IN THE SUPREME COURT OF QUEENSLAND No. 1909 of 1979

CIVIL JURISDICTION

BEFORE MR. JUSTICE CONNOLLY

BRISBANE, 1 MAY 1980

BETWEEN:

JOHN MALVERN WALSH Plaintiff

- and -

RUSSELL GEORGE CARRIER First Defendant

- and -

MARTIN EDWARD HARMSWORTH Second Defendant

JUDGMENT

HIS HONOUR: I have come to the conclusion in this case that the defendant was guilty of negligence and that the plaintiff was not guilty of contributory negligence. I assess the damages including an interest component, which I have limited, in the total sum of $28,949. There will be judgment for the plaintiff for that sum.

I order that the moneys in court with accretions if any be paid out to the solicitors for the plaintiff in part satisfaction of the judgment.

I order that the plaintiff's costs of the action including reserved costs, if any, be taxed and paid by the defendants.

I publish the reasons for my judgment.

IN THE SUPREME COURT OF QUEENSLAND No. 1909 of 1979

BETWEEN

JOHN MALVERN WALSH Plaintiff

AND

RUSSELL GEORGE CARRIER First Defendant

AND

MARTIN EDWARD UARMSWORTH Second Defendant

JUDGMENT - CONNOLLY J.

At about 11 a.m. on 23rd December 1973 the defendant Carrier was driving a Leyland motor car in an easterly direction on Coleman Street, Leichhardt, a suburb of Ipswich in the direction of its intersection with Denman Street which runs north and south. There are give way signs at this intersection against the traffic approaching it in Coleman Street both from the east and the west. The plaintiff was driving a Holden motor car on Denman. Street in a northerly direction. It was a dry clear day. His visibility to the right was obscured by a tree and he concentrated his attention in this direction. When he was approximately 20 feet from the near kerb side of Coleman Street he saw the defendant approaching from his left approximately 50 feet back from the Denman Street kerb. The plaintiff was driving at 35 miles per hour. The defendant drove straight through the give way sign in front of the plaintiff's vehicle which collided with him at about the off-side rear door. The defendant conceded to the investigating police officer after the collision that he had not seen the plaintiff's vehicle. It is conceded that the defendant should be found guilty of negligence but it is claimed that a case of contributory negligence is made out against the plaintiff on the footing that he should have kept a better lookout to his left and driven more slowly. The visibility to the left in accordance with the plaintiff's direction of

travel was not particularly good and, as I have said, there was a problem to his right also. No doubt this is why the give way signs are located against the Coleman Street traffic. The plaintiff was driving at a speed permitted by the traffic regulations. His primary obligation, despite the existence of the give way sign was to yield to traffic from his right. He is not to be found guilty of contributory negligence for concentrating his attention in that direction. Nor am I prepared to find his speed excessive in the circumstances. Thirty-five miles an hour is the speed limit in a built-up area but it is common knowledge that the speed is frequently exceeded. The traffic layout at this intersection is designed obviously to facilitate the movement of the traffic in Denman Street. I am not prepared to make a finding of contributory negligence against the plaintiff.

The plaintiff was born on 15th August 1937 so that he is now 42½ years of age. He qualified as a wood machinist but in 1959 enlisted in the Australian Regular Army as an infantryman.

The plaintiff did not lose consciousness as a result of the collision and initially had no symptons. However a day or so later he developed pain in the mid portion of the neck associated with a severe headache in the occipital area of the skull. X-rays did not reveal bony injury or any abnormality. There is now some indication of mild degenerative change between the fifth and sixth cervical vertebrae. The consensus of orthopaedic opinion is that he sustained a soft tissue injury to the musculo ligamentous supporting structures of the neck and possibly to a lower extent to the mid lumbar spine. He had various forms of treatment including a collar which he were on and off for quite some time, physiotherapy in the form of short wave diathermy and traction and in March 1975 was manipulated under anaesthetic. He had injections of portico steroids into the tender area of the back. The most serious surgical procedures he has undergone were three separate occipital neurectomies on 27th January 1976, 28th April 1977 and 13th February 1978. He seems to have been responding reasonably well to his treatment until in May 1976 he hit a bump while

driving a vehicle and the jar appears to have precipitated a recurrence of his headaches, backaches and pain in the neck. His head had struck the roof of the cabin as a result of the bump. He was given a further course of physiotherapy which seems to have improved him in the short term but he has settled into a situation in which he constantly feels tense and nervous and feels pain in the back and neck after prolonged activity such as driving. Views about his present situation differ slightly. Dr. Cleminson was of the view as long ago as October 1976 that the injury he sustained in 1973 produced a minor physical change but a relatively major psychological change. There is I think a general view that the pending litigation has contributed to his nervous tension and that there are prospects of substantial improvement once it is concluded. At the time of the accident he held the rank of Staff Sergeant. He was subsequently promoted to the temporary rank of Warrant Officer Class 2 but was never confirmed in that rank. His performance in the service deteriorated to the extent that he was about to be reverted to his substantive rank of Staff Sergeant and to avoid this he elected to take his discharge in 1979. During the last year he seems to have been in a state of constant depression. His wife says that she wakes in the morning to see him sitting on the end of his bed in tears and that he is moody with the children and exhibits an inability to control his temper. He is conscious that he drinks more than he should and he does not mix well with others. She feels that his situation is deteriorating. He has had financial worries since leaving the service and starting a business which has lost money.

Dr. Cleminson's final assessment of the plaintiff is that there is little physical, evidence of any serious degree of cervical spondylosis in that he still has a reasonable range of cervical spine movement. He has however extensive and widespread tenderness throughout the neck and shoulder region, persistent low back pain and a pallesthesia in the occipital region of the skull. Dr. Cleminson attributes his present-physical symptoms fully to the motor vehicle accident. However he regards his major disability as undoubtedly being his

psychological one. He points out that the one interacts with the other.

He is presently employed, on probation, as an occupational technical teacher at the Ithaca College of Technical Education. If he holds this appointment his change of occupation from the service to civilian life will not, it is conceded, involve any appreciable loss of earnings. However the principal gave evidence and it is clear that concern is already felt about his personality and ability to relate to fellow teachers and no doubt to students.

The defendant would seek to minimise his damages on a number of grounds. First, it is said that for reasons which I shall have to examine he was in December 1973 already a vulnerable personality who was likely to succumb to neurotic illness under moderate to severe stress. Second, attention is drawn to, an incident in April 1975 when a vehicle of which he was in charge, with a junior soldier at the wheel, fatally injured a pedestrian. It would seem that both the driver and he were under the influence of liquor and he was severely reprimanded for his part in this incident. He obviously feels very responsible for it not only in relation to the deceased person but because of the situation of the driver. The view of Dr. Milner was that this episode should be characterized as a severe stress at least in his case so that, the defendant says, his present situation cannot be confidently ascribed solely to the accident of December 1973.

It is I think beyond question that the assessment which has been made of him in the service for many years now as a vulnerable personality is wholly accurate. In a psychiatric report of 4th June 1971 Dr. Richards of Townsville described him as having come up the hard way. His father deserted the family when he was six years of age. His mother was unable to work and care for the three children and they were fostered out. She died of “barbiturate poisoning” at the age of forty-three. The doctor's assessment is that the plaintiff felt he had to succeed by his own efforts and he became efficient in his

chosen trade. He served in Malaya for two years and later had two years with Special Air Service in Perth during which time he did thirty-four jumps. He had always been physically active at least up to 1965 playing football, squash, volley ball and doing lifesaving in the summer. In 1965 he injured his left shoulder playing football as a result of which he had been classified as fit for administrative duties only and was so classified in December 1973.

I think it right to say that he did exhibit a lifestyle of compulsive work and drive. He had had a singularly undervalued childhood and he probably compensated for this by setting himself goals for his personal efficiency which not-only proved difficult to achieve but which, coupled I should think with a lack of sense of humour, brought him into conflict with his peers and his superiors. The defendant however must take him as he finds him. This the defendant does not dispute, but contends rather that by December 1973 it was already apparent that the plaintiff's future in the service was limited and that the nervous disorder from which he obviously suffers at present was really in being when the accident occurred.

While I realise that his vulnerable personality involved the possibility of severe stress precipitating neurotic illness, so that in a sense he was always and possibly always will be at risk, I do not think that the defendant's claim that by December 1973 he had reached his limit in the Army will bear close examination. It is true that on 9th March 1967 the Commanding Officer 3 Training Battalion Singleton considered him unsuitable for promotion to Sergeant. He had then held the rank of Corporal since 13th August 1965. In a confidential report of 31st May 1967 he was in effect reported upon as having an abrasive personality. He was however acknowledged to be quite industrious and trustworthy. His sobriety was not questioned but it was said that on occasions his determination had affected his flexibility. On 20th January 1967 he had applied for transfer to a warmer climate because the cold weather caused him pain and loss of movement of the left shoulder. In that application he

referred to depression and crankiness when suffering with the pain which he associated with his football injury in 1965. It is noteworthy that the Commanding Officer's comments in supporting his application were that his conduct was good, attitude satisfactory and that he had good potential as a regimental duty instructor. It seems to me however that all of this in 1967 should be assessed in the light of the fact that by 13th December 1967 he held the temporary rank, of Sergeant with the Jungle Training Centre and was described by his Commanding Officer as very industrious and determined, always willing to take responsibility and displaying plenty of moral courage. It was noted that his man management was a little arbitrary. He was promoted to Sergeant on 7th February 1968. His next posting seems to have been that of Clerk (Administration) at Headquarters 3 Task Force, North Queensland Area. On 30th July 1971 he was reported as inexperienced as a sergeant clerk and while normally reliable to have a tendency sometimes to be rash in his decisions. His appearance, bearing and conduct were said to be good and it was said that he showed definite potential. On 1st February 1973 he was promoted to Staff Sergeant.

On 17th May 1973 he qualified for promotion to the rank of Warrant Officer Class 2. It is in the light of this history that I. am not prepared to find that, by December 1973 the plaintiff had reached his ceiling in the service or that the adverse opinions upon him expressed early in 1967 can properly lead to the inference that the accident of December 1973 made little change to his personality or prospects. I find that by December 1973 he had learned to cope with the disability to his right shoulder caused by the football injury in 1965. It is plain enough that he had a demanding and somewhat difficult personality which his superiors recognised but that he had compensating qualities which made him a useful N.C.O.

I turn to the fatal accident of May 1975. The plaintiff then held the temporary rank of Warrant Officer Class 2 to which he was promoted on 22nd. August 1974. Immediately before this promotion he was described by the

Commanding Officer 23 Cadet Battalion as displaying enthusiasm, drive and ability as an instructor. Although he was severely reprimanded on 17th April 1975 for his part in the fatal accident by 30th July of that year his Commanding Officer felt able to recommend him for promotion to the substantive rank of Warrant Officer Class 2 describing him as showing keen interest in the training, of cadets and carrying out other allocated duties in a satisfactory manner. Reference was made to his aggressive personality and lack of tact but the assessment was that once he could overcome these problems he would make an excellent Senior N.C.O.

Now in attempting to assess the part played by the fatal accident in 1975 on his present condition it is I think highly significant that in a report of 22nd, April 1975 Dr. Wilton Carter of Ballarat demonstrates that all of the essential features of the plaintiff's present situation had emerged by early 1975.

The plaintiff's subsequent service history can for present purposes be dealt with shortly. He was poied to 9 Battalion Royal Queensland Regiment in July 1975. A report of 4th December of that year described him as having a pleasant sober personality although on occasions he tended to be tactless. It was said that he had shown great vigour in his initial approach to his posting as cadre staff member in Mary borough and it was recommended that he be considered for promotion to substantive Warrant Officer Class 2 in 1976. It was in the next year that his real troubles in the service started. It is apparent that he and his C.M.F. Company Commander did not get on and the report of 6th December 1976 is that he lacks tact and has the ability to get people off side because of that attribute. It was recommended that he serve in a regular unit before he could be assessed for future promotion. His own comments on this recommendation was that the report had been made by officers with whom he had had personality clashes and that it was unfair, unjust and biassed. The Commanding Officer confirmed the recommendation and noted that for some time the plaintiff had believed he was being victimised but that there was no substance in this belief. It is apparent from the file

that the Commanding Officer's views were accepted by the Directorate of Infantry which noted that the plaintiff should receive a formal warning of the likelihood of his being reduced to his substantive rank unless he improved. The Commanding Officer had directed that psychiatric advice be taken. It is clear from Dr. Arden's report of 4th March 1977 that he regarded the personality difficulty with the company commander at Mary borough as real and recommended that he be transferred to Bundaberg. On 25th November 1976 Dr. Parker took the view that something ought to be done about the company commander in question "if Walsh is the fourth Warrant Officer in succession who has had difficulty in coping with him." Dr. Parker made reference to the fact that the plaintiff had made five applications for redress of wrongs. The plaintiff was in fact transferred to Bundaberg but the position as I see it is that once launched on a train of thought in which he saw himself as victimised by his superiors he continued, unhappily, to exhibit the worst of his personality traits until finally, as I indicated much earlier in these reasons, he took his discharge from the service rather than accept the humiliation of being reverted to/his substantive rank. Now it is clear that throughout the period from late December 1973 to the present time he has exhibited much the same symptoms. They appeared to be reducing in seriousness when he sustained the slight blow to the head which precipitated their re-emergence. My personal assessment of him is very similar to that of Dr. Richards of 4th June 1971 when he described him as a genuine fellow of average intelligence who had had a minor depressive episode in the past (namely the effects of the football accident of 1965). At the time of Dr. Richards' report his serious personality disability had not come to the surface but it is clear to me and I so find that they did so almost immediately after the accident of December 1973.

I am now in a position to summarise my findings in relation to this long and complicated story.

(a) I find that the plaintiff had at all relevant times a vulnerable personality such as to

predispose him to neurotic illness if subjected to an appropriate degree of stress.

(b) In 1965 he suffered a football injury which resulted in pain and loss of movement of the right shoulder. I find that in the short term this led to a depressive state but he had recovered himself by December 1973.

(c) I find that the collision of 23rd December 1973 resulted in soft tissue damage and possibly some trauma to one of the disc spaces (see Dr. Dewar's report of 31 January 1974). The initial symptoms of pain, discomfort and limitation of movement were natural consequences of this damage but they should long since have subsided. Unfortunately the vulnerable nature of his personality, which had already been subjected to stress in 1965, was such that a severe neurosis developed.

(d) I accept the evidence of Dr. Milner that the symptoms of headache, depression and irritability induced, by the injuries of December 1973 (coupled with his underlying personality) caused the plaintiff to "over learn a generally neurotic pattern of behaviour"; and that this unfortunate and unhappy condition was, in effect, "kicked along" by the fatal accident of 1975.

(e) I find that the injuries sustained on 23rd December 1973 as a result of the negligence of the defendant acted on the underlying personality of the plaintiff to produce a severe anxiety neurosis from which he still suffers. I find that the causal effect of the injuries he sustained in December 1973 was not superseded by the fatal accident of 1975.

(f) I accept the view that there may be an element of compensation neurosis in his present situation. I also accept the view that his situation may be expected to improve as soon as this litigation is seen to be concluded. I accept the opinions which have been expressed that his long term prognosis

should be good but it is apparent that, as Dr. Milner puts it, his management had generally been surgically excessive and psychiatrically inadequate. His best hope, once this litigation is concluded, of being put on the right road is to have fairly intensive psychiatric treatment of the right sort over a period of two to three months. Dr. Milner says that, he should be hospitalised for throe weeks with vigorous outpatient follow-up which would include two to three hours per week of psychiatric treatment and up to five hours per week of physiotherapy. I accept this evidence.

(g) I am of opinion that but for the unfortunate consequences of the accident his personality disorder would not have led to his retiring without reaching the substantive rank of Warrant Officer Class 2. The consequence of this is that he received a lump sum retirement benefit $1342.60 less than he would have done had he retired at the same time in the substantive rank of Warrant Officer Class 2. In addition he has suffered a loss of $5.62 per week in his retirement pay. The latter loss over say twenty years capitalised on the 8 percent table is of the order of $2,500.

His psychiatric treatment will involve him in something of the order of three months loss of wages, his present annual rate being $12,724. The cost of the follow-up psychiatric treatment is something of the order of $60 per hour and the physiotherapy will cost $18 to $20 per hour. Thus a modest assessment of the cost of his follow-up treatment must approximate $2,000 to which must be added the cost of his three weeks hospitalisation. His special damages are admitted in the sum of $1,949. In addition he has had six and a half years of misery, considerable loss of self-esteem (important to any human being but particularly so to one who by reason of a deprived childhood felt a special need for achievement) and above all, while I have found that the prognosis is good, there is the possibility, of which account must be taken in assessing damages that, contrary to the best medical opinion he will not in fact make a good recovery.

Taking all these factors into account I assess his general damages at “25,000.

It is right that I indicate the law which I have sought to apply in relation both to his predisposition to neurotic illness and to the effects if any of the fatal accident of 1975. It is trite law that the defendant must take the plaintiff as he finds him. See e.g. Bourhill v. Young (1943) A.C. 92 at p. 109 per Lord Wright. This principle was not affected by The Wagon Mound (No. 1) (1961) A.C. 388. See Smith v. Leech Brain and Co. Ltd. (1962) 2 Q.B. 405 at p. 414 per Lord Parker C.J. but of course, the peculiar susceptibility of the plaintiff which leads to the defendant's liability may also have the effect of mitigating his damages if those resultant damages were in any event a probable occurrence. See e.g. Fleming on Torts (5th Edition) at p. 191. The question is whether, on the evidence, the conclusion should be reached that the plaintiff would probably have developed a neurotic illness at some relevant time. I am unable to make this finding. It is true that Dr. Milner whose evidence I have found generally helpful, did describe the degree of stress which was likely to lead to this result as moderate to severe and that he also expressed the opinion that the fatal accident of 1975 would have been a severe stress for the plaintiff. But with all respect to Dr. Milner it is after all only speculation to say that that accident coupled with his sense of responsibility for it was likely to precipitate a naurosis. What is demonstrated is that an accident in which he himself was physically injured did precipitate a neurosis.

The ultimate burden of proof is upon the plaintiff. See Purkess v. Crittenden (1965) 114 C.L.R. 164. It was for the defendant to introduce evidence, whether by cross-examination or in his own case to establish with some reasonable measure of precision not only the plaintiff's pre-existing condition (a fact upon which of course he himself relies), but as to the probability of its leading to a disabling neurosis independently of the defendant's negligence; ibid at p. 168. The form the plaintiff's neurosis takes lies as I understand it in a neurotic belief in the persistence and seriousness of

symptoms which derive from the negligence of the defendant. This condition as I have said above was in existence when the accident occurred in 1975. The case does not therefore, resemble Edwards v. Hourigan (1968) Qd.R. 202 in which symptoms of the plaintiff's nervous disorder do not appear to have materialised before the subsequent event (the death of her husband) and where that event could be characterized as a new and independent cause of increase in or aggravation of the plaintiff's vulnerability. See at p. 209 per Matthews J. In the result, I am by no means satisfied either that the fatal accident of 1975 would probably have precipitated the plaintiff's neurosis if it had not already existed or, if it be in some way a co-operating cause of or aggravation of his present condition what part it plays. In such a situation the observations of Dixon C.J. in Watts v. Rake (1960) 108 C.L.R. 158 at p. 160 continue, in my respectful opinion, to be relevant. It is the defendant who should be required to do the disentangling. Cf. Purkess v. Crittenden (supra) at p. 171 per Windeyer J.

There is a claim for interest which I approach on the following basis. I apportion the plaintiff's general damages over and above the particular items which I have mentioned approximately equally between the period up to trial and the future. This is because up to trial he has had as I indicated a miserable time while the uncertainties of the future form a substantial component of the balance of his general damages. His diminished lump sum on retirement and a small amount by way of reduced pension payments have accrued and I treat his special damages as having accrued progressively since December 1973. On the other hand this action has been pending either in the District Court or this Court for far too long and no explanation of that fact was really offered. While the licensed insurer was served in 1975 the defendant Carrier was not served until 1977. I propose therefore to allow interest from 1977 at 8 percent on the proportion of both general and special damages which I estimate to have accrued by then. I shall allow one year's interest on $1,350 being his reduced retirement benefit and interest at 4 percent on the

balance of the general and special damages for three years. This approach leads to a figure which I round out at $2,000. There will therefore be judgment for the plaintiff for $28,949.