ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

STARTARI

V.

LAIO

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Thursday, 24th November, 1960

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

(.1978/55

STARTARI

v.

LAIO

O R D E R

Appeal allowed with costs. Judgment of the Supreme Court of South Australia varied by substituting the sum of £8,204. 12s. 6d. for the sum of £5,204. 12s. 6d. wherever appearing therein.

STARTARI v. LAIO

JUDGMENT

McTIERNAN J.
KITTO J.
WINDEYER J.

STARTARI v. LAIO

This is an appeal from a judgment of Brazel J. by which he awarded the plaintiff, an infant who sued by her next friend, the sum of £5,204. 12. 6 as damages for injuries she suffered when the defendant's motor car collided with her when she was riding a push bicycle on Grange Road, Seaton. His Honour's finding that the plaintiff's injuries resulted solely from the defendant's negligence is not disputed, the appellant's only complaint being that the damages are inadequate. The sum awarded is made up of £204. 12. 6, agreed as special damages, and £5,000 assessed by the learned judge as general damages. The question for us is whether this sum is, in the circumstances, so clearly an erroneous estimate that this Court should, in accordance with the principles on which it acts when a judge's assessment is challenged, set it aside. The facts which are of an unusual character raise what seems to us to be a somewhat special problem. They may be briefly stated. The appellant at the time of the accident was just on twelve years old. She was born in Italy. Her parents are Italian migrants who are unable to speak English. They gave evidence by an interpreter, who said that they speak a mixture of a Calabrian dialect of Italian "and some Italo-Australian garbled in rather bad grammar all round". They are both illiterate; and the mother's mental capacity is apparently far from great. That was the impression she created on Mr. Dinning, a well-known neuro-surgeon who attended the appellant and who sought through an interpreter to discuss her condition with her mother. He said of the mother that she was quite uneducated and "I think she is pretty low mentally". The appellant herself had come to Australia with her mother, who had followed the father, arriving apparently about 1953. She had had a year's schooling in Italy, and

shortly after her arrival in Australia she began to attend a school conducted by an order of nuns. One of them who had taught her gave evidence. The appellant was, according to this teacher, slow to learn and below the average of her age. Doubtless, one would not expect her to progress rapidly as she could get no help at home in her lessons. She was having to learn a language which her parents did not speak and to learn to read and to write, which they could not do. She had, however, learnt to read and to write simple words in English and to do some very simple arithmetic. But she was well behind the other children of her age at the school, and most of them were Italian. It seems that her undoubted backwardness at school was not merely the result of the handicap of her environment. Mr. Dinning in the course of evidence of her mental state after the accident said: "I had the feeling she may have been pretty poor mentally before the accident". He thought that her mental condition then must have been "probably below normal". He gave his reasons. He said that her appearance is suggestive of mental retardation; that she has the characteristic look of a retarded child. And the actual brain damage revealed by the electroencephalogram was not, he thought, sufficient to account wholly for her very poor mentality after the accident. It is impossible to say what the future might have held for this unfortunate child had she not been injured. Her economic and social prospects must, in all probability, have been lowly. Yet there is no reason for thinking that she would not have had a happy life in a humble sphere and that she could not have got some unskilled employment and earned at least the minimum wage ordinarily payable to females: and she might have married. All this has been changed by the accident. Her physical injuries were severe. It is unnecessary to describe them beyond saying that her scalp was lacerated and her skull was badly fractured. By

surgery these were repaired and she made a slow but continuous progress in hospital. With the aid of speech therapy she regained her power of speech, that for a time she had lost. She was discharged from hospital two months after the accident. But she had suffered permanent brain injury. Electroencephalograms and psychometric tests establish that she is seriously and permanently retarded intellectually and that she will become epileptic, if she is not already. How serious the consequences of epileptic attacks in the future will be is uncertain. However, it is certain that the accident produced serious consequences. She suffers from headaches and giddiness. Her intellectual capacity ascertained by psychological tests taken after the accident when she was aged twelve was that of a child of four and a half or five years; she is confused about simple things. And according to the evidence of her mother she is wayward and clumsy and cannot be relied upon to dress herself correctly without help and needs assistance in various ways. Mr. Dinning and the psychologist who examined her agreed that she will never be employable, even in menial tasks. Mr. Dinning said: "She would need constant supervision and unless her employer was an extremely sympathetic person he wouldn't put up with it for long". He said: "She will probably finish up in an institution I expect". She is, however, not at the present time in such a condition that she needs to be admitted to an institution. She is enrolled at a school, but not the same school that she was at before the accident. She is apparently irregular in her attendance at school because her mother finds she is reluctant to go and difficult to control.

As neither side called any evidence from her present school teachers, it is not possible to say what progress, if any, she appears now to be capable of making at school. But his Honour saw her in the witness box, although

she gave no evidence, for her scant answers to some questions his Honour put shewed that she did not know the nature of an oath. The medical evidence is that her expectation of life has not been made less by the accident.

His Honour stated clearly his conclusions from the evidence. We need do no more than quote two passages from what he said.

First: "My finding on this evidence is that, although the parents probably exaggerated somewhat as to the change in their child's behaviour, the plaintiff has undoubtedly suffered a grievous brain injury, which, among other things, has affected a marked personality change. Moreover, epileptic attacks are highly likely and, sooner or later, because of the epilepsy and her impaired mentality, the plaintiff will probably need the constant care and supervision available only to her in a mental institution". Second: "My conclusions are ... As a result of her brain injury, she will almost certainly suffer recurrent epileptic attacks in the future. Her retarded mentality and the onset of epilepsy will probably result in her spending the rest of her life in an institution. In any event, she will not be able to care for or maintain herself". He said also, and we think rightly, that "the plaintiff will probably have to depend upon the damages awarded to her for her maintenance and support for many years".

As we have said, this case has some very special features and, therefore, even more than in other cases, it is inappropriate to estimate the proper damages here by comparison with what was done in other cases. As Mr. Millhouse urged it would be wrong to regard this case as one where a bright intelligent child with a rosy future was made at once a complete mental or physical invalid. Nevertheless, having carefully considered the evidence and the findings of the learned judge, we are left with the

conviction that the sum of £5,000 that he awarded is inadequate for the very serious injury she suffered and its consequences, and so much so that this Court should interfere. We need not set out our reasons at length. The case is not one in which a sum could be given to the plaintiff so that by personal use and enjoyment of it she might be compensated for suffering undergone in the past and for a reduced capacity to have all the good of life in the future. But she has suffered grievous harm and, as a result, she has lost the capacity to earn a modest living for herself. And, although it has not yet come, the time is likely to come when she must find refuge in some institution where she will be given some care and protection. There is no reason why she should have to be dependent on private charity or on the state. If she should have to go into an institution controlled by the state, to which the laws relating to persons admitted to mental institutions apply so that she or her parents might be required to contribute to her maintenance (See s. 166 of the Mental Defectives Act 1935-1953 of South Australia) clearly no obligation should fall upon her relatives to the exoneration of the respondent. No evidence was given that would justify any form of actuarial calculation or accepting any particular sum as proper on an annuity basis; and,in any event, exact mathematical calculations are of limited value in assessing economic loss caused by personal injuries, because it is fallacious to disregard the vicissitudes that may occur. But £5,000, would, if invested at five per cent, provide only £5 a week while keeping the capital intact. We do not suggest that an estimate should be made on the basis that a capital sum should be kept intact. But the appellant has a long normal expectation of life. As a direct result of the accident she will be unable to provide for herself the accommodation, food and clothing that, if she had not been injured, she could have provided. And then there are

the permanent effects for her as a woman, not merely as a potential wage-earner: a somewhat retarded child before the accident, she has been made very much worse; she is, or will probably become, subject to epilepsy; and she needs, and will continue to need, constant attention, assistance and supervision. These are weighty matters, although they are not in any precise sense weighable in money. Aided though we have been by the full and careful findings of fact by the learned trial judge, we nevertheless consider that the sum he awarded was, having regard to prevailing standards and costs, clearly not enough as general damages. In all the circumstances we think that the general damages awarded should be increased to £8,000, and that there should be judgment for the plaintiff for £8,204. 12. 6.

We would add that, as it seems the appellant when she reaches twenty-one may not be capable of managing her own affairs, it is to be hoped that it will be found possible to take any steps necessary to safeguard her interests.

The appeal should be allowed.