IN THE SUPREME COURT OF QUEENSLAND No. 1972 of 1977

CIVIL JURISDICTION

BEFORE MR. JUSTICE THOMAS

BRISBANE, 23 MARCH 1982

BETWEEN:

RONALD JAMES PETERSEN Plaintiff

- and -

ALLAN JOHN PLANT Defendant

JUDGMENT

HIS HONOUR: The plaintiff was involved in a motor accident on 11 June 1975. Early that morning at about 6.45 he was driving his motor vehicle in a southerly direction along Raceview Street towards its intersection with Hayes Street. The intersection is a T-junction and there was stationary traffic upon the plaintiff's right. The first of the vehicles in Hayes Street was being driven by Mr. Diflo and the plaintiff stopped to give right of way to him. Mr. Diflo proceeded out and had almost straightened up in Raceview Street when the plaintiff's vehicle was collided with by the defendant from the rear.

I accept the evidence of two independent witnesses, Mr. Diflo and Mr. Kelly, who was driving a vehicle immediately behind Mr. Diflo. The plaintiff stopped, on all accounts, a significant time before the defendant ran into

his rear. The defendant left skid marks of approximately 15 yards.

The defendant gave an account which has the plaintiff overtaking him at a late stage and suddenly propping in front of him. However, I reject his version as it bears no relationship to anything that anyone else saw on that occasion.

There was some mention of fog and indeed I find that some fog was present on that morning but not to any significant extent. Perhaps it is an excuse upon which the defendant driver has seized. In any event, I do not think it would be relevant as an exculpatory factor in circumstances such as the present.

I therefore find that the accident was caused by the negligence of the defendant and that the plaintiff was not guilty of contributory negligence.

When the plaintiff was injured on the occasion just described (on 11 June 1975) he was 22 years old. He had married a year previously. His first child had been born about one month before this accident. He was, and still is, employed as a maintenance fitter and turner in the mining industry. He is employed by Newhope Collieries. He works underground and on night shift.

Two years before his motor vehicle accident he suffered a significant injury to his left knee playing football. The injury occurred in May 1975 and he had an operation for it in the following August. As a result, he was off work for three and a half months. The football injury involved damage to his medial ligament and this was repaired by Dr. Walters, an orthopaedic specialist practising in the Ipswich district. During operation, the anterior cruciate ligament was also seen to be torn but no repair was attempted and it was left in that condition.

The plaintiff made a good recovery and returned to work. He also started to engage in sports once again. He

started playing squash on a reasonably regular basis with workmates who played the game socially. He also commenced training with a football group although he had no real intention of playing competitive football again. It was in this state of affairs that the motor vehicle accident happened in the middle of 1975.

One of the major difficulties in the present case is to isolate the effect which the motor vehicle accident has had upon his left leg. It came into contact with the dashboard during the accident and the plaintiff's leg also seems to have been twisted, having been held by one of the pedals.

Three orthopaedic specialists' opinions are in evidence, two of them having been called, and the third, Dr. Maguire, having presented a report. The operation on the plaintiff's knee after the motor vehicle accident was also performed by Dr. Walters. Thus, both operations were performed by that doctor. During the second operation, a torn lateral meniscus was excised, and some remains of his anterior cruciate ligament were excised.

The evidence given in Dr. Walters' reports was to the effect that the plaintiff now has a permanent disability in the use of his left leg of the order of 25 per cent and that about two thirds of that disability is attributable to the motor accident. During cross-examination, he admitted that the pre-existing condition would have left the plaintiff with disabilities of a permanent nature whether or not the motor vehicle accident had supervened. He expressed the opinion that without the motor vehicle accident his present disability would be of the order of 15 per cent. That, of course, is inconsistent with the earlier estimate that he made.

Dr. Lahz, who was called for the defendant, took a much more optimistic view of the present and future condition of the plaintiff's leg. He said that it represents a 15 per cent permanent disability. He also said

that at the very most, 5 pen cent of that assessment would be attributable to the motor accident.

Subsequently, the report from Dr. Maguire was tendered, in which Dr. Maguire expressed the opinion that the permanent disability of the leg is 20 per cent and that one half, that is 10 per cent, is attributable to the motor accident.

Although Dr. Walters had quite obvious advantages in assessing the relative parts that the respective injuries played in the overall disability, I think that his estimate of 25 per cent was arrived at in an unusual way and is perhaps on the high side. Although, on the whole, I prefer his account of the sequence of events and of the facts that were found at operation, I do give some effect to Dr. Lahz's view as to the extent of permanent disability.

Holding those provisional views, it was of some comfort to me when Dr. Maguire's report was tendered. Of course, percentages are only rough guides in any event. The view that I take is that the plaintiff now has a permanent disability of the order of 20 per cent of the left leg and that roughly half of that disability is attributable to his motor vehicle accident. Putting it another way, he would have had a 10 per cent disability of the leg in any event, but it has now been increased to a 20 per cent disability which is, of course, a more significant disability.

The question of future economic loss has been raised. This plaintiff has a very high earning capacity. His present earnings are $741 gross or approximately $465 nett per week. He is a hard worker and regularly works Saturdays and sometimes Sundays as well. It would follow that even a short curtailment of his working life would sound fairly heavily in damages.

The plaintiff fears that he may be driven to give up underground work, in which case he would do workshop work for his present employer. In that event, his earnings would be about $550 gross or about $360 nett per week. The

plaintiff's counsel's calculations are that his nett weekly loss in that event would be $103.

However, whilst such a change of employment is a possibility, I think it is a relatively remote one, having regard to the degree of disability with which I am concerned in this case, and having particular regard to the limited degree of disability for which the motor vehicle accident is responsible. The plaintiff is a good worker with a good work record and has constantly taken all the overtime available to him right up to the present time. I do not think that his injuries have yet come close to menacing his present mode of employment.

This brings me to the question of possible deterioration and the related question of a possible operation which has been mentioned to the plaintiff. Dr. Walters detected some clicking and some crepitus in the knee joint. He expressed the opinion that osteoarthritis could develop in the future. If it did, it is possible that the plaintiff would suffer a curtailment of his working life.

Dr. Lahz, who examined the plaintiff twice, did not elicit any signs of arthritis or crepitus or clicking. Dr. Maguire, who examined him once, said that no significant osteoarthritic changes were present. His examination took place in 1978.

I am therefore left with a conflict of medical opinion in this respect. Dr. Walters thought that significant arthritic changes could occur in the next 10 or 15 years. Before expressing my finding on this difficult question, I think I should advert to the question of the operation that has been suggested. The operation would be for what has been called the advancement of the medial ligaments and capsule of the knee. It would obviously be designed to increase the stability of the knee joint, which appears to be the principal cause of problems of which the plaintiff complains.

No firm decision has yet been made as to whether the plaintiff will undergo the operation, but I accept that he is keen to have his knee improved, and that if medical advice is that the chances of improvement are reasonable, he will undergo such an operation. If he does undergo it, then the probabilities are that there will be some improvement in the knee and this, in turn, would be an advantage to the plaintiff, both for his future employment and for the overall use of the limb. The medical evidence was not directed to the question whether a future operation would minimise the prospects of arthritic degeneration. I can only assume, as a matter of common sense, that if the laxity is improved and if the trauma and pain which result when the knee gives way in its present state are avoided, then the prospects of further deterioration would be somewhat more remote. Hence I regard these two factors as being related to one another. I think that the prospects of serious degeneration related to the motor vehicle accident are fairly remote.

In the present state of the evidence there is at least an even chance that the plaintiff will have such an operation. His economic loss, if he does so, will be about $5,200 from loss of earnings during his necessary absence from work. The evidence is that the operation can be obtained without private payment. The plaintiff was not asked whether he would elect to go to a private hospital and, accordingly, I am not able to make any further allowance for the cost of that operation. Having regard to the degree of speculation involved in this issue, I indicate that I have allowed $3,000 in my assessment of future economic loss for this factor.

Overall I have reached the view that the plaintiff's future working life is not likely to be substantially impaired by the consequence of his motor vehicle accident, although I think that he has established an entitlement to some allowance for the possibility that it may be abbreviated to a small extent towards the end of his projected working life.

In practical terms, the plaintiff has the following problems with his knee: he has trouble squatting; kneeling is painful and difficult; he finds it awkward working in right places he finds it difficult to jump down from machines; the knee frequently gives way and quite commonly causes him to lose his balance or fall; rough surfaces are particularly difficult for him to negotiate; he can now run but he cannot twist or change course effectively; he has given up all sport. However, I think that it is likely that at this time in his life he would have considered doing so whether or not he had suffered the motor vehicle accident. I think his present circumstance must be affected in a significant manner by the fact that he has three young children. His coping with his work is not a pain-free matter and, quite frequently, his wife rubs him with Dencorub after a night's work. Most of the symptoms which I have listed are consistent with the present condition of laxity in the knee joint which is of ligamentous origin. However, it should be noted that the kneeling problem is associated with a soreness and a numbness which appears to be entirely the result of the second operation.

I think I have now covered areas where resolution has been required of conflict in the evidence, or with respect to which counsel were at issue. The assessment of damages which I make is an award of general damages of $18,000 of which $7,500 may be regarded as attributable to loss of amenities of life and compensation for pain and suffering.

His loss of earnings prior to trial is agreed to have been $2,188. I consider that such loss of earnings was a direct result of the motor vehicle accident. Medical expenses total $586.27. He lost tax from workers' compensation payment and will have to refund the gross sum. Accordingly, his loss for what is now known as the Fox v. Wood factor is $823.24.

Mr. Myers for the defendant mounted an interesting argument to the effect that this should not he assessed as part of the plaintiff's damages. He distinguishes the High

Court decision of Fox v. Wood, 55 Australian Law Journal Reports, 562, on the basis that the plaintiff has a legal entitlement to a refund of such money from the Taxation Commissioner. He submits that the point was not argued before the High Court in Fox v. Wood. He submits that the plaintiff, at the very least, has a right to apply for a reassessment. In the present state of authorities and of the Income Tax Assessment Act, I am by no means satisfied that the plaintiff has a legal right to recover such sum from the Commissioner. It would be very difficult for me to value his right to apply for a reassessment having regard to the fact that the plaintiff may need to venture his own money to litigate such a claim against the Commissioner. Accordingly, at this stage I intend to take what I think is the conventional approach and allow the plaintiff the claimed amount for this factor, noting at the same time Mr. Myers' submissions in that regard.

This leaves only the question of interest. Mr. Lyons, for the plaintiff, referred to section 5 of the Common Law Practice Act as amended in 1981. He submitted that notwithstanding that section, the plaintiff was still entitled to a further component of damages to be assessed on the Cullen v. Trappell principle. He submitted that if that principle is applied then in the result the tables to be applied in assessing future economic loss should be the 3 per cent tables in lieu of the 5 per cent tables. However, in my opinion, section 5 declares what the compensation is to be, and it declares it is to be calculated on the 5 per crent table. In other words, I take the view that the legislation had in mind not only the Barrell Insurance case but also Cullen v. Trappell when it enacted the Common Law Practice Act Amendment Act of 1981. There is presently no authoritive decision interpreting that section. Accordingly, it is appropriate that I indicate the basis upon which I have made my assessment so that the plaintiff can have it corrected if my view is held to be wrong.

I allow interest at 8 per cent on one half of the amount I have assessed for loss of amenities of life and pain and suffering. That is to say, I allow 8 per cent of 50 per cent of $7,500 from the date of the accident to the present date. That will be for six and a half years. That sum comes to $1,950.

Although there is little logic in applying different periods and rates of interest to different items, it seems that in practice the period and rate of interest on pre-trial economic loss often differs from the interest to be allowed on the loss of amenities component which I have just dealt with. There is a difficulty in relation to interest of pre-trial economic loss in the present case. The only item to which Mr. Lyons, counsel for the plaintiff, submitted such interest should apply was the Fox v. Wood factor. This was opposed by Mr. Myers for the defendant. It seems to me that the moneys I have awarded as the Fox v. Wood factor do represent a true loss on the part of the plaintiff. It also seems to me that the loss occurred when the deduction of those moneys as tax deprived him of receipts in the nature of workers' compensation payments. The workers' compensation payments were to be received as a benefit whilst he was disabled from earning his salary and, accordingly, I think that this particular loss is an appropriate one to be reckoned for purposes of interest.

On this issue I award the plaintiff 5 per cent on $900, the rounded-off figure for four and a half years. In other words, I am awarding the plaintiff one half of 10 per lent for the period from the date of the writ to today on $900. This comes to $202.50.

The total of the sums awarded is $23,850.01. From that sum there must be deducted $2,989.60 for repayment to the Workers' Compensation Board. Accordingly, I give judgment for the plaintiff for $20,860.41 with costs to be taxed.

I order that the moneys paid into Court together with accretions, if any, he paid out to the solicitors for the defendant.
