IN THE SUPREME COURT OF QUEENSLAND No. 26 of 1985

CIVIL JURISDICTION

BEFORE MR. JUSTICE de JERSEY

MOUNT ISA, 7 FEBRUARY 1986

BETWEEN:

ALYSONE JOY PEACOCK Plaintiff

- and -

TREVOR PAUL MURAT Defendant

JUDGMENT

HIS HONOUR: The plaintiff sues for damages in respect of injuries she suffered on 24 June 1983. She was hit at about 5.20 p.m. that day by a Toyota utility driven by the defendant. The collision occurred in Burton Street, Mount Isa, just to the south of its junction with Shaw Crescent.

The plaintiff had spent the day at the Mount Isa Show where she had done about eight hours' voluntary work. She caught the bus home. The bus stopped to let her off on the western side of Burton Street just before its junction with Shaw Crescent.

I accept the evidence of the defendant and Mr. Davis that at about that time the defendant's vehicle was travelling north along Burton Street and situated about 250 m back to the south near the junction with Millen Crescent.

The plaintiff alighted from the bus. I accept the evidence of Mrs. Davis and Mr. Grove, the bus driver, that the plaintiff walked around in front of the bus to about its right front corner. She then appeared to look left and right, not necessarily in that order. I hesitate to accept the plaintiff's own evidence about looking. She suffered a head injury in the accident and is, I fear, subconsciously reconstructing the events. However, I have no hesitation in accepting the evidence of Mrs. Davis and Mr. Grove to the effect that the plaintiff did appear to look right and left before emerging further on to Burton Street from the front of the bus. How effective her looking was is a matter to which I will return.

On the basis of Mr. Davis's evidence I find that when the plaintiff was looking right and left along Burton Street the defendant's vehicle was approaching from the south along Burton Street. The plaintiff's visibility to the right was unobstructed at the time. Mr. Davis said that if the plaintiff did look to the right she should have seen the defendant's vehicle. The plaintiff gave no evidence about what she saw because she could not recall. I find on the balance of probabilities that the plaintiff should have seen the defendant's approaching vehicle before she stepped out beyond the bus; it was clearly there in her field of vision.

I accept the evidence of Mr. Grove and Mrs. Davis that the plaintiff hurried on to Burton Street from in front of the bus. I infer from what the plaintiff said to Mr. Grove on leaving the bus and the other circumstances of her day that she was anxious to get home without delay. I do not think she was running: I find that she was walking briskly, in a hurry.

Mr. Grove gave evidence, which I accept, that the plaintiff was close to the centre of Burton Street when the impact occurred. After looking to the right and left, she had moved about three metres from in front of the bus taking a few paces. I accept the evidence of Mr. Davis and

the defendant that the plaintiff came into contact with the right front of the defendant's vehicle. The plaintiff was thrown into the air, hit the vehicle again, and came to rest on the carriageway. The defendant's vehicle accelerated off not remaining at the scene.

Mr. Davis's attention focused on the defendant's vehicle. I accept his evidence that as that vehicle approached the back of the bus its speed exceeded 60 km/h, the speed limit. By how much, he could not say. I found the defendant's own evidence of speed rather unsatisfactory and vague and I am not prepared to accept his lower estimates. After the accident, Sergeant Briant and Detective Barton saw a 6.6 m tyre mark, apparently recent, approximately down the centre of Burton Street near to where the bus had been parked. Mr. Grove said that the defendant's Toyota had passed only about 3 ft. from the right-hand side of his bus. In these circumstances, I infer without hesitation that the tyre mark was left by the right-hand side wheels of the defendant's vehicle.

From those tyre marks, I would further infer that just prior to impact the defendant applied his brakes. I also accept the defendant's direct evidence about that. I am not prepared to find, however, that the speed of the defendant's vehicle appreciably changed with that braking. The defendant saw the plaintiff just prior to the impact, as he effectively conceded in his evidence, and it was too late then to avoid the collision.

I also find that at that time the defendant was travelling somewhat faster than the speed limit of 60 km/h. As I have said, I reject the defendant's evidence as to his speed. Some witnesses for the plaintiff put the defendant's speed at impact somewhat less than that. I do not accept that evidence. The attention of those witnesses was focused more on the plaintiff at the relevant time.

After the collision with the plaintiff, the defendant left the scene without stopping. He knew that he had collided with the plaintiff. What the defendant did was

obviously reprehensible but is consistent with panic. He claimed here that he panicked. His leaving the scene may be consistent with a belief on his part that he had been speeding and that that had contributed to what occurred. However, I do not think that I should reliably construe his departure as involving any implicit concession by the defendant that the accident had been his fault.

I should record that I do not consider any of the witnesses to have been dishonest, although I found some of their evidence unreliable as I have indicated. I was, nevertheless, generally more impressed with the reliability of the evidence of the plaintiff's witnesses than that of the defendant himself.

On the evidence the defendant noticed the presence of the bus from more than 200 m to the south of the point of impact. Seeing the stationary bus, the defendant should, I think, as a prudent driver have appreciated the possibility that an alighting passenger would want to cross Burton Street. As he approached the bus he did not slow down but as I have found, drove in the end somewhat faster than the speed limit. When level with the back of the bus he looked over to his left. He was driving quite close to the right-hand side of the bus. The speed of his vehicle at that stage at least, remained the same. On looking to the front, the defendant saw the plaintiff and he was unable to avoid colliding with her. The plaintiff was hit by the right-hand side of his vehicle. I find that had the defendant been travelling more slowly, the plaintiff would likely have progressed further across Burton Street and avoided injury.

In these circumstances, I find that the defendant was guilty of negligence in travelling too fast and failing to keep a proper lookout.

The plaintiff was also negligent. When she looked to the right before emerging further on to Burton Street she either failed to see the defendant's vehicle or, on the other hand, she saw it, misjudged its speed and proximity and hurried out on to Burton Street taking the chance that

she would cross the street before the arrival of the vehicle. I find it impossible to make a finding on the evidence as to which of those alternative possibilities represents what occurred. On either basis, however, the plaintiff was clearly negligent. She either inadequately glanced to the right or, alternatively, having looked and seen the defendant fell into a serious error of judgment. The plaintiff clearly should have waited for the defendant's vehicle to pass in front of her, rather than pushing out as she did effectively at the last moment into a situation of serious potential danger for her.

In apportioning liability, I cannot distinguish between the respective fault of the plaintiff and the defendant. I appreciate that as a driver the defendant was, in a sense, in greater control and able to create comparatively greater danger. However, on my findings, by moving out on to the street when she did the plaintiff displayed a considerable lack of prudence and contributed very substantially to what occurred.

In this particular case, I find the plaintiff and the defendant equally to blame.

I turn now to the assessment of damages. The plaintiff is a single girl who was born on 16 November 1965. She was, therefore, 17 years old when injured and is 20 years old now. She suffered severe multiple injuries: a closed head injury with concussion which caused an epileptic fit, a fractured left femur, a fractured pelvis involving the right hip joint, fractured ribs and multiple skin abrasions. The orthopaedic injuries were serious. She was initially in hospital for about three weeks and underwent operations. On discharge she used a wheelchair for a time and gradually thereafter became mobile utilising a walking frame, crutches and a stick. She underwent a lot of physiotherapy and a further period in hospital in early 1984 for adjustment of an orthopaedic pin.

I accept the plaintiff's evidence that her current problems are centred about the hip and lower back. She has

to walk more slowly than before. She tends to tire more easily with activity. Before the accident she was active in classical ballet and highland dancing. She has had to give up those activities. She does, however, still swim regularly and she rides a bicycle largely, I think, as before save that after three-quarters of an hour or so her hip gets sore. She gave evidence of suffering headaches mostly relieved by Aspirin but suffering an average of four to five painful headaches per month for which she has to lie down. She has scarring on her left upper leg and left buttock which, understandably, embarrasses her. I inspected the scars in Chambers. The plaintiff herself is conscious about them and wears cover-up type clothing including one-piece swimsuits.

The medical reports deal with her injuries and consequent disability comprehensively and I will do no more than summarise her current position:

1. The fractured femur has healed well leaving minimal symptoms. There is occasional leg ache but it is not serious.

2. The pelvic fracture has united leaving some three-eighths of an inch shortening of the right leg. She now has to wear a built-up shoe and she experiences some related mid-back pain. However, this is not serious and should improve.

3. The scars to which I have referred are a significant cosmetic disability and in my view a genuine cause for embarrassment in this young girl.

4. She suffers migraine headaches regularly which should, however, reduce in severity with treatment.

5. She has experienced memory lapses, jumbled speech and concussion, indicative of mild cerebral damage, but in my view unlikely to affect significantly her future employment prospects.

6. I find that there is some slightly increased risk of epilepsy in the future.

7. The problem of increased back and pelvic pain will probably arise during pregnancy. She hopes to marry and have several children.

8. She has experienced some anxiety and depression which should, however, soon resolve.

Although serious, the orthopaedic injuries have healed reasonably well but in view also of the multiplicity of the consequences of the accident, I propose to allow overall the sum of $25,000 for pain and suffering. I apportion $10,000 of that to the past and allow interest on that at 6 per cent per annum for 2.6 years, amounting to $1,560. The total component for pain and suffering including interest is, therefore, $26,560.

Specials, which were proved, include $13.50 past cost of gel for attaching pain-relieving electrodes, $90 past cost of tape for such attachment, and $1,400 (which was not disputed) as the discounted present value of future allowances for gel, tape and built-up shoes. I include all of those amounts as special damages totalling $1,503.50.

It was also not disputed that an additional amount of $11,749.54 for rehabilitation expenses is repayable. No interest was sought on that amount. The amount should, nevertheless, be included amongst the special damages which, therefore, total $13,253.04.

I turn to the claim for past economic loss. At the time of the accident the plaintiff was employed as a nursing assistant at a surgery run by one Dr. Farrand where she was paid approximately $115 net per week which was, in fact, below the applicable award rate. That surgery ceased to operate, I find, at the end of 1983. Had the plaintiff not been injured and retained that job she would in the six months following the accident have earned approximately $3,000 net. Then she would have had to seek another

position. I think it likely that she would have retained that job until the closure of the surgery. The question then arises what she would have earned but for the accident in the ensuing two years to date. It is impossible to be precise about this. If she had remained in a similar position but been paid at award rates she would in the following two years or so to date have received approximately $23,000 net. Had the Farrand surgery not closed and with no wage increases her earnings for the two years would have been approximately $13,000. In the assessment of what she would have earned but for the accident, I have to discount for a number of contingencies. One of the most important of them is that she may have had difficulty obtaining a replacement job following closure of the surgery. She had had difficulty from time to time following regular employment after leaving school. Despite her high motivation she has had similar difficulty obtaining employment in recent times, a difficulty which I am not satisfied is to be substantially explained by reference to her accident disabilities. Doing the best I can I calculate $15,000 as her likely loss over that two years which is a little less than the mean of those amounts of $23,000 and $13,000.

The total component for past economic loss, therefore, amounts to $18,000. From that, a sum of $13,014.80 unemployment benefits received has to be deducted which leaves a balance of $16,685.20. I will not allow interest on that sum for these reasons. Firstly, the assessment for past economic loss was in this case necessarily extremely broadly based and I think that to allow interest on it would be unnecessary and unjustifiably artificial. Secondly, and perhaps more significantly, the sum of $11,314.32 would have to be excluded anyway from the calculation of interest representing sickness and rehabilitation benefits. Further, I have refrained from deducting a small amount of $100 or so received as baby-sitting fees. Adopting what I understand to be a desirably broad approach in respect of interest I consider,

therefore, that it would be just to allow no interest on this particular component.

I turn now to the component for future economic loss. Both counsel conceded that determining this component is in this case especially difficult. Dr. Douglas says that the plaintiff should not engage in occupations where strain is thrown onto her back by such activities as repeated bending and heavy lifting. He would exclude employment as a nurse's aide, as a shop assistant or as a waitress. The plaintiff could, however, cope with clerical work without problems. Now the plaintiff is not well-qualified academically. She was particularly attracted to working as a nurses's aide and she is, as I have said, highly motivated. Over the last two years she has, commendably, undergone substantial rehabilitation and she has applied unsuccessfully for many jobs including governess, tracer at Mount Isa Mines, a laboratory assistant and dental nurse, jobs which she felt she could handle. She has recently applied for a nursing job with the Mount Isa Hospital and that application has not yet been determined. She applied for it against medical advice and I am not satisfied that if she obtained a position she would be able to continue in it having regard to her disabilities. The plaintiff is still young. She is highly motivated and she presents herself well. I do think it is probable that she will find a job relatively soon whether at Mount Isa or elsewhere. Largely one can only speculate as to what it might be and as to how the earnings from such a job would compare with those of a nursing assistant. In any calculation of future economic loss, the plaintiff's prospects of marriage have to be taken into account and her desire to have children which would for some years, on her evidence, prevent or limit employment.

In this case it would in my view be absurdly artificial to attempt any precise calculation of economic loss in the manner usually adopted. Mr. Dorney of counsel for the plaintiff helpfully provided some illustrative arithmetical calculations utilising the interest table but he conceded that I could properly assess this component in

this case more intuitively as I felt just. I do propose to proceed that way. I especially take into account that the field of occupations open to the plaintiff is now more limited than before. Taking all features into account as best I can, I assess this component at $25,000. The components of the award are, therefore, as follows:

Pain and suffering including interest	$26,560.00
Special damages	13,253.04
Past economic loss	16,685.20
Future economic loss	25,000.00
Total	$81,498.24

That must be reduced by 50 per cent to reflect the finding of contributory negligence.

I, therefore, give judgment for the plaintiff against the defendant in the amount of $40,749.12.

I order the defendant to pay the plaintiff's costs of and incidental to the action including reserved costs, if any, to be taxed.
