



Transcript of Proceedings

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Date: 24 March, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JONES J

Claim No 58 of 1997

RACHEL FLEUR EDWARDS

Plaintiff

and

GODNADA KHAN

Defendants

and

BEVERLEY CLAIRE KHAN

CAIRNS

..DATE 16/03/2004

JUDGMENT

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: On the 12th of April, 1987 the plaintiff was injured in a horse-riding incident at the premises of the defendants, at Smith Road, Condon, Thuringowa. She was then sixteen and a-half years old, having been born on 27 October 1970. She now claims damages for injuries sustained in that incident.

The defendants were the operators of a horse hire business, trading under the name of BK Five Hire Horses, conducted from those premises. Although they delivered a defence to the plaintiff's statement of claim the defendants do not appear now to contest the plaintiff's claim at the hearing. Accordingly, the plaintiff is required to prove her claim in accordance with the exigencies of the pleadings.

On the day in question the plaintiff and two of her friends, Maxene Bennetts and Tina Kops candy went to the defendants' premises. The plaintiff and Tina each paid \$6 to hire a horse each for half an hour. Neither was an experienced rider and they advised the person in charge to this effect. The plaintiff had only ridden on one prior occasion.

Two horses were delivered to them, and a horse called Blackie was assigned to the plaintiff. The plaintiff mounted the horse and whilst waiting for her friend, Tina, to mount her horse an attendant smacked Blackie on the rump and the horse bolted. The course followed by the horse is graphically described in the affidavit of Maxene Bennetts who observed these events. In the end result, the plaintiff was dislodged from the saddle,

following her having hit part of a tree. For a time she was dragged along with one foot caught in the stirrup for a distance of approximately 200 metres. When the horse finally stopped her foot fell from the stirrup and the horse walked off. The horse was an ex-racehorse and was known to be of a fractious temperament.

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The person in charge of the business at that time did not inquire of the plaintiff of her riding experience, nor did he make any assessment of her capability. I am satisfied that prior to the mounting of the horse the plaintiff was given no warning about the horse nor instructions as to how to handle it. She was not provided with a helmet.

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A report from a Mr Andrew McLean, an equine behavioural expert, dealt with these shortcomings in the management of the business. He gave his opinion that the various features to which I have just referred were less than the standard expected of a person running such a business.

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In their defence, the defendants simply deny the allegations of negligence, but they make no positive allegations which challenge the correctness of those facts stated.

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The circumstances outlined above bespeak negligence in my view on the part of the defendants in their conduct of the business.

I find that the defendants' negligent conduct caused the plaintiff's injury. No allegation is made that the plaintiff herself contributed to her own injuries.

Quantum: The plaintiff was rendered unconscious because of her injuries and remained unconscious until an ambulance was called to the scene and she was removed to the Townsville General Hospital where she was initially treated. She was kept there for a period of hours during which time the lacerations on her face were sutured and no doubt she received some other general examination. She was then discharged into the care of her mother.

There appears to have been little follow-up treatment after her discharge from hospital, although she did continue to suffer pain in her neck and her back and particularly her right shoulder.

Some years later attempts have been made to assess the full nature of her injuries and there have been difficulties associated with this lack of follow up immediately after the incident. She did however, notice problems soon after this incident with mood swings, depression and low self-esteem.

In the end result I find that as a consequence of this incident the plaintiff suffered the following injuries:-

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- (1) closed head injury;
- (2) soft tissue, musculo-ligamentous injuries to her neck and lumbar spine within plate changes at thoracic T10;
- (3) evidence of mild compression fracture of the body of C5;
- (4) right full thickness rotator cuff tear;
- (5) general lacerations, bruises and abrasions

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Some years after this incident when the effect of her injuries impacted on her life, the plaintiff sought further medical help, including specialist medical assessment. She had in the interim visited England to where her mother had moved some three years after the incident, but there does not appear to be any indication that the plaintiff sought medical help whilst in England.

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In 1994 the plaintiff consulted Dr Turner, general practitioner, with complaints which he considered directly related to her head injury. He also referred her to Dr Muscio, orthopaedic surgeon, for treatment of her right shoulder. After radiological investigation the plaintiff underwent surgery to correct the tear in her rotator cuff tendons. That surgery has not relieved all the associated symptoms. She continues to have difficulties in her shoulder which Dr Curtis assessed at a four per cent loss of the whole

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person. She has problems also with her thoracic spine which is assessed at three per cent loss of the whole person and in her neck, which is assessed at five per cent loss of the whole person.

The adverse effect of her closed head injuries continue, but the extent of those effects is difficult to determine because of the time lapse between the injury and the assessment. The plaintiff suffers from mood swings, panic attacks, anxiety, sleep disturbance, anhedonia, low self-esteem, low energy, impaired memory and reduced cognitive function.

There is difficulty in assessing the loss of intellectual function referable to the incident. The plaintiff had difficulty with her schooling prior to this incident which led to a suggestion of limited intellectual ability and low memory function. She left school at the age of 15 years and worked for a period before deciding to return to school to complete her year 10. The incident occurred after this return to school.

Dr Boyce, neurologist, after considering her background of the findings of a PET scan, retained an early opinion which was expressed as follows:-

"It would be my belief that there has been some impairment in terms of her behavioural disorders which has been complicated by the head injury and also by her mental retardation. Secondly, the onsets of headaches. Accordingly, my belief that Rachel does have some degree of impairment as a consequence of her accident, I would regard as being of the order of 10 per cent of the whole person."

Despite the difficulty that Dr Boyce had in arriving at that assessment, on the balance of probability it seems appropriate to accept that level of impairment as being due to the accident.

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Professor James, as psychiatrist, in his report dated 7th of September 2001 expresses his opinion in the following terms, about the plaintiff's depression:

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"The seriousness of her depression is considerable. It now overwhelms all other considerations and although I see no reason to challenge the results of various psychometric evaluations which have been carried out with highly consistent set of results, at the present time it would be quite impossible to evaluate Ms Edwards' cognitive function, including memory."

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That depression has continued. One complicating factor might well be that the plaintiff, in December 2003, ended a seven year relationship with a man who throughout that time provided her with considerable emotional support. Her former partner also has the custody of their two children who are now aged six years and three years.

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It is not necessary to refer to all of the opinions expressed by various medical practitioners. It is clear that the plaintiff has suffered significant physical and psychological damages as a consequence of this incident. Her disabilities affect her capacity to function in her day to day activities, and to care for her children when she has access to them. She will have difficulty in forming emotional attachments, and her capacity to enjoy life has been seriously diminished.

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There is some likelihood, I believe, that future treatment will reduce the level of depression and one hopes that this will add to the quality of her life. I would assess her general damages for pain suffering at \$50,000, and allow interest on \$25,000 of that amount at two per cent for 16 years, resulting in a further component of \$8,000.

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The special damages relate to out of pocket expenses paid by the plaintiff in the sum of \$3,929.40. The amounts paid to the plaintiff and due to the Health Insurance Commission total \$4,882.60. On the out of pocket expenses I would allow interest at six per cent per annum for 10 years, which adds a further component of \$2,357.

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Economic Loss: The plaintiff was still at school at the time of this incident and had only limited experience in the workforce. She had intellectual limitations which inevitably have reduced the range of employment opportunities. I would expect the most likely avenue of employment would have been in the areas of process work and domestic or commercial cleaning. There was perhaps some opportunity for sales work. There would be periods when the plaintiff would have ceased work, or reduced the hours of work in order to care for children.

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Since the accident the plaintiff initially attempted to further her education by undertaking a course at TAFE. Since then she has travelled to England to be cared for by her mother. She has found short-term, casual employment in a

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variety of occupations listed in her loss and damage statement. These included as a catering assistant, as a cleaner, as a shop assistant, kitchen hand and delivery driver. Since 1995, however, the plaintiff has been in receipt of a disability pension and this is likely to continue into the future.

The plaintiff claims lost income from 1 July 1995 to the present, but allows two years off work which would be devoted to childcare. After allowing for the total net earnings in that period of \$24,000 the amount claimed is \$145,000 based on average net earnings of \$300 per week.

In my view, that approach makes insufficient allowance for the vagaries of the labour market for someone in the plaintiff's position, as well as inadequate allowance for the likely time off the plaintiff would have had for the care of her family.

Considering these further matters, I would allow \$120,000 for
past economic loss of which I would allow interest on \$40,000
at 4.75 per cent for 10 years. The amount on which interest
is allowed takes account of the fact that the plaintiff has
received approximately \$80,000 from the Department of Social
Security in that time. The interest component calculates to
\$19,000.

The past superannuation I will allow on the sum of \$120,000 at
the average rate of six per cent per annum, which adds a
component of \$7,200.

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HIS HONOUR: For the future I note that the plaintiff is now
33 years of age. Projecting a future earning capacity over a
20 year period I assess the loss of her earning capacity on an
average basis at \$180 per week net. For the 20 year period I
assess this loss at \$150,000. I allow the loss of
superannuation benefit at nine per cent on that sum, adding a
further component of \$13,500.

For past care I allow three hours per week at \$10 per hour,
totalling \$30 per week, for a period of 10 years. That
calculates to a sum of \$15,000, on which I will allow interest

at five per cent per annum for 10 years, adding a component of \$7,500.

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For the future I would assess the plaintiff's Griffiths and Kerkemeyer claim at two hours per week at \$15 per hour for 30 years with a three per cent discount rate. That calculation rounded off will come to \$30,000. Future expenses are claimed for medication and I would add counselling. For this sum I allow \$6,000.

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In summary then I set out the allowances as follows:

General damages: \$50,000

Interest thereon: \$8,000

Special damages including interest: \$11,169

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Past economic loss: \$120,000

Interest thereon \$19,000

Loss of past superannuation: \$7,200

Future economic loss: \$150,000

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Loss of future superannuation: \$13,500

Past care: \$15,000

Interest thereon: \$7,500

Future care: \$30,000

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Future medical expenses: \$6,000

The total is \$437,369.

The report of Mr Walkley recommends that a protection order be made in respect of this award of damages reflecting the reduced level of the plaintiff's capacity to care for such a sum.

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I accept that such an order should be made and that the funds ought to be invested with an authorised trustee company. Taking into account the amounts which have to be drawn from that sum, namely payments to the health insurance fund, and to the plaintiff for her out of pocket expenses, as well as to those persons who have provided care, the approximate fund available for investment is \$400,000 from which will be paid the costs which have to be paid to legal advisors, and the amount of \$500 which will be paid initially to the trustee company as part of their set-up costs.

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I will therefore calculate the costs of fund administration
which must be borne by the defendant on the basis of an
investment of \$400,000 in respect of which the trustee company
will charge an annual percentage rate of 2.2 per cent. Mr
Wilkins, who gave evidence before me, however, has apportioned
the cost of pure maintenance of the fund and the preparation
of taxation returns as resulting in a cost of 1.1 per cent of
the total cost of the fund. This equates to approximately \$85
per week which sum, after allowance for contingencies, should
be projected over 45 years. This would result in a cost of
fund administration which I will round off to \$80,000.

Now, Mr Turnbull, I am going to ask you to prepare an order in
the usual terms and allowing judgment in the sum of \$517,364
with the usual orders then concerning the payment of legal
fees.

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HIS HONOUR: And the appointment of the Trust Company of
Australia Limited as trustees.

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HIS HONOUR: I will order that costs to be taxed on the
standard basis.

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HIS HONOUR: That will be costs including reserve costs. You can add to the order that there be liberty to apply.

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