

TRANSCRIPT OF PROCEEDINGS

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SUPREME COURT OF QUEENSLAND

No 1970 of 1989

CIVIL JURISDICTION

de JERSEY J

LOIS JOYCE PAWLOW

Plaintiff

and

AUSTRALIAN POULTRY LIMITED

Defendant

BRISBANE

..DATE 4/3/92

JUDGMENT

HIS HONOUR: The plaintiff is a 37-year-old married woman who was injured at work on 25 March 1988 when she was almost 34 years old. She was knocked to a concrete floor by a fellow employee, landing on her buttocks.

At the time, she had some degeneration of the lumbar spine, but it had not produced symptoms and may never have done so. Dr Curtis said that the condition would probably, but for the accident, have produced symptoms sufficient to prevent her working after 15 years. (See page 12 of his report, Exhibit 6). I prefer Dr Sutherland's view, however, that such time estimates are little more than guesses. I take a similar approach in relation to Dr Morris' estimate.

I accept Dr Sutherland's evidence that the fall on 25 March 1988 caused a disc protrusion in the lower lumbar region at the level of L4/5, aggravating and rendering symptomatic the existing degeneration. After the fall, the plaintiff continued working for a month, took about three weeks off, and then worked for another four months or so before giving up work on 19 September 1988. At that stage, she was suffering from intense back pain. The back pain had commenced with the fall and became progressively worse, although relieved for a time during the three-week rest period. Mr Campbell who appeared for the defendant pointed to her not having raised back pain with her doctor (Dr Wilson) over that five or six-month period, or with the sister at work. I do, however, accept the plaintiff's explanation that she was very anxious to avoid putting her employment in jeopardy. That explains the absence of complaint either to Dr Wilson or Mrs Hindley. I am not prepared to infer from the bare entry in Mrs Hindley's register that the back pain commenced only in August. The plaintiff believed, rightly or wrongly, that if she raised the matter with her doctor, or the defendant, she may be put off on workers' compensation and that that may lead to her losing her job. She and her husband were under considerable financial pressure at this time and she was very concerned not to reduce their income, so she put up with the steadily increasing pain until September 1988 when she stopped work. I did not doubt the evidence of Mr Kanofski, but the question is the plaintiff's belief, and that is relevant only to explain why she may not have sought medical treatment for her back. The issue is her credibility and I formed a favourable view on that.

The plaintiff underwent a CT scan in early 1989 and it disclosed a protrusion. A month later, she had a laminectomy. With continuing pain, she underwent a spinal fusion operation on 28 June 1991. Her condition has improved since then, although the graft has not yet fully taken. Dr Curtis says that there is a better than 50 per cent chance that it will fully take. If there is complete fusion, say within the six to nine month period Dr Curtis

mentioned, then the plaintiff will, nevertheless, suffer intermittent back pain thereafter, depending on activity. If there is no complete fusion, then she will continue to suffer constant pain as now, although at varying levels. I accept the plaintiff's evidence about her disabilities and pain levels from time to time. I also accepted the evidence of the plaintiff's husband, but he had a limited recollection of the detailed progression of his wife's condition. As to her evidence, I mention, in particular, the migraines, pain so severe as to cause her to vomit, the inadvisability of her now having children should the present pain level continue, and interference with sexual relations. The plaintiff has also suffered a lot of depression since the fall, which Dr Cameron, at an earlier stage, called a major depressive disorder. The plaintiff attempted suicide at Easter time last year. Associated with this depression has been serious prejudice to her marriage, which the plaintiff describes as still shaky. I accept Dr Cameron's view that if spinal fusion is ultimately completely successful, the plaintiff's psychological state should improve.

I found the evidence of Dr Sutherland convincing. Dr Atkinson expressed a contrary view critical of the plaintiff in Exhibit 10 and his oral evidence. He described her in his oral evidence as "a lady looking for reasons to be sick". I do not accept Dr Atkinson's overall view. There was clearly some conflict between the plaintiff and him. I consider his assessment of her was unduly severe. It was influenced by the plaintiff's failure to complain in the months following the fall, which, as I have said, bears on her credibility and I have determined that issue favourably to her. I found the evidence of Doctors Sutherland and Curtis more compelling and helpful. They identified an organic basis for her pain. Acknowledging that, it falls to me, with the help of the medical evidence, to assess the credibility of the plaintiff's claims about the level of that pain. I consider the plaintiff to be an honest and accurate witness not given to exaggeration.

Dr Morris diminished the role of the fall with respect to the plaintiff's present disability describing it as a "relatively trivial fall", and he inferred from the plaintiff's having continued work for four months after the fall that the pain was not severe. The general credibility of the plaintiff and especially of her explanation as to how she got through that six months after the fall, is a significant feature. To the extent that Dr Morris was sceptical of her relationship between the plaintiff's present disability and the fall, I did not accept his view for reasons similar to those I have expressed in relation to the evidence of Dr Atkinson. In short, I believe the plaintiff, and I am not dissuaded from accepting her by the circumstances of her work following the fall and the absence of complaint to doctors following the fall. I do not accept Dr Morris' view that the fall was merely a temporary aggravating feature of existing degeneration. I prefer the evidence of Doctors Sutherland and Curtis on that matter, and I also reject the contrary views of Dr Hazelton. I consider the criticisms levelled by Mr Land through cross-examination of Dr Hazelton to have been valid. Dr Hazelton was also influenced by the plaintiff's failure to seek medical attention for her back within the six-month period to which I have referred. As I have said a number of times now, I accept the plaintiff's explanation for that. For pain suffering and loss of amenities I allow \$40,000. I apportion two-thirds of that to the past, subtract \$11,170, the lump sum workers' compensation payment, and allow interest at, 2 per cent per annum for four years on the balance of \$15,500 and that interest amounts to \$1,240. I find that the plaintiff has not been able to work since she left the defendant's employment on 19 September 1988 because of the injury suffered on 25 March 1988 and its consequences. I am satisfied that the plaintiff would have worked throughout that period but for this accident.

For past economic loss, I allow \$50,427.45, which is the amount on the schedule, Exhibit 15, based on the relevant award, minus \$5,000 against the possibility that,

but for the accident, she would have become pregnant within that period and taken a few months off work. I allow \$45,427.45, I therefore, and interest on \$29,000, which allows for workers' compensation payments at 6 per cent per annum for four years which amounts to \$6,960.

It is very difficult to work out the component for her reduced earning capacity in respect of the future. I may record at once the plaintiff's working capacity is only in the manual unskilled area. She presently hopes to retrain into the field of social work or psychology and to obtain employment in that area. She left school at junior and is probably of average intelligence so that her prospects are not especially bright in relation to that goal. But especially if the fusion is completely successful she should be able to carry put light to moderate work, assuming that that is available.

There are a number of imponderables: the possibility of her degenerative spine producing difficulties, anyway, and possibly stopping her from working or making work difficult; the prospect of the spinal fusion graft being completely successful; the question of whether, assuming continuing problems, suitable light work would be available; and so on. I have to go through an evaluative type process. I accept that the plaintiff would have worked throughout an ordinary working life span, allowing for a few months off for the hoped-for child following birth. There is presently a substantial reduction in her earning capacity, but that should improve considerably if the graft fully takes. I also note the improvement in her condition which has occurred since the fusion operation. It is now four years since the accident. I cannot, in this case, assess this component on the normal basis. That would be inappropriate. I have to take a more global and broad approach. As a guide, however, I note that five years lost income at the present rate of \$300 per week would now be worth \$69,300, and that ten years lost income on that basis would now be worth \$123,000. Taking account of the features I have mentioned and other ordinary contingencies, I allow

\$90,000 for reduced earning capacity with respect to the future.

For special damages, I allow \$7,941.90 (see Exhibit 21). I allow \$56 interest on the \$469 item included in Exhibit 1 at 6 per cent per annum for two years.

As to the pain clinic, I accept that the plaintiff will attend. The cost would be \$3,900. Accepting the plaintiff's evidence as I do, I see no reason why I should not allow that full amount of \$3,900, and I do so.

There is a Fox v. Wood component of \$3,550.02.

Last, there is a Griffiths v. Kerkemeyer claim. That should be moderate. I take account of the realities of the household. One would expect a decent husband such as the plaintiff's husband to have been prepared to put himself out a bit more in the difficult circumstances which arose. But he did, nevertheless, help to an extent which warrants some compensation under this head on the authorities with which I am familiar. A relevant commercial rate is, I am told, by agreement, \$7 per hour and that is, as I have said, relevant, though it is not definitive. I take account of the continuing prospect of improvement in the plaintiff's condition. Again, it is not appropriate for me to calculate this claim in any precise way. I allow \$2,000 which should be taken to include interest.

The amount of the award totals \$201,075.37. From that, I subtract \$39,495.98 repayable to the Workers' Compensation Board. There will then be judgment for the plaintiff against the defendant for \$161,579.39 and costs including any reserved costs to be taxed.
