IN THE SUPREME COURT OF QUEENSLAND No. 36 of 1983

CIVIL JURISDICTION

BEFORE MR JUSTICE SHEPHERDSON

TOWNSVILLE, 26 MARCH 1985

BETWEEN:

YVONNE MARGARET SCOTT Plaintiff

-and-

MARION COSSBURN Defendant

JUDGMENT

HIS HONOUR: The plaintiff who was born on 5 March 1943 was injured in a motor vehicle accident on 31 March 1981. Liability is not in issue and my task is limited to assessing the plaintiff's damages.

The plaintiff alleges that in the accident she sustained personal injuries including “a central lumbar disc prolapse and a whiplash injury”.

The plaintiff was not treated at a hospital. Nest day she attended Dr. R.R.D. Watson, a medical practitioner in Townsville whose special interest is musculo-skeletal medicine and spinally derived pain. The plaintiff had earlier been treated by Dr. Watson and I shall say more of this shortly.

Dr.Watson wrote five medical reports, all of which were tendered in evidence by consent. He also gave oral evidence and was the only doctor called as a witness. I also had a report before me dated 13 August 1984 from

Dr.Gavin Douglas, an orthopaedic surgeon, given after examining the plaintiff on 3 August 1984 and two reports dated 27 October 1984 and 20 November 1984 from Dr. Wilfred Richards, a psychiatrist.

Part of the plaintiff' evidence was an eight page typewritten document called a quantum statement (Exhibit 17) signed by her on 25 March 1985, the date of the trial.

The plaintiff was the driver of a stationary vehicle struck by another vehicle. She said that after alighting from her vehicle at the accident scene she felt a tingling sensation straight down her legs. As I have already mentioned the plaintiff consulted Dr.Watson the next day. After conservative management, including wearing a collar and a trial of Commonwealth Rehabilitation, pain in the back persisted. Dr. Watson referred the plaintiff to Brisbane for a C.A.T. scan which was done in October 1982. This scan showed a large L5/S1 central disc protrusion.

Dr. Watson referred her to a Dr.Rossato, a Townsville neurosurgeon. Dr. Rossato arranged myelograms. Apparently a lumbar myelogram was performed in January 1983 and a cervical myelogram was performed in February 1983. I say “apparently” because no medical evidence to prove these dates was led. I had only the plaintiff's evidence on these matters.

In June 1983 Dr. Rossato operated on the plaintiff and surgically fused C5-6. In October 1983 a cervical functional X-ray showed sound fusion had occurred. This did not relieve all the plaintiff's back pain although I am satisfied it did give her some relief of neck pain for about six months. Dr. Rossato did not give any evidence, nor did he furnish a report. What he found at surgery in June 1983 one does not know although Dr. Watson swore that the plaintiff had suffered a disc protrusion.

Low back pain persisted and in June 1984 Dr. Rossato performed a lumbar laminectomy at L5/S1, the site of a proven disc protrusion. The plaintiff obtained some pain

relief. Some wasting of musculature on one hip also ceased and her leg became stronger.

In addition to the above surgery the plaintiff also underwent on two occasions a manipulation of her cervical spina, Dr. Watson did each manipulation while she was under a general anaesthetic.

The plaintiff claimed she has continued to suffer pain in her cervical spine and in her lumbar spine. She says she has some restrictions of her head movements and that these restrictions are due to pain. The plaintiff claims she is rarely without pain. She ingests analgesics and other drugs including Omnopon and Pethidine.

I am satisfied on the evidence that the lumbo-sacral injury was caused in the 1981 motor vehicle accident.

The defence has submitted that the plaintiff has not discharged her burden of proving that the cervical spine injury was caused in the same accident. It bases its submissions on a number of matters, the chief of which are Dr. Watson's treatment of the plaintiff before the accident and the plaintiff's credibility.

I find that the plaintiff and her family came to live in Townsville in 1977 and that on 11 October 1978 she first consulted Dr.Watson having been referred to him by Dr. Peter Doyle, a Townsville general practitioner. I find that the plaintiff had consulted Dr.Doyle because she had been troubled by fairly severe and persistent pain in the neck and had not responded to any form of therapy Dr.Doyle could give and therefore Dr.Doyle sought Dr.Watson's opinion.

I find too that when the plaintiff first saw Dr.Watson she told him that she had intermittent neck pain associated with headaches, that she had sustained a, whiplash injury some five and a half years earlier in a motor vehicle accident and that the symptoms were regularly precipitated by vacuuming and had become more severe over the previous year following an attack of flu.

At this stage I should say that during cross-examination when first asked what caused her to have neck problems after she came to Townsville, the plaintiff gave a number of reasons none of which referred to the motor vehicle accident which, it transpired, occurred in Victoria. These reasons included lifting articles while at work and while helping her husband work at building their home. The plaintiff specifically said that she just told Dr. Watson when she first saw him that she had a stiff shoulder and neck.

After Dr.Watson had given his evidence the plaintiff was recalled for cross-examination and conceded that in about 1973 she had suffered a whiplash injury to her neck in a motor vehicle accident. She claimed that then she had seen an orthopaedic specialist in Melbourne once or twice and that the neck problem had cleared up. She admitted too that in Melbourne she had had physiotherapy for her neck but did not think it would have lasted for months. According to Dr.Watson the plaintiff told him this physiotherapy took place over “quite a prolonged period, some months.”

I found the plaintiff less than frank on this aspect of what caused her to have neck problems after she came to live in Townsville in 1977. I do not believe that when first cross-examined, her failure to recall the 1973 accident and the whiplash injury was due to poor memory. The plaintiff impressed me as a mentally alert person and her lack of candour in the matter I have discussed and its effect on her credibility have caused me to doubt her evidence as to the level and frequency of pain which she describes herself as suffering. I accept Dr. Watson's view that pain is subjective and in consequence my assessment of the plaintiff's credibility plays quite an important part in the assessment of damages in this case.

When the plaintiff first consulted Dr Watson he manipulated her neck and she obtained instant relief. Thereafter the plaintiff was, I find, asymptomatic in her neck until 5/2/79 when she again attended Dr Watson with a complaint of five days of headache but no specific neck pain. Dr Watson manipulated her neck on that visit.

On 24 May 1979 and 8 August 1979 the plaintiff again saw Dr. Watson for manipulation of her neck. On each of these two visits the plaintiff's complaints included neck pain and headache.

On 29 August 1979 Dr Watson reviewed the plaintiff who said that within two days of the previous manipulation she had complete relief of her symptoms.

The plaintiff next attended Dr Watson on 21 January 1981 and complained of approximately one month of increasing neck trouble following a fall on to her outstretched right arm, Dr Watson again manipulated her neck and did not, as I so find, see the plaintiff again until she went to see him on the day following the motor vehicle accident, the subject of this action.

I thought it significant that the plaintiff believed that in that accident the tingling sensation straight down her legs which she said she felt straight after the event was related to her back. Otherwise, why see Dr Watson, the doctor who specialised in spinally related pain and who just over two years earlier she had told of the 1973 motor vehicle accident and the whiplash then suffered?

I am satisfied after hearing Dr Watson that immediately before the 1981 accident the plaintiff had some degree of permanent damage to her cervical spine and was more predisposed suffer increased neck pains as the result of any trauma, affecting her bale than would have been the case of a person who had not before suffered neck pain.

There was no evidence of X-rays to disclose the state of the plaintiff's cervical spine prior to the 1981 accident and so I. have concluded that in that accident the plaintiff did suffer an injury to her cervical spine. Although, as I have said, she then had some degree of permanent damage to her cervical spine, the defendant who bears the disentangling onus has not satisfied me on the evidence with any reasonable measure of precision what “the future effects both as to their nature and their future development and progress were likely to be”

(Purkess v. Crittenden (1965) 114 C.L.R. 164 at page 168).

The most that can be said is that the plaintiff was at greater risk to neck trauma than other community members having no prior history of neck pain and further that given her prior history of neck pain and visits to Dr.Watson she would probably have suffered intermittent neck pain throughout the balance of her life. Thus, as it seems to me, some small part of the pain suffered in the cervical spine is due to causes other than the 1981 accident and this aspect I take into account in my assessment for pain, suffering and loss of amenities of life both past and future and other components of damage.

I should add that Dr.Watson in his latest report (22/3/85, Exhibit 5) has spoken of the possibility of further surgery to the plaintiff's cervical spine because of suggested pathology at C6/7 level. The evidence does not disclose a probability - only what Dr.Watsdon calls “a distinct possibility”. I felt Dr. Watson was guarded in his opinion as to this pathology partly because of lack of information from Dr. Rossat who had performed the surgical fusion of C5-6 and who Dr. Watson thought could reasonably have fused C6-7 at the same time had that been needed.

In addition to complaints of back pain the plaintiff has suffered headaches and these appear to start in her neck area.

The plaintiff has numerous complaints of inability to do certain housework, e.g. sewing and other tasks involving bending and restrictions in various areas, e.g. hanging out washing. Other matters are mentioned in her quantum statement and I do not repeat them all here.

While I am satisfied that generally speaking these complaints have substance, I am satisfied too from Dr. Richard's report that the plaintiff does suffer psychogenic accentuation of organically determined pain and incapacity. I am also of the view that Dr. Richards is correct when he says that following this litigation, there should be some improvement in the plaintiff's

general anxieties and somatic complaints and disabilities. So I find that the plaintiff's future will not be as bleak as she presently believes it will be.

The plaintiff has sworn to the need to engage the services of a cleaning lady and an ironing lady since the accident. The cleaning lady has regularly come once a week for four hours and the ironing lady once a week on the same day for two hours. The plaintiff's evidence is that the estimated cost during the first 12 months was $1,440. Thereafter the hourly rate increased. The weekly cost is now $34. The plaintiff's estimate of cost since then is $4,896 and thus the total estimate of these costs is $6,336. The plaintiff claims she will need to continue to employ this domestic help for the rest of her life. Although no evidence was led as to her life expectancy, the plaintiff's counsel has referred me to certain statistical tables from which he says she has a life expectancy of 35 years.

The plaintiff's husband is a 50 year old boiler attendant working at the Townsville General Hospital. He does shift work. Living at home with the plaintiff and her husband are their 20 year old daughter, who attends James Cook University, and a 16 year old son and 13 year old son both still at school. The children give some household assistance, and I am not persuaded that that assistance should sound in damages. It is the sort one would expect to find in any family, let alone one with an injured mother.

I consider that with Dr. Richards expected improvement in the plaintiff's condition, the provision of six hours per week household assistance will prove excessive. Furthermore, as the years go by and the children leave home, the size of the household will diminish. It is, in my view, unlikely that the plaintiff will continue to need six hours per week for the rest of her life.

One end of the range of the present value of the future cost of household help is based on a present outlay of $34 a week for 35 years. Using the five per cent tables, that present value is $29,784. What the

other end is, one can only guess at. I must assess a sum which is fair compensation to this plaintiff. I propose to allow under this head $24,000 for the cost of future household help.

The plaintiff also claims for the cost of variety of pain-killers which she now takes as a result of the accident. The weekly cost is some $2 and again using the five per cent tables, the present value of that recurring weekly expense for 35 years is $1,752. I propose to allow $1,500 on this head.

To return to the component for pain, suffering and loss of amenities, the plaintiff complains that the social life of her and her husband has become more restricted since the accident and is now virtually non-existent. She claims that she and her husband no longer go out socially because of her continual pain. Because of my views about the plaintiff's credibility, I do not accept this claim in its entirety and I find that with expected improvement in the plaintiff once this litigation is over, her former social life will return, although probably not entirely. I add that there is no complaint of any impairment of the plaintiff's relations with her husband.

I recognise that the component for pain, suffering and loss of amenities both past and future must in this case reflect what this plaintiff has suffered in the past and will suffer in the future. She has had two major operations and two manipulations under general anaesthetic as well as two myelograms. The plaintiff also has two surgical scars. There is a vertical one in her lower back and one on the side of her neck. The latter is visible at close quarters and noticeable for about three inches of its length. It is a fine white line.

I turn now to the plaintiff's claim based on impairment of earning capacity. I find that since coming to Townsville in 1977 and until the March 1981 accident, the plaintiff worked full-time for two Townsville chemists - Green and Rawkins until 1979 and Graham Bourke from 3/9/1979. She was employed at the latter chemist as a shop assistant and her gross weekly wage as at 21/3/81

was $214.55, some $27 above the Award for a shop assistant. Her net wage after tax was $169.40.

The plaintiff ceased that employment on 9 April 1981. She was paid weekly compensation by the Workers' Compensation Board up to 4 September 1982. The total of such payments was $10,640.30, and the taxation component in this was $1,551.56.

The plaintiff did not attempt work again until 3 November 1983 when she commenced work as a shop assistant with Fotographics (N.Q.) Pty. Ltd. She did casual work and was paid $7.96 per hour. She continued in this work until 28/4/84 when she left. She then had her second operation. She resumed that employment on 30/8/84 and still works there. Her work place is a small booth in a large shopping centre and her usual hours of work are 5 p.m. to 9p.m. Thursdays and 8.30a.m. till 12 noon Saturdays. Her work is sedentary and light. It involves mainly writing orders on taking films for developing. There are sales of small items allied to photography.

In the Christmas period in each of 1983 and 1984, the plaintiff did extra work for the same employer. In the weeks ending 15/12/84 and 22/12/84, she worked on each of six successive days - a total of 27 and a half hours including eight hours on the Thursday. On 27, 28, 29 and 30 December 1984, she worked a total of 11 and three quarter hours. She worked similar hours in 1983. The plaintiff claimed that this extra work caused her to retire to bed as soon as she got home from work each night and Dr. Watson supported the reasonableness of this claim.

The plaintiff's gross earnings from this casual work up to 16 March 1985 amounted to $3,622.92 - no tax was paid on this.

The plaintiff's counsel put before me an accountant's calculations (Exhibit 16) from which it appears that from 31/3/81 to the date of trial, the plaintiff has lost net, earnings of $38,586. This figure assumes total unemployment in that period. This calculation is based on the Shop Assistant's Award

applicable during that period. Rather surprisingly, it did not take into account the over-award payment of some $27 per week made by her employer, Bourke. Thus, had the plaintiff continued with Bourke during that period, her loss would have been greater and I estimate that in those circumstances, the loss would have been about $42,000.

The $3,622.92 must be set off against this and in view of the plaintiff's pre-existing cervical condition, some further discount should be made. I would allow $36,000 for loss due to impairment of earning capacity to the date of trial.

As for the future, I find on the evidence that the plaintiff will never again be able to work full-time as a shop assistant in a pharmacy or elsewhere. Most of her working life has been in pharmacies and the plaintiff does have some undefined skill with cosmetics.

I do not accept her evidence that she will be unable to work longer hours than she does now. I find that in accordance with Dr. Richard's views, there is likely to be improvement in the plaintiff and this will probably reflect in her ability to work. The plaintiff claims that it is pain which presently restricts her. The extent of that improvement can only be guessed at and I don't propose to try to put any figure on it.

Although the plaintiff says that had she not had the accident she intended to work until aged 65, I do not accept this. Her husband will retire at 65. She is 9 years younger than him and the probabilities are that she will stop work when he retires. Thus, for the future, her maximum working life would have been some 14 years.

If she were totally unemployed during that period, her net weekly loss under the Shop Assistant's Award would be about $210 per week, (See Exhibit 16). The present value of that loss would, on the five per cent tables, be $110,090.

If an over-award component were included so that the net salary were about $228 per week, that sum would be $120,6.12 However, I am satisfied the plaintiff does have

a residual earning capacity and that capacity can and probably will be used more than it is at present. It has been said that mathematical calculations in this area of damages give a disarming appearance of accuracy. I have decided that the best approach to the element of future impairment of earning capacity in this case is the broad brush.

I bear in mind the dictum of the High Court in Graham v. Baker (1961) 106 C.L.R. 340 at p. 347 when it stated —

> "An injured plaintiff recovers not merely because his earning capacity has been diminished, but because the dimunition of his earning capacity is or may be productive of financial loss."

I also take into account the vicissitudes of this plaintiff's life and I allow $50,000 for future impairment of earning capacity.

Special damages are agreed in the sum of $7,537.11. Of this sum $1,630.46 has been paid by the Workers' Compensation Board and is to be refunded by the plaintiff. The balance, namely, $5,906.65 has been spent since 4 September 1982. The parties have agreed interest on this sum at $750. The Workers' Compensation Board has a total claim of $12,270.76.

In the result, I assess damages as follows:

1. Pain suffering and loss of amenities to date of trial	$ 8,000.00
2. Future pain, suffering and loss of amenities	$22,000.00
3. Scarring	$ 300.00
4. Impairment of earning capacity to date of trial	$36,000.00
5. Future impairment of earning capacity	$50,000,00
6. Cost of household assistance (to date of trial)	$ 6,000.00
7. Future cost of household assistance	$24,000.00
8. Future cost of medication	$1,500.00
9. Special damages	% 7,537.11
10. Pox v. Wood damages	$ 1,551.56
11. Interest (as agreed)	$ 750.00

$157,638.67

In addition, I award interest as follows:

(a) on $14,000 @6 per cent per annum from 31/3/81 to date hereof (refer items 1 to 6 above).

(b) on $27,000 @ 6 per cent per annum from 4/9/82 to the date hereof.

I therefore give judgment for the plaintiff against the defendant in the sum of $157,638.67 with costs to be taxed and I award interest as above.
