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IN THE HIGH COURT OF AUSTRALIA

BRANDI

v.

MINGOT

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on WEDNESDAY 24 NOVEMBER 1976

RM74/30574

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ORDER

Appeal allowed with costs.

Judgment of the Full Court of the Supreme Court of Victoria set aside. In lieu thereof order that the appeal to that Court be allowed with costs and that the verdict and judgment appealed from be set aside and that there be a new trial of the action limited to the issue of damages and that the defendant pay the plaintiff's taxed costs of the trial.

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JUDGMENT

GIBBS A.C.J.
STEPHEN J.
MASON J.
AICKIN J.

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This is an appeal by an appellant in person against the dismissal by the Full Court of the Supreme Court of Victoria of his appeal against the quantum of damages awarded to him by verdict of a jury in an action for personal injuries. The appellant had been involved in a motor car accident in April 1964. His writ was issued in December 1965 but the trial did not take place until July 1975, more than eleven years after the accident. The trial was confined to the assessment of damages, liability being admitted. The jury's verdict was for $10,000.

On the appeal to this Court the appellant, now appearing in person, proved unable to provide the Court with any assistance in understanding his appeal. In consequence it has been necessary to have recourse to his notice of appeal, which was prepared professionally, and to examine in detail, in the light of the grounds there stated, the transcript of evidence, the learned trial judge's charge to the jury and the reasons for judgment of the Full Court.

Before the Full Court two principal grounds of appeal were relied upon, that the damages awarded were so unreasonably low as to call for the setting aside of the verdict and that the

jury had been misdirected concerning the significance, for them, of the appellant's failure to call certain medical evidence. The Full Court was in our view entirely correct in rejecting this latter ground of appeal; it was of no substance and, although persisted in on the present appeal, we do not stay to say more of it. The other ground of appeal raised matters of real substance. It appears again in the present notice of appeal, coupled with details of what are said to be errors discernible in the reasons given by the Full Court for rejecting it. This ground should, we think, have succeeded before the Full Court and it provides the basis upon which we would allow this present appeal.

In April 1964, the appellant was driving to work in the city area of Melbourne. While his car was stationary at an intersection it was struck by a car driven by the respondent which collided with the rear of it. The appellant described the collision as a violent one.

The appellant was, at the time of this accident, in April 1964, an employee of the Victorian Railways. He was aged about 29 and was an experienced locomotive fireman. He had then been working in the railways for almost ten years, having begun to work there very soon after arriving in Australia as a young Italian migrant of about twenty. During those years he had advanced from unskilled work in railway stores through a railway workshops job to his position of locomotive fireman. Following study and examinations he was, when the accident occurred, about to become a qualified engine driver driving diesel engines on Victorian country lines. He in fact attained this position soon after the accident. He had always enjoyed good health and was apparently an intelligent and hard working man. At the time of the trial engine drivers in the Victorian Railways were earning just over $200 per week gross,

including overtime pay, or a little more than $10,000 per annum. In the case of the appellant income tax would have reduced these figures to rather more than $150 per week or $7,500 per annum. The job would have been a secure one and it carried with it contributory superannuation benefits, long service leave rights and certain rights to free travel on the railways.

This, then, appeared to be, before his accident, what the future held for the appellant. With it may be contrasted the employment prospects of the appellant as they appeared at the trial in mid-1975, affected as they had been by his changed physical condition. He had by then left the railways some years earlier and after some time had moved to Stawell where he lived with his wife and young family. Two experienced and highly qualified orthopaedic surgeons, the only medical witnesses called in the trial and who had treated him for some years, spoke of his physical condition. One of them, Mr. Jens, said that it was such that the appellant's future employment opportunities would, at best, be confined to work involving no heavy lifting, bending or even prolonged sitting, the jolting movements of a railway engine debarring him from the occupation of an engine driver. However unless there was an improvement in the appellant's anxiety state, associated with his physical incapacities, there was, he thought, little prospect of any employment for him in the future. The other, a Mr. Beetham, regarded the appellant as unfit for any physical work involving bending or lifting; given "supportive

physical therapy and tablet treatment and so on, he can probably be tided along" in a job not involving such work. As at the time of the trial the appellant, he said, had for some time been unfitted for any work but seemed to be, if anything, somewhat improved when he had last examined him shortly before the trial.

The appellant's own description of his physical disabilities and their effect upon his capacity for work was, as might be expected in one suffering a considerable degree of anxiety and functional overlay, a gloomy one, even less favourable than that of his doctors. It should, no doubt, on any view be treated with some reservation as very likely to be much influenced by the depressed mental state which both doctors attributed to him.

However in the light of the evidence of these experienced orthopaedic surgeons, whose evidence in this regard was substantially unaffected despite lengthy cross-examination, it would be quite perverse for a jury to regard the appellant as having, at the date of trial, other than a quite substantially reduced earning capacity when compared with his position before the accident. Their evidence did not, of course, by any means rely solely upon the account of symptoms and of pain given by the appellant but were founded upon examinations conducted over some years of observation and treatment and involving a wide range of diagnostic aids. There was no evidence to suggest that the appellant would improve in the future; the medical opinions were to the contrary.

Unless, then, the jury might, on the evidence, reasonably fail to be satisfied that the appellant's present physical condition was brought about by the accident we must regard the damages awarded as wholly incommensurate with the injury suffered by the appellant. Bearing in mind his present physical condition, some idea of the extent of this disproportion may be gained by comparing the verdict of $10,000 with the sum of over $10,000 to which his gross annual wage in his former relatively secure employment would probably have amounted in 1975. Again the damages awarded may be compared with the unrecouped expenses of $7,750 which the appellant had admittedly incurred before trial on medical treatment and associated travelling expenses alone, exclusive of the expenses of his not infrequent hospitalization.

One possible explanation of the amount of the award may be disposed of immediately; there was no evidence to suggest that before the accident the appellant was other than a healthy, active man. Indeed he seems to have been both active and enterprising; not only had he much improved upon his original economic position, that of an unskilled migrant worker, he had also acquired not insubstantial assets, a small farm of over one hundred acres and two blocks of land in the Moonee Ponds area. Again, this is not the case of a jury either refusing to regard a plaintiff as having suffered any accident-caused injuries or believing a plaintiff to be a mere malingerer. The jury did award the appellant $10,000 in damages.

Any explanation of the jury's verdict which is designed to uphold its rationality must not only account for its apparent want of correlation with the changes in the appellant's physical condition and their consequences; it must also be consistent with the award of $10,000, an award which itself acknowledges that the appellant did suffer not insubstantial detriment as a result of the accident.

Such an explanation was sought for and expounded in the reasons for judgment of the Full Court. Their Honours' explanation turned upon a segregation of the appellant's injuries into two distinct areas, his neck and his lower back, the latter being said to be such that the jury might reasonably fail to be satisfied that it was attributable to the original accident. This explanation relied quite substantially upon two linked factors, what was seen as the successful attack upon the appellant's credit made in his cross-examination and the significance which the jury may have placed upon the failure to call medical evidence which should have been available to the appellant. These factors are inter-connected because they both relate to a feature of the appellant's case, his apparent relative well-being and lack of need of medical attention during a period from about mid-1966 until about mid-1967, during which time, having resigned from the railways, he purchased a run-down hotel at Stawell and began a career as a successful country publican. The suggestion is that he had by 1966 in fact recovered from his injuries suffered in the accident, which were substantially neck injuries, and that his evidence to the contrary was not believed

by the jury, which might have been influenced to this view by the appellant's failure to call certain medical evidence as to his condition during the period before 1967.

It will be necessary to look in some detail at the reasons for judgment of the Full Court. The Full Court's approach to the matter was to note at the outset that the only medical evidence tendered on the appellant's behalf for the period from the accident in April 1964 until May 1967, when he first attended Mr. Jens, was a report by a Dr. Wilson, since deceased, given in July 1965. The appellant had first consulted Dr. Wilson, a general practitioner in North Melbourne, on the day of the collision in April 1964 and saw him thereafter over thirty times until the appellant moved to Stawell. Dr. Wilson's report, described as "an interim report only", gives the appellant's account of the accident and of the resultant neck pain of which he complained on his first visit to the surgery on the day of the accident. Then, after the briefest of references to an x-ray of the cervical spine which showed no bone abnormality and to a subsequent intensive course of physiotherapy which "failed to produce any satisfactory results", it states that the appellant was referred to a Mr. Emmett Spring. It concludes with the statement that the appellant was still undergoing treatment. It is not the singularly uninformative nature of the report that is emphasized by the Full Court but rather its failure to recount any complaint by the appellant concerning his back or any mention of injury to the cervical spine or discs.

This is said to be in contrast to the appellant's history as given to Mr. Jens in May 1967, that immediately after the accident he had complained of pain in the neck and in the low back. Mr. Jens' evidence as to the history obtained from the appellant is illuminating; he described the appellant as telling him

> "that he had been driving a car and had been struck severely in the rear and that he had been thrown about and he immediately complained of a painful neck and painful low back. He had been treated by his own doctor in Melbourne at this stage, by physiotherapy and manipulative treatments, and he had some relief of his low back condition from this. With passage of time he had an increasing amount of pain in the neck and the low back. Most of the treatment had been directed towards his neck but he was having considerable disability from his back when I saw him." (emphasis added).

It is perhaps significant that Dr. Wilson's report, given in July 1965, some fifteen months after the accident, may well have been made at a time when, according to the appellant's history as given to Mr. Jens, it was upon the appellant's neck that attention was being concentrated, "some relief of his low back condition" having by then been afforded by physiotherapy and manipulation.

Mr. Beetham's account of the history given by the appellant is different and better accords with Dr. Wilson's report; to him the appellant's history immediately after the accident was confined to the neck pain, low back pain only becoming apparent some time later. If this be so it would account for the omission of back pain in Dr. Wilson's report, which in this respect is confined to events on the day of the collision. Whatever be the reason for no reference to the appellant's lower back in this report, its generally perfunctory and fragmentary nature must deprive the omission

of much of its force. At all events, five months after this report a writ was issued in which the particulars of injury alleged "aching in lumbar spine with right sciatic pain", a description not inappropriate to the condition diagnosed by Mr. Jens when he first saw the appellant in 1967 and one which establishes that at least in December 1965 the appellant was complaining of low back pain.

The Full Court's reasons for judgment, after then noting that at the trial the respondent fought the case on the footing that the appellant's low back condition was not caused by or a consequence of the accident, go on to state that it must be to the successful attack made on the appellant's credit in cross-examination that the small amount of the verdict must be attributed. The reasoning is explained in this way: it is said that a careful study of the appellant's evidence makes it clear that the jury were entitled not be be satisfied with the appellant's account "of the nature and course of his physical injuries, so as to establish a link with the accident". There follow five matters which are said to support this view. First, the absence from Dr. Wilson's report of any reference to a back injury. Secondly, the appellant's failure to establish the financial losses which he had allegedly suffered in his hotel business through having to employ extra labour to do work which his injuries made him incapable of doing. Thirdly, the fact that a variety of witnesses spoke of occasions, particularly before 1968, when he made no complaints of injury and appeared to be without disability; some of these witnesses also described and contrasted his later condition of severe disability. Fourthly, the fact that

both the appellant and a doctor treating him who sold to him the Stawell hotel business on extended terms of payment must have regarded him in 1966 as fit to run that business. Fifthly, the failure to call as witnesses doctors who had examined, and, in some instances, treated, the appellant in the years immediately after the accident.

With the first of these we have already dealt. The second goes rather to the credit generally of the appellant. As to the third matter, the evidence of the witnesses in question does, we think, establish that when the appellant began his hotel business in Stawell in 1966 he was in a much better physical condition than at the trial. The same may be said of the fourth matter to which the Full Court adverted.

However this fact will be of little significance unless it leaves open the conclusion that the appellant's condition at trial was unconnected with the accident; this we do not think it can do. The medical evidence was quite unequivocal. Mr. Beetham said that it was consistent with the appellant's injuries that the lower back condition should come on more slowly than the original neck condition, "the lower back condition is often delayed for some considerable period of presentation after such an accident". The following passage from this witness's evidence summarises his view of the matter:

> "The time gap is variable in relation to soft tissue injury effects in the spine. There is quite commonly a gap between the, shall we say, the minor symptoms and the major symptoms by virtue of the type of injuries which can occur to the spine.

> It is quite common to have a time lag and in fact, you can have consequences of an injury and then a period when there is not much trouble and then a very minor effort can produce symptoms of a major nature. In other words, one gets an injury to the back and one of the problems of the back is that that ligaments don't heal well like ligaments in other parts of the body and so we are left with a situation where various further problems can occur as a result of the original injury.
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> His Honour: What, the injury sets up a situation which is one which cannot contain the effects of bodily disturbances that normally the spine would accept? --- Yes. By nature of the actual structure of the ligaments and the disc in particular and if the ligament, which is a very complicated structure, is damaged and then it has not healed properly, then such a movement - - - well, commonly enough a thing like coughing, sneezing, even cleaning one's teeth.
>
> Treading on a pencil? --- Yes, can produce a severe aggravation as a result of the original injury.".

Mr. Jens said, on the same topic:

> "... there very frequently is on a long-term basis at the contra end of the spine with an injury, say, to the neck, a later appearance of back problems because of the postural upset of the spinal mechanism. The spine is a perfect mechanism almost watchlike in its precision. If upset one part of the watch, throw strain on other parts of it. Very frequently find low back injury developing a neck problem over many months, or vice versa.".

Not only was it consistent with the medical evidence that the appellant might only experience severe back pains long after the accident but the whole of the evidence, including that of the appellant and his wife and of the witnesses to whose evidence the Full Court referred in what we have described above as the third matter, suggested that this was precisely what did occur. A number of witnesses spoke of the change that gradually came over the appellant while he was engaged in running his hotel at Stawell and even the appellant, unsatisfactory witness that he was as a result of his

exaggeratedly depressed mental condition, acknowledged that he had not always been as incapacitated as he now considered himself to be. He said that as the hotel's "business was increasing I was deteriorating", he was "gradually worsening to a slow degree". His wife gave a similar account; speaking of their time at Stawell she said "Oh, he was going worse all the time, when we first start he wasn't very bad, but he was going down with the time". The records of medical treatment of the appellant are consistent with this, from September 1966 until November 1967, during his early period at Stawell, he underwent no medical attention but thereafter was almost continually under medical care and treatment. It is perhaps worth remarking, as casting some light upon the genuineness of the appellant's physical decline, that it occurred at a time when his hotel business was greatly prospering; the Full Court described him as an astute and successful businessman. The effect of his physical decline was, of course, to put an end to his promising future as a publican.

The remaining matter referred to by the Full Court was the appellant's failure, without explanation, to call any medical evidence for the quite lengthy period from the accident, in April 1964, until May 1967, some time after the appellant had moved to Stawell. It was said, with citation of authorities, that the jury could conclude that the medical witnesses who were not called "would, if called, have exposed facts unfavourable to the plaintiff" and that the respondent's failure to call his own medical witnesses,

who had examined the appellant on a number of occasions from 1966 onwards, "could not be regarded as affording any excuse for the plaintiff's failure ... ".

This calls, we think, for a number of comments. First, the jury would not know of the authorities relied upon by the Full Court; they were, on the other hand, instructed by the learned trial judge in rather different terms as to how they should view this failure on the appellant's part. They were told that ordinarily it might be inferred from a party's failure to call such evidence that that evidence "would not have advanced that party's case". However the learned trial judge went on to say that "this matter does not affect very clearly the present case" since both parties had failed to call such evidence. As his Honour said "each side has to live with the tactics that they have adopted and each must bear the comment that can be made by their opponents about their failure to call medical evidence.". So, as far as the jury were concerned, the directions as to the law given to them would not have operated upon their minds in the way suggested by the reasons of the Full Court. If some explanation for the jury's verdict is to be sought it may be found in the law as it was explained to them by the trial judge, but will not lie in the law as it may otherwise appear in the authorities.

Secondly, the Full Court derived some support for the view that the appellant's uncalled medical witnesses would not have supported his case from something said to them by the appellant in argument during the appeal after he had disposed of the assistance

of his counsel and their instructing solicitors. While such a statement by the appellant, if made in sufficiently clear terms and with sufficient knowledge of the facts, might no doubt throw light upon the reason for not calling these witnesses, it could in no way assist in determining the only presently relevant matter, what it was which led the jury to bring in the verdict it did.

The third comment we would make is that in our view the learned trial judge's direction to the jury, in the terms summarized above was, in any event, correct and is to be preferred to the somewhat different statement of the position by the Full Court. In the authority relied upon by the Full Court, O'Donnell v. Reichard [1975] V.R. 916, the joint judgment of Newton and Norris JJ does, we think, correctly state the law when it says, at p.929, that a jury may infer that the evidence of the absent witness "would not have helped that party's case". This is just what the jury were told in the present case. With this may be contrasted the view expressed in the judgment now under appeal, that the proper inference is that the absent witness's evidence would have exposed facts unfavourable to the case of the party failing to call that potential witness. This latter approach reflects the views of Wigmore (3rd Ed. par. 285 et seq.), as Street J. observed in Dilosa v. Latec Finance Pty Ltd (1966) 84 W.N. (Pt. 1) (N.S.W.) 557 at p.582. Like Street J., we too regard a narrower view, as expressed in the

joint judgment in O'Donnell v. Reichard, as that which has come to be accepted in Australia - The Insurance Commissioner v. Joyce (1948) 77 C.L.R. 39 at p.61, Jones v. Dunkel (1959) 101 C.L.R. 298, especially at pp.308, 312 and 321, Lopes v. Taylor (1970) 44 A.L.J.R. 412 per Windeyer J. at p.418 and per Gibbs J. at p.422, Nuhic v. Rail & Road Excavations [1972] 1 N.S.W.L.R. 204 per Jacobs J.A. and Mason J.A.

In the learned trial judge's charge he also stated that the consequences of failure to call available witnesses did, in this instance, cut both ways since the case of each party was open to the like comment. His Honour was, with respect, clearly correct in saying this in the particular circumstances of this case where, the appellant having led some expert medical testimony, the evidentiary onus as to the appellant's physical condition thereupon passed to the respondent. Once that stage was reached the respondent's failure to call available medical evidence was open to the same inference as that flowing from the appellant's like failure. No doubt the former's failure does not "excuse" the failure of the latter, but in truth no question of excuse arises. When both sides fail to call available evidence competing inferences arise and it will then be for the tribunal of fact to consider the evidence which is before it, in the present case coming exclusively from the appellant and his witnesses, in the light of such inferences.

Two further comments may be made on this matter. The first is that the foundation of the inference that the absent witness "would not have helped the party's case" is that the party or his advisers are presumed to know the content of the absent witness's evidence, otherwise he would not be a witness whom "that party might reasonably be expected to call". A party may thus reasonably be expected to call his own medical advisers but no such expectation could arise as to medical practitioners who examined him on behalf of other persons and whose reports may not have been available to the party. The charge mentions medical practitioners ("the Railway doctors") in the latter category and thus might have misled the jury. Care should always be taken to avoid this risk. The second is a comment by the trial judge after referring to circumstances where absence of available medical evidence from one party "tends to make the mind easier in accepting the medical evidence of the side which has offered it to you". He said "It may be that you would then feel happier about drawing any necessary inferences". This passage, however, is too cryptic to be of assistance to a jury in a case where both parties refrained from calling medical evidence which they might have been expected to call. It is a formula expressed in terms designed for cases where only one party refrains from calling evidence, and even there some explanation of the kind of permissible inferences is desirable. If such a suggestion can properly be made at all where both parties have refrained from calling available evidence it needs especially careful explanation, which was not given in this case.

It follows that we cannot, with respect, regard the five matters relied upon by the Full Court as leading to the conclusion that it was reasonably open to the jury not to be satisfied that a causal connexion had been established between the accident and the appellant's condition at the time of the trial, in 1975.

The reasons of the Full Court go on to ask the question "What evidence should the jury acting reasonably have accepted in this case?". They answer this by stating the following propositions:

(a) that the appellant suffered soft tissue injury to his neck, as reported on by Dr. Wilson;

(b) that he was, in consequence, off work for twelve days and was treated for this injury during 1964 and 1965;

(c) that his capacity for work as a fireman or engine driver was not thereby substantially interfered with;

(d) that in October 1966 he was physically capable of running a country hotel;

(e) that by then he had incurred some expenses, not very great, for medical treatment;

(f) that he had suffered no financial loss up until the trial by reason of reduced earning capacity.

It is then said that in the light of these conclusions, reasonably open to the jury "on the contradictory evidence before it and the

plaintiff's palpable exaggeration of his claim with a consequential loss of credit on his oath", the verdict of $10,000 was not unreasonable.

If the appellant's account of his troubles be discounted, as we think it must be on account of his state of depression and gloom, there remains, in our view, little, if any, contradictory evidence. The whole account by lay witnesses of the appellant's physical condition over the years accords well enough with the medical evidence of what might be entailed in his involvement in just such an accident as the appellant described. The respondent chose to give no evidence himself of the accident, which he might be expected to do if the appellant's account of it was exaggerated. The medical evidence was consistent and largely unequivocal: the appellant had been x-rayed in 1967 and this disclosed damage to soft tissue in the lumbar spine and neck. A later myelogram in 1974 showed a very definite disc injury in the lower lumber spine, one that was "quite clear cut", showing actual pressure of soft tissue on the nerve root and Mr. Beetham was satisfied that he could say on oath, as cross-examining counsel put it, that the injury was related to the motor car accident; medical examination of the appellant had provided, in 1969, clinical evidence of that injury, as had the x-ray evidence of 1967; the appellant was not imagining his problems, instead he had positive physical evidence of them. The complaint of aching in the lumber spine, appearing in the writ issued in 1965, was consistent with his subsequently detected injuries.

Mr. Jens was equally confident of his clinical findings, confirmed by x-rays and later by myelogram examination, of injury to the lumbar spine, "a very definite mechanical problem of his lower back", a "severe involvement".

In the light of all the evidence we would not ourselves regard all of the propositions formulated by the Full Court as being reasonably open to the jury. Moreover we have, in any event, some difficulty in reconciling those conclusions, if they were those of the jury, with the bringing in of a verdict for as much as $10,000. We are by no means satisfied that the verdict can be attributed to any division of the injuries into neck and lower back, only the former being regarded as attributable to the accident. We are not uninfluenced by the absence, in cross-examination of the appellant and of his witnesses, of any suggestion that any event happened to him after 1964 which might itself be an independent cause of the low back condition of which the medical witnesses spoke; the appellant was not even questioned as to the possibility of any trauma intervening between the original accident and the time when he first came into the hands of Mr. Jens and Mr. Beetham; the existence of an intervening accident was never an issue in the case.

It is not irrelevant to observe that his Honour's charge to the jury was, on the whole, not unfavourable to the appellant and would not have been in any way calculated to suggest to the jury that they might arrive at the several conclusions referred to in the reasons for judgment of the Full Court. On the contrary the jury

might have gathered from what his Honour said that it was, to say the least, well open to them to conclude that the appellant's condition as described by the medical witnesses at the trial was attributable to injuries sustained in the collision eleven years earlier.

His Honour, when coming to the question of the actual process of assessment of damages, remarked that the jury might well think it proper to allow, as special damages to which the appellant was entitled, the whole of the sum of $7,750 "and then pass on the general damages", that they might well accept the fact that the accident involved the appellant in a heavy impact which could have caused a sudden, even violent movement of his body and in particular of his head, of which both the appellant's physical symptoms and his mental depression were all consequences. After exposing the unsatisfactory nature of the financial accounts of the hotel as providing any satisfactory basis for ascertaining any economic loss to the plaintiff flowing from his physical incapacity experienced while conducting the hotel, his Honour went on to say that the jury might feel that the appellant must have made more out of the conduct of the hotel had he been able "to devote full and active time to running the venture". His Honour concluded by saying

> "If you accept the evidence which, if I may say so, I think would be very hard to reject, that this man either is suffering from a serious physical disability or at least believes that he has a physical disability which has mounted now into a composite disability, partly physical and partly mental, that you might be prepared to infer that if he were running a small country hotel filling in different functions during the working day and the evening, that a disability such as this would prevent him from attending to it all the time that he could otherwise have attended to it, and that is a matter for you.".

This passage in particular we find difficult to reconcile with a view that his Honour regarded as seriously in issue the causal connexion between the accident-caused injury and the disabilities affecting the appellant during his latter days at the hotel and still subsisting at the trial.

If some explanation be sought for the verdict other than that suggested in the reasons of the Full Court it may lie in the omission from the charge of any reference to the fact that the appellant was to be compensated for any loss of earning capacity in the future. The charge contains only one reference, a passing one, to the future at all and that in a context which may have been understood as applying only to pain and suffering and loss of enjoyment of life. Not only was the future thus ignored but nowhere was it said that the appellant's damages were now to be assessed once and for all, without any opportunity of further claim. These features of the charge may have been due to the long period, eleven years, which had elapsed since the accident. Whatever the cause, once combined with a heavy concentration upon the past, they were, we think, quite capable of leading the jury to conclude that it was with the past eleven years that it was either exclusively, or substantially, concerned in awarding damages.

Occasional passages in the charge may, quite apart from its general concentration upon the past to the exclusion of the future, have suggested to the jury that it was only with the past eleven years that they were concerned. They were told that the

figure at which damages were to be assessed "will be the sum that is assessed as at the date of the accident, that is in April 1964. Of course, the future is what you have heard about but the notion is that by causing the injury in 1964 the defendant who is liable, as is not disputed, is liable to pay an amount of damages which compensates for the loss that would result to the plaintiff as from that date, so that the history of eleven years overtakes the future as it appeared in April 1964.". His Honour said that special damages had to be assessed "up to the date of verdict, that is today's date, and not beyond it", but the position as to general damages was not contrasted with that. They were told that general damages fell under three heads, pain and suffering, loss of enjoyment of living and economic loss and it was suggested that they should ask themselves four questions, what was the plaintiff like before the accident, what happened to him in the accident, what were his resultant injuries and how had those injuries affected him in bodily physical effects, feelings and economic loss. His Honour, in dealing with this fourth question, took three distinct periods, the latest of which ended at the date of trial. He said nothing about any subsequent period save that he did, in dealing with pain and suffering and loss of enjoyment of living, once refer to "what the future will probably be". When he turned to economic loss he dealt at length with the appellant's hotel venture which ended in 1971 and with whether its conduct reflected any loss attributable to the injury but nothing was said concerning the future.

No doubt counsel for the appellant spoke of the future and of the effect which the appellant's injuries would have upon his earning capacity in the future, but if the jury is later directed in its task of assessment without reference to the future it may well fall into error, as we think occurred in the present case. We are conscious of the absence of any exception taken at the trial by the appellant's counsel to this aspect of the charge; however we are here concerned not with a ground of appeal founded upon misdirection but rather with a possible explanation of the jury's verdict. To the extent that the charge may provide such an explanation we think it may properly be consulted for that purpose, particularly where its effect upon those who heard it is little likely to have been different from its effect upon those who subsequently read it.

Whatever may have been the reason or combination of reasons which led the jury to award no more than $10,000 by way of damages, we think that in the present case it is correct to say that, as was said by four members of the Court in Coates v. Carter (1951) 82 C.L.R. 537 at p.543, the placing of too much emphasis upon the need for considering how the jury have misapplied their minds is likely to obscure the truth; it is enough if the conclusion at which they arrived, however it is to be accounted for, is unreasonable.

That is the conclusion to which we have come despite the consciousness we have of the particular respect due to the unanimous decision of a Full Court on any matter which is very largely one of

impression - Australian Iron & Steel Ltd v. Greenwood (1962) 107 C.L.R. 308 at p.311 per Taylor, Menzies & Owen JJ. Taking the view of the evidence most favourable to the respondent we nevertheless must regard this as a case which requires that there should be a new trial as to quantum. We are fortified by the fact that, faced with the amount of the verdict as compared with the state of health of the appellant, the Full Court itself felt the need to find an explanation which might accord to the award a rational basis. For the reasons which we have given we are, with respect, unable to accept that explanation and in its absence must regard the verdict as a quite unreasonable one.

We would, for these reasons, allow this appeal and order a new trial.

BRANDI

V.

MINGOT

JUDGMENT MURPHY J.

The assessment of damages was a jury issue. Except where there is judicial error, the verdict of a jury should not be interfered with unless the case for doing so is very strong (Precision Plastics Pty. Ltd. v. Demmir (1975) 6 A.L.R. 311). The judges in this court, or that below, may have decided the case differently but the issue was committed not to us or to them, but to the jury (see Hocking v. Bell (1947) 75 C.L.R. 125 (P.C.); Leotta v. Public Transport Commission (not yet reported)). On the evidence, it was reasonably open to the jury to reach the assessment of $10,000 as it would have been for them to award a much higher sum.

On the resolution of this issue of mixed law and fact, the jury are entitled to the advice of the judge on the law and to such assistance as he might give on questions of fact. If the instructions to the jury were adequate, the assessment should not be disturbed. However, I agree with the other members of this Court that the instructions on economic loss were deficient. They amounted to judicial error.

The appeal should be allowed, and a new trial ordered on the issue of damages.