SUPREME COURT OF QUEENSLAND

CITATION:	*Mills v BHP Coal Pty Ltd* [2017] QSC 184
PARTIES:	**FRANK RICHARD MILLS** (Plaintiff) **v** **BHP COAL PTY LTD (ACN 010 595 721)** (Defendant)
FILE NO/S:	S4 of 2017
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	31 August 2017
DELIVERED AT:	Rockhampton
HEARING DATE:	21, 22 August 2017. Final submissions received 28 August 2017.
JUDGE:	McMeekin J
ORDER:	**1. Judgment for the plaintiff in the sum of $853,002.20.** **2. The defendant to pay the plaintiff's costs on the standard basis.**
CATCHWORDS:	TORTS – NEGLIGENCE – DAMAGES– GENERALLY – where the plaintiff claims damages for injuries suffered in the course of employment – where liability is conceded on the pleadings – where several heads of loss have been agreed. TORTS – NEGLIGENCE – DAMAGES – GENERAL DAMAGES – where general damages for pain and suffering remain to be determined – where counsel are agreed on the nature of the injury – where counsel cannot agree on the appropriate ISV – whether the maximum dominant ISV is sufficient – whether an uplift should be applied – whether an uplift in the given circumstances is justified. TORTS – NEGLIGENCE – DAMAGE – FUTURE ECONOMIC LOSS – where plaintiff has returned to pre-accident employment – where the plaintiff works under modified duties program –where there is a dispute as to how

long the plaintiff will last in employment – where there is a dispute as how long the plaintiff would have maintained employment had the injury not occurred – whether the plaintiff if uninjured would have maintained employment in the mining industry until aged 70.

Social Security Act 1991 (Cth) s 23(5A)

Superannuation Guarantee (Administration) Act 1992 (Cth) s19

Workers' Compensation and Rehabilitation Act 2003 (Qld) s 306J, s306L, s 306P

Workers' Compensation and Rehabilitation Regulation 2014 (Qld) s 130, Schedule 8 and Schedule 9

Baldwin v Lisicic [1993] NSWCA 18, considered

Haylett v Hail Creek Coal Pty Ltd [2014] QSC 176, cited

Heywood v Commercial Electrical Pty Ltd [2013] QCA 270, distinguished

Malec v Hutton (1990) 169 CLR 638; [1990] HCA 20, applied

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

Sharman v Evans (1997) 138 CLR 563, cited

Wynn v NSW Insurance Ministerial Corporation (1995) 184 CLR 485, cited

COUNSEL: GF Crow QC with S Deaves for the Plaintiff

GC O'Driscoll for the Defendant

SOLICITORS: Macrossan and Amiet Solicitors for the Plaintiff

HWL Ebsworth Lawyers for the Defendant

[1] **McMEEKIN J:** Frank Mills claims damages for injuries that he suffered on 1 October 2014 in the course of his employment with the defendant, BHP Coal Pty Ltd

("BHP"). The injuries occurred when he endeavoured to open a stuck butterfly valve on a vac pump. He damaged his cervical spine and right rotator cuff.

[2] Liability for the injury is conceded on the pleadings. Several heads of loss have been agreed. The issues that remain to be determined now are principally general damages for pain and suffering, damages for future impairment of earning capacity, and damages for future expenses.

[3] Mr Mills was born on 7 November 1958. He was therefore 55 years of age at the date of injury. He is presently aged 58.

[4] Damages are to be assessed pursuant to the *Workers' Compensation and Rehabilitation Act 2003* (Qld) (WCRA).

General Damages

[5] General damages for pain and suffering are to be assessed in accordance with section 306P of the WCRA and the general damages calculation provisions in section 130 of the *Workers' Compensation and Rehabilitation Regulation 2014* (Qld) ("the WCRR") and Schedules 8 and 9 of the WCRR. The following summary of how the provisions are intended to be applied is, I think, uncontroversial:

(a) the dominant injury is to be determined having regard to the range of ISV's applicable to the injury;
(b) determine ISV within the range of ISV's provided for the injury and determine whether the maximum ISV in the range adequately reflects the adverse impact of all the injuries ("the maximum dominant ISV");
(c) if the maximum dominant ISV is not sufficient, then the ISV may be higher but not more than 100 and only rarely more than 25% above the maximum dominant ISV;
(d) in arriving at the appropriate ISV, the court is to bear in mind that the effects of multiple injuries commonly overlap;
(e) in assessing an ISV for multiple injuries, the range for, and other provisions of Schedule 9 in relation to an injury other than the dominant injury of the multiple injuries can be considered;
(f) the overriding purpose of the ISV's prescribed – to reflect the level of adverse impact of the injury on the injured person;
(g) the court is guided by the provisions of Schedule 9 but is not necessarily limited to those factors and a court can have regard to other matters relevant to the particular case e.g., age, insight, life expectancy, pain, suffering and loss of amenity;
(h) an important consideration is the extent of the whole person impairment.

[6] Counsel are agreed that Item 96, moderate shoulder injury (ISV 6-15), and Item 87, moderate cervical injury (ISV 5-10), are applicable. Senior counsel for Mr Mills submits that I should adopt an ISV of 15 for the shoulder injury and apply a 25% uplift to allow for the cervical spine injury arriving at an ISV of 19 and damages of $32,940. On my arithmetic the damages that apply to an ISV of 19 are $33,230.

[7] Counsel for BHP submits that an ISV of 15 ie the maximum dominant ISV is sufficient. Damages would therefore be assessed at $24,550.

[8] The orthopaedic specialists disagree in some aspects of the assessment but the difference is not of great significance. Dr Shaw assesses a 14% whole person impairment and Dr McPhee an 11% impairment. Dr Shaw would add a further 2% for scarring. Each are agreed that the shoulder injury justifies an impairment rating well in excess of 14%. They disagree as to the appropriate method of arriving at a concluded figure. Dr Shaw uses the approved guidelines to arrive at an impairment of 23%. Each has assessed a 5% impairment of the cervical spine.

[9] The comment in Item 96 is:

> "An ISV at or near the top of the range will be appropriate if there is a DPI for the injury of 12% and the injury is to the dominant upper limb."

[10] In my view the DPI exceeds 12% here. The injury here is to Mr Mills' dominant upper limb.

[11] The doctors disagreed as to the significance of pre-existing degeneration. The evidence was that there had been no symptoms at all for over 10 years and even then no attendance on a medical practitioner. There was the possibility of the condition becoming symptomatic. Whether it would have done so (and Dr McPhee thought it probable and for good reason) and more importantly to what extent cannot be predicted.

[12] Mr Mills has daily and significant pain. He reports that he is in agony. Quite apart from his reports of pain it was evident in observing him in the witness box that he struggles with his right arm. He was barely able to raise it to place his hand on the Bible to take his oath. He frequently held the injured shoulder and grimaced with apparent pain. There was no doubting his honesty or integrity. His companions have commented on his obvious tremors. He has required guided injections of steroids and has twice undergone surgery. He needs pain relieving medication. He resorts to much stronger pain killers and alcohol on weekends to relieve his pain. He experiences numbness, weakness and has anxiety. His problems are aggravated by his duties at work and the long drives that he undertakes to get to and from the mine site.

[13] The impairment ratings by the experts show that an ISV at the top of the range is amply justified and arguably understates the impact of the injuries on Mr Mills. The addition of the cervical injury would justify some uplift.

[14] I adopt an ISV of 19 and assess damages at $33,230.

Future Economic Loss

[15] The facts are a little out of the ordinary. Mr Mills has returned to his pre-accident employment. He is a coal load out operator at the Goonyella Riverside coal mine. He works under a modified duties programme. He has worked at the mine for 42 years and in the wash plant there for decades. He is highly skilled in the work and is entrusted with training other operators. His employer is obviously sympathetic to him, at least under present management. There is no ongoing loss of income. That of course does not mean that there is no loss of earning capacity: see *Medlin v State Government Insurance Commission.*[1]

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[1] (1995) 182 CLR 1 at 16 per McHugh J.

[16] Mr Mills' claim is based on the assumption that he will not see out his working life. That is not really in dispute. The arguments between the parties concern how long he will last in his employment and how long he would have lasted had the injury not occurred.

[17] Mr Mills says that he is struggling now to complete the tasks expected of him. His plan is to take a year off work on long leave and then assess how things are. He is owed about 39 weeks' leave. He generally finds that he is much more comfortable at home and when away from his employment duties. He avoids taking strong pain killers at work. He thinks that he may well not return to work after a long period of leave. Had he not been injured he planned to work to age 70 years. He has little in the way of assets, has a substantial mortgage, and his presently anticipated superannuation pension is well below his present income. Senior counsel for Mr Mills submits that damages should be assessed at $927,531, adopting these assumptions.

[18] BHP argues that Mr Mills can effectively stay in employment as long as he desires, that there is no pressure on him from management to leave,[2] that he functions well on his restricted duties, and that he was most unlikely to work to age 70 if uninjured. BHP points out that he recently passed his six monthly coal board medical. As well there is the prospect of the degenerative condition becoming symptomatic. Counsel for BHP submits that the assessment should be a global sum of $200,000.

[19] Sections 306J and 306L WCRA are relevant. Section 306J provides:

> **306J When earnings can not be precisely calculated**
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> (1) This section applies if a court is considering making an award of damages for loss of earnings that are unable to be precisely calculated by reference to a defined weekly loss.
>
> (2) The court may only award damages if it is satisfied that the worker has suffered or will suffer loss having regard to the person's age, work history, actual loss of earnings, any permanent impairment and any other relevant matters.
>
> (3) If the court awards damages, the court must state the assumptions on which the award is based and the methodology it used to arrive at the award.
>
> (4) The limitation mentioned in section 306I(2) applies to an award of damages under this section.

[20] Given the concession that a substantial global assessment is justified I take it that BHP accepts that the precondition set out in subsection 306J(2) is met. I am satisfied that the evidence amply justifies that finding.

[21] Counsel for BHP had the experts agree that Mr Mills could carry out the principal tasks involved in coal loading, that is, that the tasks were, in their view, within his functional capacities.

[22] That does not assist a great deal however. The short answer to an argument that the medical practitioners think that he can do the work where the principal problem in performing the work is pain, is that it is not their pain. Nor do they have experience

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[2] But that can change. Senior Counsel cites *Haylett v Hail Creek Coal Pty Ltd* [2014] QSC 176.

with the actual duties. Mr Mills says that despite some of the tasks appearing relatively innocuous – and they involve little more than moving five small levers fractionally back and forwards – he is struggling with his duties. He needs to reach up and back from time to time to access equipment when coal loading, which aggravates the condition. He says that he is in such pain at times that he attempts to ease his pain by reaching over with his left hand to move the levers on the right side. As well there are other tasks that do involve more manual work. They include getting roofing bolts out of feeders, moving pumps and other equipment, and hosing. Mr Mills is coping but only just. The observations of his work mates confirm the ongoing effort to maintain his employment. They are carrying him to a degree. He says that he uses his annual leave to take a break from his work as he needs to.

[23] I accept that Mr Mills is struggling with his constant pain and that he is very likely nearing the time when he will retire from his employment. As well his employer has a duty to protect him and others. If he reaches the stage where they are concerned about safety they will have no choice but to end his employment.

[24] The question of how long Mr Mills might have worked if uninjured is problematic. He is no financial position to give up work. I am sure that he would have continued to work as long as he was able and as long as he perceived a financial need to do so. He plainly enjoys his work, has the respect of his work mates, and even at their most arduous the duties are not particularly demanding. Shovelling coal appeared to be the most arduous but is rarely done.

[25] Dr McPhee opines that Mr Mills would not have worked past age 65. I do not accept that view. Nor did Dr Shaw. In addition to the points made by Dr Shaw[3] I note the following. The timing and severity of the onset of any symptoms are not able to be predicted. As Mr Mills has demonstrated, he is very stoical. Despite a significant injury he has battled on. As BHP has demonstrated, the fact that an employee has some restrictions does not necessarily mean the end of their employment. There is no basis for thinking that the symptoms from any degeneration would have been as serious as he presently bears. There is no certainty at all that the degenerative condition would have stopped him working.

[26] *Malec v Hutton*[4] requires that allowance be made for those possibilities that are greater than 1%. That Mr Mills might have worked to age 70 if uninjured involves, in my estimation, a probability of more than 1%. It is very likely – say more than 90% - that he would have worked on if uninjured to age 67, the age that now seems to be accepted as a reasonable retirement age. In that regard I note that those born after 1 July 1957, as Mr Mills was, are not eligible to receive the age pension until aged 67.[5] There is some authority that subject to the evidence in any individual case, the pension age is some guide to the future: *Baldwin v Lisicic* [1993] NSWCA 18.

[27] Mr Mills' present net weekly income is $2,360.14. There are travel costs in getting to and from work that need to be brought into account.[6] If Mr Mills gives up this

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[3] See the file note Ex 6 paragraphs 28 to 34.
[4] (1990) 169 CLR 638; [1990] HCA 20.
[5] *Social Security Act 1991* (Cth) s 23(5A).
[6] T1-34/6-26 - $85 per round trip three times per month. As to the legal principles applicable: *Sharman v Evans* (1997) 138 CLR 563 at 577; *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485 at 490.

employment there is no real prospect of him obtaining alternative employment with his background and at his age.

[28] I assess damages under this head at $650,000. To the extent that there is arithmetic involved I note that a loss of income up to age 67 years delayed one year and discounted by 10% to allow for contingencies results in an award of $610,650.[7] Something should be added for a possible loss from age 67 to age 70. Given that continued availability of employment was virtually certain so long as Mr Mills remained fit, and the relatively short period of time under consideration, the discount I have adopted is, in my view, generous to the defendant.[8]

Loss of superannuation benefits

[29] Past loss of superannuation benefits is agreed at $4,135.81.

[30] For the future, the loss is claimed by the plaintiff at 13% relying on the decision of the Court of Appeal in *Heywood v Commercial Electrical Pty Ltd*[9] where the average of 11.33% was adopted as reflecting the then expectation of the statutory guarantee in the years ahead.[10] To that percentage has been added an amount to reflect the enterprise bargaining arrangements that have prevailed in the past. I was informed that the current enterprise bargaining agreement has expired. What any future agreement will be is speculative. The present expectations are that the statutory guarantee rate will remain at 9.5% for another 5 years, increasing to 10% from July 2021, and eventually increasing to 12% from July 2025.[11] That is very different from the expectations adopted in *Heywood*.

[31] I will adopt 11.5% being the rate in the recently expired EBA. I allow $74,750.

Loss of employment benefits

[32] Mr Mills receives subsidised meals. He says that it is worth about $100 per week to him in reduced grocery bills. He was off work for a year and a claim is made for $5,200. He points out that he was required to pay a camp allowance even though he was off work and not attending camp – in other words he was out of pocket without a commensurate benefit. There was no challenge to his claims. I assess the past loss at $5,200.

[33] The claim for loss of meal benefits in the future depends on whether the new EBA provides for the same benefits and, of course, on a view as to Mr Mill's likely future employment. A claim is made for $27,510 adopting a loss over 11 years delayed for a year with a 30% discount for contingencies.

[34] I will adopt the same multiplier for the future as previously (295) and adopt the suggested discount of 30%. Meal benefits have been a very long standing feature of mining EBAs no doubt because the workers often live away from home in camps, as

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[7] $2300 x (346-51) x 90% = $610,650.

[8] As to appropriate discounting for contingencies see Luntz H, *Assessment of Damages for Personal Injury and Death* 4th ed, Butterworths, Sydney 2002, paragraphs 6.4.14.

[9] [2013] QCA 270.

[10] That average of course depends on the starting rate, which was from 2014 in *Heywood*, and the period under consideration.

[11] *Superannuation Guarantee (Administration) Act 1992* (Cth) s 19.

did Mr Mills. It is highly likely that there will be some compensation allowed for such costs in future EBAs.

[35] I allow $20,000 for the future.

Future paid care and assistance

[36] Past expenses incurred is agreed at $5,414 and included in special damages.

[37] The claim here is for future paid care, not gratuitous care.

[38] Mr Mills claims a need for services in respect of lawn mowing, servicing of his motor vehicle, pool cleaning, and household maintenance. There was no real challenge to his assertion that he needs such assistance. He claims $19,920.68 being a future weekly cost of $26.42 applied over 25 years. The break up is set out in counsels' submissions.

[39] There are at least three matters not allowed for in this analysis. One is that Mr Mills may be able to cope more easily with such chores once he gives up work. A second matter is that Mr Mills may have needed help even if uninjured as he aged and if his degenerative condition came against him. The third matter is that he may not have had lawn to mow or a pool to clean or a similar sized house to maintain as he aged. Most people downsize as they get older.

[40] I accept a need for some level of services and that it is likely that Mr Mills will engage paid help from time to time. I will allow a global sum of $8,000.

Recurring medical and medication expenses

[41] The plaintiff claims $19,423 adopting a weekly cost $25.76 and applying that over 25 years. The cost base is arrived at by averaging the costs incurred to date.

[42] The defendant allows a global sum between $3,000 and $5,000.

[43] Mr Mills purchases painkilling medication including Lyrica which requires a prescription. He was cross examined about his purchases of Lyrica from one chemist which averaged one packet per year, but peculiarly not all chemists that he apparently patronises. The special damages agreed includes the cost of 56 packets of Lyrica over three years. So the expense at one chemist evidently does not cover the cost of the Lyrica overall.

[44] In addition Mr Mills purchases boxes of codeine and amounts of non-prescription painkillers. Essentially the plaintiff has claimed his past average cost as a continuing cost.

[45] The flaw in the plaintiff's approach is to assume that the future will be as the past. The assumption underlying the award is that Mr Mills will give up his employment because of ongoing intractable pain but his evidence is that his pain eases substantially on weekends off. So should his need for painkillers assuming a work free future.

[46] I will allow roughly one half of the amount claimed - $10,000.

Special damages

[47] I was informed in the course of the trial that special damages paid by the plaintiff had been agreed at $10,050.90.[12]

Summary

[48] In summary I assess the damages as follows:

Head of damage	
General Damages	$33,230.00
Past Economic Loss	$112,070.92
Past Loss of Employment Benefits	$5,200.00
Interest on Past Economic Loss	$1,329.21
Past Loss of Superannuation	$4,135.81
Future Loss of Earning Capacity	$650,000.00
Future Loss of Superannuation Benefits	$74,750.00
Future Loss of Employment Benefits	$20,000.00
Future Medical and Medication Expenses	$10,000.00
Future Assistance	$8,000.00
Fox v Wood	$48,828.00
Special Damages	$10,050.90
Interest (as per plaintiff's schedule)	$342.69
Special Damages (Paid by BHP)	$35,194.36
Total	**$1,013,131.89**
Less WorkCover refund	$160,129.69
Net Total	**$853,002.20**

Orders

[49] I will hear from counsel as to the appropriate orders in light of these reasons and as to costs.

[12] T1-4/10.