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ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

HAMEY

V.

THE COMMONWEALTH OF AUSTRALIA
AND ANOTHER

ORIGINAL

REASONS FOR JUDGMENT

FILED
29 JUN 1964
BRISBANE REGISTRY

Oral Judgment delivered at BRISBANE

on Wednesday, 10th June 1964

HAMEY

v.

THE COMMONWEALTH OF AUSTRALIA
AND ANOTHER

JUDGMENT
(ORAL)

WINDEYER J.

HAMEY

v.

THE COMMONWEALTH OF AUSTRALIA
AND ANOTHER

The plaintiff in this case, Trevor Charles Hamey, was hurt in an accident on 6th March 1959. An Army vehicle, driven by the second named defendant, a soldier in the Regular Army, who was driving on duty, hit a safety standard, that is a standard carrying on it a disc to mark a safety zone, at a tramway stopping place.

The plaintiff was standing in the safety zone and as a result of the motor vehicle hitting the standard, it was knocked against the plaintiff and he was hurt. The accident occurred at 8 o'clock in the morning. The plaintiff was taken, dazed, into a nearby shop and from there to hospital, but after being in hospital a very short time he was found to be not suffering, so it was thought, from any serious injury; and he went from the hospital to his work at the Post Office.

It is admitted that the occurrence was caused by the negligence of the driver of the vehicle; and, as he was at the time in the course of his employment, the plaintiff is entitled to a judgment for damages against the defendant.

It is admitted further that the plaintiff is entitled to recover as special damages the sum of £129.10.9. The only task for the Court is, therefore, to assess the general damages to which the plaintiff is entitled for such personal injuries he has sustained as a result of the accident.

The plaintiff is now aged twenty-three. He has been married for the last two years. At the time of the accident he was eighteen years and nine months and he was then unmarried. He was then, and now is, a clerk in the Postal

Department. At the time of the accident he was working in the G.P.O., Brisbane, at, I think, one of the counters there, attending to members of the public. He is now in another branch of the Post Office, having made some advancement in the postal service, and apparently he has prospects of further advancement if he qualifies by study and passes examinations.

He left school at the age of fourteen and became a Post Office messenger. After joining the clerical division he has to some extent made up the deficiencies of his education caused by the early age at which he left school. He has passed certain examinations in the Public Service, though not perhaps of a very advanced character.

All this really does him credit because he is not naturally of a studious disposition. In the past he has found study irksome and perhaps has not been always persistent in it. He left school as a boy not, I think, because he had to for any economic reasons, but rather because, it is suggested, of a streak of impatience and restlessness in his make-up, and from a desire on his part to be out and about and doing things. Leaving aside for a moment the effect of the accident upon him, I see no reason to suppose that his temperament will in any way preclude his advancing in the service of the Post Office or that he will not in the future be able to devote himself to such study as may be necessary to that end. After all, he is now a young married man and I suppose he has every reason to wish to get on.

His interests and recreation before the accident were in outdoor activities. He took some part in athletics and played football and tennis. The disability of which he complains, which he contends is the result of the accident, may be shortly described as a recurring backache and pain which it is claimed prevent his participation in vigorous games or engaging in any form of vigorous physical activities. Ever

since the accident he has had - intermittently, I think, rather than constantly, but frequently - pain. That led him to seek medical advice and medical treatment; and also treatment from a chiropractor and physiotherapist, with a view to obtaining an alleviation of the pain at times when it came severely upon him. Some of the treatment which he had was itself very painful. The pain he now has is not only a wearying burden in itself: when endured in the course of a day it sometimes makes him irritable and it may militate somewhat against efforts which he would otherwise make to apply himself to study at night.

I do not doubt that he does get aches or pains in the back after standing for a prolonged period. And possibly sitting in the one position for a prolonged period may bring the pain on. That makes him at times somewhat restless.

On medical advice he no longer plays games. That is, for him, a considerable deprivation of enjoyment because, apart from the restrictions that medical advice and the onset of pain combine to place upon his activities, he is by nature a physically active young man who formerly got satisfaction in movement and activity. He would like to be able at least to play tennis in company with his wife who is herself a sport-loving young woman. The restrictions on his activity are I have no doubt felt by him as a hardship, because, not being a man of intellectual tastes or interests, he has not easily found other forms of recreation. He is, however, able to do gardening although perhaps not heavy work, and I think that, as he obviously desires to make the best of it, has his own home and garden, and is young and married, he will probably adjust himself fairly readily as time goes on to the situation in which he finds himself and will find some less strenuous forms of recreation than football and athletics - he said that at one time he used to breed canaries. The inability to play

football is not a permanent hardship in life. He says he misses the companionship of the men who used to be his comrades in the football teams, and that he sees less of them than he used to, but that is largely the result I suppose of his having married and naturally devoting time to his home.

Whether the advice to him to abstain from all games was necessary is not for me to say. It was given by a well qualified doctor in whom the plaintiff had confidence, and he accepted it. Moreover he said that if he does try to engage in any strenuous exercise he is really prevented from doing so by the onset of pain. Apart, however, from the restriction which occurs when movement is arrested by pain, he has no serious physical disability. His spinal movements, forward, backward, sideways and rotating, are but slightly affected - any limitation of them is brought about only by the onset of pain and discomfort. On medical advice he wears a surgical corset as a support for his back, and he probably may never find it wise permanently to discard it. He wears it to work, but usually leaves it off when he gets home. Having to wear it is obviously a disadvantage. It is, he says, especially uncomfortable in hot weather, and one can well imagine that it would be so during a Brisbane summer. It must, however, be remembered that, being young, and with the natural resilience which enables people to get used to, and adjust themselves to such things, wearing this support will prove less irksome as time goes on.

Having observed the plaintiff during the course of the proceedings, and noticed the manner in which he gave his evidence, his bearing and expression, I formed a decidedly favourable impression of him and of his attitude to his situation. I did not think that he seemed to exaggerate the effect of pain. He was frank and helpful in his answers to questions both in examination-in-chief and cross-examination.

I did not think that he seemed in any way morbid or depressed. The evidence of the psychiatrist who examined him recently was that, although sedentary work was not to his liking, there was no evidence at all of his having any significant psychological maladjustment. The suggestions that his personality had been changed by the accident were, I felt, altogether too far-fetched. I do not for one moment doubt his mother's evidence that at one stage after the accident he was intolerant of his younger brothers and that he, at times, used language in the home which he ought not to have used and behaved in other ways that were trying to his family. Young men aged eighteen do get difficult at times. And I have no doubt that his behaviour may have been somewhat affected by backache - it is hard to think that it would not make him irritable at times - but I do not regard the matters that were mentioned of his behaviour at home or at work as being in any way significant. I think it would be most unfortunate if he got the idea that he was a melancholy, morbid or moody person. He did not seem to me to be so, and there is no need for me to consider him as such. Moreover, I am not prepared to consider any effect that his discomfort and pain may have on his temperament as a separate element of damage. Their effect is simply as an element of the pain and suffering he suffers and for which he is to be compensated.

The case for the defendant is that whatever disabilities the plaintiff now has are, in the main, not caused by the accident; and that as set out in the statement of claim his complaints are greatly exaggerated. Counsel for the plaintiff conceded at the outset that the allegations in the statement of claim are exaggerated. It is a catalogue of complaints the terms of which were belied by the manly attitude of the plaintiff himself when he gave his evidence. I do not think that his capacity for the performance of his duties or

his prospects in his employment have been, to any significant effect, retarded. Of course, as I have already said, any man might be at times handicapped in putting forth his best mental effort when in physical discomfort.

But the main proposition of the defendant - namely that the plaintiff had not proved that his pain is the consequence of the accident - is one of some difficulty. The medical evidence is somewhat conflicting as to the anatomical or organic conditions to which the pain is to be attributed. It seems to arise from some condition in the lumbosacral region of the back. I do not think it necessary that I go through all the medical evidence. I have considered it carefully and in the light of the defendant's case that the plaintiff's disability comes in part as a consequence of the injury and in part - the defendant says mainly - from another cause or causes. The details of the medical evidence are important in so far as they enable me to come to a conclusion about that contention. But apart from that I do not think that I need decide precisely which region of the back was injured and what exactly was the anatomical nature of the injury.

One view is that the plaintiff suffered from some injury to the ligaments, perhaps a rupture to ligaments in the region of the sacroiliac joint, that there was permanent damage to the ligaments there; and it was suggested that it is most unlikely that this condition will ever improve. Most of the witnesses thought it was more probable that the site of the injury was in the lumbosacral region rather than in the sacroiliac joint.

However that may be, it does seem likely that the plaintiff's impaired back condition will continue. It may not improve. There is a possibility that it will deteriorate. There was a suggestion that there might be some deterioration which would lead ultimately to the necessity of an operation

to fuse the sacroiliac joint. But on the evidence this seemed to me outside the range of even remote probability as a consequence of the accident. I think that if the plaintiff should be worrying about that as a prospect of the future, he would be well advised not to do so and to put it completely out of his mind. I put it out of my assessment of the damages to which he is entitled.

Two conclusions can, I think, safely be drawn from the medical evidence. One is that the plaintiff did suffer an injury to his back - I use that as a general phrase - and that the pain which he got in 1959, which led to his seeking medical advice, was a consequence then of that injury. The other is that he did have before the accident some minor curvature of the spine which could cause a postural defect or be associated with a postural defect, and that that of itself could lead to a painful condition. However, he had not noticed, apparently not experienced before the accident any pain in the back similar to that he now has. On one occasion when riding a bicycle uphill in the course of his duties when he was employed as a postal messenger, he did feel a sudden pain, and reported to a medical officer of his employer. He was put off work for a couple of days. On one other occasion he sought medical advice from his local doctor on some hurt to his back which he suffered as a result of a bump in football. But the fact is, and it must be significant for me in drawing inferences of fact, that before this accident the plaintiff had not, as far as the evidence shows - and I accept his evidence on the point - had not suffered from pain as subsequently he has. It first came on soon after the accident.

More than one of the medical witnesses has spoken of his having some postural defect, not altogether it would seem an unusual thing in young people. When I say more than one of the medical witnesses speaks of that, that means that

the evidence is not only that of the defendant's witness. But only the defendant's witness, Dr. Gallagher, speaks I think of any degenerative change having occurred in the lumbosacral region or in any part of the spine. Dr. Gallagher says there is a degenerative process, that it is a consequence, he thinks, of the plaintiff having had, as he assumes, Scheuerman's Disease at some time in his adolescence. That conclusion was based on the examination of the plaintiff he made quite recently, on clinical signs, local tenderness and largely on what he saw in X-ray photographs he had had taken. Dr. Gallagher agrees that he suffers from backache.

"The question", he said - and these are his words - "The question was what was the predominant cause of it? And I consider it is altogether due to his previous deformity, he is prone to backache, he has mild postural defects". He said, "I consider that he had a backache due to postural defects and aggravated to a certain degree by this accident".

He also said he had "degenerative changes in his back which will progress and get worse as he gets older. The question is how much of that is due to posture and how much is due to injury? There is no scientific way of determining this question to my knowledge. It is a matter of opinion, and in my opinion his injury was not terribly severe, and I would think the subsequent disability that he might suffer would be primarily due to his deformity rather than an injury".

In support of his view that a degenerative process had been initiated as he put it by Scheuerman's Disease, the doctor showed me the X-ray photographs. My own ability to interpret them is entirely based on the explanation he gave. No other medical witness was asked to examine them or to comment on them. I am not prepared to come to the conclusion that any spinal abnormality they show can be said to be the main cause or an independent cause of the plaintiff's present

pain and discomfort in his back. I do not think that the evidence for the defendant separated the effect of what the doctor called an abnormality making him prone to backache from the effect of the accident itself upon a person with that abnormality. In that connection I would refer to what this Court, and in particular to what the then Chief Justice, Sir Owen Dixon, said in Watts v. Rake (1960), 108 C.L.R. 158 at p. 160: "If the disabilities of the plaintiff can be disentangled and one or more traced to causes in which the injuries he sustained through the accident play no part, it is the defendant who should be required to do the disentangling and to exclude the operation of the accident as a contributory cause. If it be the case that at some future date the plaintiff would in any event have reached his present pitiable state, the defendant should be called upon to prove that satisfactorily and moreover to show the period at the close of which it would have occurred".

Dr. Gallagher said - and I was generally impressed by his evidence - that the effect of any damage to the ligaments which he had sustained would now be a scarring, and perhaps some damage to the degenerative discs, which, as he had said, were more prone to injury than normal. Some of the plaintiff's difficulties are probably due to a tautness of his hamstring muscles; and I have no doubt that they are to some extent due to the postural matters which were referred to. But, as I have said, I do not think it has been at all established, nor indeed is there any evidence, that the pain and discomfort he suffers can be said to have arisen independently of whatever harm resulted from the accident. It is not easy to attribute pain of a generalized character in a particular region to different originating factors. We do not know enough about pain to say this; for it is largely a subjective experience. Moreover, a tortfeasor is liable for

all the consequences - provided they are not too remote in the eye of the law - of personal injury to a plaintiff which his tort causes. That the man injured was frail or suffered disability, was prone to some ailment which was brought on, aggravated or precipitated by a tortious act, does not excuse the tortfeasor nor lessen his liability for the consequences of his wrongful act. The condition of the man injured may make those consequences more severe than they would be in a more robust man; but the tortfeasor gets no allowance for that.

On the other hand, if a condition which would have sooner or later produced pain or disability existed before the accident - that is to say a bodily defect existed which in time would have produced the pain and disability - that is a matter which must be taken into consideration in estimating damages. Although the evidence on the matter is slight, I think there is some evidence of that in this case, which would justify me in finding, and that I should find, that, although no period of time has been suggested, perhaps none could be suggested - the plaintiff would probably at some stage of his life have suffered some degree of spinal disability or discomfort even if the accident had not occurred. I think therefore that some allowance must be made for the fact that some part of the difficulties, troubles, disabilities, of which the plaintiff now complains would probably have beset him at some time. But I certainly do not think that I should say that they would have already come upon him independently of the accident. It is obvious that the law looks at the whole question of cause and effect in a case such as this somewhat differently from the way those who practise the art of medicine look at it. One has to find whether or not in an action or tort the defendant's conduct is, in the legal sense, the cause of damage - not to assess the contributions to a total result

made by separate factors.

Doing the best I can in all the circumstances, remembering the things I have already mentioned, remembering too the character of the plaintiff and the ordinary capacity of man to adjust himself to circumstances, remembering that, although no estimate was given, the plaintiff may incur expenses in the future for medical advice and treatment, and remembering also what he has suffered, does now suffer and probably will suffer in the many years which one hopes lie before him, I consider he is entitled to the sum of £2,429.10.9. and I give judgment accordingly with costs. The sum of money in Court may be paid out to the plaintiff's solicitors in part settlement of the judgment.