COURT OF APPEAL [1996] QCA 096

DAVIES JA
McPHERSON JA
AMBROSE J

App 190 of 1995

FAI GENERAL INSURANCE COMPANY LIMITED Appellant

and

ISABELLE JEAN SELBY Respondent

BRISBANE

..DATE 22/03/96

JUDGMENT

DAVIES JA: The respondent plaintiff who was then 65 years of age was injured in a motor vehicle accident on 2 February 1994. She was an old age pensioner. Her major injury was a whiplash injury to her neck. She also had cuts to her face, bruising around her face and bruising of the thigh.

The injuries apart from her neck injury although initially painful and unsightly soon cleared up. However she continues to have a disability in her neck and the aftermath of the accident together with this disability has caused her considerable anxiety and some depression.

Her neck disability continues to cause her pain and limitation of movement and consequently restricts her in performing many of the activities which she performed without limitation or pain before her accident.

What seems to have caused her present symptoms is the precipitation by the trauma of the accident of symptoms of a previous asymptomatic but advanced osteoarthritis in her neck. Of the two medical specialists who gave evidence, both of whom were accepted by the learned trial Judge who expressed the view that there was no significant difference between their opinions, thought that "perhaps age 65 could be used as the time when she may start to have symptoms", presumably of the kind which she now suffers, had the accident not occurred.

Plainly the doctor was not saying that the respondent would

have had symptoms of the kind she now has at her present age even if she had not had the accident but he was saying that that was a possibility. Not surprisingly he did not express an opinion, and was not asked to do so, as to the likelihood of that possibility occurring.

The learned trial Judge assessed damages at a total of $79,301. This comprised pain and suffering $24,500; interest on that $250; past care $18,460; interest on that $560; future care $31,200; analgesics agreed at $245; interest on those $22; and future physiotherapy expenses $4,056. The appellant appeals against that assessment and not surprisingly focuses on the four largest components, being those for pain and suffering, past and future care and future physiotherapy expenses.

As its counsel in his outline more than 60 per cent of the damages comprises past and future care. It is convenient to discuss those components in the order in which the appellant sought to attack the amounts assessed for each of them before this Court.

Future physiotherapy

The appellant contends that there was no medical evidence presented that the respondent needed or required future physiotherapy. Whilst that statement is literally true Dr Boys, one of the two orthopaedic surgeons said in his report of 9 June 1995 that a gentle and regular program of muscle

stretching, conditioning of the supporting muscles of the neck would be advised. That seems to me plainly a reference to physiotherapy treatment.

A rate for that treatment was agreed at $26 per session but there was a paucity of evidence from which any conclusion could be reached as to the frequency with which such treatment should be given and the period of time over which it should be given. That was not a reason for not making an award but it was a reason for making a conservative award under this heading.

The learned trial Judge recognised this and, having regard to the fact that during the time the plaintiff received free physiotherapy from Maryborough Hospital she was originally receiving it three times a week and then later twice a week, His Honour allowed it over a three year period once a week.

Although the estimate of perhaps even once a week may be a little generous to the respondent I do not think that His Honour's assessment having regard to the paucity of evidence was outside the range of a reasonable assessment under this head of damage.

Past and future domestic assistance

The amounts awarded under this head were made up as follows: for the first three months after the accident, six hours a day at $9.50 an hour making a total of $5,130; from then to the

date of trial, a period of 15 months, three hours a day at $9.50 an hour making a total of $13,338; and future assistance three hours a day for three years at $9.50 an hour making a total of $31,200.

The appellant does not making any complaint about the rate but says that the total time allowed was too great for a number of reasons, set out originally in the written outline, some of which were pursued further orally before us.

The first was that it was submitted that the work which allowance was made included work done for others in the household. That is a common complaint in cases such as this but in truth it is often difficult to separate out the work which the plaintiff formerly did for herself and that which she did for others. In this case I do not think it was unreasonable for His Honour to accept the estimates of time given, because the work described can properly be said to be work which involved services formerly performed by the respondent for herself, even though that work benefited other persons in the household.

The second complaint was that the amount of work in effect reflected the respondent's obsessiveness in the house. In other words it was more than a reasonable person in her position would have done. Whilst the frequency with which the respondent said she washed and ironed and cleaned might have

been more than one would ordinarily expect the estimates on which His Honour based his assessment were of the amount of time which the respondent daughter spent in performing the respondent's house work.

There does not seem to have been at the trial any criticism of those hours as opposed to the hours which the respondent herself spent. Although the hours seem to me to be rather high I cannot be satisfied that they were so high as to be unreasonable.

Finally it was submitted that these figures do not adequately take into account contingencies such as the pre-existing neck degeneration. What the learned trial Judge appears to have done under this and the previous heading of physiotherapy expenses is to have assumed that but for the accident the respondent's degenerative condition would have become symptomatic in the way it now is within three years of the date of trial.

His Honour said that there must be a discount for the fact of the pre-existing condition of the respondent's spine. That was plainly the circumstance in my view or at least the major circumstance in my view which caused him to limit these damages in the way he did.

Mr Morton, who appeared for the respondent before us, submitted that, in the case of these expenses, the three year

limitation was taken by His Honour because of the advancing age of the respondent, and the fact that she would probably have needed care in any event.

But that does not explain the limitation of the physiotherapy expenses to a three-year period. It seems to me that the predominant reason for His Honour taking into account a three year limitation period was the one I have already mentioned.

Although it is arguable that the assessment made by His Honour under this head was generous to the respondent, it is impossible, in my view, to say that it is so genereous as to make his assessment of this component manifestly excessive.

General damages

Again, the main complaint here appears to be that the learned trial Judge in assessing the amount of $24,500 under this head failed to have sufficient regard to the possibility that the respondent would have developed the symptoms in any event, on the assumption that the learned trial Judge must have made that the symptoms would have developed within three years of trial.

The amount assessed, in my view, was excessive. It was, as submitted by Mr Flint for the appellant, at least twice that which ought to have been assessed under this head. I think that the amount for which he contends, that is $10,000 and to

be fair to him he submitted that as a maximum amount, would have been an appropriate award for past and future pain and suffering and loss of amenities, limited as it must have been having regard to His Honour's other findings to a period of three years from the date of trial.

It follows that the interest on that sum should also be reduced and I would round that off to a figure of $100. In my view that is a sufficiently substantial reduction in the total award as to justify interfering with that award and allowing the appeal.

Accordingly, I would allow the appeal set aside the judgment below, and substitute a judgment in the sum of - and I would ask you both to check this - $64,651 with costs. I would want to hear argument from counsel as to the costs of this appeal. I would also grant any leave necessary to amend the plaint to accord with the judgment which I would pronounce.

McPHERSON JA: I agree with the reasons that have been given and with the order proposed.

AMBROSE J: Yes, I agree also.

DAVIES JA: Is that figure correct, gentlemen?

MR MORTON: Your Honours -----

DAVIES JA: I reduced it to 10,000.

MR MORTON: Yes.

DAVIES JA: And reduced the interest on that sum of $100.

MR MORTON: Yes. I think Your Honour might be $100 short.

DAVIES JA: Could be. Well, could you gentlemen agree on it? $64,651; do you agree?

MR FLINT: Yes, Your Honour.

DAVIES JA: All right. I'll change that to $64,651. Now, what about costs of the appeal?

MR MORTON: Your Honour, on the presumption my learned friend would ask for them, they failed on two grounds and succeeded on one. These sorts of things can sometimes be settled as long as the - what is being asked for is less than what was asked for in this case. I can't tell Your Honours whether that would have happened in this case obviously but they certainly appealed as to a substantial part of the judgment, well over I think 60 per cent of it, and succeeded for something in the order of - on my usually defective mathematics, something in the order of perhaps 20 per cent of it.

DAVIES JA: So what do you say?

MR MORTON: I say that at worst - I mean, if Your Honours divided it up on a third, a third, a third then two-thirds would cancel us out and we should have a third of the costs. That might seem to be overly adventurous and accordingly I'd ask Your Honours to make no order as to costs.

DAVIES JA: Thank you. What do you say, Mr Flint?

MR FLINT: Your Honours, we've succeeded on one issue, could I submit - could we submit one-third of the cost of the appeal.

DAVIES JA: One-third of the cost?

MR FLINT: Yes.

DAVIES JA: That's what you're asking for, all right.

We will award the appellant one-third of its taxed costs of the appeal. Thank you.
