IN THE HIGH COURT OF AUSTRALIA

MENELAWS

V.

McNEIL

REASONS FOR JUDGMENT

Judgment delivered at Brisbane

on 5th September, 1962

MENELAWS

v.

McNEIL

JUDGMENT
(ORAL)

JUDGMENT OF THE COURT
DELIVERED BY KITTO J.

CORAM: KITTO J.
WINDEYER J.
OWEN J.

MENELAWS

v.

McNEIL

This is an appeal from an assessment of damages by his Honour Mr. Justice Stable in an action for personal injuries in respect of an injury which the plaintiff suffered by being run down by a motor car. His Honour gave judgment for £10,939.15.0. consisting of three items. Special damages amounting to £2,139.15.0. were not in dispute. His Honour fixed the sum of £2,000 for general damages other than loss of future earnings and as to that there is no challenge offered on this appeal. His Honour also allowed £6,800 for loss of future earnings and it is that item which is the subject of controversy now.

The situation in which the plaintiff, now the respondent, was before his injury was that he was receiving an income of £17.1.0. nett per week from his employment as a specialist compositor, and in addition, he was being paid about £28 a month as an art instructor at the Central Technical College, where he gave lessons, I think, on two nights a week and on Saturday mornings. Since his injury, and leaving aside the period in which he was totally incapacitated, a period which is covered by the special damages, he has found himself able to resume his work as an art instructor to the same extent as before, but he is not qualified to go higher in that line of work and there is no full-time employment as an art instructor which appears to be open to him. So far as employment as compositor is concerned, he finds himself unable to carry on that work at all, and the finding of the learned judge on, I think, ample evidence, was that he is permanently disabled from working in that capacity.

Mr. Justice Stable proceeded on the view that the respondent had lost £17.1.0. per week for the rest of his working life, subject to what his Honour called "contingencies". The plaintiff was aged 54 years at the date of the trial. It was proved by a master printer who gave evidence that there is no rigid retiring age for compositors, and that most of them retire at about the age of 65 years, but only when they want to or when decreased ability makes it necessary.

His Honour took the minimum probable period of future employment, namely 11 years, as a basis for his calculations of the loss of future earnings, being of opinion that if that minimum period were taken, sufficient allowance would be made for whatever possibility there might be of the respondent getting a little casual work from time to time.

It was proved by the evidence of an actuary that the present value of £17 a week for 11 years is £7,570. To allow, as I have said, for what his Honour described broadly as contingencies, he deducted 10 per cent, thus reaching his ultimate figure of £6,800.

Upon that figure two grounds of attack have been developed. The first is that there was no allowance made for the possibility that the respondent might die during the 11-year period. The 10 per cent proportion was suggested to his Honour by the evidence of Mr. Rutherford, the State Actuary, who, however, arrived at it as the average absences from work in the case of a man in the age range of 50 to 70. It was his Honour himself who in the course of that evidence elicited from the actuary that the absences for which the 10 per cent was allowed were limited to absences due to sickness or accident, and that no allowance was made for any pay that might be obtained during any part of those absences.

Consequently, when his Honour deducted 10 per cent and expressed himself as allowing it in respect of contingencies

generally, he could not have been unmindful of the fact that he was allowing more than the actuary would have suggested on the footing that any pay could be obtained for any period of absence; and he must have been using the general word "contingencies" in quite a general sense to cover every contingency, including the possibility of earlier death.

Whether another judge would have allowed 10 per cent is not to the point. It was an allowance which, I think, was not unreasonable, one which his Honour could fairly make in the circumstances to cover all contingencies, and it seems to me that the attack upon the award in relation to that should not be sustained.

The main part of the appellant's argument has been directed to the suggestion that his Honour was in error in proceeding on the footing that the respondent was virtually unemployable, save for his employment as an art instructor. A good deal of the cross-examination was directed to the possibility of his getting employment either now or in the future, and no doubt there was room for the comment on his evidence that he had made no very extensive search for employment. But, according to his evidence - and it was evidence which was uncontradicted and which the learned judge was entitled to accept, and did accept - he suffered constantly from a feeling of tension across the side of his face and down the back of his neck; he had a constant watering of the left eye, and a tendency to giddiness on quick movement; he suffered from lack of concentration, and was easily exhausted by continuous activity. In addition to that, he was worried about the future and was unable to see what work he could do. But his Honour was satisfied, having seen him in the witness box, that he was genuinely anxious to do what work he could, and that his statements that he felt himself unable to perform work other than that of an art teacher

were genuinely made.

If it had appeared to his Honour that the plaintiff was insincere in saying that he was unable to get employment, or that, not being insincere, he was yet mistaken about it because of some psychological condition which would be likely to improve when the litigation was over, then no doubt there would be strong ground for saying that the award was too high. But his Honour was convinced that the respondent was genuinely anxious to obtain employment, was genuinely convinced that he could not, and that in fact he probably would not be able to obtain any substantial period of employment, that is to say, any employment other than casual work.

Some mention has been made particularly of the absence of medical evidence to support the plaintiff's own evidence as to the condition in which he found himself. No doctor gave evidence in the box, but by consent some medical certificates were put in evidence, including one from Dr. Anderson in which he described what the respondent himself had said about his symptoms as late as February 1962, and in which the doctor made the comment that the residuum of this man's head injury would seem to be unimproved and, therefore, permanent.

Notwithstanding the absence of medical oral testimony, it was well open to his Honour to accept the evidence of the plaintiff himself in the circumstances; and the inference was fairly open that the reason for the defendant's omission to call medical evidence was that he did not consider that he could strengthen his case by doing so.

In the circumstances, it seems to me that his Honour was entitled to proceed on the basis which he adopted, and that the award which he made was one with which it is not possible for a court of appeal to interfere.

In my opinion the appeal should be dismissed.