ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

WAIN

V.

CARRUTHERS

17/6

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Friday, 18th May 1956

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

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ORDER

Application refused.

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JUDGMENT

DIXON C.J.

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This was a motion upon notice for leave to appeal from an interlocutory order of the Supreme Court of New South Wales. The application was on the part of the plaintiff who, in an action for personal injuries, had recovered a verdict for £9800 damages. The defendant appealed to the Full Court of the Supreme Court both on the ground that there was no evidence of the cause of action and that the damages were excessive. The Full Court sustained the finding of the jury on the question of liability but ordered a new trial limited to damages. The order as to the costs of the first trial was that they should follow the event of the new trial. It is agreed on behalf of the defendant that the result of this is that, since the plaintiff has a verdict or finding on the issue of liability, the defendant must pay the costs of the first trial in any event, it not being a case where it would be possible for the jury to award no damages.

In support of the application for leave to appeal it is urged on the part of the plaintiff that in the reasons given by Street C.J. and Herron J., in which Manning J. concurred, the evidence concerning damages was examined as if the Court were entitled to form its own judgment upon the facts. It seems hardly necessary to say that when an award of damages by a jury is attacked upon the ground that the damages are excessive the court of appeal stands in relation to the evidence of damage in no different position from that which it occupies in dealing with any other issue of fact. On the subsidiary questions of fact which may be involved in the award of damages such as the character of the plaintiff's injuries, their permanency, the probability of the continuance of incapacity, or the expectation of future damage, the Court must assume in favour

of the verdict that the jury acted upon that view of the evidence, amongst those reasonably open, which lends the greatest support to the assessment and best explains it. It is not open to the Court to form from the evidence its own opinion as to the true conclusions or inferences of fact with respect to these subsidiary matters. If there is evidence upon which a jury might reasonably make a finding favourable to the plaintiff upon any such matter, it is enough. Adopting the assumptions of fact demanded by a proper application of this principle it is, of course, for the Court to say whether on the view of the facts so assumed the amount awarded is excessive. It is excessive if it is so disproportionate to the injury which the jury must be taken to have found to exist as to be unreasonable.

A consideration of the reasons given in the Supreme Court seemed to support the complaint that the learned judges had not adhered to the foregoing standard but had in fact formed their own opinion as to what was the truth concerning the plaintiff's injuries and the duration of his future incapacity. Prima facie this would entitle the plaintiff to leave to appeal. But as it seemed possible, and indeed not unlikely, that upon a proper application of principle the conclusion that the verdict was excessive might be supported, we took time to examine the evidence for ourselves.

It is not necessary to do more than state very briefly what was the character of the plaintiff's injuries. He was crushed between the tail of the defendant's truck and a stump. This occurred on 26th May 1952. He was at once taken to hospital where it was found that there had been a severance of the lower bowel. An immediate operation was performed and an anastomosis effected. It was also found that his twelfth left rib had been fractured, the pieces being separated, and that there had been a fracture of the transverse process of the third lumbar vertebra.

He remained in hospital until 22nd July 1952. For a few months he was a convalescent. He was later returned to another hospital and then on 18th January 1953 some further treatment proved necessary as a consequence of an intestinal adhesion or stoppage. Then from 5th to 20th March 1953 he was again in hospital where an operation for a midline hernia was performed. The hernia was attributed to the abdominal surgical incision. He has continued to suffer from time to time from abdominal troubles accompanied by headaches and vomiting and other symptoms. The evidence attributes to him a loss of power of concentration, inability to withstand noise, difficulty in sleeping by night and a neurosis described as an anxiety state. The prognosis concerning this anxiety state or neurosis was the subject of conflicting evidence but there is evidence upon which it might be concluded that its removal or cessation may be more a matter of chance than of treatment.

Apart from loss of earnings, the special damages alleged amounted to £236, Even deducting an amount for the loss of earnings during the long period in which he has been and perhaps is likely to remain incapable of regular work, an award of £9800 is undeniably a large one. It is large enough to leave it not entirely free from doubt whether upon the evidence fit to be submitted to the jury on the subsidiary issues already mentioned the award should be allowed to stand.

Before the hearing of the motion the defendant made some attempt to appeal to this Court on the issue of liability. He did not file a notice of appeal in due time and an extension was refused in chambers. It would seem, however, that if leave to appeal were given to the plaintiff and if pursuant to such leave he appealed from the order of the Full Court of the Supreme Court, the way would be opened under rule 13 of Order 70 of the rules of this Court for the plaintiff to

cross-appeal so far as affects the issue of liability.

A further circumstance which may not be immaterial is that unfortunately at the time when he opened the plaintiff's case to the jury the learned counsel for the plaintiff was under a misapprehension on two important matters which would affect the quantum of damages. One was that at the time the anastomosis was effected it had been found necessary to make a temporary opening in the abdominal wall for the evacuation of the intestines. The other was that it was likely that the plaintiff might in the future be confined as a mental patient. These matters he appears to have used in his opening. Although no doubt as much as possible was done to remove all misapprehension as to these matters from the minds of the jury, it is never certain what residual influences upon the outlook of a jury as to the quantum of damages may remain when first impressions are formed on erroneous facts.

Another matter which we are perhaps entitled to take into account in exercising our discretion is that after all a new trial will be held at the expense of the defendant and not of the plaintiff.

In all these circumstances it appears to me that a wise exercise of our discretion would be to refuse leave to appeal, notwithstanding the prima facie view that might be formed on reading the judgments delivered in the Supreme Court.

The application should be refused. As the failure of the plaintiff's application is the result of an exercise of discretion, notwithstanding the existence of prima facie grounds for the application, I would make no order as to the costs of the application.

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JUDGMENT

McTIERNAN J.

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JUDGMENT McTIERNAN J.

I agree with the reasons for judgment of the Chief Justice and, therefore, that the application for leave to appeal should be refused.

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JUDGMENT WEBB, J.

I would refuse this application for the reasons given by the Chief Justice.

For the purpose of ascertaining whether the damages awarded were out of all proportion to the injuries inflicted, we are to take the most favourable view of the evidence reasonably open to the jury, properly instructed, as they were. Now I think the evidence most favourable to the claim for damages was given by Dr. Sullivan and by Dr. King who were the applicant's doctors after the accident and up to the trial, which took place in September, 1954. Dr. Sullivan was his doctor up to September 1953, and Dr. King during the next twelve months. There was no reason why the jury should not have accepted these doctors as witnesses of truth. Dr. Sullivan, after stating the nature and extent of the injuries, said that he considered the applicant would not be fit to follow any occupation because he would not be able to"keep his mind on any project long enough to be able to do any work". But Dr. Sullivan had not seen him for twelve months before the trial. However, Dr. King, who had seen him during that period, said that, although there was a possibility that he would be able to earn his living, it was "almost certain he would not be in a position where he could take the responsibility associated with it". Pausing here, it will be observed that both doctors emphasized the applicant's mental state, and not his physical condition, as the cause of his inability to work. But Dr.King added that he would not like to say whether he could or could not earn a living in some form of occupation, and that if he could be induced to "take an interest in a thing" there was no reason why he should not make a success of it.

The jury awarded £9800 damages. Deducting from this sum £250 for the special damages proved, and say £2000 for wages lost after the accident and up to the trial, I think the balance exceeding £7500 is far too high, and indeed out of all proportion to the injuries inflicted, including pain and suffering, loss of future earnings, and diminished prospects generally.

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JUDGMENT KITTO J.

I agree in the judgment of the Chief Justice.

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TAYLOR J.

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JUDGMENT TAYLOR J.

In the action in the Supreme Court which has led to this motion for leave to appeal the applicant succeeded in obtaining the verdict of a jury for the sum of £9800. This amount was awarded as damages for injuries received by the applicant as the result of the respondent's negligence in the management of a motor vehicle. On appeal the Full Court considered the award excessive and a new trial on the issue of damages was directed. This motion is for leave to appeal from the order of that Court.

There is no doubt that the applicant's physical injuries were substantial but it is equally clear, upon the evidence, that his progress towards recovery at the time of the trial had been such that, if they were the only matters to be taken into consideration, there could be no escape from the conclusion that the award could not possibly be justified. It is so far out of proportion to those injuries that one could not regard it as otherwise than grossly excessive. But the additional claim was made that evidence relating to a disturbance in the applicant's mental condition precluded the conclusion that the verdict was excessive. This evidence, it was claimed by counsel, justified a finding that the applicant's mental condition was so disturbed that it was likely or, perhaps, possible that he would never work again or, at all events, would remain incapable of useful and sustained work. The applicant's condition in this respect was the subject of evidence given on his behalf by two psychiatrists who, not unexpectedly, were not in entire agreement. But taking the most pessimistic view of their evidence the conclusion that the applicant would never perform useful work again would be quite unjustified. Dr. Minogue, who saw the applicant a matter of a week or two before the trial commenced, does not

appear to me to have said so whilst, according to Dr. Arnott's evidence, the probabilities were otherwise.

The complaint of the applicant in the present case is, however, that the members of the Full Court assumed the task of deciding for themselves what conclusions of fact should be reached upon this evidence and that, in doing so, they had usurped the functions of the jury. Whilst there are some observations in their reasons which are capable of suggesting this I doubt very much if this was the course which their Honours pursued. They were dealing with medical evidence much of which was vague and uncertain and which required examination, not for the purpose of assessing its worth and credibility and thereupon reaching conclusions of fact upon it, but for the purpose of understanding what the witnesses had said and how far their evidence was capable of carrying the applicant's case. In particular their Honours were concerned to see if the evidence was capable of supporting the claims made on behalf of the applicant. When the reasons of the members of the Court are examined it is obvious that they were - as one might expect - fully aware of the principles to be applied and I doubt if they intended to convey more than I have indicated. The suggestion that their Honours had gone further, however, was sufficient to require us to reserve the matter for our consideration as a result of which I am now satisfied that leave should be refused. I am strongly inclined to think that, upon the evidence, the verdict was excessive and that in all the circumstances of the case, including the unsatisfactory features arising out of the manner in which the case was opened to the jury and which are referred to by the Chief Justice in the concluding part of his reasons, I am of the opinion that a new trial on the issue of damages should take place.