IN THE HIGH COURT OF AUSTRALIA

PEARSON BRIDGE PTY. LIMITED

v.

ALONZO

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on MONDAY 15 NOVEMBER 1976

PEARSON BRIDGE PTY LTD

v.

ALONZO

O R D E R

Appeal dismissed with costs.

PEARSON BRIDGE PTY LTD

v.

ALONZO

JUDGMENT

STEPHEN J.

PEARSON BRIDGE LTD

v.

ALONZO

This appeal is noteable for the unsatisfactory nature of the evidence upon which the learned trial judge was obliged to arrive at his decision. The full circumstances of the appeal appear from the reasons for judgment of my brother Aickin.

Argument on the appeal concentrated upon the view to be taken of the respondent's pre-accident earning capacity. This was said largely to depend upon the respondent's rate of earnings at the time of the accident, when employed by the appellant for whom he had worked for only seven days when he received his injury.

This may seem a slender foundation upon which to erect an estimate of earning capacity which is to be projected for some twenty years into the future; the more so since the respondent's employment was as a labourer on a civil engineering project of limited duration which provided unusual working conditions and correspondingly unusual terms of remuneration, involving shift work underground on the basis of a six-day working week.

I do not regard his Honour's assessment of economic loss as being to any substantial extent dependent upon the respondent's brief period of pre-injury employment with the appellant. However, since a good deal was made of the point, I state my views concerning

the evidence of the respondent's earnings during that period. The learned trial judge said that he accepted the plaintiff's evidence that he earned some $200 clear of tax for the week he worked for the appellant. It is not clear to me that this is what the respondent intended to convey when he said, through an interpreter, "I got $205-206". However he was not cross-examined on the point and the defendant led no oral evidence; indeed in a somewhat equivocal exchange between counsel for the defendant, the present appellant, and the learned trial judge the former may have gone so far as to concede the accuracy of the evidence; as with much else in the evidence, the position is not clear. Some doubt is cast upon that evidence by other circumstances. In the particulars to his statement of claim the respondent asserted a capacity to earn, before his injury, only $180 per week, and that without specifying whether before or after tax, but this does not appear to have been adverted to by the parties at the trial. Through a witness called on the respondent's behalf, an experienced local union official who was familiar with the rates of pay and conditions of the respondent's employment, the respondent tendered a schedule of award rates payable locally to builders' labourers such as the respondent; even allowing for the special margins and allowances applicable to employment with the appellant, it nevertheless appears to conflict with the respondent's evidence. However this witness was not questioned about any such inconsistency nor was it put to the respondent. Lastly, the appellant tendered the appellant's pay record relating to the

respondent which does not at all support the respondent's evidence but is, on analysis, quite consistent with the information in the schedule of award rates. However, the pay record, tendered by consent, appears to have been treated by both counsel as of no particular significance, certainly not as contradicting the respondent's evidence of his earnings, however that may have been understood at the time.

In the result, the respondent's evidence of his earnings, unsatisfactory though it is, was left in a position in which it was open to the trial judge both to accept it and to understand it in the sense which he did, that is, as relating to earnings net after tax. His Honour remarked that he regarded the appellant's pay record as unclear; if indeed it is in any respect wanting in clarity and had the appellant's counsel intended at the time to make something of its tender, some oral evidence explaining it would no doubt have added to its weight as evidence.

Whatever the worth of the respondent's evidence of pre-accident earnings, the appellant's attack upon his Honour's acceptance of that evidence was, I think, substantially misdirected. His Honour's reasons reveal little direct reliance upon the figure of $200 net weekly earnings in his assessment of the respondent's diminished earning capacity. Aickin J. has analysed the process of assessment disclosed in his Honour's reasons and I share with him the view that the award of damages should not be disturbed. I would only add that the suggestion that his Honour failed to make

due allowance for contingencies in relation to lost earning capacity in the future is, I think, adequately answered by reference to the amount of $30 per week diminution in earning capacity which was adopted as the basis of assessment of this head of damages; on the evidence this was a quite modest weekly sum and its adoption ensured the making of ample allowance for appropriate contingencies.

I would dismiss this appeal for the reasons stated by Aickin J.

PEARSON BRIDGE PTY. LIMITED

v.

ALONZO

JUDGMENT

MASON J.

PEARSON BRIDGE PTY. LIMITED

v.

ALONZO

I would dismiss this appeal for the reasons given by Aickin J.

PEARSON BRIDGE PTY. LIMITED

v.

ALONZO

JUDGMENT

AICKIN J.

PEARSON BRIDGE PTY. LIMITED

v.

ALONZO

This is an appeal from the Supreme Court of the Australian Capital Territory from a judgment entered in favour of the plaintiff (respondent) in an action for damages for negligence. There is no appeal from the decision of the trial judge that the defendant in the action was negligent or from the decision that damage flowed from that negligence. The appeal is concerned only with the quantum of damages. It is said on behalf of the appellant that the trial judge misunderstood the facts, made errors of principle and grossly over-estimated the damages.

The plaintiff was born in Spain and had worked as a mechanic on a number of ships before coming to Australia. He said in evidence that he gave up his work at sea in order to be able to be with his family. Prior to entering the employment of the defendant he had been employed as a builder's labourer in the Australian Capital Territory with a firm called Canciani. It appears from other evidence that in the Australian Capital Territory there is in effect only one category of builder's labourer i.e. "skilled builder's labourer". He said in evidence that during the last month with that firm he received in his "pay packet" amounts ranging from $165 to $180 per week. The importance of the expression "pay packet" in this context is that it is clear that he is there referring to "take home pay" or to pay after

tax. He was not cross-examined upon that statement.

In about May 1973 he left that employment and took up employment with the defendant company, apparently at the suggestion of a friend, upon the ground that he would earn more with the defendant. He had in fact been employed for a total of only six days during the period 16 May 1973 to 22 May 1973 before the accident, out of which this action arises, occurred. He was thus working a six day week. As a result of the accident he suffered injury to his left hand which involved permanent damage to the middle and ring fingers. His own account of his present condition is that he cannot properly grip with his left hand because of the damage to these two fingers and that with continued hard work with his left hand he suffers pain and in addition he suffers pain in cold weather and upon change of weather. He also has suffered some loss of feeling in the tips of one or both of these fingers. As a result of these injuries there are some kinds of work in which he had been previously employed which he can no longer perform.

Although he was not kept in hospital, he had his hand in plaster for a considerable period and was incapable of doing any work for a period of nine weeks. At the end of that period i.e. on 29 July 1973 he presented himself to the defendant for work but was given termination pay and sent away. He then returned to a former employer named Citra and worked for them for ten months, i.e. until approximately May 1974. He then spent a period of four

months fruit picking at Griffith and thereafter he went to Sydney and obtained work with Tooheys Brewery (at which he had previously worked). He continued to be employed by Tooheys up to the time of the trial and at that time was earning $102 per week after tax. A certificate from Tooheys put in evidence by the plaintiff showed that his gross wage was at 30 April 1976 (just prior to the trial) $132.50 per week. This was for a five day week with no overtime. It appeared that up to about twelve months earlier he had been working some overtime but that at the date of the trial no overtime was available in the section in which he was employed.

On the evidence the trial judge was entitled to hold that the plaintiff was now not able to perform some of the work which he had previously done and that his earning capacity was reduced. The learned judge approached the question of damages by looking at four aspects. He looked at the period from the date of the injury to the end of July 1973 during which the plaintiff was unable to work because of his injury and assessed loss of wages during that period. He then looked at the plaintiff's reduced earning capacity during the period from August 1973 until the date of the trial (3 May 1976) and assessed a figure in respect of that period. He then looked at the diminution of future earning capacity by reason of the injury and upon the basis that the plaintiff was aged 42 years, said that he could reasonably expect to work for a further 20 to 25 years, and he assessed a figure for loss in respect of

reduced earning capacity for that period. Finally he made an allowance for pain and suffering and loss of enjoyment of life by reason of the injuries. He then assessed a total figure of $32,500, for some of the components of which precise figures were given in the judgment.

The defendant complains that the trial judge misunderstood the evidence and wrongly acted upon the basis that while in the employment of the defendant he was earning approximately $200 per week after tax and submitted that the Court could not properly have found that he was then earning more than $176 after tax and submitted that on earnings of $205 gross the tax would be $59.45 leaving a net amount of $157.55. Irrespective of the correctness of the basis of that calculation, the end result is plainly wrong. The witness, McMahon, an official of the Building Workers' Industrial Union, had said in evidence that a skilled builder's labourer doing Saturday work would earn an extra $40 after tax. It was submitted that accordingly the net amount could not exceed $140 per week. It was also submitted that the trial judge had misunderstood the evidence relating to skilled builder's labourers and that upon the basis of the schedule of wages produced by the witness, McMahon, the plaintiff's earnings from Citra would have been less than $120 net upon the assumption of tax at $25 per week. It was also submitted that the trial judge had failed to consider contingencies in respect of both the period from resuming work to the date of the trial and in respect of the period thereafter. It was suggested

that there was no basis for assuming that he intended to continue work as a skilled builder's labourer and no evidence that work of that kind would continue to be available. It was also submitted that it was not proper to make mathematical calculations and that the judge should have simply assessed a sum of money.

There is no doubt as to the correct basis for assessing damages in such a case as this, and that account must be taken of adverse contingencies. There is equally no doubt as to the only basis upon which this Court may review awards of damages in such cases.

The plaintiff was not cross-examined on his evidence that while employed by the firm, Canciani, in building operations involving the fixing of beams and other structures, he had earned amounts ranging from $196 to $180 per week after tax. The schedule of wage rates produced by the witness, McMahon was not put to him, and it affords no basis for attacking the trial judge's view, because all that it gives is the award rate for a forty hour week.

The plaintiff was asked "how much were you paid with this company (i.e. the defendant) do you remember?" and he answered "the last week before the accident occurred I got $205-$206". The question does not expressly distinguish between total wage and "pay packet" but shortly prior to that question he was asked about "that little brown pay envelope each week or fortnight from Citra" and "How much do you bring back in your pay packet from Tooheys a week ...?"

It was put in argument that the trial judge was wrong in accepting this evidence because it was contrary to the documentary evidence. The documentary evidence was in the form of a copy of the defendant's wage record and was tendered by the defendant in circumstances to which I shall refer below. It was said in argument on behalf of the defendant that no one at the trial had understood this document. The trial judge said in his judgment that "the records of payments to the plaintiff are not clear and I accept the plaintiff's evidence that he earned approximately $200 clear of tax for the week he did work for the defendant".

The wage record (exhibit 2), which shows that the plaintiff was employed as a "tunneller", comprises two sheets, the first dealing with two periods one ending on 20 May 1973, and the other on 27 May 1973. If it is proper to attempt to construe them without expert guidance they appear to show that in the first period the plaintiff worked for a total period of 24 hours at a rate of time and a quarter (i.e. for three days) and 8 hours at double time, making an equivalent of 46 ordinary hours upon which pay was calculated at an hourly rate of $2.20. The resultant figure is $101.20 to which are added various unidentified payments making a total gross pay for those four days of $145.40 with tax deducted of $33.40. In the period ending 27 May the plaintiff is shown as having worked 16 hours at a rate of time and a quarter, (i.e. for two days) being equivalent to 20 ordinary hours in respect of which he was entitled to $44 plus various additions giving a total of $71.62 from which tax of $7.62

was deducted. On that basis he received for six working days a gross wage of $217.02 from which tax of $41.02 was to be deducted, leaving an after tax amount of $176. It does not appear from the wage sheet whether this amount was actually paid in one or two different payments. It seems clear that, if that view of the record is right, he received $176 after tax in respect of six days work. The other sheet of the exhibit relates to 29 July 1973 and is endorsed "term", presumably meaning termination pay. That is made up of two unidentified items of $11.78 and $165.24, totalling $177.02 from which an unidentified deduction of 2 cents is made. It is consistent with the plaintiff's evidence that he did receive termination pay.

If this is the correct interpretation of the document the first stage of the appellant's contention in respect of this figure is made out but the evidence does not support the contention that the trial judge should have proceeded on the basis that the plaintiff had earned no more than $170 after tax, or, as it was put in an alternative argument, no more than $157 after tax.

The significance of this evidence is affected by three factors. The first is the failure to cross-examine the plaintiff on his oral evidence, including the failure to ask for him to be recalled for further cross-examination after the wage record had been produced. The second is the circumstances in which the exhibit was tendered. After the plaintiff's counsel had closed his case the trial judge asked counsel for the defendant if he intended to call any evidence. The transcript records the following exchange, which represents

the whole of the balance of the hearing:-

> "HIS HONOUR: Do you intend to call any evidence Mr. Curlewis?
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> MR. CURLEWIS: Only to tender a wage record relating to the plaintiff.
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> HIS HONOUR: Without seeing that document, Mr. Curlewis, I could well understand that what the witness says would be correct. I am not saying that he is correct. Is there any way of - some times these records do not give a true or fair picture. But may be severence pay or - - -
>
> MR. CURLEWIS: I do not query what he says, Your Honour.
>
> MR. NORRIS: I am not going to object it, Your Honour. We did tender records and they were not produced in accordance with the subpoena, and my friend has produced them and he probably got them indirectly from some officer in the company (not audible)."

In the hearing of the appeal before this Court attention was drawn to this passage and counsel for the respondent was asked whether in his view the witness to whom the trial judge referred was the plaintiff or the witness, McMahon. He had not been present at the trial and was not able to assist the Court. Counsel for the appellant, one of whom had appeared at the trial, did not volunteer any explanation.

The natural reading of the passage is that it refers to the plaintiff and it constitutes a statement by counsel for the defendant that he did not query what the plaintiff had said on the question of the wages that he had received from the defendant. In the light of this the trial judge was entitled to accept the plaintiff's evidence on this point.

The third matter to be borne in mind is that, if one examines the calculations made by the trial judge in assessing the loss in respect of the period between the date of the accident and the date of the plaintiff becoming fit to resume work, it is clear that he discounted the weekly pay received immediately prior to the accident. He says whilst the plaintiff was totally unfit to work "it would seem that his loss of wages would be approximately $1,500 clear of tax." It is clear that he was absent from work for approximately nine weeks. If he had been receiving approximately $200 per week after tax the loss would therefore have been approximately $1,800. If however, he had been receiving after tax only $176 per week his loss would have been $1,584. Accordingly, it would seem to be clear that the trial judge did not use the figure of $200 but either used the figure of $176 or considerably discounted the former figure. There is accordingly, no basis for regarding that particular aspect of the judgment as having been based upon some error.

The next aspect of the trial judge's calculation was loss in respect of the period from the plaintiff resuming work until the date of the trial, some 130 weeks. He took the view that the plaintiff had earned at least $40 to $50 clear less than he would have earned if the accident had not occurred. The evidence as to what he in fact earned during that period is that for ten months he worked for Citra for $120 after tax but somewhat less when there was no Saturday work. He then worked for four months fruit picking. Although

the evidence as to what he earned from that work cannot be regarded as satisfactory, it is a reasonable inference from what he said that he did not earn on the average more than say $25 a day but whether before or after tax is less easy to determine but even on a six day week that would not amount to more than $150 a week and in the circumstances of this trial the learned judge's inference is justifiable in respect of that period. In respect of the period when he worked with Tooheys both his before tax and after tax pay are clearly established as being $132 and $102 respectively for a five day week. On this evidence the judge arrived at a figure of approximately $5,200 to $6,500 for that period. In respect of future loss of earnings the judge estimated a working life of 20 to 25 years and concluded that his earning capacity would be at least $30 per week less than it would have been but for the accident. This view seems to represent a reasonable estimate making adequate allowance for contingencies. As an arithmetic proposition 20 years based upon a $30 per week diminution would amount to $31,200 and for a 25 year period $39,000. The mean of those figures is $35,000. The figure adopted by the trial judge is $17,500 which indicates that he made allowance both for contingencies and for discount to present value, although he does not indicate the arithmetic basis which he adopted. His judgment does not reveal whether any argument was addressed to him on how the amount should be discounted to obtain present value, and no such argument was put to this Court.

It remains to consider the overall figure which was arrived at after taking into consideration the factors

already referred to and the questions of pain and suffering and loss of enjoyment of life. After adverting to those questions, the trial judge arrived at a total figure of $32,500, which on a purely arithmetical basis, must have involved attributing the sum of approximately $7,000 to $8,000 to this factor. Although the total amount may seem at first sight to be somewhat high, it does not appear to me that, in the light of the above considerations, it is so large as to be wholly disproportionate to the nature of the injury and the extent of the identifiable pecuniary loss. I am also of the opinion that the decision involved no error of law or misunderstanding of the evidence.

I am therefore of the opinion that this appeal should be dismissed.