No 29 of 1961

IN THE HIGH COURT OF AUSTRALIA

PROSSER AND OTHERS

V.

GEORGHIOU

(ORAL)

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on MONDAY, 18TH MARCH 1963

A. C. Brooks, Government Printer, Melbourne
C.7639/60

PROSSER AND OTHERS

v.

GEORGHIOU

JUDGMENT
(ORAL)

WINDEYER J.

PROSSER AND OTHERS

v.

GEORGHIOU

HIS HONOUR: The plaintiffs in this action are Leonard Bennett Prosser and Stella Prosser, his wife, and a daughter, who at the time when the action was commenced was Carolyn Claire Prosser. She has since married and is now Carolyn Claire Creed.

Mrs. Creed was at the time when the action commenced an infant, and she is still an infant, being now aged nineteen. She sues by her father as next friend.

The plaintiffs are residents of Victoria. The defendant is a resident of South Australia.

The action is one for damages resulting from a motor car collision which occurred in March 1961 near Bordertown in South Australia. Liability is admitted; and therefore the only question for the Court is the assessment of damages.

The claim of the second named plaintiff, Mrs. Prosser, has been settled. All that I am asked to do is to make an order that she have her taxed costs. I therefore give judgment to that effect accordingly.

As to the third named plaintiff, the daughter, it is agreed between the parties that she should have judgment for £627/19/6, of which £127/19/6 is attributable to her special damages. She being an infant, I am asked to approve of this settlement.

She suffered a broken nose, with resulting pain and some shock. But that is all now in the past; her nose has healed satisfactorily; any displacement of it that has occurred is certainly not in any sense a disfigurement. It does not

at all impair her good looks. Her nose does, however, tend to bleed at times. It is probable that this can be remedied by cauterising and that it will have to be remedied at some time. Any more extensive operation is not recommended and it appears unlikely that one will become necessary.

Mrs. Creed and her father, as her next friend, are both well content with the proposed settlement of the claim, and, having heard the medical evidence and spoken to Mrs. Creed, I approve it.

I am asked to order that part of the judgment - £250 it is suggested - be paid directly to Mrs. Creed forthwith, so that she may have it to assist in the purchase of a home which she and her husband are buying upon terms. This seems to me to be a thoroughly suitable proposition. She is now aged nineteen and is a married woman living with her husband.

I therefore give judgment for the plaintiff Carolyn Claire Creed for £627/19/6 and costs. I direct that, of this amount, £127/19/6 be paid to her solicitors to be disbursed by them in accordance with the particulars of special damage filed. Of the balance, £250 is to be paid to Mrs. Creed, her receipt to be a sufficient discharge, and £250 is to be paid into Court to the credit of an account entitled in her action and to be invested, as contemplated by Order 23 Rule 11. The said sum and its proceeds will be paid out to her on her attaining the age of twenty-one, but, if it becomes necessary for her to have an operation on her nose in the meantime, then £50 thereof, or such larger amount as a Justice of this Court may order, is to be paid out to her upon her having such operation.

That leaves me, then, with the task of assessing the damages to which Mr. Prosser is entitled.

He is now aged fifty-six. He was fifty-four at the time of the accident. He is an automotive engineer, who was before the accident, and still is, employed by Unilever Limited.

Some months after he had gone back to work after the accident, he was promoted to be an engineering accounts supervisor, and his salary was then slightly increased. In his capacity as engineering accounts supervisor, he supervises the work of several clerks and considers questions of costing of some engineering projects. To do this he has to visit various parts of the plant from time to time and to keep in touch daily with the works accountant, who is his immediate superior. In the ordinary course of his duties he has to visit the accounts section at the company's plant. This section happens to be located on the third floor of a building, in which there is no lift. This means that he must ascend and descend sixty-one steps on an average of twice a day. An injury to his leg makes this a slow matter, but there is no suggestion that he cannot do it; in fact, he is doing it. Furthermore, if he were to become unable to get about sufficiently to perform the particular work of his present appointment, he would nevertheless be retained in the employment of the company in some clerical position until the retiring age of sixty-five. There seems to be little doubt that that would happen. It might, however, mean some slight reduction not in his salary but in the prospects of advancement to a higher salary.

His salary before the accident was £22/10/- a week. His present salary is £25 a week. He may in the ordinary course, if he continues as a supervisor, probably get some further increases in his salary before reaching the age of sixty-five. When he becomes sixty-five he will be retired and will become entitled to superannuation benefits under a contributory superannuation scheme. It is apparent that he has not suffered any loss of pay and probably has not suffered any loss of prospects by reason of the accident.

A claim was made, in the particulars of special damage filed, for a loss of ten weeks' wages, he having been away

from work for ten weeks; and it was argued before me that this was an item to be taken into consideration in estimating his damages. But in fact he lost no wages. He was paid for the period he was away. The company appears to have recorded the amount he was paid in some form of suspense account, awaiting the determination of this action, but there is no suggestion that he is under any legal liability to refund what has been paid to him. The accountant of the company disclaimed any intention on the part of the company of seeking to recover, by any process of law or assertion of legal right, any sum from him. His contract of service with the company was never terminated, and there is no reason to suppose, from the facts before me, that he received his salary during his absence on any other basis than of legal common law right. As to this I refer to the cases that are referred to in Paff v.Speed, 105 C.L.R., the relevant passage being at p. 566, and Graham v. Baker, 106 C.L.R., the relevant passage being at pp. 346-7. I therefore reject the claim for £200 for loss of wages as a separate item of special damage for the perfectly simple reason that he did not lose it.

The only economic loss that he can be said to have suffered is, I think, that the range of possible remunerative employment open to him has been lessened. This, however, is mainly hypothetical, because there is no suggestion that at his age he would consider relinquishing his employment with Unilever Limited and seeking employment elsewhere, nor is there any probability, as far as I can see from the evidence, that he will not be retained in the company's service until he reaches the age of sixty-five. The most then that can be said is that if he should wish to take some employment after the age of sixty-five, some whole time or part time employment to supplement his superannuation income, he might perhaps be handicapped in finding suitable work by his disabilities. I have not overlooked this

element of possible economic loss in arriving at my estimate of general damages, but it is not a very substantial matter. The damages to which he is entitled flow from disabilities and disadvantages which are the result of the accident but which do not directly impair his earning powers.

I do not think it is necessary that I give a detailed catalogue in medical terms of the injuries that the plaintiff suffered. It is enough to say that they included a lacerated scalp, concussion, broken ribs and an injury to the left knee. He was in hospital for some weeks, more or less unconscious for part of the time. He went from hospital to his home; and then, ten weeks after the accident, he was fit to resume work; but he has been left with some permanent and serious disabilities.

He has been made wholly and permanently deaf in the left ear. His general hearing, however, has not been significantly impaired. He seemed to have no difficulty in following the proceedings in court and in hearing and answering the questions asked of him by counsel and by me.

His left knee remains badly affected. It is, he said, prone to give way; so that he has to wear a caliper. A caliper was prescribed for him by a doctor who examined him. He, the plaintiff, says, and I see no reason to disbelieve him, that unless he does wear a caliper he cannot be sure of being able to support his weight on his left leg. His knee, he says, is unstable. He walks with a limp and slowly. He goes up stairs, generally speaking, one at a time. He has discomfort and some pain in his knee. These conditions are permanent. The only way in which any considerable improvement - if it is to be called an improvement - could be effected would be by fixation of the knee joint, that is arthrodesis. This, as I understand it, would relieve the pain and the instability; but, of course, it would produce a permanently stiff leg. If in the future such

an operation should be recommended or desired, the cost of it - that is medical fees and hospital treatment - would be £200 to £300. At the present time such an operation is not suggested. At the present time there is no evidence from clinical and radiological examination of any continuing deterioration in the condition of the knee. There is a possibility, but it is apparently only a possibility, that at some time in the future osteo-arthritis may develop. There is, as I understand the evidence, no present sign of that.

Since the accident the plaintiff has suffered from the effects of an hiatus hernia of the oesophagus. This is a troublesome and embarrassing condition as it causes intermittent painful indigestion, heartburn and at times nausea and vomiting. It is said that he may vomit unexpectedly and without any warning. His condition is associated with an inflammation of the gullet. The attacks of pain and discomfort, vomiting and so forth, to which it gives rise, may respond to medical treatment. Surgical operation to remedy the cause is, according to the medical evidence, to be avoided if possible. If nevertheless a surgical operation should become necessary it, with hospital treatment, would cost about £300. The plaintiff must, I think, on the evidence, have had a pre-disposition to this disability before the accident, but it was the accident and the accompanying period in hospital and the stresses associated with that episode that caused the condition from which he now suffers. It seems likely that it may settle down somewhat when all the anxieties associated with the accident and with this litigation are things of the past. Anxiety aggravates the distressing symptoms caused by the hernia. Medication, it was said by one of the medical witnesses, by alkalies and sedatives may help to control those symptoms. That seemed to me to be the effect of the evidence.

The result in terms of possible future monetary outlay of the disabilities which I have chronicled up to the present is hard to assess. It may be that either or both of two operations, each costing between £200 or £300, will be necessary at some time in the future. It is impossible to say. What I think must certainly be contemplated is that a man in such a state of health will require fairly regular attention by and consultation with some medical practitioner such as the family physician.

The plaintiff also complains of matters of a more subjective and less definite kind: headaches, inability to concentrate, irritability at home and at work, anxiety, lack of interest, and so forth. That he has been and still is affected by anxieties and worries seems perfectly clear. The evidence, however, seemed to me to show a strong probability that time will mend much of this. He had a severe concussion; but there is no neurological sign of brain injury. The indispositions of which he complains are, I am inclined to think, rather psychological and subjective than the result of any direct physical injury. It is never easy to form any clear conclusion on these matters. With this case hanging over him, and with the years steadily growing upon him, it is perhaps natural that he should at times seem pre-occupied and uninterested, and that his family should be ready to attribute, by way of explanation or excuse, all manifestations of irritation, apathy and intolerance solely to the accident. The explanation of his mood is probably much more complex. To understand it fully a fairly complete knowledge of background matters of his domestic, social and working life would be needed - much more, I think, than the evidence of a neuro-surgeon, whose only acquaintance with him was a meeting of one hour's duration to prepare him, the surgeon, to come into the witness box, an hour which was largely spent in listening to what the patient, on whose behalf he was to give evidence, told

him. I do not think the plaintiff wilfully exaggerated his worries. But I am inclined to think that - allowing for his age and the rapidity with which the years go by as one comes towards the age of sixty and realises that the time of retirement is approaching - much of what he complained is likely in time to seem less significant, and that he will probably regain his equanimity. One reason for awarding him damages is to help him to do so. I base my conclusion on this aspect not only on what he and other witnesses said, but on my observation of him and on how he and they said what they said.

I accept the evidence that the plaintiff was an energetic man of cheerful disposition before the accident. He enjoyed open-air recreation and was as fit as most men of his then age to engage in outdoor activities. He had generally a zest for life and a capacity to enjoy it. However he apparently had some physical disabilities before the accident; the toe of his right leg and his shoulder were in some way affected. These disabilities were held by the Repatriation Department to be due to war service. Although his daughter said they did not curtail his activities in any way, they were sufficiently serious to entitle him to obtain and retain a free pass on the trams. A man of fifty-seven with these disabilities was perhaps not quite so regular and enthusiastic and competent an athlete as his counsel suggested to me. It is perhaps not a very serious deprivation for a man of his age to have to relinquish the playing of an occasional game of tennis or golf. Those matters seem to me, although they are always adverted to in cases of this kind, not to be a very helpful means by which to measure the consequences to the plaintiff of his injuries. Damages in a case like this cannot really be measured by absences from golf courses or tennis courts or the beach.

His injuries are ever-present; they cause, if not constant pain, at all events pain from time to time, and so far

as the leg is concerned, it seems this will continue unless the joint be fixed. Making all allowances for the capacity of a man to adjust himself to his situation, his injuries must remain a serious handicap to him in all sorts of ways in his daily life. I do not think it is necessary really to enlarge on that. Everybody knows the difficulty of assessing damages in a matter in which there is no objective criterion. All I would say is that it is the totality of the damage that has to be arrived at, and it cannot be arrived at by making as it were an itemized account of various mayhems.

Making the best estimate I can, I assess the general damages of the first named plaintiff at £6,300. To this must be added the agreed sum of £620/2/7 for special damages. I therefore give judgment for him for £6,920/2/7 and costs. Of this amount, the sum of £620/2/7 is to be paid to his solicitors on their undertaking to disburse it in accordance with the particulars of special damages filed.

MR. ANDERSON: That undertaking, through me, is given on behalf of the plaintiff's solicitors.

HIS HONOUR: Yes thank you. That undertaking applies also to Mrs. Creed's special damages. The amounts of damages to which Mrs. Creed is entitled are to be paid to her and into court, and in relation to the special damages to her solicitors, within twenty-one days.