wellness". He explained in his evidence that he purchased certain vitamin tablets and intended to on sell them. He declared an income of \$753 for such sales (one only) but claimed deductions of \$15,480. His expenses related principally to the purchase of product (\$2,212), travel and accommodation (\$3,993), mobile telephone expenses (\$5,600 with a private use of 50%), and motor vehicle expenses of \$5,600. His evidence concerning the accuracy of the claimed deductions did not inspire confidence that the claims were legitimate but I am not prepared to draw the inference that they were without foundation. It seems evident that he consumed the bulk of the product, probably did not have the particular motor vehicle identified in the return, and offered no explanation of how he could have incurred such significant phone bills. As well, as best I can see, he made no reference to carrying on this business to the various medical practitioners that he has seen. Certainly Dr Chau, who prepared a detailed report in December 2007, makes no mention of it.
- [33] That the plaintiff would not be greatly concerned about inaccuracies in his return I think is plain. The evidence added to the general impression of a lack of confidence in the reliability in anything the plaintiff asserts.
- [34] I turn then to the evidence about the condition that he claims he had.

¹⁷ T1-22/40

¹⁸ Ex 2 p 467

¹⁹ T2-87/25: "I didn't run it all through the books at all the time, sir. It was easy to - cash money"

²⁰ Ex 17

- [35] First, the plaintiff conceded in his cross examination that he had researched his condition. While concessions adverse to his interest are a point in his favour it nonetheless remains the fact that he has had the opportunity to garner information about the symptoms that he ought to portray that might encourage a belief that he is psychiatrically affected by the accident.²¹
- [36] Secondly, a psychiatrist, Dr Penny King, was “sceptical that he had any significant illness”. She saw him on 16 December 2008. She thought that his “constellation of symptoms and presentation did not typically fit an anxiety disorder nor psychotic illness”.²² Dr King explained in her evidence that “it would be extremely rare for someone to present with a significant ... pattern of thought disorder as he was presenting with on the day.”²³
- [37] Thirdly, the DVD evidence demonstrates that the plaintiff has been dishonest in his reporting. The most graphic example is the film of the plaintiff driving on 26 June 2009. On that same day he attended on Dr Robyn Murray and informed her that he had not driven for a week.²⁴
- [38] Fourthly, the DVD evidence demonstrates activities that are impossible to reconcile with the plaintiff’s reporting of the depth of his symptoms. On the plaintiff’s account his symptoms have varied. On any version he would have it that he was severely debilitated by the symptoms of the psychiatric illness. Any improvement is said to have occurred after his return to Mackay from Byron Bay in mid 2009.²⁵ His general practitioner, Dr Nicole Higgins, reported that he said he needed to wear the same clothes every day when in Byron Bay and “that he had to spend at least four hours a day gardening bare footed from 6am-10am or something bad would happen”. She described his reporting of his condition at the time he lived at Byron Bay in these terms:

“... he could only drive his car between 10.00am and 2.00pm, and whilst driving he had to add the numbers on all the number plates he saw to get the number to it's (sic) root number, he had to peel a citrus fruit every afternoon at 2.00pm in the middle of his fruit trees and if he was able to peel same without spilling any of it's (sic) juice he would live for another day, he had to count the number of steps he was taking to get to any given place, he had to spend the time between 6.00am and 10.00am each morning in his garden, without shoes on so he was able to feel connected to the earth, he had to eat Lamb for Breakfast, Pork for Lunch and Beef for dinner, this he said was for strength and courage, but he had to buy half a lamb, half a pig and half a cow each time he needed food, he denies any ritualised behaviour at present but it is noted that he will only go to the gym with his cousin, and that whenever I asked if the behaviours were still present or when was the last time they

²¹ I note that he had told Dr Chau that he had researched anxiety conditions (Ex 2.5 at p 38). That statement to Dr Chau no doubt suggested the cross examination and perhaps also informed the plaintiff’s response.

²² Ex 3 at p3

²³ T3-79/10

²⁴ There was in fact no direct evidence that the videos were taken on the date and at the times recorded on the image. The defendant’s counsel made extensive submissions on that assumption. No submission was made that I should make any other assumption.

²⁵ Ex 1 at paragraph 55 for the date of return. The plaintiff told Dr Chau on 5 August 2009 that he had returned to Mackay two weeks before: Ex 2.5 at p 40 of the exhibit volume.

occured (sic) he became more agitated and was deliberately evasive in his answers.”²⁶

- [39] On the DVD footage the plaintiff appears throughout to be behaving perfectly normally and indeed to be enjoying everyday outdoor activities. He goes to the beach, he surfs, he drives at various hours of the day and not restricted to the hours mentioned to doctors, he jogs and plays tennis, he is with his girlfriend and at times they hold hands and hug, he goes to social occasions, he appears on one occasion when at a café to be engaging animatedly in conversation with his companions.²⁷ He is active between 6am and 10 am and drives on apparently overcast days.
- [40] While DVD footage such as this may not conclusively be able to prove or disprove the existence of a psychiatric illness, the plaintiff’s behaviour on the 15 random days that he was filmed over an eight month period suggests that there is little wrong with him.
- [41] Fifthly, the DVD evidence strongly suggests that an important part of the plaintiff’s claims are false. The difficulties that the plaintiff claimed to have with driving were an integral part of his case. He told Dr Chau in December 2007 that he was “hypervigilant” when a driver or passenger, that each time he was driving he was “risking his life” and that he only drove between 10am and 2 pm or when rain was not threatening because conditions of visibility were better.²⁸ In June 2009 he gave a similar account to Dr Murray.²⁹ In August 2009 he told Dr Chau that he was improved such that he could drive in daylight hours but nonetheless, on her report, said: “I’m the most cautious driver there is. It’s an effort for me to drive.”³⁰ Film taken on 10 December 2008 shows the plaintiff placing a dining table on the top of the roof of his car and then to drive off with it so positioned, he holding it in place with his right hand whilst steering with his left.
- [42] To the lay mind that would appear to be completely at odds with his claimed condition. So it appeared to the psychiatrist Dr Chau who said of this footage:
- “I must say the most important part of what I have seen in the footage is – it was just astounding that he had loaded up a table on top of his car – this would not happen with someone with a significant anxiety problem about driving – a post traumatic stress disorder. It doesn't even look like he has put any ropes or anything to tie it on the top and instead he's just driving one-handed, with one hand holding onto the table. I've never ever seen someone with a significant anxiety disorder with driving or post traumatic stress disorder related to a motor vehicle accident, driving like that. I would have said that was quite reckless actually.”³¹
- [43] While Mr Philp of Senior Counsel made some headway in cross examination it is nevertheless apparent that the two principal practitioners who were to be relied on in

²⁶ Ex 16 – see report of 29 March 2010 at p 3.

²⁷ While the witness box is not the place for animated conversation I should note that the plaintiff’s demeanour in the witness box, while it varied, was markedly different. Most of his evidence was given very hesitantly.

²⁸ Ex 2.3 at p 11.

²⁹ Ex 2.6 at pp 58-59.

³⁰ Ex 2.5 at p 37.

³¹ T5-8/40-50 – incorrectly shown on the transcript pagination as occurring on day 1 of the trial.

support of the plaintiff's case, Drs Chau and Murray, considered that his presentation on the DVD footage was so at odds with his presentation to them and the history he provided that they felt unable to maintain the opinions that they had previously expressed that the plaintiff suffered from a psychiatric condition.³²

- [44] Mr Philp stressed that in assessing the plaintiff I should bear in mind the fact that at the time of the accident he had managed to secure himself employment at the mines on an excellent wage and that he gave that employment up on 24 October 2006 – only a month after the accident – to pursue a career as a healer and apparently on the recommendation of his doctor and after seeing a psychologist.³³ That change in his employment might well be consistent with the onset of an anxiety condition but equally it might reflect that Mr Phillips came to the view that a life in the mines was simply not suitable for him. I note that he told the psychologist Ms Fisher-Nusenu that “working in the mining industry and living [in Mackay] had not turned out to be what he expected, and he was more interested in working in areas such as ‘Reiki’ and healing as a career”.³⁴ The change of career direction and the timing of it does not alter the very adverse view that I formed of the plaintiff's credibility.
- [45] I am conscious of the points made by Mr Philp in his submissions. DVD evidence in cases of psychiatric injury has limitations. Care needs to be exercised in assuming what he meant to convey by his descriptions. There is the possibility of misunderstandings. And the plaintiff should not be too harshly judged on issues that are more relevant to unassisted memory of events long ago.
- [46] Bearing all that in mind I conclude that the plaintiff was a witness not worthy of credit.

Mrs Knezevic' Evidence

- [47] The issue then is whether his account is sufficiently corroborated by his mother, Mrs Knezevic, so as to justify acceptance of the claimed severe psychiatric injury, as Mr Philp submitted.
- [48] Mrs Knezevic said that after the plaintiff's release from prison he returned home to live with her and his step father and he was then “well and happy” and determined to gain employment at the mines. After the subject accident she said that “he was sad, he was angry, he started to sleep with the light on. He just started – he wouldn't get out of bed, he was not motivated. It was terrible and we were really worried.”³⁵ She noticed that “he was anxious ... he wasn't looking after himself, he didn't want to eat ... he was a mess.”³⁶ He told her that he was fearful of driving, that he had “a thing about the weather” and if it was raining. He requested that she drive him and that she accompany him to doctor's appointments. He let his appearance go, needed encouragement to shower, and did not engage in social activities as he used to. When he moved to Byron Bay he would telephone her “endlessly numerous times a day... he wasn't well. It was like he'd be crying or he didn't know what to do with himself”.³⁷

³² See Exhibits 18 and 19 respectively.

³³ See a file note on the TESA records at Ex 2 p363.

³⁴ Ex 2.1 at p2.

³⁵ T3-44/35.

³⁶ T3-45/5.

³⁷ T4-4/15-20.

- [49] Upon his return to Mackay in mid 2009 she thought that “he was a terrible mess”. She related an incident that occurred on his second day back:

“I was preparing lunch and I asked him to just duck down to a shop not far away to grab something. And he didn't come back for hours, but he came back a total mess. Just sobbing and crying and raced into the house. He'd run – run over a dog.

Yes?-- And he kept – he was searching the area knocking on doors looking for the owner of this dog, but he – he was crippled by it. And I realised he – he was in trouble. Where he'd come home very sick.”³⁸

- [50] The plaintiff then spent a short time away from his mother's home living in a shed that she and her husband provided but he became lonely and returned to live with her. She related that she then observed:

“He is very forgetful, he loses things, he – he has lost car keys that have cost, you know those automatic car keys hundreds of dollars to replace. He – he has a false tooth, he lost that – he's lost three of – of those. One – just one – he loses things all the time. His telephone. He doesn't remember things. He – to – one time for a break for myself, and to help Ben, he has been a health worker and to upgrade his skills or to bring them up to date, I sent him to – he went to his sister's in Brisbane and – and attended a Pilates course and – but he wouldn't go without his dog. So, we sent the dog and then when he came home he left the dog at the airport. He forgot the dog. Friends recently had – their daughter had a – my cousin actually ... her daughter had her 21st on Hamilton Island and – and they know Ben and his condition, but they took him overnight and we were packing just to come down here. I said, ‘Ben where is my suitcase.’ ‘It's still on Hamilton Island full of dirty clothes.’”³⁹

- [51] Mrs Knezevic explained that to her observation a recent change in medication had proved beneficial as “he's very obedient. We're finding we can get along with him much better.”⁴⁰

- [52] The effect of Mrs Knezevic' evidence was that the plaintiff was significantly changed after the subject accident. She compared her son's condition before and after the subject accident in these terms: “he was proud before the accident, he was – he was – he was a man. He was a proud man. He was very pleased with himself and now he's like a child. I just want to get help for Ben.”⁴¹ She had closed her art gallery to care for and supervise the plaintiff. His condition had taken its toll on her. She had seen nothing to suggest that his symptoms were not genuine.⁴²

- [53] Mr Philp's submission was that acceptance of this evidence provides sufficient corroboration of the plaintiff's evidence and should thus lead to an acceptance of the conditions diagnosed by the psychiatrist Dr Chau and hence to an acceptance of a

³⁸ T4-5/10-20.

³⁹ T4-7/1-5.

⁴⁰ T4-8/25.

⁴¹ T4-7/15.

⁴² T4-9/45.

significant disability sufficient to justify a substantial award of damages based on a presumed loss of earning capacity as an operator in the mines over a 10 year period.

- [54] There are several difficulties with this submission.
- [55] First, while I accept that Mrs Knezevic was an honest witness, that does not meet the possibility that her son was putting on an act for her.
- [56] Secondly, assuming the presentation to the mother was genuine, and I do not make that assumption, it does not mean that symptoms reported by the plaintiff but not observed by Mrs Kenesevic ought to be assumed to be true.
- [57] Thirdly, neither Dr Chau nor Dr Murray was asked to consider Mrs Knezevic' account of the symptoms she observed and, based solely on that evidence, express a view as to the presence or otherwise of any psychiatric disorder and its causal relation to the subject accident. It by no means follows that a diagnosis or prognosis based on one set of assumed facts would be maintained on a differing set of assumptions. On a similar basis the plaintiff's claim was rejected in *Midwest Radio v Arnold*.⁴³

Conclusion

- [58] Mr Phillips' description of the mental disorders he purports to suffer is fundamentally unreliable. There is no expert evidence to support any psychiatric disorder that can be causally linked to the subject accident. There is therefore no basis upon which I can find that the plaintiff suffered psychiatric injury as a result of that accident.
- [59] Counsel are agreed that should I reject the plaintiff's claim to having suffered psychiatric injury, damages should be assessed as outlined by the defendants' counsel:

Pain, suffering and loss of amenities of life (ISV 4)	\$4,000.00
<i>Fox v Wood</i> (WorkCover refund)	\$7,004.32
Total Damages	\$11,004.32

Orders

- [60] There will be judgment for the plaintiff in the sum of \$11,004.32.
- [61] I will hear from counsel as to costs.

⁴³ Unreported – Queensland Court of Appeal – 12 February 1999 – No 4010 of 1998.