

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
PERSONAL INJURY LIST

Not Restricted

S CI 2014 03292

KATE MATHEWS

Plaintiff

v

WINSLOW CONSTRUCTORS (VIC) PTY LTD

Defendant

JUDGE: T FORREST J
WHERE HELD: Melbourne
DATES OF HEARING: 26, 27, 28, 29, 30 October, 4 November, 10 December 2015
DATE OF JUDGMENT: 17 December 2015
CASE MAY BE CITED AS: Mathews v Winslow Constructors (Vic) Pty Ltd
MEDIUM NEUTRAL CITATION: [2015] VSC 728

PERSONAL INJURY - Negligence - Abuse, bullying and sexual harassment in the workplace - Psychiatric injury - Damages - Past economic loss - Future economic loss - General damages.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr J Mighell QC Mr R Ajzensztat	Maurice Blackburn
For the Defendant	Ms J Forbes QC Ms D Manova	Thomson Geer

HIS HONOUR:

Introduction

- 1 The plaintiff, Kate Mathews, alleges that throughout the course of her employment with the defendant, Winslow Constructors Pty Ltd (**Winslow**), she was subjected to abuse, bullying and sexual harassment from Winslow employees and subcontractors. Ms Mathews further alleges that Winslow was vicariously liable for the tortious acts of these employees and subcontractors, or alternatively Winslow was negligent in failing to provide Ms Mathews with a safe working environment. Winslow initially denied liability and alternatively alleged contributory negligence.
- 2 Ms Mathews alleges that as a result of the abuse, bullying and sexual harassment she suffered and continues to suffer a serious chronic psychiatric illness. At the commencement of the fifth hearing day, Winslow advised the court that it admitted negligence, did not persist with its allegation of contributory negligence and that quantum only remained to be determined.

Background

- 3 Ms Mathews commenced work as a labourer with Winslow in August 2008. In the relevant Enterprise Bargaining Agreement she was classified as a CW2 worker. Winslow was (and is) a large construction company with many employees at many sites, specialising in civil engineering projects. At the time of her employment with the defendant, Ms Mathews was soon to turn 35 years of age. Up until the age of about 30 she had held down constant employment in sedentary jobs. She then did not work in paid employment for about five years, during which time she lived with her father and helped out intermittently in his tree-logging business. She then worked for Winslow for a little less than two years. She was an industrious worker over that period.¹

¹ Transcript of proceedings, *Mathews v Winslow Constructions (Vic) Pty Ltd* (Supreme Court of Victoria, S CI 2014 03292, T Forrest J, 26 October 2015 onward) (**Transcript**). Robert McPherson: 'She was better than a lot of men.' Transcript 168; Craig Nicholls: '...When she was given a task she never whinged, she never complained...she did it.' Transcript 178; Leslie Baldwin: 'She was a good worker.' Transcript 185; N M: '...It would be correct..(to say that she worked harder than some males)...' Transcript 334.

The Winslow experience

4 Given Winslow's admission of liability, it is unnecessary to set out a comprehensive analysis of the evidence. I will however set out a summary of the relevant misconduct which comes largely from the evidence of Ms Mathews.

5 Ms Mathews commenced her employment with the defendant at a site known as the Marriott Waters Estate in Lyndhurst. She worked at this and other sites from August 2008 until early July 2010. When working at these sites, amongst other offensive remarks or conduct, the following remarks or conduct were directed at Ms Mathews or carried out in her presence:

(a) Conduct or remarks by 'H G':

(i) Workers in the crib shed showed pornographic material to Ms Mathews. She was asked 'Would you do this?'²

(ii) 'You are a spastic, a bimbo.'³

(iii) 'Get out. You are fucking useless.'⁴

(iv) 'Do you have to go home and hide your dildos and play toys?'⁵

(b) Conduct or remarks by 'C H':

(i) 'Kate, let's put a pole in the yard and you can get it off.'⁶

(ii) 'Did you get laid over the weekend?'⁷

(iii) 'I had a great wank over you last night.'⁸

(iv) 'Check out her arms. She would rip my cock off.'⁹

2 H G, Transcript 35.

3 H G, Transcript 39.

4 H G, Transcript 40.

5 H G, Transcript 41.

6 C H, Transcript 34. 20 workers present at a work barbecue.

7 C H, Transcript 37.

8 C H, Transcript 37; Transcript 177.

9 C H, Transcript 37.

- (v) 'When a guy's been drinking and he blows in your mouth, does it taste the same as when he hasn't?'¹⁰
 - (vi) 'I will take you into the container and fuck you.'¹¹
 - (vii) 'Do you have silicone boobs?'¹²
 - (viii) 'You have a great fucking arse.'¹³
 - (ix) When Ms Mathews was cleaning out a drainage pit with a Mr McPherson, C H came up behind Ms Mathews 'grabbed her by the hips' and 'performed a sexual act on her, or acted it.'¹⁴
 - (x) C H said to Ms Mathews that he would like to throw her to the ground, 'come all over her and then watch her lick it off.'¹⁵
 - (xi) On 1 July 2010, Ms Mathews announced that she was going to lunch. C H said to her 'I am going to follow you home, rip your clothes off and rape you.'¹⁶
- (c) Remark by 'N M':
- 'Anything that bleeds once a month should be shot.'¹⁷
- (d) Various subcontractors:
- (i) A subcontractor to Winslow slapped Ms Mathews on her bottom.¹⁸
 - (ii) A subcontractor to Winslow asked Ms Mathews to look at his tattoo. A second subcontractor said 'It's on his cock.'¹⁹

¹⁰ C H, Transcript 37-38.

¹¹ C H, Transcript 38; T 187.

¹² C H, Transcript 38.

¹³ C H, Transcript 38.

¹⁴ C H, Transcript 164 (Evidence of Robert McPherson).

¹⁵ Transcript 165 (Evidence of Robert McPherson).

¹⁶ C H, Transcript 46.

¹⁷ N M, Transcript 52.

¹⁸ Transcript 41.

¹⁹ Transcript 41.

(iii) A subcontractor said to her 'You have nice tits', and later 'You have a nice arse.'²⁰

6 The above is a snapshot only of the remarks and conduct directed at Ms Mathews, said to be largely by C H and to a lesser extent by H G. I accept the evidence of Ms Mathews, whom I considered to be an honest and largely reliable witness, that conduct of this type occurred very frequently on the site. I also accept that she was reluctant to complain to her foreman, H G, as he was responsible himself for some of the offensive remarks. When she did complain about an offensive comment made by C H, H G 'laughed'.²¹ On occasions H G had called Ms Mathews 'useless', a 'spastic' and a 'bimbo'. On one occasion Ms Mathews had cleaned a pit. H G kicked dirt back in and said 'You missed a bit'.²² The person above H G in the company hierarchy was N M, Area Site Manager. On occasions when Ms Mathews complained to him, he said words to the effect of 'leave it with me.'²³ To Ms Mathews' observation nothing appeared to have been done about her complaints until she was moved to another crew at another site in September 2009. Ms Mathews stated that there was no sexual harassment from this time onwards until late June 2010, when, inexplicably Ms Mathews was moved back into the H G/C H crew. The sexual harassment, bullying and abuse resumed. When Ms Mathews complained that she had been moved back to the H G/C H crew, H G said 'You will work with whoever I fucking tell you to work with.'²⁴

7 On 1 July 2010, Ms Mathews went to her house at lunchtime. C H had threatened to 'follow (her) home, rip her clothes off and rape (her)'. Ms Mathews was 'frightened and scared' and recounted the threat to her mother. Later that afternoon she rang 'P A', whom she thought was responsible for Human Resources at Winslow. She recounted the threat to P A. According to Ms Mathews' evidence, P A invited Ms Mathews to '...come to my place in Warrandyte, and we will have a drink and talk

²⁰ Transcript 165 (Evidence of Leslie Baldwin).

²¹ Transcript 40; T 99.

²² Transcript 40.

²³ Transcript 34; Transcript 42.

²⁴ Transcript 45.

about it.’

8 Later that afternoon Ms Mathews received a telephone call on her cell phone from a private number. A male voice called Ms Mathews ‘a cunt’. Ms Mathews has not worked since.

The cause of Ms Mathews’ mental illness

9 On 31 July 2008, shortly after her father had ejected her from his home and prior to commencing work at Winslow, Ms Mathews attended her GP, Dr Golets.²⁵ She was sleep deprived and displayed symptoms of anxiety and depression.²⁶ In evidence, Ms Mathews stated she went there to get something to help her sleep.

10 In cross-examination, Ms Mathews accepted that at that time she may be have been experiencing suicidal thoughts,²⁷ although she qualified this a little later in her evidence.²⁸ She accepted that Dr Golets may have referred her to the Wonthaggi District Health Service for mental health treatment but she declined that treatment, ‘I didn’t think I needed to. I just wanted to have a good night’s sleep and find a house to live in.’²⁹ There is no evidence that Ms Mathews had sought psychiatric or psychological treatment before this sole visit to Dr Golets. I accept Ms Mathews’ evidence about it and I regard this visit as insignificant in the context of this case. Put another way, in my view there is no nexus or relationship between these pre-Winslow symptoms of anxiety and perhaps depression and the serious chronic psychiatric illness that developed during and subsequent to her employment with Winslow (August 2008 - July 2010).

11 Ms Mathews recounted in evidence the distress caused by the relevant conduct and remarks. Within days of leaving Winslow she had been referred by her GP (Dr Singh) to Dr Petruilis, a psychologist. His brief was to ‘treat anxiety, stress and

²⁵ Transcript 125.

²⁶ Transcript 126.

²⁷ Transcript 126.

²⁸ Transcript 126.

²⁹ Transcript 130.

depression, secondary to recent sexual harassment at work.’³⁰ He saw Ms Mathews four times in July and early August 2010. Dr Petrusis diagnosed ‘high levels of anxiety, stress and depression’³¹ according to the DASS questionnaire. Dr Singh saw Ms Mathews on 6 July 2010, at which time she was tearful and depressed.³² He treated her on eight occasions during July, August and September 2010 and prescribed Cymbalta, 60mg daily, but this was discontinued because of side effects. Ms Mathews was commenced on Pristiq, 50mg daily, and Valium, 5 mg daily if required.³³

12 In late-September 2010, Ms Mathews sought treatment from Dr Robyn Newnham, a General Practitioner at the Casey Medical Centre. Dr Newnham remains Ms Mathews’ treating GP. Ms Mathews was initially assessed as being severely depressed and Cymbalta, 60mg daily, was resumed. She gave a history of crying a lot, persistent lowered mood, difficulty getting out of bed, avoidance and disturbed sleep. She remained severely depressed over subsequent months despite referral to a psychologist, Ms Ashman.³⁴ Ms Mathews was resistant to seeing a psychiatrist and became hyperalert and vigilant. She would become distressed at the sight of people in fluorescent vests or at the sight of a Winslow truck.³⁵ Eventually, in early 2012, Ms Mathews agreed to see Dr Brendan Spence, a psychiatrist.

13 Throughout 2011, Ms Ashman continued to provide psychological treatment to Ms Mathews. She saw her on 11 occasions between February and November 2011. Ms Ashman diagnosed major depressive disorder with concomitant post-traumatic stress disorder (**PTSD**). Dr Spence agreed. In January 2012, Dr Spence said: ‘Kate Mathews (has) a diagnosis of Major Depressive Disorder, severe. She also has severe and clinical Post-Traumatic Stress Disorder.’ Dr Spence proposed inpatient psychiatric treatment in early 2012 but Ms Mathews was reluctant to take this step.

³⁰ Exhibit 5.1, Report of Dr Petrusis, 9 November 2011, p 1.

³¹ Exhibit 5.1, Report of Dr Petrusis, 9 November 2011, p 3.

³² Exhibit 5.2, Report of Dr Singh, 17 November 2011, p 2.

³³ Exhibit 5.2 Report of Dr Singh, 17 November 2011, p 2.

³⁴ Exhibit 5.4, Report of Dr Newnham, 11 November 2011, p 2.

³⁵ Exhibit 4, *ibid* p 2.

She saw Dr Spence on 12 occasions in 2012, ceasing in November. He reported³⁶ that her engagement with him was 'tenuous and limited.'

14 It is apparent that Ms Mathews responds more openly to female treaters. Dr Spence referred her to Ms Rose Zohs, psychologist, who carried out therapy fortnightly or monthly, but ceased in September 2013. Ms Zohs was of the view that despite relatively intensive psychotherapy, medication and psychiatric intervention, Ms Mathews' depressive symptoms and anxiety increased: 'She continues to suffer from severe depression – a major depressive disorder with anxiety...' Ms Zohs' view was that Ms Mathews continued to meet the diagnostic criteria for PTSD with major depression, however she acknowledged that Ms Mathews' current (in March 2013) psychiatrist had revised the diagnosis somewhat.

15 Dr Jill Hosking became Ms Mathews' treating psychiatrist in January 2013.³⁷ She has seen Ms Mathews roughly on a monthly basis since August 2013. Initially she too was of the view that Ms Mathews, 'a distressed young woman',³⁸ was suffering from major depressive disorder and a significant chronic PTSD 'which appeared not to have resolved or improved since she left work in July 2010.'³⁹ Ms Mathews was a reluctant historian who was 'obviously distressed in every session.' Dr Hosking has treated Ms Mathews with Valproate (200mg) and Cymbalta (30mg). Diazepam (5mg) was prescribed for a temporomandibular joint dysfunction. Additionally, she was referred to Delmont Private Hospital where (under the care of Dr Varma, consultant psychiatrist) she was given six Electroconvulsive Therapy Treatments between 13 November and 25 November 2013. Thereafter, she had further 'maintenance treatment' on 31 January 2014, 25 February 2014, 12 March 2014 and 1 April 2014. This apparently improved Ms Mathews mood for a time but produced a 'hypomanic switch.' Dr Hosking reports '(it) was clear then that she was suffering Bipolar II disorder with significant irritability as part of regular dysthymic hypomanic episodes which the ECT has exposed...' Dr Hosking's opinion is that Ms Mathews is

³⁶ Exhibit 5.6, Report of Dr Brendan Spence, 23 September 2014, p 1.

³⁷ Transcript 230.

³⁸ Exhibit 3, Report of Dr Hosking dated 21 June 2015, p 2.

³⁹ Exhibit 3, *ibid* p 2.

suffering from PTSD and Bipolar II Disorder. In evidence, Dr Hosking explained that she thought the Bipolar disorder was 'ECT-induced.'⁴⁰ Bipolar II Disorder is a recognised psychiatric disorder referred to in DSM-V.⁴¹ The PTSD is chronic and the Bipolar II Disorder, within which reside depressive symptoms, is a 'permanent condition which will require medication and regular review.'⁴² Her view was that Ms Mathews' prognosis was poor: 'Ms Mathews' Bipolar II Disorder is currently stable, but will require monitoring by a psychiatrist for the rest of her life. Ms Mathews' PTSD is stable but chronic and permanently disabling...it is unlikely to remit significantly'.⁴³

16 In this review of Ms Mathews' psychiatric and psychological treatment to date I have endeavoured to capture the extent and nature of her mental illness, her treatment and her prognosis as seen by those treaters. None of this evidence was seriously challenged by Winslow.

Medico-Legal evidence

17 No medico-legal practitioners were called to give oral evidence. Dr Nigel Strauss, psychiatrist, provided a report to Ms Mathews' solicitors dated 19 March 2015.⁴⁴ He interviewed Ms Mathews on that day and was provided with reports from her treaters including Drs Newnham, Spence, Varma, Petrulis and Ms Zohs. He did not have a copy of Dr Hosking's reports. It was Dr Strauss' opinion that Ms Mathews was entirely genuine and suffering from a moderately severe psychiatric condition involving a major depression and a post-traumatic stress disorder. Her quality of life has suffered severely. She has a poor prognosis.

18 Winslow admitted having Ms Mathews assessed by the following psychiatrists on the dates referred to:

- (i) Dr Chris Grant, 24 November 2011;

⁴⁰ Transcript 241; 242.

⁴¹ Transcript 259.

⁴² Exhibit 3, *ibid* p 7.

⁴³ Exhibit 3, *ibid* p 8.

⁴⁴ Exhibit 5.13.

- (ii) Dr Stephen Stern, 24 November 2011;
- (iii) Professor Ivor Jones, 20 June 2012, 13 September 2012 and probably 12 February 2013.

None of these psychiatrists were called to give evidence by Ms Winslow and none of their reports were tendered.

The jaw injury

19 In addition to her psychiatric injuries Ms Mathews has sustained an injury to her tempero-mandibular joint as a consequence of grinding her teeth. Dr Newnham referred Ms Mathews to Mr Poon, an oral and maxillofacial surgeon. He considered that Ms Mathews suffered from 'myofacial pain related to displacement of the intra-articular disc, jarring of the joint and secondary spasm of the masticatory muscles.' She was advised to adopt a softer non-chew diet and to wear a nocturnal splint. There are no satisfactory surgical procedures available unless the joint disease becomes 'end stage'. Mr Poon did not offer an opinion as to the nexus between Ms Mathews' mental impairment and this physical injury, however Dr Newnham did: '(It) progressively developed over a period of time due to her tension, holding her muscles very tight and grinding her teeth'.⁴⁵ In answer to a question enquiring as to any connection between the employment and this injury, Dr Hosking stated that Ms Mathews sustained 'a permanent bilateral tempero-mandibular jaw injury due to chronically grinding her teeth and which causes ongoing pain and severe limitation to her capacity to chew and enjoy many foods'.⁴⁶ In evidence, she said that Ms Mathews' teeth grinding was related to her psychiatric illness. Neither Drs Newnham nor Hosking were challenged on these opinions. I conclude that Ms Mathews' employment at Winslow was also a cause of this injury.

Ms Mathews' current lifestyle

20 I have indicated that I considered Ms Mathews to be a truthful and largely reliable

⁴⁵ Transcript 267.

⁴⁶ Exhibit 3, Dr Hosking's report, 21 June 2015, p 7.

witness. I did not detect any tendency to exaggerate or to prevaricate. Ms Mathews became upset and occasionally tearful both in examination-in-chief and in cross-examination. I am satisfied that these episodes were genuine and consistent with her psychiatric and psychological impairments. Ms Mathews described her current circumstances:

- (a) She does not feel well enough to work.
- (b) She rides her bicycle and/or walks with her mother almost daily and in summer goes to the beach with her mother almost daily and in summer goes to the beach with her three times a week.
- (c) She has lived with her partner, Sibren Burggraaff, for about three and a half years.
- (d) She drives her car, does the shopping and cooks and cleans her house.
- (e) She works in the garden.
- (f) Every day she ruminates about what occurred at Winslow. She has difficulty sleeping and in fact sleeps better during the day. She often will not get out of bed in the morning unless her mother contacts her and instructs her to do so. She will often return to bed during the day.
- (g) Fluorescent jackets, road works, and white utility vehicles similar to the type used by Winslow will cause her to become upset.
- (h) She did not like to leave the house on her own. When asked to describe her mood, she said 'I hate that I have woken up.'⁴⁷

21 Ms Mathews said her jaw pain was getting worse and she has been eating soft food and chopping her meals up finely. She feels pain just in front of her right ear. She has been wearing a mouthpiece at night for the last seven months.

⁴⁷ Transcript 63.

22 Rhonda McMahon is Ms Mathews' mother. Ms Mathews, she said, was one of three girls. Before Ms Mathews worked for Winslow she was, Ms McMahon said, a bright, bubbly, confident, young woman who loved outdoor activities. Ms Mathews became upset when her father ejected her from his unit but she recovered quickly and found herself a unit. During the time that Ms Mathews worked at Winslow, Ms McMahon observed that her daughter seemed to become anxious and to experience headaches and insomnia. Her daughter would recount to her what the Winslow employees were saying. When Ms Mathews recounted the C H rape threat she 'was just beyond herself. She was just horrible.'⁴⁸ The next day Ms McMahon went to see her daughter. 'She was just crying and screaming and - yes, really in a state.'⁴⁹ She had never seen her like this before.

23 Ms McMahon now speaks to her daughter three or four times a day. 'I ring her to get her out of bed and have a bike ride with me, if she doesn't want to, I go down there and get her out of bed and take her for a walk.'⁵⁰ When asked why she would ring in the morning she said it was because when she would say goodnight to Ms Mathews, Ms Mathews would say 'Mum, I don't know if I will be here in the morning.' On some days Ms Mathews showed a happy face, but Ms McMahon suspected this was put on for her benefit: 'Are there any occasions when you have seen her crying, broken down?...Oh, yes. How frequently might that occur?...Four times a week.'⁵¹

24 Mr Burggraaff has been Ms Mathews's partner for five years and they have lived together for the last three and a half years. He has known her for about 20 years. He is a self-employed builder. He said that before working at Winslow Ms Mathews was bright, witty and fun-loving. She is 'a fair bit'⁵² different now. She seems to lack motivation and spend a lot of her time in bed. 'I always wonder what I am going to come across each time (I come home). Like, whether I find her alive or dead. I dread

48 Transcript 206.

49 Transcript 206.

50 Transcript 207.

51 Transcript 208.

52 Transcript 285.

sometimes coming home.⁵³ The relationship has been placed under great strain⁵⁴ and he has almost walked out on occasions. When asked to compare Ms Mathews before Winslow to her after, he said this:

She's nothing like (the woman I knew before) because that was an outgoing woman and she – now I have to plead with her to go to a shopping centre or anything because she's got a fear of Winslow workers coming in and stuff like that; going by road works she freezes up. It's just not an enjoyable trip if we go anywhere or do anything now – she's so worried and I don't like to stress her that much. If we go out at all, it's a bit of a stress.⁵⁵

25 Mr Burggraaff said that his partner still loved to garden and in a very modest way she helped him with home renovations.⁵⁶

The films

26 Neither Ms McMahon nor Mr Burggraaff were seriously challenged in cross-examination. I was impressed by their evidence. I consider them both to be honest and reliable historians who are both extraordinarily worried for Ms Mathews's welfare.

27 The only evidence from Winslow came in the form of three DVDs showing film of Ms Mathews taken covertly at different locations at different times. It became a centrepiece of Winslow's submissions. The films, so the argument goes, demonstrate that there is light and shade in Ms Mathews' day. Ms Mathews consistently presented to doctors in a distressed state but the films showed, on occasions, Ms Mathews to smile, to engage with a shopkeeper, to walk with her mother and to talk on the telephone. The films appeared to demonstrate Ms Mathews as capable of sustained physical activities, specifically gardening and moving wheelbarrow-loads of wood around her house.

28 The defendant argued that this asserted discrepancy between Ms Mathews' presentation to doctors and her presentation in everyday life 'bears upon the

⁵³ Transcript 286.

⁵⁴ Transcript 286.

⁵⁵ Transcript 287.

⁵⁶ Transcript 285.

relativity of the plaintiff's evidence as to quantum.⁵⁷

29 In my view, the films have no material impact on Ms Mathews' reliability as a witness, nor upon the nature and extent of her psychiatric illness. The films were taken on seven separate days between March 2014 and January 2015. There is about 95 minutes of footage. I remarked to counsel during the trial that if this were a 'back case' the films would be highly probative. They show Ms Mathews engaging in protracted physical activity in the garden. This activity in my view says very little, if anything, about her mental state. It is true that the films show Ms Mathews outside the safety of her house but nearly always with her mother or her partner. It is also true that she smiles on occasions and appears (insofar as one can tell) animated and engaged. On other occasions she appears distressed. East Side Investigations described Exhibit A (1 of 3) as depicting the following:

MS MATHEWS forcefully removing plants from a planter box, placing them into large plastic bags, taking photos of her planter box, sweeping and watering the planter box area, boarding and alighting from her vehicle, moving around at the file address, farewelling her parents, sitting at a table talking to her partner, walking various distances, carrying a hot beverage and talking to her mother, sitting at a park bench talking to her mother, crossing the road, crying.

30 Ms Mathews accepted that one of the films showed her out and about in Wonthaggi with her partner and in that film she demonstrated an apparent range of emotions whilst doing ordinary things, such as smiling and engaging with shopkeepers and her partner. Ms Mathews agreed that she did not spend her days always on the verge of tears. Certainly, Ms Mathews invariably presented at her treating doctors in an anxious, tense state. She was often teary. Portions of the October 2014 video were played to Dr Newnham, Ms Mathews' treating GP. Dr Newnham said she would expect that there would be times when, in her own environment, Ms Mathews would appear comfortable. In cross-examination, Dr Newnham explained this apparent difference to Ms Mathews' demeanour when consulting her:

...It doesn't surprise me that she can perform in that way. It doesn't exclude (performing in that way) by how she presents to me.

⁵⁷ Exhibit R1: Defendant's outline of submissions as to quantum, p 1.

My question was is that demeanour (on the video) consistent or inconsistent with the demeanour when she comes to you?

She's in her own environment there, she's in a relaxed place. She's very uncomfortable when she presents to me so it's a very different presentation when I see her.

Does that presentation surprise you?

No.⁵⁸

31 I consider that real caution must be exercised in any personal injury case where a judge is required to evaluate covertly recorded footage of what are necessarily only fragments of a plaintiff's life. The need for caution is heightened in a case where psychiatric injuries are claimed. If the film demonstrates that a plaintiff has falsely claimed to have some limitation, or has exaggerated the extent of it (e.g. I never, or hardly ever leave home) then it may have some value. If, however, the film shows a plaintiff to smile on occasions or to laugh whilst engaging with others, for my part, I doubt that anything much can be inferred from that. The fact that a plaintiff may appear normal during that surveillance simply does not mean that he or she is normal. To conclude so would be to guess, particularly in the absence of any psychiatric evidence whatsoever called on behalf of the defendant. In this case, I do not regard the film as impacting at all on the plaintiff's reliability, nor to contradict any aspect of Ms Mathews' case.

32 I consider that Ms Mathews has sustained very considerable psychiatric injuries as a direct consequence of the bullying, abuse and sexual harassment levelled at her by employees and subcontractors of Winslow. It matters relatively little whether her diagnosis is:

- (a) Bipolar disorder II together with chronic PTSD;⁵⁹
- (b) A major depressive illness together with chronic PTSD.⁶⁰

33 On either diagnosis, Ms Mathews has suffered chronic and significant psychiatric

⁵⁸ Transcript 278.

⁵⁹ As diagnosed by Dr Hosking.

⁶⁰ As diagnosed by Dr Strauss and Ms Ashman.

injuries that have and will continue to diminish the quality of her life.

General damages

34 For the reasons that I have expressed thus far, and particularly from paragraphs [9] to [33], I assess Ms Mathews' general damages at \$380,000. This amount includes compensation for both her psychiatric injuries and her jaw injury.

Past and future economic loss

35 Ms Mathews gave evidence that, harassment aside, she enjoyed the nature of her work at Winslow⁶¹ and hoped to progress beyond her then work status.⁶² I accept this. N M was the only witness called by Winslow. In cross-examination, he set out potential work paths available to Winslow employees:

We have heard from some witnesses who worked with her, some males, that she worked harder than some males who were on the site?---That would be correct.

If...the bullying or sexual harassment...had not occurred, she had a bright future with Winslow?---Correct.⁶³

36 A little later in cross-examination, N M expanded on this:

If she had remained working there, what I suggest to you is that she is the sort of worker who could have progressed through some further levels of structure within the company?---Yes. There would have been a few options for Kate, yes.

Can I suggest she struck you as a fairly intelligent woman?---Yes.⁶⁴

37 N M went on to explain the options that would have been open to Ms Mathews. She could have remained in the civil construction hierarchy. Beyond her status as a labourer there were positions within the company structure to which she may have been promoted: leading hand, foreman and area supervisor. N M thought that if Ms Mathews wished to pursue that field or position as an area supervisor at some stage in the future, that was a possibility.

⁶¹ Transcript 93.

⁶² Transcript 62.

⁶³ Transcript 334.

⁶⁴ Transcript 335.

38 The evidence is resounding and unanimous that Ms Mathews was a good worker.⁶⁵ In my view it is likely that, had she remained healthy and working at Winslow, she would have moved 'up the ladder'. It is of course impossible to identify this progression with any precision. Promotion was available at Winslow and Ms Mathews (absent the effects of sexual harassment) was eminently promotable. She has proved that to my satisfaction. Doing the best I can, and adopting a conservative approach to this progression, I have concluded as follows:

- (a) Ms Mathews would have continued to work as a CW2 labourer until not later than 1 July 2011. By that stage she would have been employed by Winslow for three years.
- (b) From 1 July 2011 to 15 December 2015 Ms Mathews would have worked at Winslow as a leading hand. By that stage she would have been employed by Winslow for nearly 7 ½ years.
- (c) From 15 December 2015 onwards Ms Mathews would have been employed by Winslow as a foreman.

39 The evidence is also virtually unanimous that it is unlikely Ms Mathews will ever work again. I shall summarise it briefly:

- (a) Dr Newnham

I do not believe Kate has any work capacity at present. Due to the prolonged nature of this episode and lack of response to various treatments...(i)t is difficult to say whether she will be able to recover in (the) future enough to work.⁶⁶

'You would expect that at some point in the future she would be well enough to attempt (work in a non-threatening environment)?---I don't expect that, no'.⁶⁷

- (b) Dr Hosking

⁶⁵ See footnote 2.

⁶⁶ Exhibit 4.

⁶⁷ Transcript 279.

...Ms Mathews certainly has no current work capacity.⁶⁸

'Do you think there is a realistic possibility, or even a possibility of this lady returning to work in the future?--No, never'.⁶⁹

(c) Dr Spence (2012)⁷⁰

'I would have to conclude that it's possible that her inability to work is indefinite'.

(d) Dr Strauss (March 2015)

'On psychiatric ground alone she has to be considered totally and permanently incapacitated for employment...I cannot see her working again in the foreseeable future. She will probably need psychiatric treatment indefinitely because of her poor prognosis'.⁷¹

(e) Ms Zohs (March 2013)

'Her incapacity for work is long term'.⁷²

40 Ms Mathews tendered other psychiatric or psychological reports⁷³ but none dealt with her capacity for work. No mental health professional who treated Ms Mathews or who assessed her suggested that she was fit for work, or that she would be likely to be so at some future date. In paragraph [18] of these reasons I note that the defendant had Ms Mathews assessed by three psychiatrists on a total of (probably) five occasions, most recently 33 months ago in February 2013. The defendant called no evidence from these psychiatrists.

41 I am satisfied, on balance, that Ms Mathews has had no work capacity since leaving Winslow and will not work again. I am fortified in this conclusion by the failure of the defendant to adduce psychiatric evidence. I infer that this evidence would not have assisted the defendant, and the absence of it enables me more readily to accept the opinions that I have set out in paragraph [34].

⁶⁸ Exhibit 3.

⁶⁹ T 234.

⁷⁰ Exhibit 5.4.

⁷¹ Exhibit 5.13.

⁷² Exhibit 5.9.

⁷³ From DR Singh, A. Prof Varma and Ms Ashman.

Past economic loss

42 Applying the conclusions I have expressed in paragraph [38] as to past economic loss, and based on the agreed wage rates provided by the parties, I calculate past economic loss to 15 December 2015 as set out in the table below:

Year	Period (weeks)	Role	Gross weekly wage	Net weekly wage	Total (net)	Total superannuation
2010 - 11	52	CW2	\$829.00	\$719.00	\$37,388.00	\$3,987.00
2011 - 12	52	Leading hand	\$1,154.00	\$919.00	\$47,800.00	\$5,400.00
2012 - 13	52	Leading hand	\$1,154.00	\$926.00	\$48,153.00	\$5,400.00
2013 - 14	52	Leading hand	\$1,154.00	\$926.00	\$48,153.00	\$5,704.00
2014 - 15	52	Leading hand	\$1,154.00	\$926.00	\$48,153.00	\$5,704.00
2015 - 16	24	Leading hand	\$1,346.00	\$1,043.00	\$25,032.00	\$3067.70
TOTALS:					\$254,679.00	\$29,262.70
TOTAL PAST ECONOMIC LOSS:						\$283,941.70

43 I consider that there is some chance that Ms Mathews would not have been promoted to leading hand level either as early as 2011-12 or at all. There is also some chance that Ms Mathews would have been promoted to foreman level earlier than I assessed. In the circumstances I do not propose to discount Ms Mathews' past economic loss to reflect these competing *Malec v Hutton*⁷⁴ factors. There are no other discounting factors for that past that I regard as significant. Ms Mathews' job was secure, and absent the bullying I accept that she enjoyed her work.

Future loss of earning capacity

44 It is agreed between the parties that a foreman employed by Winslow currently earns \$60,840 net per annum or \$1,170 net per week. Superannuation accrues at

⁷⁴ *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638.

\$146.15 per week. It follows that if Ms Mathews were currently working with Winslow as a foreman she would earn \$1,316.15 net per week inclusive of super.

45 I can see no reason why Ms Mathews would not have continued to work until the normal retirement age of 65. Ms Mathews is now aged 42. The multiplier to age 65 is agreed at 661.1. Before discounts I calculate future economic loss as:
 $\$1,316.15 \times 661.1 = \$870,106.76$.

46 I must discount this figure for the normal vicissitudes of life. In addition to the normal vicissitudes there is another aspect that I must consider. In paragraph [3] I have observed that Ms Mathews was unemployed for about five years before her two years employment at Winslow. As I have observed earlier in these reasons, before that five year 'gap' she was fully employed. In my view, there is a realistic possibility that Ms Mathews would have experienced either unemployment or less remunerative employment at some future stage. On the other hand, though in my view it is unlikely that Ms Mathews would have progressed beyond foreman to area supervisor, it is not completely unrealistic. Had she progressed to area supervisor her income would have been in the range of \$120,000 per annum.⁷⁵

47 Balancing these factors as best I can, I reduce Ms Mathews' entitlement to damages for loss of earning capacity by 20%. I award Ms Mathews $\$870,106.76 \times 80\% = \$696,085.41$.

Conclusion

48 I assess damages as follows:

General damages:	\$380,000
Past economic loss:	\$283,942
Loss of earning capacity:	\$696,085
Total	<u>\$1,360,027</u>

⁷⁵ Evidence of N M, Transcript 337.

49 I will hear the parties on costs.