

9 OF 1960 ORIGINAL 10 4

IN THE HIGH COURT OF AUSTRALIA

MORGAN

V.

HOSKING

ORIGINAL

REASONS FOR JUDGMENT

12-6

Judgment delivered at Sydney
Thursday
on 15th December, 1960

MORGAN v. HOSKING

ORDER

Appeal and cross-appeal dismissed.

MORGAN v. HOSKING

JUDGMENT

KITTO J.
MENZIES J.
WINDEYER J.

MORGAN v. HOSKING

The appellant was seriously injured in a street accident by the negligence of the respondent on 24th June 1957. She was awarded by Ross J. £16,000 general damages and £2,994. 16s. 7d. special damages. She appeals to this Court on the ground that the £16,000 was inadequate as general damages, and the respondent cross-appeals on the ground that it is excessive.

At the time of the accident the appellant was a schoolgirl fifteen years of age. Ross J., in his reasons for judgment, described her as she then was by saying:

"She was a happy, healthy, intelligent girl who enjoyed her school and home life, showed considerable promise in her school work, and had many friends. She enjoyed playing games and was a good tennis player and captain of a basketball team. She was interested in needlework, had won prizes for this sort of work and had an ambition to become a dressmaker. Upon the evidence given she had every prospect of living a full, happy and useful life."

The accident caused the plaintiff a fracture of the nose and of the jaw, a laceration of the forehead, and grave damage to the brain. She was for about nine months unconscious or nearly so, and though her condition has since improved she remains and will remain for the rest of her life (to use his Honour's words) "an inert, paralysed wreck". She has completely lost the use of her legs, and almost completely the use of her arms. Her bowels and bladder are completely uncontrolled; she cannot feed herself, and when fed has difficulty in swallowing. Complications from her injuries included in the early stages

embarrassed breathing, which necessitated a tracheotomy operation, and the tube remained in her throat for nine months. Probably as a result, she suffers from coughing spasms bringing on involuntary spasms of the limbs. Her sight and hearing are unaffected. Apparently she has some understanding of what is said to her, and she can indicate assent or denial by movements of the head or left hand; but though she has been given voice therapy she can say only two words, "No" and "Home". She retains a sense of humour and can play simple games with her mother. She can enjoy radio and television programmes, and can get some pleasure from looking at illustrated papers and books, though she cannot read properly. She appears sometimes happy and sometimes sad and depressed, and she knows what loneliness is. For a few hours each day she is able to sit strapped in a chair, and she can be taken out in a car, and can go home for a few hours several days a week. There is an ever-present danger of a fatal infection through either the skin or the urinary tract, and indeed it is only by the most devoted and careful nursing that the danger has been so far averted. She will never be able to look after herself. In fact she will always require constant expert nursing, and her present pitiable condition is unlikely to improve.

Even given every attention, she has, as Ross J. said, a tenuous hold on life. Four medical men, including eminent specialists, have expressed opinions as to her expectation of life, and their judgment on the whole, is that a period of ten years is probably the extreme limit. Apparently there is a possibility that she may live longer, and even a remote possibility that she may live much longer, as in exceptional cases persons so injured have been known to do; but patients such as she are prone to potentially fatal illnesses such as pneumonia and gastro-enteritis. The opinion of Dr. Ian Hamilton, a surgeon

who has given much attention to the case, dealt with the probabilities of the future in these words: "With careful and protective attention she might live up to ten years. It is unlikely she will extend up to that period (sic). With less careful attention I doubt if it would be extended up to that period She may live longer. No one could tell; it would be an outside estimate."

The plaintiff is clearly not certifiable as mentally defective. She spent a month in a mental institution, but then she was moved to another hospital, and ultimately to Thebarton Community Hospital where she has remained ever since. She has, and must have, a private room. The cost of her maintenance up to the time of the trial has averaged £25. 5s. 0d. a week. There are several matters to be borne in mind in connexion with that amount before the figure can be taken as a guide to future costs. It is subject to some reduction on account of Commonwealth hospital benefits and includes medical fees of greater amount than is likely to be incurred in the future. On the other hand there is a marked tendency, proved by the evidence, for hospital fees to rise substantially. The learned judge thought that if a fund were to be provided to meet hospital expenses, it might reasonably be based on a weekly amount of £21. 12s. 0d. for the full period of ten years; that is to say, without any reduction for the possibility of earlier death, but without making any allowance for the possibility of increased hospital charges. According to actuarial figures given in evidence the sum that would be required in order to provide an annuity equal to the weekly amount mentioned, for ten years at five per centum, is £9,000. His Honour considered that this would probably be sufficient to defray the cost of keeping the appellant properly nursed and with expert medical treatment for the rest of her life. To the £9,000, his Honour added £7,000 to cover other general

damages. He pointed out that if the appellant should live beyond the ten year period, the latter sum would be available to provide for continued nursing attention.

The learned judge, in starting with the £9,000, was not making the mistake of supposing that in a case like the present an assessment of damages is a matter of arithmetic. Clearly no amount would be proper which was not substantially greater than that which would provide £21. 12s. 0d. a week for ten years; but it is useful to take that as a commencing figure, so long as one remembers that it is only a commencing figure, and that if the weekly sum it provides of the deficiency proves to be less than actual outgoings the amount/will deplete the balance of the general damages.

For his determination of the additional £7,000, his Honour gave no detailed reasons; and indeed it would have been impossible to arrive at a final amount by any process of exact reasoning. The general considerations to be borne in mind are obvious and important. The appellant has lost almost all that life had to offer. No amount of money can be considered adequate as damages which does not make it reasonably certain that as long as she lives she will lack for nothing that may alleviate her lot by contributing to her comfort, or by giving her as many as possible of the small pleasures she can still enjoy, or by ensuring that she will have all the special medical and nursing attention which her condition requires. While motor car outings will help her, she should have them. She should be in a position to pay the expenses of the constant visits of her parents which, as the evidence shows, mean much to her. The amount awarded should be large enough to make possible a generous and sympathetic administration of it without fear of its giving out too soon. Pain and suffering from her minor as well as her major injuries must be allowed for; and loss of expectation of life must be taken into account also.

Such a case demonstrates as vividly as any the sheer impossibility of perceiving any real proportion between the damage suffered and a sum of money. In some cases the problem of assessing damages is made easier because the injured person retains such a capacity for enjoying what money can provide that a sum can be fixed with a view to the possibility of its being employed to give a particular compensation for the loss and suffering that have been sustained. That is not so here. All that can be done is to fix upon an amount which appeals to good sense as reasonably appropriate.

It is impossible to read the reasons for judgment of the learned trial judge without seeing that it was with these considerations much in mind that his Honour made his award of damages. If he had given more than £16,000 for general damages, a court of appeal might well have found it impossible to hold that he had exceeded the proper limits of a sound discretionary judgment. It is difficult to treat seriously the cross-appeal attacking the award as excessive. But is the amount awarded so low that a court of appeal is justified in increasing it? If there had been a more substantial prospect than there is of the appellant living for more than ten years, it would probably have been necessary to think in terms of a larger, and perhaps a much larger, amount. But after giving the closest attention to all the circumstances of this distressing and difficult case, we find ourselves unable to conclude that Ross J.'s assessment fell below the range of choice which was fairly open to him. Applying the well-recognized principles by which an appellate court is bound to guide itself in reviewing an assessment of damages by a judge, our conclusion is that the award must stand.

The appeal and cross-appeal must both be dismissed. There will be no order as to the costs of either.