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IN THE HIGH COURT OF AUSTRALIA

CONNELL

V.

RAKOS AND ANOTHER

ORIGINAL

REASONS FOR JUDGMENT

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Copy Reasons for Judgt.

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Judgment delivered at SYDNEY

on FRIDAY, 11th MAY 1962

W. M. Houston, Govt. Print., Melb.

CONNELL

v.

RAKOS AND BOWIE

ORDER

Verdict and judgment for the plaintiff for £11,848 against the defendant Rakos. The defendant Rakos to pay the plaintiff's costs including the reserved costs of the interlocutory proceedings.

Verdict and judgment in favour of the defendant Bowie. The defendant Rakos to pay the costs of the defendant Bowie.

CONNELL

v.

RAKOS AND BOWIE

JUDGMENT OWEN J.

CONNELL

v.

RAKOS AND BOWIE

The plaintiff, a resident of Queensland, seeks to recover damages from the defendants, who reside in New South Wales, for personal injuries suffered by him in an accident which occurred about 1 p.m. on Sunday, 2nd August 1959, when a car driven by the defendant Rakos and a car driven by the defendant Bowie came into collision at the intersection of Grafton and Vernon Streets, Woollahra. The plaintiff was a passenger in Bowie's car and was sitting on the near side of the front seat. Each of the streets is about 30 feet wide, Grafton Street running east and west and Vernon Street north and south. In Vernon Street, a few feet back from its intersection with Grafton Street, there are two "Stop" signs, one facing north on the northern side of the intersection, the other facing south on the southern side of the intersection. In other words, all traffic going along Vernon Street in either direction is required to stop before entering upon the crossing of Grafton Street. On the occasion in question Bowie's car was being driven at about 20 miles per hour along Grafton Street in a westerly direction. It had just entered the intersection when Rakos' car came out of Vernon Street, going south, and the cars collided at a point about the centre of the intersection and slightly to the south of the centre line of Grafton Street. In his evidence the defendant Rakos frankly admitted that he had been in a hurry to get home to get ready to go to work and that he had not stopped his car before beginning to cross Grafton Street. He said that as he approached the crossing he slowed his speed

to about 10 miles per hour and then accelerated to about 20 miles per hour to make the crossing. The defendant Bowie said that the first he saw of Rakos' car was "a flash on my right" just before the impact. He said also that as he approached the intersection he had seen no car in Vernon Street at or near the "Stop" sign.

The plaintiff is entitled to a verdict and judgment against Rakos whose conduct was unquestionably negligent. I am not prepared, however, to make a finding of negligence against Bowie. It is true that as the cars approached the intersection Rakos' car was coming up Vernon Street on Bowie's right-hand side but Bowie did not see it and, by reason of the intervening buildings at the corner, could not have seen it approaching until he was within a few yards of the intersection. No doubt Bowie assumed that if there was a car being driven along Vernon Street in either direction its driver would obey the "Stop" sign. This was, in my opinion, not an unreasonable assumption to make and I think that there was no negligence on his part. He is therefore entitled to a verdict and judgment in his favour.

I go then to the question of damages. At the time of the accident, the plaintiff was employed by Australia Silknit Ltd. as a commercial traveller. He had been in that company's employ for many years and the evidence, which I accept, is that he was held in high regard by his employer and had proved to be a very successful traveller. At the time of the accident he was 57 years of age and at various times had been the company's head traveller in different parts of the Commonwealth. At the time when he was injured his work lay in country districts in New South Wales and he had come to Sydney to consult with the defendant Bowie, who was also in the company's employ. Mr. Lane, who gave evidence before me and, until fairly recently,

had been the managing director of the company, said that the plaintiff was a man who was moved from State to State wherever the company's business required the attention of a man upon whom reliance could be placed. Evidence, which I accept, was also given by a number of persons who had known the plaintiff that up to the time of the accident the plaintiff was an alert, active man who took a great interest in his work and the associations which it brought with fellow commercial travellers and customers, and that he was a cheerful man who enjoyed his social and business life. This is a matter which is of importance, having regard to some of the medical evidence to which I shall refer later. There is no doubt that since the accident the plaintiff's mental and physical condition has greatly deteriorated. He finds difficulty in concentrating, his memory has become defective, he suffers from severe headaches and has had, on a number of occasions, what have been variously described as "blackouts" and "dropping" or "falling" attacks. In the witness-box he gave me the impression of being a prematurely aged man and, as one of the doctors said, there was "ample evidence of senescence". One of the injuries which the plaintiff suffered was a fracture of the upper end of the tibia in his left leg involving the knee joint, and about this injury and its results there is no real dispute. The fracture united satisfactorily and in good position but in the result he is left with a substantial permanent limitation of movement in the knee joint and a minor degree of limitation of movement in the ankle joint. He has to use a walking stick and finds some difficulty in going down steps. He has pain in the knee joint and there are indications of the development of arthritis. His leg disability is of importance since his pre-accident occupation involved constant travelling about the country by train and other public conveyances and much walking,

visiting customers and carrying suitcases containing samples. One of the medical witnesses expressed the opinion, which I accept, that for work entailing walking the plaintiff is at least 50 per cent disabled.

The more serious matter, however, arises from the fact that in the collision he received a blow on the left-hand side of his forehead above the left end of the left eyebrow, as a result of which he suffered concussion. He was taken to hospital by an ambulance in a semi-conscious state and when examined at the hospital was in a confused mental condition. He was in hospital for about a month and he says that whilst there he began to suffer from headaches which have continued with increasing severity ever since.

Dr Toakley, a neuro-surgeon practising in Brisbane, who has had the plaintiff under his care since June, 1960, is of opinion that the plaintiff is suffering from some form of post traumatic epilepsy, not "grand mal" but a "petit mal" form of epilepsy, resulting from injury to the brain caused by the blow to the plaintiff's head in the accident. The doctor has been treating the plaintiff with anti-epileptic drugs which, he says, the plaintiff must continue to take for the rest of his life and, since the treatment began, the plaintiff's "falling" attacks seem to have diminished in severity and frequency.

Dr Scott Charlton, a Sydney neuro-surgeon, who examined the plaintiff in April, 1962, then formed the opinion that the plaintiff was suffering from premature old age and, as I understood his evidence, thought that this had probably been his condition before the accident. After his examination the doctor reported that he could "find no evidence which would lead" him "to conclude that the patient's headaches, progressive deterioration of memory and attacks of falling into unconsciousness were all a consequence of his injuries" in the accident.

But, having had his attention called to further material which was given in evidence about which he had not earlier known, the doctor said that he had changed his opinion and now considered that the plaintiff had probably suffered some brain injury in the accident and that this had aggravated or accelerated his premature advance into old age. In the light of the evidence of the plaintiff's pre-accident state of mind and health to which I have already referred, I think the doctor's opinion that before the accident the plaintiff had probably been suffering from premature old age is erroneous and I am satisfied that the deterioration in the plaintiff's condition which is now obvious has developed since the accident. A third neuro-surgeon, Dr Lister Reid, who first examined the plaintiff in October, 1961, thought that there was no evidence that the plaintiff was suffering from any form of epilepsy or that any brain injury had been caused by the blow to his head in the accident. He said that the plaintiff's headaches, loss of memory, fainting or falling attacks were "psychogenic symptoms" resulting from worry. I do not doubt that the plaintiff has been and is seriously worried about his condition and about the fact that he can no longer carry on his pre-accident occupation and that he has only been able to obtain rather unrewarding employment for short periods since the accident and no doubt has worried also about the litigation. And there is no doubt that in 1960 after he returned to work for Australia Silknit Ltd he had many serious business worries. All these things have played a part in producing his present condition. But I think the major factor is that in 1959 he sustained an injury to his brain which has resulted in some form of epilepsy evidenced by his "falling" or "dropping" attacks, due in turn to brain injury. Dr Toakley, who has been treating him for nearly two years and has seen him frequently, is in a better position than the other

neuro-surgeons to form an opinion. That, however, does not necessarily decide the question whether that brain injury occurred in the accident or at a later date, namely on 24th May 1960 after the plaintiff had returned to work with Australia Silknit Ltd in March of that year and had been posted to Melbourne. On 24th May 1960 when the plaintiff was walking along Fitzroy Street, St Kilda, on his way to work, he fell or dropped to the ground while crossing the street and struck his head on the roadway, suffering considerable concussion. A doctor who examined him at the hospital to which he was taken, thought that there was a probable fracture of the skull, basing his opinion on the fact that there was some bleeding from the right ear. Whether there was or was not a fracture is perhaps of little importance, since there is no doubt that the plaintiff did, on that occasion, suffer some injury to the brain. Reliance was placed on this accident by the counsel for the defendants who naturally contended that if the plaintiff was in fact suffering from some form of epilepsy or other result of brain injury it could be accounted for by the injury sustained on May 24th. I am satisfied, however, that the fall on that day resulted from a pre-existing brain injury and for several reasons. In the first place, the plaintiff was picked up after his fall by a Mr Barragwanath, a bank officer who was working close by and who went to the plaintiff's assistance. He described the plaintiff as lying on the road "his teeth were on the road alongside him, his eyes were rolling round and his mouth was twitching and he was going 'oh, oh, oh, oh', and there was saliva coming out of his mouth - it was foaming - like frothing at the mouth with his own saliva". This, as Dr Toakley said, was probably an epileptic attack and I agree. And, if it was, then it could only have been caused by some earlier injury to the brain. In the second place, before 24th May 1960 an incident had occurred

to the plaintiff when he was at the home of a friend of his named Marks, which seems to me to be of significance. The plaintiff was sitting in a chair talking to Mr Marks when, as the latter said, "his head sagged sideways". Marks asked him what was wrong but could get no answer and with the help of his wife carried the plaintiff to a bed upon which he lay for some hours, apparently without moving or speaking. This incident was, so Dr Toakley thought, probably a minor epileptic attack and I accept his opinion. Finally, there is a good deal of evidence, which I accept, that during the period between the date of the accident and 24th May 1960 the plaintiff's mental condition had greatly deteriorated, and I think it improbable that this was due only to worry about himself and his work.

It remains then to assess the amount of damages to which the plaintiff is entitled. His out-of-pocket expenses for hospital and medical care and the like up to the date of the trial are agreed as amounting to £445. From the date of his accident until March 1960, when he returned to work, he received Workers' Compensation payments amounting to £322 and his employer during that period paid him the balance of his salary. Counsel agree that the sum of £322 is recoverable in this action. In October 1960 the plaintiff had to resign his position, being unable by reason of his condition to carry on his work. At the date of his resignation he was receiving a net weekly salary of £19. 7. 0. and a further weekly net sum of £6. 10. 0. to cover his living expenses in Melbourne. Between the date of his resignation and the date of the trial he was able to earn only £66 notwithstanding his many endeavours to obtain employment. Had he continued in the employ of Australia Silknit Ltd up to the date of the trial and continued to be stationed in Melbourne he would have received a total of £2,147 net. It was submitted that of this sum £540, representing the living

allowance over this period, ought not to be taken into account in assessing the loss to the date of the trial, but I am of opinion that it should. The result is then that the special damages amount to £2,848. Looking to the future, I think it would not be proper to regard the plaintiff as completely unemployable but I have no doubt that his capacity to earn a living has been greatly reduced. Had it not been for the injuries resulting from the accident it would, I think, be reasonable to assume that he would have continued to follow the occupation of a commercial traveller for at least ten years and perhaps for longer. His employment with Australia Silknit Ltd would probably not have continued for that period because that company has now ceased to manufacture the type of goods which the plaintiff was employed to sell. But I am satisfied that had he been in good health the plaintiff would, as Mr Lane said, have had no difficulty in obtaining a position elsewhere as a traveller. I think £6,000 is a reasonable figure to award for the loss of earning capacity in the future and to that I add a further £3,000 for pain and suffering and the loss of the amenities of life. This means that the total award is £11,848.

The plaintiff is entitled to judgment for that amount against the defendant Rakos and I order Rakos to pay the plaintiff's costs (including the reserved costs of certain interlocutory proceedings). Judgment should be entered in favour of the defendant Bowie. Some argument was addressed to me as to the proper order to be made in relation to the latter's costs. Originally, Bowie was joined as a third party by Rakos. Thereafter the plaintiff obtained leave to amend and added Bowie as a defendant. I think the plaintiff and his legal advisers acted reasonably in taking this course and I am of opinion that I should order that the defendant Rakos pay the costs of the

defendant Bowie. It is better, I think, that I should make an order for the payment of Bowie's costs direct by Rakos rather than that I should order the plaintiff to pay Bowie's costs and Rakos to pay the plaintiff the costs paid by him to Bowie.