Martin v Moore [1999] NTSC 34

PARTIES:	BRIAN MARTIN v BRETT PHILIP MOORE trading as SUREFIX ALUMINIUM
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
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JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Plaintiff:	D. Alderman
Defendant:	In person

Solicitors:

Plaintiff:	De Silva Hebron
Defendant:	

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Martin v Moore [1999] NTSC 34
No. 74 of 1996 (9609406)

BETWEEN:

BRIAN MARTIN
Plaintiff

AND:

BRETT PHILIP MOORE trading as SUREFIX ALUMINIUM
Defendant

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 15 April 1999)

[1] The plaintiff, Brian Martin, claims damages from the defendant, Brett Philip Moore, arising out of an injury which he suffered on 10 January 1995. The injury occurred in the course of his employment with the defendant at Pruen Road Berrimah.

[2] The plaintiff was injured when he fell from a ladder whilst assisting other workers to lift a bed base onto the roof of an internal toilet block. The plaintiff gave evidence that he had been approached by Andrew Philips, another worker at the premises, to "give him a hand out in the shed". He

went out to the shed where he found two step ladders and an extension ladder. The step ladders were set up along one wall of the toilet block and the extension ladder against another wall as depicted in the diagram which became Exhibit P3.

[3] The exercise in which the plaintiff was involved was to place a mattress and then a bed base upon the roof of the internal toilet block. Firstly he and Mr Philips obtained the mattress and the plaintiff described the process adopted as follows:

> "The mattresses were leaning against the ladders and as Andrew and I pushed them up Sam was on the other end up against the end of the building there and he steadied while we proceeded to push the mattresses up onto the roof."

[4] He went on to say:

> "Well, as we pushed – as we pushed the mattress up we walked up the ladders while Sam steadied the mattress from his end of the building and such time as the mattresses leaned forward a bit it was pushed up flat onto the roof and then I think it was Andrew and I proceeded to pick up the bed base and take that up.
>
> Right. With the mattress – you pushed it up and it fell over, did it, onto the roof?---Onto the roof, yes.
>
> What did you do with the mattress then?---We just pushed it over a bit onto the roof so it wasn't hanging over the edge. Then we proceeded to get the bed base."

[5] The plaintiff and Andrew Philips obtained the bed base and they proceeded to push it up the ladders and onto the mattress using the same method. The

injury to the plaintiff occurred in that process. He said that he was using both hands to push the bed base up the ladder and then he said:

> "Well, I was pushing – oh, I couldn't hang onto the ladder, so I was gradually working outwards pushing it, I got up about the third step and I felt something move underneath me, and next thing I knew was it moved, I tried to get down a step, and in the process of trying to get down the step, whatever it was underneath me moved and I ended up going backwards onto the concrete floor and I managed to turn myself in the air and landed on my right side in the process and I finished up laying across the casing beam."

[6] It seems the bed base remained on the toilet roof. In the fall the plaintiff cut his wrist and injured his left ankle. At first it was thought that the ankle was sprained and his fellow workers obtained cold water for him to place his foot in. After a while the plaintiff hopped into the defendant's office and sat down. He later drove his car home.

[7] At that time he was in severe pain, especially when he tried to stand on his ankle. He went home to where he lived in a caravan and then, when the pain continued, he went to the Royal Darwin Hospital. At the hospital his foot was x-rayed and he was subsequently admitted to the hospital where he remained for a period of about six days. During that period he received pain killers and underwent treatment which involved repeatedly having his foot packed in ice for a period of time and then placed in a compression bandage. He was in pain throughout the period and described the pain as "excruciating" when any effort was made to stand on the foot. At the end of his stay in hospital the foot was "still sore" but the swelling had gone down considerably and he was mobilised on crutches.

[8] An orthopaedic surgeon, Mr Robin Jackson, diagnosed the injury as a comminuted, crush fracture of the left os calcis. Mr Jackson also expressed the view that the plaintiff may have sustained some inter-articular damage to his left ankle.

[9] Apart from a period of employment with the defendant, which both the plaintiff and the defendant agreed was a failure, the plaintiff has not worked since the date of the accident.

The Employment Contract

[10] The plaintiff first worked for the defendant in 1983 in a labouring capacity. He left to take employment with Ingham's Chickens and other employers. In 1988 he commenced working with Heng Yang Darwin Pty Ltd as a laundry hand. During 1989, and in the course of that employment, he injured his back. He ultimately took legal action against Heng Yang Darwin Pty Ltd in relation to his injury and received a payment in settlement of the proceedings in the sum of $18,786.80.

[11] The plaintiff says that he was off work for approximately three years and then returned to work with the defendant "somewhere in 92/93 as a casual". At all times his work with the defendant was of a manual kind and involved transporting materials from one location to another, assisting other workers, doing messages, looking after the office and generally helping out with whatever was happening. At that time the plaintiff was, as he says, working on a casual basis and was paid a set hourly rate. He was not a PAYE

employee and taxation instalments were deducted pursuant to the Prescribed Payment scheme.

[12] The plaintiff gave evidence that he did not work at all between August 1993 and August 1994. He said that this was due to there being a lack of work available and partly because of a recurrence of the injury to his back. He said that, during this period, "I spent about 6 months on a walking stick".

[13] Notwithstanding the evidence he gave in this regard he subsequently indicated that he had been working for the defendant on occasions during this period and again had been doing so on a casual basis.

[14] In September 1994 the plaintiff approached the defendant and asked if he could obtain permanent work with the defendant. The catalyst for this approach was described by the plaintiff as:

> "I – I had a – a – a run in with Social Security, and I was – I was convicted for Social Security fraud. … I was still collecting unemployment while I was working with Mr Moore part time".

[15] The plaintiff gave evidence that he undertook to make restitution to the Department of Social Security and he needed full time work for that purpose. He approached the defendant who said that the plaintiff could become "permanent". There was no discussion of any other terms, no forms were filled out and there was no change in the rate of remuneration which remained at $12 per hour. The nature of his duties did not change at all. He continued to receive his instructions from the defendant.

[16] There seems to be no dispute between the plaintiff and the defendant as to the defendant agreeing to provide the plaintiff with more work. The plaintiff used the descriptions “permanent” and “full time” work. The defendant said he was to provide more “reliable” work. However the parties placed different interpretations on what was intended. For the plaintiff it meant a “40-hour week, 5 days a week with overtime”. He seems to have regarded the arrangement as having become one of full time employment.

[17] The view of the defendant was that the relationship between plaintiff and defendant remained the same (ie a relationship of contractor and subcontractor) save that the plaintiff was to be given more hours of work over a period of time.

[18] There was no disagreement between the parties that, as a matter of fact, the plaintiff was at the time of his accident not a PAYE tax payer and that the provisions of the *Work Health Act* did not apply to this relationship.

[19] Save for the differences mentioned above there does not seem to be any material dispute as to the terms of the engagement of the plaintiff by the defendant. PPS payments were deducted rather than PAYE tax. The contract was for the provision of labour alone. The plaintiff at all times operated under the direction and under the control of the defendant. The defendant provided all the necessary tools and equipment. The plaintiff provided no tools. The hours of employment were regular (7.30am to 3.30pm Monday to Friday) and overtime was paid in respect of hours

outside of those regular working hours at the rate of time and a half. There was no agreement as to holidays, long service leave or sick leave as the issue was not discussed. The plaintiff did not perform work for any other person. He was 'part and parcel' of the defendant's organisation.

[20] There was disagreement between the plaintiff and the defendant as to two matters. The first was whether the method of payment of the plaintiff was solely at an hourly rate or whether there were some contractual payments incorporated into the remuneration of the plaintiff. It was the evidence of the plaintiff that he was paid an hourly rate set at $12 per hour at the relevant times and, in the case of work on weekends, he would be paid $16 per hour. On the other hand the defendant indicated that the plaintiff was paid an hourly rate for some work but "some of the work he did for me was a contract" which the defendant explained as follows:

> "Well, from time to time would be a set load to deliver to a set job and I'd say: 'how much do you want for that?' and he might say: 'oh, $200', and he'd go out and do the job and he'd get $200. That might take him six hours, for instance. It's not $12 an hour."

[21] I am unable to accept the evidence of the defendant in this regard. It may be that there were isolated incidents of some workers providing a lump sum quote for a piece of work but there is no identification of any occasion upon which the plaintiff did so. No invoice was presented or discovered and the defendant was unable to point to any example of such a payment being made in the wages records produced to me. In the statement which became Exhibit P34 the defendant told Graham Willoughby, an insurance

investigator, that the plaintiff's payments were calculated "generally on an hourly rate" and that occasionally there were invoices submitted. However, it seems from the evidence that the invoices related to identifying the length of time that he had worked on a given occasion. There was no suggestion in that conversation (which took place on 28 May 1996) or in any of the documentation tendered, that lump sum contracts were ever entered into between the plaintiff and the defendant.

[22] A second area in which there was some dispute related to the issue of insurance. The defendant, in his evidence before me, said that on the occasion when he offered the plaintiff "reliable" employment he asked the plaintiff if his personal accident insurance was up to date and was informed that it was. Later the defendant submitted that he would not have had any problem had the plaintiff been insured because the plaintiff would have been able to claim against his own insurance company. The plaintiff on the other hand denied that there was any discussion regarding the status of his insurance.

[23] I do not accept that there was any discussion regarding insurance on that occasion. If the version of events provided by the defendant be accepted, the situation was that the status of the plaintiff regarding employment did not change save that he was to be provided with more "reliable" work. At the time he had already been working for the defendant on various occasions and in the period leading up to the conversation. There would seem to be no reason why the issue of insurance should be raised at that time, given that

all other terms and conditions remained the same. In any event there was no suggestion from the defendant that there was any requirement imposed by him upon the plaintiff that he be insured. Taken at its highest, all that was discussed was "personal accident insurance" which would not have assisted the defendant in any event. Had the plaintiff successfully claimed compensation pursuant to a policy of personal accident insurance the insurer would have been subrogated to the rights of the plaintiff and been able to pursue the defendant in the same manner as has occurred in these proceedings.

[24] No matter how the parties may describe their relationship and no matter how it may be characterised for the purposes of the *Work Health Act*, for present purposes the relationship was clearly one of employer and employee. All of the significant indicia point in the one direction: *Stevens v Brodribb Sawmilling Co Pty Ltd* (1985-1986) 160 CLR 16 at 36-38; *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at 386; *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395.

Safe System of Work

[25] There is an obligation upon a person in the position of an employer to provide a safe system of work to those who occupy the position of his employee. Mason J in *Kondis v State Transport Authority* (1984) 154 CLR 672 observed (687) that the:

> "… employer has the exclusive responsibility for the safety of the appliances, the premises and the system of work to which he subjects his employee and the employee has no choice but to accept and rely on the employer's provision and judgment in relation to these matters."

His Honour described this as a "non-delegable duty".

[26] In *McLean v Tedman* (1984) 155 CLR 306 a majority of the High Court said (313):

> "The employer's obligation is not merely to provide a safe system of work; it is an obligation to establish, maintain and enforce such a system. Accident prevention is unquestionably one of the modern responsibilities of an employer: see Fleming, Law of Torts, 6th Ed. (1983), pp480-481. And in deciding whether an employer has discharged his common law obligation to his employees the Court must take account of the power of the employer to prescribe, warn, command and enforce obedience to his command."

[27] In the present case it is not clear by whom the system of work was devised on this particular occasion. It is clear that it was not the plaintiff as the plaintiff was called in to assist in carrying out the system which had already been devised. The other persons involved in the exercise were the son of the defendant, Sam Wilks who was himself an employee, and Andrew Philips who may have been a subcontractor or, arguably, an employee as well. The likelihood is that one or other or both of these gentlemen devised the system as they were present and ready to implement it when the plaintiff arrived. It was at the request of Andrew Philips that the plaintiff took part in the process. Whether or not Mr Philips was a subcontractor is not relevant for present purposes, as he was not acting within the scope of any special skill that he may have had but rather was assisting with tidying up the shed. The

defendant is ultimately responsible for the system of work adopted on this occasion. In the circumstances he is so responsible whether the system was devised by a subcontractor, employee or a combination of the two: *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Forsayth Mining Services Pty Ltd v Gavin Jack and Anor* (Full Court of the Supreme Court of WA, unreported, 10 May 1995).

[28] In the circumstances of this matter there can be no doubt that the relevant relationship of proximity existed between the plaintiff and the defendant. Further, there can be no doubt that the risk of injury was foreseeable, given that a heavy and awkward bed base was to be placed on the roof of the toilet block by means of two men simultaneously pushing it up separate ladders. The ladders were not secured and the process involved persons climbing the ladders whilst pushing the bed base above them. In his submissions the defendant described it as a "very stupid thing to do".

[29] There were obvious safer ways of dealing with the problem which confronted the workers. There were tiered benches available in the work shop which could have been used to provide a safer platform. The ladders could have (indeed should have) been secured against the toilet wall to prevent movement. A forklift, which was available without a great deal of inconvenience, could have been employed. Other safer systems were clearly and readily available.

[30] In the circumstances I have no difficulty in determining that the defendant owed to the plaintiff a duty to provide a safe system of work, that such a safe system was not provided on this occasion and that the plaintiff fell and injured himself as a consequence thereof.

[31] There was a good deal of evidence directed towards the state of the ladder which was used by the plaintiff in the process. In my view the system of work was unsafe even if the ladder was of a stable construction. I see no need to determine what the state of the ladder was as at the date of the occurrence.

[32] In this matter there was no claim that the plaintiff was guilty of contributory negligence and, in the circumstances, it is difficult to see that any such claim would have been sustained in any event.

The Injuries

[33] In the fall the plaintiff suffered a crush fracture of the left os calcis and, as Mr Jackson noted, he may also have sustained some inter-articular damage to his left ankle.

[34] Two medical practitioners were called to give evidence and both were called on behalf of the plaintiff. The orthopaedic surgeon Mr R V Jackson in his report dated 17 April 1998 (which became Exhibit P14) noted that there was muscle wasting above and below the left knee with swelling around the left ankle and heel. He observed “some apparent shortening in his left leg due to

the compression fracture of the os calcis". He observed no abnormality in the hips and knees. He then expressed the following opinions:

> "In my opinion Mr Martin's prognosis is poor. He has a deformed heel bone with persistent discomfort, which I consider relates to the subtalar joint which is now arthritic. He does experience some pain and swelling in his left ankle, suggesting that he may have some early osteoarthritic change here as well. X-rays show no abnormality but an arthroscopy would need to be carried out to fully evaluate the inter-articular condition.
>
> In my opinion Mr Martin will experience continuing discomfort around his left heel and ankle. He has (a very) stiff subtalar joint at this time and it is my opinion that he may develop progressive symptomatology, referable to his left ankle."

[35] Mr Jackson did not consider that any further treatment was necessary at this time.

[36] In relation to the effect of the injury upon the capacity of the plaintiff to obtain work Mr Jackson made the following observations:

> "In my opinion, Mr Martin is fit for full time light selected duties. He is not fit to return to heavy manual work which he has done in the past. He should be placed in a position whereby he is not required to spend extended periods of time standing on his left leg.
>
> He should ideally be in a position where he can change position frequently between sitting and standing and he should not be required to carry out any heavy lifting, bending, stooping or negotiating considerable numbers of stairs or walk over rough or uneven ground."

[37] In a later report dated 8 March 1999 (Exhibit P15) Mr Jackson noted that the degree of shortening of the left leg was "minor". He went on to assess permanent impairment based on the *Guide to the Evaluation of Permanent Impairment, 4th Edition* of 10 per cent of the whole person. He related this

to a figure of eight per cent as a direct result of the fracture of the os calcis and the deformity which has occurred, together with a further two percent of the whole person relating to the loss of ankle movement, and the muscle wasting affecting his left leg.

[38] In relation to the employment prospects of the plaintiff as at the time of the second report Mr Jackson had this to say:

> "I believe this man could work as a taxi driver or courier driver, although he would experience some problems due to the sitting required for these occupations. This would relate more to his past spinal injury, than to the injury to his left heel. He should be able to cope with work as a clerical person, providing he was able to shift position frequently and not be required to sit for extended periods of time. Perhaps if he could be allowed to arise from a chair for five minutes every hour would be satisfactory. Similarly, he should be able to work as a telephone assistant, with the same restrictions.
>
> I cannot accept that this man is totally unemployable, but I will accept that he is only fit for a certain type of selected work, but it must be appreciated that some of this relates to previous spinal injury and to some extent to the injury to his left heel."

[39] In his evidence before me Mr Jackson discussed the prospect of the plaintiff obtaining employment as a taxi driver. He said this:

> "Sitting tends to aggravate this man's low back problem. He has what we call a relatively low sitting tolerance which I believe is about 20 minutes. If he was to work as a taxi driver, I believe it correct to say he would need a reasonably sympathetic employer because he would not be able to take fares for long distances, he would have to confine himself to the shorter trips, possibly just within the metropolitan area, so that he would be able to get out of the car, walk around for a few minutes and avoid sitting for long periods of time. Certainly as a courier driver, he would only be able to do metropolitan areas. He would not be able to drive for extended distances and again, he would not be able to do any significant heavy lifting. He would only be able to do very light parcel delivery type courier driving."

[40] In my view these restrictions would make it almost impossible for the plaintiff to obtain work in the area of taxi driving and courier driving. The view that the plaintiff could not obtain work as a taxi driver or courier driver is reinforced by the Commercial Drivers Health Assessment (Exhibit P20) conducted in relation to the plaintiff on 18 February 1999 by the other medical witness, Dr Richard Giese. Dr Giese certified that he had examined the plaintiff and that the plaintiff did not meet the criteria for obtaining employment as a commercial vehicle driver. No evidence was led as to the availability of such driving work for people who suffer the incapacities described by Mr Jackson.

[41] Dr Giese is the general practitioner who has treated the plaintiff since about the time of his injury. He was of the view that occupations such as taxi driver, mini bus driver, keyboard operator etc. would be inappropriate due to the amount of sitting time required in all these positions. He expressed the view that the plaintiff "is nearly unemployable in any area which he has qualifications or experience." Whilst I accept the view of Dr Giese in relation to employment positions involving driving, I believe he is unduly pessimistic about the capacity of the plaintiff to obtain employment of a clerical type. I prefer the views expressed by Mr Jackson supported as they are by the assessments carried out by a Psychologist and an Occupational Therapist.

The Back Injury

[42] The plaintiff described a back injury suffered in the course of his employment with Heng Yang Darwin Pty Ltd and gave varying descriptions of the effect that injury has had on him over the ensuing years. In this regard I found his evidence to be inconsistent and unsatisfactory. However there is more reliable evidence available from the medical experts.

[43] Mr Jackson noted that there was evidence of early degenerative change (spondylosis) at the L4/5 and L5/S1 levels of the lumbo-sacral spine and he described this as "moderate disc degenerative disease at L4/5 and L5/S1 levels with osteoarthritis in lower inter-facetal joints".

[44] In relation to the impact of the injury suffered by the plaintiff in January 1995 Mr Jackson said:

> "In my opinion, the impairment due to the aggravation factor of his long standing spinal injury, would be no more than one percent of whole person impairment."

[45] When asked about the relationship between the low back pain suffered by the plaintiff and the injury to the ankle, Mr Jackson said:

> "It is only partly attributed to the ankle injury, Your Honour. This man has a very significant history of a past – sorry, a very significant past history of an injury to his back which was quite disabling for him. Following that injury, he did have some ongoing low back pain even prior to the incident where he injured his heel bone. He attributes that increase of back pain, since his injury to the heel bone, secondary to his limping on the left leg."

[46] He went on to observe that the back condition is difficult to treat and would be treated by conservative means. He expressed the opinion that the injury to the ankle did have an ongoing impact in relation to the back injury because the ankle injury affected the plaintiff's gait. I accept this evidence.

Assessment of Damages

(a) General Damages

[47] I have described above the immediate aftermath of the incident. Upon his discharge from hospital the plaintiff returned home to his caravan. He had difficulty with everyday activities such as getting in and out of the caravan, showering himself and other such domestic activities. He is a single man and was unable to cope on his own. He went to stay with his father at Coolalinga for a period. There he spent most of his time sitting on the couch with his foot suspended. However on Fridays he went to the premises of the defendant and "did the payroll", ie collected the pay for the employees of the defendant.

[48] Whilst he stayed with his father Mr Martin Snr. provided meals for the plaintiff and did his washing and shopping. Mr Martin Snr. gave evidence and indicated that he spent some four or five hours per day undertaking the tasks described on behalf of his son. The plaintiff stated that he remained at his father's premises for roughly two months before returning to his own accommodation.

[49] During this period the plaintiff underwent physiotherapy at the Royal Darwin Hospital, as he understood it "to stimulate the circulation and help the swelling to go down".

[50] The plaintiff now walks with a limp which, he says, has been reduced "considerably" by the use of prosthetics. These are inserts placed inside his shoes which he describes as "runners". The limp was described by Mr Jackson as an antalgic gait and the shortening of the leg as "minor". The nature of the limp was not demonstrated to me.

[51] The plaintiff says that the injuries have had a continuing effect on his life. Prior to adopting the implant for his shoe he suffered a greater limp and this had an impact on his low back pain. He says he now suffers pain in the foot if he stands in one spot for too long, ie "10 or 15 minutes." He suffers swelling if his foot is overused. He is unable to squat. He has difficulty driving manual vehicles because of the resistance of the clutch. He notices pain around the hip joint which is at least partially attributable to his altered gait. He suffers a stabbing pain in the lower back when ascending or descending stairs. If he sits for too long he suffers a backache or hip ache and that is relieved by changing position. The injuries have an impact on many of his daily activities. However he manages these activities without assistance, albeit with some difficulty and over a longer period of time.

[52] The plaintiff is now in his mid forties having been born in December 1952. Prior to the accident he was a gardener and he also liked to "play around

with my cars quite a bit". He used to ride a push bike and did "a bit of walking now and then". It seems he lead a relatively quiet life and was not overly physically active. The past-times he did enjoy are now only available to him on a very restricted basis.

[53] Taking into account the matters mentioned above, and those appearing in the various medical reports, I consider an appropriate award for damages for pain and suffering and loss of amenities of life in this matter to be the sum of $45,000. I apportion $25,000 to the past and $20,000 to the future.

(b) Special Damages

[54] There was no dispute as to the figure which should be allowed under this head of damages. The plaintiff claimed the sum of $259.80 due to the Health Commission and the sum of $3,222.11 due to CRS Rehabilitation. Neither of these figures was challenged and I therefore allow a total of $3481.91.

[55] There was no claim made for future medical expenses. There was a claim made for the cost of the shoe inserts that the plaintiff requires in order to reduce the effect of the shortening of his leg. I make no allowance in respect of this claim as the items are available to the plaintiff free of charge through the Royal Darwin Hospital.

(c) Loss of Income

[56] At the time of the accident the plaintiff was earning approximately $480 per week with a net income of $400.62 per week. Since the accident he has

worked for only two weeks in an experiment with the defendant. That experiment was unsuccessful.

[57] Prior to the accident the plaintiff had a patchy employment record. He had left school at the age of 15 years, having reached grade 7 by Queensland standards. He worked in various labouring type jobs including in a supermarket, some panel shops and an abattoir and then as a general labourer in the building trade. Immediately prior to the accident he had been unemployed for about three years following the injury suffered at Heng Yang Darwin Pty Ltd and he then returned to work on a casual basis with the defendant followed by the more regular employment described above. I have been provided with some Income Tax Returns for the plaintiff and these indicate that in the year to 30 June 1994 he earned $9,012 taxable income and in the year to 30 June 1995 he earned income of $19,923 but, of course, these were unusual years.

[58] Since the accident the plaintiff has undertaken a computer training program. He has been assessed by a psychologist as being suited to a range of occupations including clerical work but with the observation that his ability to enter higher levels of clerical work and retraining would be limited. He has also been assessed by an occupational therapist who has indicated he should avoid undertaking physical activities that involve walking over uneven ground and climbing. He has a restricted capacity for walking, standing, sitting, lifting and carrying of objects.

[59] To my mind the observations made by Mr Jackson and set out at par [38] above fairly set out the employment capabilities of the plaintiff. He will have significant problems in obtaining employment and to some extent will require a sympathetic employer in order to obtain and retain employment. However he is capable of working and has a continuing capacity to earn income. He has had that capacity for some time and at least from the time of the report of Mr Jackson of April 1998.

[60] The plaintiff is entitled to compensation for his lost earning capacity calculated both as to past loss and future loss. Such a calculation can only be an estimate. At the time of his accident the plaintiff was earning a net weekly amount of $400.62. There was no evidence that he could earn any greater figure and, given his skills and history of employment, I consider it most unlikely that he would do so.

[61] Had he not suffered the injury on 10 January 1995 it is unlikely that the plaintiff would have worked for the whole of the time from that date until this. Similarly it is most unlikely that he would have worked the whole of the time from the present until he reached the age of 60 or 65 years.

[62] Looking at past loss of income I conclude, on the balance of probabilities, that the plaintiff would have worked for approximately sixty percent of the period from January 1995 to the present. The plaintiff conceded that there were annual lengthy periods in which activity in the building industry declined and when work was generally not available. In addition, the

plaintiff's work history and the problems he experienced with his back from time to time, suggest that he would not work for the whole of the period in any event. The plaintiff also conceded that he had been paid up to 10 November 1995 and his claim for past loss of income is for the period 10 November 1995 to 1 April 1999, being the date this matter was heard. That period is approximately 176 weeks. If, as I hold, he would have worked for about sixty percent of that time or some 105 weeks then the loss suffered by the plaintiff is 105 weeks at $400.62 (net) per week, giving a total (in round figures) of $42,000. I allow this figure for past loss of income.

[63] As to future loss of income I note the evidence of the plaintiff was that he would have stopped working at "60, 65". In view of the degenerative condition of his back, the fact that his employment was in the nature of labouring, and in view of his work history, I consider it most unlikely that he would have worked past the age of 60 years. The plaintiff is now aged just over 46 years and the period until his likely retirement but for his injury is therefore 14 years. By reference to the tables which appear in Professor Luntz's work, 'Assessment of Damages for Personal Injury and Death' (3rd Ed.), the relevant multiplier is 573. Accepting his loss of income at present as being $400.62 per week, the future loss is therefore $229,555 before taking contingencies into consideration.

[64] It is necessary to consider the question whether some alteration to this figure should be made to reflect the contingencies which affect human life and human operations. On the positive side it may be that the plaintiff

would have worked beyond the age of 60 years and it may be that his earning capacity would have increased. On the negative side the plaintiff suffered from a "very significant" pre-existing back condition. As he got older the prospect of finding suitable labouring jobs was likely to decrease. He had a patchy work history. These matters are in addition to other, more general, contingencies such as the prospect of sickness, accident, industrial problems and the like. In this case it seems to me that the unfavourable contingencies are significant and that a deduction should be made which reflects this fact. In all the circumstances I regard 40 percent as an appropriate deduction to be made for contingencies. This is a higher allowance than applies in many cases but reflects the particular circumstances of the plaintiff. I note the plaintiff adopted this figure in his submissions. This leaves an award of $138,000 in respect of future loss of earning capacity.

(d) Loss of Superannuation

[65] Under the statutory scheme established by the *Superannuation Guarantee Charge Act* 1992 and the *Superannuation Guarantee (Administration) Act* 1992, employers are bound to make periodic contributions towards the superannuation needs of their employees. Whilst the plaintiff is unemployed by virtue of his injuries he will lose the benefit of those contributions and he is therefore entitled to an award of damages in respect thereof.

[66] The plaintiff is an “employee” for the purposes of that legislation because his relationship with the defendant was a contract “wholly or principally for the labour of the person”. His contract is therefore subject to superannuation support provided for under the legislation.

[67] Evidence was led from an accountant, Mr Roland Chin, in this regard and his calculations became Exhibit P27. There was no challenge to this evidence by the defendant. Mr Chin provided a number of scenarios in relation to the present value of the loss suffered by the plaintiff in respect of superannuation support. The figures he provided ranged from $33,517 through to $73,460. Each of the assumptions upon which he proceeded included an assumption that the plaintiff would be in continuous employment through to a retiring age which was set at 60 years in some cases and 65 in others. For the reasons set out about I have found that the likely retirement age of the plaintiff was 60 years. The calculations also proceeded in some cases on the basis of interest rates which reflect conditions which applied in the late 1980’s and early 1990’s when interest rates and rates of return were higher than they were in the period from 1995.

[68] Any calculation of loss in this regard must be subject to the contingencies which I have discussed above. My task is to provide an award of damages to compensate the plaintiff for the present day value of the loss of employer contributions to the ultimate superannuation which he will draw at the end of his working life. I take as my starting point the calculation made by Mr Chin relating to a retirement at age 60 years, a return of 7.4 percent, and

a gross wage of $480 per week. According to the calculations the present value of the loss is $36,973. After applying the reduction in respect of contingencies I allow a figure of $22,000 in this regard.

Interest

Interest on Non-Economic Loss

[69] The plaintiff is entitled to interest on non-economic loss for the period from the date of the injury until the present. In *Rosecrance v Rosecrance* (1995-96) 105 NTR 1 Mildren J (at19) allowed interest at the rate of 4 percent on the whole of the amount attributed to past non-economic loss for the whole of the period of that loss. This decision was reconsidered on appeal in *Rosecrance v Rosecrance* (Court of Appeal, 17 April 1998, unreported as to this issue) where it was submitted that either the interest rate should be halved to 2 percent or, alternatively, interest should only be applied for one half of the period of the loss. This was to reflect the fact that the loss was spread over the whole period rather than being suffered at the commencement of the period. The Court of Appeal referred to the approach adopted by Mildren J as the "settled practice in the Northern Territory" and observed that "before changing what has become the settled practice to award 4 percent on the non-economic loss items this Court should hear evidence. Such evidence has not been put forward in this matter. In the absence of evidence we are not inclined to interfere."

[70] In the circumstances it seems to me to be appropriate to apply the settled practice as no evidence has been introduced in these proceedings to justify any change, and there has been no submission made to me that I should depart from the previous practice. However it is a matter which will have to be considered in an appropriate case in due course.

[71] The award for non-economic loss in respect of the period to date is $25,000 and I therefore allow interest in the sum of $4,230 (4.23 years x 4% x $25,000).

Interest on past economic loss

[72] The plaintiff is also entitled to interest on past economic loss awarded at ordinary commercial rates. No evidence was led before me of what those rates might be over the relevant period and reference to decisions of this Court reveal differing figures for different periods. The plaintiff, in his submissions, suggested that an appropriate source of information would be the interest rates allowed on judgment debts pursuant to the *Supreme Court Act and Rules* and published in the Law Almanac for 1999. I adopt this approach and allow interest at the rate of 8 percent per annum. The rate should be halved for the relevant period in order to reflect the fact that the loss occurred over the whole of the period and was not a loss of one sum at the commencement of the period: *Cullen v Trappell* (1979-1980) 146 CLR 1 at 19. In the present case the loss commenced after the defendant (or the Territory Insurance Office) stopped making payments to the plaintiff on 10 November 1995. The period for which interest should be paid is

therefore from 10 November 1995 to 1 April 1999, a period of 176 weeks or approximately 3.4 years. Interest is therefore $42000 x 4% x 3.4 years giving an allowance of $5712.

Gratuitous Services

[73] The plaintiff has claimed damages in respect of the services provided to him by his father during the period when he was unable to adequately care for himself. The evidence was that Mr Martin Snr. assisted his son by cooking, cleaning and shopping for groceries and the like for a period of approximately two months. Mr Martin Snr. suggested that he was involved in this way for some four or five hours per day during that period.

[74] Mrs H R Burkitt, the manager of the Red Cross Home Care Services, gave evidence that her organisation charged between $3 and $12.50 in respect of such services during the relevant period. In his submissions the plaintiff claimed the cost for the services provided by his father at $10 per hour and I regard this as a reasonable figure in the circumstances.

[75] I therefore allow this claim at 4 hours per day x 60 days x $10 per hour, giving a total of $2,400.

[76] Interest is payable on that amount at the rate of 8 percent from March 1995 (when the services were provided) until April 1999. I allow $768 in respect of interest under this head.

Conclusion

[77] I find that the negligence of the defendant caused loss to the plaintiff and I award the following sums in respect of that loss:

Pain and suffering and loss of amenities	$45000.00
Interest on past component	$ 4230.00
Special damages	$ 3481.91
Past loss earnings	$ 42000.00
Interest thereon	$ 5712.00
Loss of future earning capacity	$138000.00
Past gratuitous services	$ 2400.00
Interest thereon	$ 768.00
Loss in respect of superannuation	$ 22000.00
	$263591.00

I will hear the parties as to costs.

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