[2014] QDC 106

DISTRICT COURT OF QUEENSLAND

CIVIL JURISDICTION

JUDGE BAULCH SC

No. 400 of 2013

SAM LUKE TURNER	**Plaintiff**
and	
STACY NICOLE TURNER and ANOTHER	**Defendant**

TOWNSVILLE

10.01 AM, TUESDAY, 18 MARCH 2014

JUDGMENT

HIS HONOUR: Sam Turner was born on the 18th of November 1994. He suffered a severe neck injury in a single vehicle rollover accident which occurred on the 20th of March 2011. He was a passenger in the vehicle which was being driven by his sister. The vehicle insurer admits liability to pay damages in respect of his injuries and I am asked to assess those damages.

At the time of the accident, Sam Turner was a front seat passenger and seatbelted. As the vehicle was travelling along the highway at approximately 100 kilometres per hour in wet, rainy conditions, a tyre blew and the driver lost control of the vehicle and it careered off the highway, rolling over three or four times before coming to a halt on its side against a tree. Sam Turner was not knocked out but was dazed and shocked. He managed to extract himself from the vehicle, but noted an immediate onset of neck pain and mid back pain.

He was taken by ambulance to the Mackay Base Hospital for an assessment. X-rays and a CT scan of his cervical spine were taken and were reported as showing a burst fracture of C7 and a minor fracture of C6. He was admitted for overnight observation and then transferred to the Townsville Hospital the following day for review by a neurosurgeon.

The CT scan revealed that the burst fracture of the C7 vertebral body was accompanied by retropulsion of the central fragments. Compression was noted anteriorly with a reduction of the height of that segment by about 35 per cent. A fracture line was noted in the saggital plane through the superior endplate. The retropulsion of the central fragment was noted by about 30 per cent of the spinal canal. The degree of cord impingement, however, was not clear. Adjacent disc spaces were normal, but there was a further mild anterior compression of the C6 vertebral body noted. The compression was noted to be about 25 per cent anteriorly.

The injury was treated with a halo thoracic brace for three months and thereafter, the plaintiff wore a soft collar for about six weeks.

I was provided with hospital records from the Mackay Base Hospital and the Townsville Hospital as well as the medical records of a medical practice at Glenden. All of those records were tendered by consent, as was the only specialist material which came in the form of a report by Dr Scott Campbell, neurosurgeon, dated the 14th of June 2013.

Dr Campbell examined Sam Turner on the 14th of June 2013. The report records that the plaintiff complained of neck pain and stiffness and that he detailed the neck pain as occurring two or three times a week and being moderate to severe in its nature, with radiation down to the mid back region and up to the sub occipital region, causing headaches. Dr Campbell understood him to say that the neck pain was aggravated by sitting for 45 minutes, by driving cars long distances, by doing computer work, watching television, standing for 60 minutes, looking up to perform overhead work and sudden movements to the left or right as well as bending to pick up items from the floor or pushing a lawnmower.

The plaintiff was between jobs when he saw Dr Campbell and actively looking for new work. It appears that he told Dr Campbell it was necessary for him to exercise caution when performing manual handling tasks at work and looking up and to the side to observe his work surrounds. He said that he was unable to play football or ride a motor bike as a result of the neck injury. The plaintiff denies any pre-existing problems with his neck and there was no issue taken with that denial at the trial before me.

The plaintiff's quantum statement is exhibit 7. At the commencement of the trial, I ruled that some paragraphs of it were inadmissible through the plaintiff. Two of them were paragraphs where he purported to express a view that he had lost the opportunity to work as a diesel fitter or a haul truck driver. The objection was taken as to the form in which those statements had been expressed and, in my view, was a proper one. When the plaintiff gave evidence, he was asked whether he believed he could work as a diesel fitter in mines or elsewhere and he said that he could not:

> *Just – just because of working as a trade's assistant and that sort of thing. Been doing – sort of doing even light work in that area. It causes discomfort and pain in my back. It doesn't seem like, from my perspective, I don't feel unfit to do it.*

See the transcript page 35, lines 1 to 4. He was asked whether about his belief as to his ability to work as a truck driver and he said:

> *No, I don't think I could to be honest, because it's very aggravating on the pain to my neck. I don't want to get back into that, working as an operator.*

He further said that working as a trade's assistant, which involved the changing of tyres or lifting tyres and moving items around a workshop aggravated his neck pain. He was cross-examined about this topic and eventually he said while acknowledging that no medical practitioner had told him that he could not operate a haul truck:

> *From my experience, it's not the smart thing to do. It does cause pain and there's been people – people with perfectly fine backs been operating and then got back injuries from the job. So there is no way that I will return to operating.*

See page 43 of the transcript.

I heard evidence from other witnesses who have experience operating haul trucks in the mining environment. I was particularly impressed by the evidence of the witness Hetherington as to the effects that a 12 hour shift operating such a vehicle has on his healthy spine. See pages 62 to 63 of the transcript.

I am left with no doubt that operating a haul truck places significant stresses on the spine and particularly requires an operator to be alert to what is going on around him. They are very heavy vehicles and they carry very heavy loads over rough ground routinely. There is also a need to maintain a good pace with the work, and that

would be expected to have an impact on the driver's opportunity to operate the vehicle slowly and carefully to avoid the bouncing and jarring which is usually associated with the operation of such vehicles. It does not seem to me that it is suitable work for a man with the plaintiff's history of injury, who was advised that he should exercise caution with heavy lifting and bending and performing manual handling tasks.

Nevertheless, it is submitted on behalf of the second defendant that I should not conclude that the plaintiff is prohibited from working as an operator, the term often used to describe the driver of a haul truck, because of the following passage that appears in Dr Campbell's report, and I quote:

> *Mr Turner has made a reasonably good recovery from the cervical spine injury and has managed to reintegrate into the workforce. He should be able to perform his duties as an operator in the future as long as he exercises caution with heavy lifting and bending and performing manual handling tasks.*

Counsel for the second defendant submits that because that passage appears in the report, and because it does not appear the plaintiff had any difficulty communicating the extent of his disability to Dr Campbell, I could not, on the facts of this case, find that the accident has caused the plaintiff to be incapacitated from performing the work of an operator.

I have some reluctance about approaching the matter in that way, because although the report of Dr Campbell was tendered by consent, the report itself does not disclose a full understanding of the nature of the risks that are inherent in the operation of haul trucks. And absent more detailed evidence on the topic, I'm inclined to think that the plaintiff, who I assess to be a man of few words, may not have fully explained the nature of his work to Dr Campbell. It is to be noted that he was between jobs when he saw Dr Campbell and the nature of the work may not have been at the forefront of his mind.

However, it does not seem to me to be appropriate to resolve the matter on that narrow basis. If the case is to be approached on the basis of the decision of the plaintiff not to pursue employment in the mining industry should be seen as a voluntary decision made by him and not based on medical advice, then it is necessary to consider whether or not that decision relieves the defendant from liability in respect of losses consequent on his decision not to pursue such employment. On reflection, it seems to me that the conduct of a plaintiff in electing not to seek employment in the mining industry, particularly the conduct of the plaintiff here in making the decision, was not voluntary or deliberate or unusual conduct, such as would relieve the negligent defendant of liability for the loss suffered by the plaintiff. In that regard, see Hurst v Nominal Defendant [2005] 2 Qd R 133; Gratax, Proprietary Limited v TD & C Proprietary Limited [2013] QCA 385; and Medlin v State Government Insurance Commission (1995) 182 CLR 1.

I assess the plaintiff to be an honest, if somewhat monosyllabic, man. There was no indication of exaggeration or untruthfulness about the way in which he gave his evidence. He recounted the difficulties that he had during the period he was engaged

as a trainee operator and the difficulties that he has had in other occupations that he has followed since that time. Taking that evidence with the evidence of the very serious nature of his injury, I would conclude, not simply, that his decision not to seek work as a diesel fitter or a haul out driver is a reasonable and sensible one in all of the circumstances, but that it is the only sensible one for him to make in the circumstances in which he finds himself as a result of his injury.

That is so because in either occupation, the work is demanding and places stresses on the neck and back. A man with the plaintiff's history of injury and a level of whole person impairment which was not disputed to be 16 per cent would be courageous indeed to embark on a career in one of those occupations. Even if he was minded to pursue a career of that sort, he would be faced with the significant difficulty in obtaining such employment by reason of the provisions of the Workers' Compensation and Rehabilitation Act 2003. See sections 571A, B and C. Sensible employers would be likely to make inquiries about the matters raised in those sections and would, in my opinion, be unlikely to employ a man with the plaintiff's level of incapacity.

Thus, I conclude that the plaintiff has, by reason of his injuries, lost the opportunity to pursue both the careers that I have identified.

Because he was a very young man just embarking on his working life, it remains to assess what prospect there was that he would have pursued such a career if uninjured. Notwithstanding his injuries, he was successful in obtaining a traineeship which he performed over a period of six months. He was one of four trainees taken on at that time and the only one not to be employed at the conclusion of his traineeship.

The coal mine medical which he underwent prior to commencing the traineeship gave a hint of the difficulties that might beset any attempt by him to pursue employment long term in mining work. Examination of the relevant document shows that he gave an account of himself saying that he had no continuing disabilities related to the motor vehicle accident. The examining practitioner, however, noted that he seemed to be somewhat stiff. Had that examination taken place when the sections of the Workers' Compensation and Rehabilitation Act 2003 that I have referred to were in force, the outcome of his application might well have been a different one.

The plaintiff says that he had difficulty during the traineeship because he operated the vehicle rather more slowly than other trainees, attempting to minimise the impacts on his injured neck. While there was an issue about the admissibility of the evidence in his quantum statement on that topic and it became clear that paragraph 44 of exhibit 7 was inadmissible hearsay evidence, there was evidence which I accept that he was often driving a vehicle which was causing other vehicles to slow down and that, on occasions, he was remonstrated with by his supervisors about that practice.

Prior to the accident, the plaintiff was a school student who did part time work as a cleaner. He says he had an ambition to work in the mines, and it is acknowledged that he had some advantages over the general population in seeking such

employment. First, he was a resident of Glenden, and, second, his father worked in the mining industry. Both of those things were acknowledged as advantages when seeking to pursue such a career. I also note that notwithstanding the injury, he was able to obtain the traineeship and that probably confirms the advantage that those matters that I have mentioned have for an applicant.

Thus, I conclude that the plaintiff had a substantial prospect of gaining employment in the mining industry, either as a diesel fitter or an operator, and I am satisfied that he has lost that chance by reason of his injuries.

There are a number of factors to consider relating to the question whether or not the plaintiff would have been successful in pursuing that career in the mining industry.

The second defendant urges me to take account of the school records, which are exhibit 10, as being documents which may have persuaded an employer not to employ the plaintiff. I've perused the school records and find them to be of little assistance. I do not know what the expression "HOD" or the expression "level 3" mean. The matters recorded do seem to me to be minor disciplinary matters and not things that any reasonable person would regard as serious misconduct or such as would cause a reasonable person to reject the plaintiff's application for employment.

Further, I note the existence of those records did not prevent the plaintiff from obtaining the traineeship in the mining industry. Where there was no employment history to draw upon, it seems to me that such things as school records might have been of great importance.

The plaintiff, as I say, had the benefit of a family connection to the mining industry, the benefit of being a local resident, and the fact that he was a good sportsman and in good physical condition were all matters that would recommend him to an employer.

Absent any other explanation, it seems to me to be likely that his medical condition and the slow speed at which he lived as a result of that condition probably made him a less attractive employee at the end of his traineeship than the others who completed the traineeship with him.

I note that two of the four trainees who completed the same period of traineeship as the plaintiff remain in employment in the mines.

Taking all of those matters into account, I am satisfied that the plaintiff's prospects of obtaining employment in the mines were at least 50 per cent.

Had he obtained such employment at the conclusion of his traineeship, the plaintiff's counsel submits that his earnings would have been approximately $1650 net per week until the present time. In that regard, I note his earnings during the period of traineeship and the evidence from the witnesses, Hetherington and Stickland, as to their earnings, as well as the evidence of Mr Saunders. All of that evidence seems to support earnings at about the level or a little more, and I think the figure of $1650 is a reasonable one to adopt.

Accordingly, I would assess past economic loss over the period of 70 weeks between the 5th of November 2012 and the 11th of March 2014 at $825 net per week. Deducting his earnings during that period, the appropriate award for past economic loss will be one of $54,000. Interest on that sum at 1.91 per cent is agreed, and a loss of superannuation benefits at 9 per cent should be added to that sum to complete the calculation in respect of past economic loss.

So far as future economic loss is concerned, the plaintiff's calculation proceeds on the basis of a starting figure of $825 net per week. It seems to me that that method is not appropriate because it does not make allowance for the plaintiff's residual earning capacity. The material before me indicates that the plaintiff is capable of earning income in the region of $600 net per week, and I would assess that as being his residual earning capacity. On that basis, it seems to me that the 50 per cent chance of earning the sum of $1650 per week is appropriately compensated by taking 50 per cent of the net weekly loss and allowing that over the rest of the plaintiff's working life.

It is necessary to take into account the fact that many who work in the mining industry do not spend their entire lives in that industry, and notwithstanding the plaintiff's young age, it seems to me to be appropriate to allow the loss over a period of 35 years, ending when the plaintiff is in his mid-fifties. Adopting the multiplier 753.7, the amount to be allowed for future economic loss then is $376,850. There should be added to that a further 11.33 per cent, an agreed rate in respect of the consequent loss of superannuation contributions.

Another matter which remains to be considered is what allowance should be made for the plaintiff's claim for future expenses in respect of attendances at a gymnasium. The evidence in respect of that claim was slight. The plaintiff says he would have undertaken gym training already if he'd been able to afford it. He said without objection that the cost of joining a gym was $600 for six months, approximately $23 a week. There was no medical evidence to support this claim. However that may be, it seems to me that in the absence of any evidence to the contrary, it accords with commonsense that a person who has suffered an injury of the serious nature that the plaintiff has would be wise to attend a gymnasium and undertake such exercises as he might be advised with a view to strengthening his upper back and neck. The plaintiff urges on me that an allowance at $23 a week over a period of 30 years would be appropriate, but I'm inclined to think that is somewhat excessive. I will allow a global sum in respect of gym attendance in the sum of $10,000.

An additional claim is pressed in respect of additional pain killers and further medical treatment said to be necessary as the plaintiff ages. It was put forward as a global claim for $10,000 in damages. Absent any medical evidence that the plaintiff's needs will increase as his life progresses, it seems to me to be entirely speculative. I will not make any allowance for additional pharmaceuticals or medical treatment over and above the agreed amount of $4048.

During the course of the hearing, the second defendant sought and was granted leave to file an amended defence in which the amount claimed for general damages was

admitted. On that basis, it is not necessary for me to discuss the way in which the figure for general damages is arrived at.

Accordingly, I assess the damages as follows:

general damages, $41,200;
past economic loss, $54,000;
interest on past economic loss, $1459.08;
past loss of superannuation benefits, $4995;
future economic loss, $376,850;
future loss of superannuation, $42,697;
past home assistance, an agreed sum of $14,500;
future paid home assistance, an agreed sum of $15,000;
special damages paid by the plaintiff were agreed at $7000;
interest on special damages paid by the plaintiff were agreed at $405,
and, as I say, future pharmaceuticals were agreed at $4048;
future gymnasium expenses will be allowed in the sum of $10,000.

That makes a total, as I calculate it, of $572,154.08 and there will be judgment for the plaintiff in that amount. I'll hear the parties as to costs.

...

HIS HONOUR: Very well then. The second defendant will pay the plaintiff's costs of and incidental to the action to be assessed on the indemnity basis. There's no other order required?

MR PATERSON: No, your Honour.

MR SMITH: No, your Honour.

HIS HONOUR: Thank you. Well, you can terminate the connection if you wish.

MR PATERSON: Thank you, your Honour.

MR SMITH: Thank you.

HIS HONOUR: Thank you.