BARNEWALL

V.

BAKOP

REASONS FOR JUDGMENT

Oral

Judgment delivered at Melbourne

on Monday 28th February 1972

BARNEWALL

v.

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ORDER

Appeal allowed with costs. Order of the Full Court of the Supreme Court of Victoria set aside and in lieu thereof order that the appeal to that Court be dismissed with costs.

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JUDGMENT
(ORAL)

BARWICK C.J.

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The appellant, at the time he received serious injuries as a result of a road accident, was one of three brothers conducting what appears to have been a self-service food and grocery shop. Prior to engaging in this enterprise the appellant had worked for some years as a carpenter, although he had not been through an apprenticeship or any particular training for that occupation.

He suffered very considerable injuries in the accident. For a time thereafter he continued some activity in the food and grocery business. However, that business was sold perhaps sooner than it might otherwise have been, due in part at least to the consequences of his injuries. It was a busines which had been started by the appellant and his brothers and which, having regard to its sale price, had developed a consider goodwill.

He sued the respondent, claiming as special damage, a sum for the cost of employing labour in the business to replace some effort on his own part which he could no longer make, and a sum calculated at $100 a week for a period of

weeks elapsing between the sale of the business and the date of the trial. No claim was made for any loss of profits or of goodwill of the said business due to the injuries received. No evidence was given at the trial on which the cost of employing substitute labour could be quantified, nor was evidence given of the profits actually earned in the said business.

The jury, with whom the action was tried, returned a verdict for the appellant for $28,000 for damages, including special damage. The respondent appealed to the Full Court on th grounds, amongst other grounds, that the verdict was excessive and that there had been an inadequate direction by the trial judge as to the application to the facts of relevant principles of law as to the assessment of damages.

The Full Court was not convinced that the amount of the damages was excessive. Nor am I. It held, however, that the trial Judge's directions as to damages were inadequate It set aside the verdict and remitted the action for a new tria limited to damages. The basis of the Full Court's reasons seem to me to be first, that a statement by counsel for the appellan in addressing the jury was inadequately countered by the trial judge in his summing-up; and second, that the absence of specific evidence as to what occupation the appellant would hav followed if he had not been injured, and what he could have earned in all or some of the occupations of which he was former capable of following, required fuller and more specific directi to be given to the jury than those given by the trial judge. The Full Court, rightly as I think, concluded that, otherwise,

there was no error of law or fact in the trial Judge's charge to the jury.

The respondent in this appeal has supported these reasons and has also submitted that the verdict was excessive. As I have indicated, in my opinion, the verdict ought not to be disturbed on the ground that it was excessive.

It was known that one of the appellant's capacities was that of a carpenter. It was clear that due to injuries he had received he could not have earned any money as carpenter between the sale of the shop and the date of the tri Indeed, he could not have done so from the date of the receipt of the injuries. The medical evidence was such, in my opinion that the jury would have been entitled to regard the appellant as incapable of doing the work of a carpenter, for at least a considerable period in the future after the trial, if not inde for the indefinite future.

It is true that there was no specific evidence as what occupation the appellant would have followed had he not been injured. No doubt it could be concluded that for some ti he may have continued with the food and grocery store. He had said he had intended with his brothers to follow the course of obtaining shops and of selling them as they developed goodwill Whether the shops were always to be built by the respondent ar his brothers did not clearly appear. But that the respondent had a number of capacities which could be exercised with economic gain was clearly a conclusion open on the evidence.

There was evidence that, in the period between the sale of the shop and the trial, a carpenter could earn at lea

$100 per week. Indeed, a brother of the appellant, when the shop was sold, did turn to carpentering and earned at least that sum. It was not made clear whether that sum was gross or net, but the respondent appears to have been content to allow the evidence to remain in what is claimed to be a vague or ambiguous state.

No doubt, as the evidence stood, it was necessary for the jury to decide and for them to decide whether the deprivation of the capacity to earn wages as a carpenter was a significant economic loss suffered by the appellant due to his injuries. It was not a necessary conclusion. But in my opinion, it was undoubtedly a conclusion open to the jury on the evidence. They could properly take the view that the capac of doing the work of a carpenter would have been an economicall significant capacity in the appellant's future had the accident not occurred to him. Of course, that matter involved the question whether the appellant was likely to have to resort to the use of that capacity in that future, and the question whether if he did he could gainfully exercise it. But in my opinion there was material before the jury upon which they could answer both those questions favourably to the appellant. They could do so, in my opinion, without any specific declarati by the appellant as to what, had he not been injured, he was minded to do: and they could do so although they did not have detailed evidence as to what he might have earned if he had followed any of his other capacities. They were entitled, in my opinion, to take the view that, at least, as a fall-back

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JUDGMENT
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MELLISH J.

I agree. I consider the Full Court was in error in setting aside the verdict on the ground that its aim was to be explained by reference to a misdirection on the part of the learned trial judge, rather than to the evidence which had been given.

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OWEN J.

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I agree.

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WALSH J.

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I agree.

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JUDGMENT
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GIBBS J.

I agree. With regard to the alleged misdirection on the part of the learned trial judge I would only add that the case seems to me to be governed by the statement of principle made in Manning v. Bernard Manning & Company Pty. Ltd. (1960) 101 C.L.R. 345 at p. 351, where the Court said:

> "To obtain a new trial in a case where there can be no complaint of the direction in law given by the judge, and no complaint that any error of law arose in the course of the trial, it must be shown that a grave risk of the jury's being misled in their view of the case has nevertheless been occasioned. The case was eminently one for the jury to decide and in such a case to grant a new trial on the ground that arguments of fact were employed which might have misled the jury and went uncorrected by the judge at the trial, is a course to be taken only where the error is plain and the probability of injustice is high."

In accordance with that principle a new trial should have been refused in the circumstances of the present case.