IN THE HIGH COURT OF AUSTRALIA

THE MURRUMBIDGEE COUNTY COUNCIL

V.

HUGHES

REASONS FOR JUDGMENT

Judgment delivered at Sydney

Wednesday 7th April 1971

THE MURRUMBIDGEE COUNTY COUNCIL

v.

HUGHES

ORDER

Appeal dismissed with costs.

THE MURRUMBIDGEE COUNTY COUNCIL

v.

HUGHES

JUDGMENT McTIERNAN J.

THE MURRUMBIDGEE COUNTY COUNCIL

v.

HUGHES

I agree in the reasons for judgment prepared by Walsh J. and would therefore dismiss the appeal.

THE MURRUMBIDGEE COUNTY COUNCIL

v.

HUGHES

JUDGMENT MENZIES J.

Notwithstanding my conviction that, had it been my duty to assess damages in this case, I would have chosen a figure substantially less than that awarded by the jury, I have satisfied myself that this would have been the result of my taking a view of the evidence of the plaintiff's lost working capacity different from that which the jury must have taken and which I cannot but recognise was a view that could not unreasonably have been taken.

I have read the judgment of Walsh J. and agree with his reasons for dismissing the appeal.

THE MURRUMBIDGEE COUNTY COUNCIL

v.

HUGHES

JUDGMENT WINDEYER J.

THE MURRUMBIDGEE COUNTY COUNCIL

v.

HUGHES

In my opinion the Court of Appeal Division of the Supreme Court rightly dismissed the appeal from the judgment given at nisi prius. I do not think that it can be said that the jury's verdict was not open to them. It cannot be described as an assessment that no reasonable men could make on the evidence that was before them. I do not wish to add anything in explanation of my conclusion beyond saying that I agree in the analysis of the facts that my brother Walsh has made in his judgment, which I have read. I can see no ground for this Court to interfere with the decision of the Supreme Court. I would dismiss the appeal.

THE MURRUMBIDGEE COUNTY COUNCIL

v.

HUGHES

JUDGMENT OWEN J.

THE MURRUMBIDGEE COUNTY COUNCIL

v.

HUGHES

I have had the advantage of reading the judgment of my brother Walsh. I agree with it and it follows that in my opinion the appeal should be dismissed.

THE MURRUMBIDGEE COUNTY COUNCIL

v.

HUGHES

JUDGMENT WALSH J.

THE MURRUMBIDGEE COUNTY COUNCIL

v.

HUGHES

In an action brought against the appellant in the Supreme Court of New South Wales the respondent obtained a verdict in the sum of $53,150 for damages for personal injuries alleged to have been caused by the negligence of the appellant which was his employer. At the trial before Slattery J. and a jury, liability was admitted. The Court of Appeal Division of the Supreme Court dismissed an appeal brought to it in which the only ground taken was that the award of damages was excessive. The appellant has appealed to this Court against the order of the Court of Appeal.

The accident out of which the action arose occurred in April 1965. The respondent suffered injuries to his back and two fusion operations were afterwards performed on his lumbar spine, one of them in November 1966 and the other in January 1968. At the trial of the action in April 1970, it was not really disputed that the respondent still suffered and would continue to suffer disabilities as a result of his injuries. Nor was it disputed that his earning capacity had been permanently reduced. But there was a contest as to the extent of his continuing disabilities and their effects and, in particular, as to the economic effects which they would probably have on him. The appellant called no evidence to contradict or to qualify the evidence given in the case for the respondent. But the conclusions to which the jury ought to come as to the effects of the injuries upon the respondent were a matter of contention between the parties.

It has been accepted that there could properly have been included in the award an amount of approximately $10,000 in respect of medical and hospital expenses and wages lost up to the date of the trial. Therefore the verdict may be considered on the basis that about $43,000 was the sum allowed for all other damage suffered by the respondent.

The ultimate question which the Court of Appeal had to decide was whether or not the verdict, considered as a whole, was so disproportionate to the injury suffered by the respondent that it should be set aside. But the case was one in which the claim of the respondent that his earning capacity had been very seriously reduced was a major issue. In my opinion the verdict was one which could not be disturbed, unless it appeared that it was not reasonably open to the jury to accept the contentions put forward on behalf of the respondent as to the extent of the loss of his earning capacity.

There was clear evidence at the trial that the respondent, who was at the time of the accident thirty-one years of age and was employed by the appellant as a linesman, was no longer fit to perform the duties of that occupation. By the time of the trial the wages which would have been payable to the respondent as a third grade linesman were $88 a week. There was evidence that it was possible that if the respondent had continued in that employment he might have become in the course of time a leading hand linesman, that is, a man in charge in a gang of five linesmen; or he might possibly have become a sub-foreman. But evidence was not given as to the rates of pay of men in those positions.

The fact, which was not seriously disputed, that the respondent was not fit for the work of a linesman,

coupled with the fact that he had no special skill or training in any other field of work, meant that it could not be disputed that his capacity to earn had been reduced. But the appellant disputed the claim on behalf of the respondent that he was not able to continue to be employed as a lineman's assistant. He had been employed in that capacity at intervals between the date of the accident and the time of the trial, including a period of about five months which ended shortly before the trial. He had been paid about $68 a week. Whether that was his gross or his net wage is not altogether clear from the evidence, but it seems that both parties treated the evidence as showing that at the time of the trial the difference between the wages of a linesman and the wages of a linesman's assistant was about $20 per week net. In evidence the respondent agreed that the job of assistant linesman was "open" to him for as long as he wanted it. In these circumstances it was put to the jury by counsel (as appears from the summing-up of the trial judge) that if the respondent should be found to be fit to work as a lineman's assistant he would suffer a continuing loss of wages at the rate of $20 per week. His counsel argued to the jury that they should consider the question of compensation for the loss of earning capacity on the footing that the reduction in the respondent's wages would be not less than $20 a week, but they ought to find on the evidence that he could not do the work of a linesman's assistant and would be limited to whatever other jobs he could obtain, and that he might be able to earn no more than about $38 a week, so that his loss might be up to $50 a week.

Since the respondent had been in fact employed as a lineman's assistant until shortly before the trial and

had then left that employment, which he said was still open to him, a question of major importance in the appeal is the question whether or not the jury, acting reasonably, could have found that the respondent was justified in claiming that he was not fit for that employment and would not be able thereafter to engage in it. If the jury could have taken that view then, in my opinion, they could have accepted the contention made on the respondent's behalf that his loss could be assessed on the footing that his actual earnings might be reduced by an amount approaching $50 per week. If the jury did accept that contention, it would have been right for them to heed the directions of the learned trial judge that they should have regard to the uncertainties affecting the amount which the respondent would have earned if he had not been injured. But assuming that the jury took those contingencies into account, they could not be said, in my opinion, to have acted unreasonably in making the award which they did make, if they were entitled to find that the respondent was unfit for employment as a linesman's assistant, as well as for employment as a linesman, and that he would be required to depend upon such unskilled employment as he might be able to find. On that view of the case, the jury could have reasonably allowed in respect of the respondent's loss of earning capacity such a large sum that, in my opinion, when regard is had to the pain and discomfort which the respondent had suffered and would suffer and to the limitations which his disabilities would impose upon his other activities, as well as upon his capacity to work, the total amount awarded would not warrant the intervention of an appellate court.

I turn to the question whether or not the jury,

assumed to be acting reasonably and in accordance with the evidence and with the directions given by the trial judge, could have accepted the contentions put forward on behalf of the respondent as to the extent of the loss of earnings which he would probably suffer. The learned trial judge told the jury that it was open to them to accept those contentions and no objection was made to that direction. After referring to evidence that the respondent was a good worker and that the wage for a third class linesman was about $88 a week his Honour said:

> "As a result Mr. Einfeld's case is that at a minimum he is fit for no more than a linesman's assistant and, therefore, on that basis he would be losing $20 a week. But Mr. Einfeld says, on one view of the medical evidence, he cannot even do that job, so he is left to obtain what other jobs he can on the open market and his loss may well be up to $50 a week, no doubt treating him as a man who would be working for the minimum wage of about $38 a week. He says there is a range of $20 a week to $50 a week. Your view on this would depend basically on your acceptance of the medical evidence, which view you accept, which medical evidence you accept, and your acceptance of the plaintiff and I wish to refer very briefly to some of the medical evidence, to remind you what that evidence was".

Later, after reviewing the medical evidence, the learned judge directed the attention of the jury to the contentions of the parties concerning the respondent's employment prospects. His Honour said that it was put on behalf of the respondent that he would never be able to pursue his old job and that "he is back to what he was without any

skill at all, namely a man in the open market who has a disability" and for that reason it was argued that the respondent would lose the sum of $20 to $50 per week. His Honour then recalled to the jury the arguments for the defendant that the respondent had been back at work and, more particularly, had done the work of a linesman's assistant from November 1969 to April 1970, that there was no reason why he should not carry on with that job, that after the case was over he would throw off some of his worries and would get back to a more orderly way of life and be able to resume with more freedom the job of assistant linesman and, perhaps, would be able to get back to the job of linesman. Then his Honour said:

> "These are all matters for you. There is evidence before you which can support any one of these contentions and it is your assessment that matters, but if you took the view that this man would never get back to his former job as a linesman third class, or ever achieve any promotion, which is inferentially suggested to you, such as a leading hand, then you have to come to the problem as to what you would allow him for loss of this earning capacity".

In the light of that account given by the learned judge to the jury of the matters which they should consider and his statement to the jury that there was evidence which could support "any one of these contentions" it is not possible, in my opinion, to conclude that the acceptance by the jury of the contention most favourable to the respondent's claim on the question of his probable future loss of earnings would have been unreasonable.

Although no objection was taken to the foregoing statements to the jury, I think it is proper to consider whether or not there was evidence upon which it could reasonably be found that the respondent was not able to perform the duties of a linesman's assistant and that his giving up of that position had been a reasonable act on his part. In my opinion there was such evidence. The respondent himself said that in that employment he did not do much work and that "it depended on the generosity of the gang to carry me along". He said that he had been instructed by Dr. Birbara to cease work. He said the work "was just too hard for me to do". He gave evidence of constant pain in his spine and said that if at work he did much lifting or bending he would be awake nearly all night with severe pain. Dr. Birbara, who had been treating the respondent from time to time from April 1966, gave evidence that in April 1970 he put the respondent off work. He said that there was no alternative and added, "he could not carry on the way he was and I felt I just had to put him off". I need not refer to other evidence. It does not avail the appellant that there was other evidence given by witnesses called on behalf of the respondent expressing opinions more favourable to the appellant concerning the respondent's disabilities. The jury could act upon the evidence to which I have referred and could conclude that the respondent was not capable of continuing with the work in which he had been employed. The jury could take the view that, although it appeared that the appellant was willing to keep the respondent in employment, he was not bound to continue to try to do work which was too hard for him or to impose

upon the willingness of his fellow workers to do work which he should be but was not doing. Furthermore, the jury were not bound to assume that the willingness of the appellant to employ the respondent would continue indefinitely after the case had been concluded.

I have already stated the opinion that, if the jury could have accepted the claims made on behalf of the respondent as to the likely effect of his injuries on his future earnings, then having regard to the other ingredients in his claim for damages the amount of the verdict was not so high that it ought to have been set aside. I do not think that it is necessary to set out any details of the evidence relating to the pain and discomfort which the respondent had suffered and continued to suffer or to the restrictions imposed upon him by his disabilities. It is sufficient to say that those effects of the injury were quite substantial.

For the foregoing reasons I am of opinion that the decision of the Court of Appeal was correct and that this appeal should be dismissed.