

IN THE SUPREME COURT OF QUEENSLAND

No. 772 of 1984

CIVIL JURISDICTION

BEFORE MR. JUSTICE G.N. WILLIAMS

BRISBANE, 6 MARCH 1986

BETWEEN:

HELEN ELIZABETH CLARE

Plaintiff

-and-

MICHAEL BRYCE

First Defendant

-and-

HAZEL E. GERRARD

Second Defendant

JUDGMENT

HIS HONOUR: On 28 October 1983 the plaintiff received serious injuries to her right leg when the motor cycle on which she was a pillion passenger came into collision with a motor vehicle. Liability is conceded by the defendants in the action and the only matter for my determination is that of the quantum of damages the plaintiff is entitled to.

She was born on 27 February 1958, and after leaving school worked in a number of clerical jobs before joining the Commonwealth Public Service in the year 1979. At the time of the accident she was employed in the C.E.S. office and it is clear that she had decided to make her career in the public service. She married in the year 1983 another

public servant, and it was her intention to work, with perhaps some interruptions when having a family, until retirement at about age 55 years.

She was conveyed from the scene of the accident by ambulance to the Royal Brisbane Hospital. I accept that at that time she was suffering quite severe pain. Her injuries were diagnosed as an undisplaced fracture of the right tibial plateau, an undisplaced fracture of the right upper fibula, an undisplaced fractured proximal phalanx of the great toe on the right foot, fractured right fifth metatarsal, transverse fracture of the midshaft of the right femur, and a severe gash medial to the patella of the right knee which actually entered the joint itself.

She was operated on at the hospital on 28 October 1983 when a Kuntschner nail was inserted into her right femur and the right knee wound was surgically debrided and cleaned. During the operation it was noted that the wound to her right knee entered the knee joint via a ragged flap. It was also noted that the inferior surface of the medial femoral condyle was severely abraded with ragged and absent cartilage, and the inferior facet of the medial side of the patella was similarly damaged.

A further operation was performed to close the wound of the right knee on 31 October 1983. Thereafter in hospital she underwent intensive physiotherapy treatment with a view to minimising stiffness.

A month after the incident her right knee was still very stiff with marked decrease in flexion, and in consequence it was manipulated under anaesthetic on 28 November 1983. Thereafter flexion was much improved and she was discharged from hospital on 1 December 1983.

For some four to five weeks during her period in hospital she had been in traction, and for some of the time part of her leg was in plaster. She experienced pain and discomfort during that period. When she was discharged she was on crutches which she had to use for some three to four

months. She returned regularly to the Royal Brisbane Hospital for physiotherapy treatment and orthopaedic review. During that time residual stiffness was noted to be present.

She continued visiting the outpatients department throughout 1984 and it was noted that the fracture to the right femur was slowly progressing and that mobilisation, muscle strength, and tone were improving. However, marked retro-patella crepitus of the right knee was noted throughout that period of rehabilitation. The report from the hospital dated 9 April 1985 states:

"Despite marked improvement in her gait and muscle strength and a good range of knee movement, she still has gross retro-patella crepitus indicating the presence of marked destruction, probably a traumatic osteoarthritis."

The fracture of the femur had not healed satisfactorily by August 1985, and in consequence the plaintiff was readmitted to the Royal Brisbane Hospital where the original Kuntschner nail was removed and a larger A.O. nail was inserted. She was discharged from hospital on that occasion on 15 August 1985 when it was noted that the nail was in perfect position.

About a week ago the plaintiff again underwent surgery at the Royal Brisbane Hospital for the removal of the nail in the femur, that bone having by then healed satisfactorily. Prior to the removal of the nail the plaintiff had experienced pain and discomfort caused by the head of the nail interfering with her hip joint.

During her period of treatment at the Royal Brisbane Hospital she was from time to time under the care of Dr. Walters, an orthopaedic surgeon, and I have the benefit of a report from him; he also gave oral evidence. The plaintiff has also been examined on a number of occasions by another orthopaedic specialist, Dr. Donald Watson, and four reports from him were tendered. In addition he gave oral evidence.

I have come to the conclusion that there is no difference of opinion on any matter of principle between the doctors. Both are in general agreement, and the plaintiff herself does not contend to the contrary, that the injuries to her right leg, other than that to her knee, are now no longer of significant concern. The major residual disability is occasioned by the injury to the right knee, and the significant aspect of that injury is the traumatic osteoarthritis which was occasioned by the initial trauma to the knee joint itself.

The doctors agree that the plaintiff has extensive osteoarthritis in the knee joint at the present time, and it is the source of reasonable pain from time to time. She is unable to spend any lengthy period on her feet without the onset of quite severe pain. In his report of 9 November 1984 Dr. Watson said:

"I do not think she will be able to manage duties which involved a lot of standing and a lot of walking or a lot of driving around in cars. I think her work future will largely be involved with sedentary duties."

The plaintiff herself said that she was able to walk, at most, the distance of about four city blocks before the pain in her knee became virtually disabling. She also finds that she is significantly less active than she was before the accident. Many activities such as gardening and dancing, which she participated in before the accident, are now not within her capability.

I accept the evidence of Dr. Walters that her present disability is of the order of 25 to 30 per cent of her right lower limb.

One of the main issues at the trial has been as to the likelihood of the plaintiff undergoing future surgery to the knee, and determining what that surgery will be and when it is likely to occur. Both doctors agree that it is possible that within the next 10 years symptoms will develop in the knee which could be significantly reduced by

the removal of the patella. Both doctors agree that that operation should not be performed until such time as it is absolutely necessary. They each agree that the removal of the patella will not prevent the progress of the osteoarthritis, though it is possible that the patellectomy may postpone for some time the necessity of further surgery.

The onset and progression of the osteoarthritis will certainly necessitate the plaintiff, within 15 years at the outside, undergoing either an arthrodesis or a joint replacement operation. It seems to me that there is no conflict between the doctors on that issue. It is not possible to say at this point of time which operative procedure will be undertaken. It will be for the plaintiff to select when the time comes which operation will best meet her then requirements; to some extent the answer will depend upon progress in the development of the joint replacement operation over the ensuing years and on the lifestyle of the plaintiff at the time the operation becomes a necessity. However, it seems to me that it is only reasonable that a relatively young woman would prefer an operation which gave her some flexibility in her knee, rather than an operation which would permanently stiffen that joint.

I am therefore of the view on the balance of probability that within the next 15 years the plaintiff will have a joint replacement operation to her right knee but, unfortunately, that will, in all probability, not be the end of the matter. Given medical knowledge at the present time, which I must act upon, the probability is that if such an operation was carried out, it would be necessary for the plaintiff, within her normal life span, to have to undergo further surgery. That further surgery may be for a further joint replacement or may be for an arthrodesis. The risks associated with each operation after there has already been a joint replacement are much greater, the risk of failure being significantly higher. I approach the assessment of damages on the basis that the

plaintiff will have at least two major operations on her right knee in the course of her lifetime.

On present costs, a joint replacement operation, including all hospital and physiotherapy fees as well as doctors' fees, would be \$5,800 and the cost of an arthrodesis, again including hospital and physiotherapy, would be \$2,500. In addition, regardless of which procedure was carried out, the plaintiff would be off work for some three to four months. The first operation is likely to be carried out during her working life, but the second operation may well be after she has ceased work.

The plaintiff also has some significant scarring which is amply depicted in photographs which were tendered in evidence. There is obvious scarring to the region of the right ankle, a very noticeable scar across the right knee, and she has also an operation scar high up on the right thigh. Those are of some concern to her but she is able to hide most of them by wearing appropriate clothing.

The plaintiff married in 1983 and she has given evidence that it is her intention, after having had discussions with her husband, to have at most one child. She says that she has taken steps to ensure that such is the position, but it should be noted that notwithstanding those steps she did fall pregnant some years ago but miscarried. I conclude on the balance of probabilities that looked at as at the date of the accident, and now, the plaintiff will work as a Commonwealth public servant until retirement at age about 55. I am satisfied that if she did have a child she would take advantage of the conditions of employment which enable her to take maternity leave, and leave without pay for 12 months, without any loss of position; at the end of that period she would resume her employment with the public service.

I am also satisfied that she has lost promotional opportunities. It seems clear on the evidence that there were greater promotional prospects for her in the Commonwealth Employment Service office. That work did, of

necessity, involve her being on her feet and being much more mobile throughout the day than is within her current capacity. She has, in consequence, taken a position in an account section, which is a sedentary job. She does not find that as interesting as her previous job in the Commonwealth Employment Service and she did describe the work as routine and mundane.

Because of the size of the section in which she is involved, promotional prospects are not as good. She will remain on classification 2/3 for some time and may attain classification 4. However, it is unlikely that she will attain classifications 5 or 6, which it was reasonably likely she would have done if she had remained in the Commonwealth Employment Service office. There will be some future economic loss spanning most of the period that she will remain in the public service, that is until aged 55. If one takes a very discounted figure of \$40 per week over the next 20 years, calculation of the loss using the 5 per cent table gives the figure of approximately \$26,000; that, in my view, is an indication of the extent of the loss the plaintiff will suffer. In addition, she has suffered some loss to date because of the loss of promotional opportunity and I will include that in the overall award for future economic loss.

Given all the matters that I have referred to, I assess the damages for pain and suffering and loss of amenities in the sum of \$35,000. I am satisfied that the plaintiff will undergo two operations in the future, one of which at least will be within her working life. I have to discount the figures led in evidence as being the relevant costs because of the fact that I am awarding a present sum for a future loss. With respect to the cost of future treatment, including loss of wages associated therewith, I allow the sum of \$5,000. For future economic loss, including the economic loss attributable to loss of promotion to date, I award as damages the sum of \$30,000.

There has been no real dispute as to special damages. Schedules which have been tendered establish, with the inclusion of a figure of \$900 for sick pay entitlement lost, a total figure of \$10,233,41 for wages lost. There are also hospital expenses of \$8,546 and other special damages totalling \$916. That makes a total for special damages of \$19,695.41.

The accident occurred just over two years ago and I allow interest on the sum of \$17,000, which includes a proportion of the award for damages for pain and suffering and a cum representing special damages which resulted in the plaintiff being out of pocket; I allow interest at the rate of 6 per cent per annum for a period of two years which gives a total of \$2,040.

My award can therefore be summarised as follows: pain and suffering and loss of amenities \$35,000; future economic loss \$30,000; cost of future treatment \$5,000; special damages \$19,695.41; interest \$2,040, which gives a total of \$91,735.41.

There will be judgment for the plaintiff against the defendants in the sum of \$91,735.41 with costs to be taxed.
