

IN THE SUPREME COURT OF QUEENSLAND      Appeal No. 2 of 1973

BETWEEN:

FRANK LAWRENCE KURTH                                 (Plaintiff) Respondent

AND:

JACK LAWRENCE FRANKS                                 (Defendant) Appellant

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Cor: The Honourable Mr. Justice Skerman,  
The Honourable Mr. Justice Lucas,  
The Honourable Mr. Justice Matthews.

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Reasons for Judgment of Matthews J. delivered the  
twentyfifth day of May, 1973. Skerman and Lucas J.J.  
concurring.

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"APPEAL ALLOWED, AND JUDGMENT IN ACTION VARIED BY  
SUBSTITUTING FOR THE LETTERS AND FIGURES \$8,000 WHEREVER  
THEY APPEAR THE LETTERS AND FIGURES \$6062.80. RESPONDENT TO  
PAY APPELLANT'S COSTS OF APPEAL TO BE TAXED. CROSS APPEAL  
DISMISSED WITHOUT ANY ORDER AS TO COSTS. RESPONDENT'S COSTS  
OF APPEAL AND CROSS APPEAL TO BE TAXED AS BETWEEN SOLICITOR  
AND OWN CLIENT AND PAID OUT OF TRUST FUND REFERRED TO IN  
THE JUDGMENT OF THE DISTRICT COURT TO THE SOLICITORS FOR  
THE RESPONDENT".

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IN THE SUPREME COURT OF QUEENSLAND      Appeal No. 2 of 1973

BETWEEN

FRANK LAWRENCE KURTH

(Plaintiff) Respondent

AND

JACK LAWRENCE FRANKS

(Defendant) Appellant

JUDGMENT - MATTHEWS J.

The respondent (plaintiff) sued the appellant (defendant) in the District Court for damages for negligence arising out of the collision of two motor vehicles. He claimed \$10,000.00 which was the limit of the District Court's jurisdiction in an action of this nature.

At the trial, by agreement of the parties, liability was apportioned between the respondent and the appellant in the ratio of one-fifth to four-fifths. The only issue therefore, before the trial judge was the quantum of damage sustained by the respondent. The trial judge assessed the respondent's general damages in the sum of \$13,500.00 but after argument in that behalf and upon the authority of Kelly v. Stockport Corporation (1949) 1 A.E.R. 893, Honour awarded to the respondent and entered judgment for a sum of \$8,000.00 which represented four-fifths of the sum which, as I have said, is the limit of the Court's jurisdiction. In addition to the findings of general damages to which I have referred, special damages totalling \$78.50 were found by His Honour to have been suffered by the plaintiff.

The appellant submitted before this Court that assessment of the respondent's general damages in the sum of \$13,500.00 and the consequent award of \$8,000.00 damages were both manifestly excessive, and supported the general proposition that the damages were so disproportionate to the injuries suffered by the respondent as to warrant interference with the award, with particular grounds for interference with His Honour's findings asserted in the Notice of Appeal as follows:-

- "1. That His Honour's finding that there was a demonstrable diminution in the

plaintiff/respondent's ability to earn an income because of headaches was against the evidence and the weight of the evidence and was unreasonable.

2. That on the whole of the evidence His Honour's finding that the plaintiff/respondent suffers and will continue to suffer from positional vertigo was against the evidence and the weight of the evidence and was unreasonable.
3. That His Honour's finding that the plaintiff/respondent suffering from positional vertigo will have serious consequences as far as his ability to earn an income is concerned is against the evidence and the weight of the evidence and is unreasonable.
4. That on the whole of the evidence His Honour should have accepted the opinion of Dr. Ferguson in relation to the plaintiff/respondent's suffering from headaches and/or positional vertigo."

The respondent gave notice of his intention to cross-appeal, asserting that in the circumstances to which I have referred, judgment should have been entered for the respondent in the sum of £10,000.00.

In the view I take of the matter I find it unnecessary to consider the merits of the arguments advanced upon the cross-appeal because I am of opinion that the assessment of general damages made by the trial judge cannot stand and that general damages assessed on respect of the plaintiff's injuries, should not have exceeded \$10,000.00. I will mention later the amount which I think should have been assessed in respect of this head.

In the collision which led to the action the respondent, who was born on the 9th April 1953, suffered what the trial judge described in his reasons for judgment as seemingly slight initial injuries. His Honour found that the respondent was unconscious for a brief period but still

in his vehicle when he regained consciousness; he had a gash on his forehead, a sore nose and sore chest; the cut on the forehead was sutured at the hospital but the respondent was not admitted to hospital. The respondent was off work as a result of his injuries for a period of two weeks.

The respondent has a resultant scar on his forehead but this and some mishap which occurred to his left knee were found by the trial judge to be of little consequence. But further disabilities in the form of continuing headaches and positional vertigo were found to be of such significance as to justify the assessment of damages and the award was based to a degree upon His Honour's conclusions that as a result of the headaches there had been "a demonstrable diminution in his capacity to earn an income" and with respect to the positional vertigo "serious consequences as far as his ability to earn an income is concerned".

The collision occurred on the 23rd November 1970 some two years prior to trial. In June 1969 the plaintiff had commenced a four year apprenticeship as a boilermaker and I assume that, as was expected by him at the trial, he qualified as a tradesman in February 1973. Apart from the loss of two weeks' work immediately following the collision the respondent up to the time of trial stated, and in this was accepted by the trial judge, that because of headaches he had since lost half a days' work every couple of months. On the subject of headaches and particularly their frequency, duration and disabling effect, there were apparent conflicts of evidence but His Honour found that the plaintiff had and will for the rest of his life suffer from headaches there was evidence, accepted by His Honour, which justified such finding.

However, I do not think that a similar conclusion should be reached in respect of His Honour's finding that the plaintiff suffers and will suffer from positional vertigo. His Honour, in this behalf, relied upon and

accepted evidence of Dr. Landy and in the course of explanation of this finding said:-

"The plaintiff has described what he calls 'giddiness'. He says, and I accept his evidence, that these attacks vary in frequency from once a week to once a month. He believes that they last from 10 to 15 seconds but they seem a lot longer. He feels that he is falling and that everything around him is moving. To combat these attacks he grabs hold of something and closes his eyes. He recounted an episode in which he might have been killed or seriously injured had he not taken hold of an upright stay and thus avoided a 30 feet fall. He keeps away from working on heights and inside tanks. He has had these attacks at home as well as at work. When pressed in cross-examination by Mr. Crooke, the plaintiff did say that during one of these attacks, objects were vibrating from side to side and also that an object would look as if it were moving across sideways. He denied any object spun - he said that it moved backwards and forwards.

However, it is of interest to note that in Dr. Ferguson's evidence (at page 14 (p. 19 of this Record, "as amended)) the plaintiff gave him a history as follows:-

'He said he had a lightheaded feeling, a feeling as if he was not orientated in his position and he actually felt the room going around and around.'

Again, it is of interest to note that in Dr. Landy's evidence (at page 24 (p. 30 of this Record)) the following appears:-

'Well, when I asked him what giddiness meant, he said it was a rotation of the surroundings. A rotation - spinning, yes.'"

It seems to me that this passage discloses in two important respects error by His Honour who was misled by an incorrect transcript and misunderstood the effect which should be given to evidence led before him. In what was a rather unusual course, the appellant, without objection from counsel for the respondent, was permitted to read in this Court an Affidavit by Dr. Ferguson deposing to the fact that the particular passage, which was quoted in His

Honour's judgment as setting forth what Dr. Ferguson had said, was wrong; the affidavit further stated that he, Dr. Ferguson, had not given evidence in such terms and that the plaintiff questioned in that behalf by the doctor had on no occasion told Dr. Ferguson that he felt the room going around and around and had denied such a symptom.

Moreover, the statement by Dr. Landy of the description of giddiness given to him by the respondent could only be used in support of the truth of it if the respondent had, by his evidence, made such a complaint. His Honour, in the passage which I have quoted, refers to the respondent's evidence that "everything around him was moving" (a statement which appears both in the course of his examination in chief and in cross-examination) but I think it must be understood in the context of the explanation of his meaning which he gave in cross-examination when the following questions were asked and answered as appears from the transcript:-

"What do you mean 'around the place'? -- Everything seems to be moving like that, vibrating.

Vibrating from side to side? -- Yes.

.....

When you look at some object in the room, how does it appear to you? It will look as if it was moving across sideways.

"Oscillating backwards and forwards is that right? -- Yes.

You do not have any sensation or thin is spinning; is that the situation? -- No nothing spins, just moves backwards and forwards."

Dr. Landy's statement, therefore, that there was a rotation or spinning, falls a within the category of but hearsay evidence and he refusal of the respondent to confirm that particular complaint must contract from the value of the opinion expressed by Dr. Landy (See Ramsay v.

Watson (1961) 103 C.L.R. 642 at p. 649). The importance of this of course is that, accepting the plaintiff's evidence His Honour could have reasonably found that the plaintiff suffered from some form of giddiness or dizziness but that this did not correspond with positional vertigo because as a necessary consequence of the latter the plaintiff would have described the apparent spinning or rotational moving of objects around him. It does appear from the evidence that positional vertigo would continue throughout the lifetime of a person suffering from it but that giddiness or dizziness not a symptom of positional vertigo would probably be of neurotic origin, and not of such significance.

His Honour noted therefore, in by opinion, upon misapprehension of the facts before him and this led him into error in his assessment of general damages. I would fix the general damages at \$7,500,00, add to that sum the special damages to which I have referred and order that the appeal be allowed and that the judgment in the action be varied by substituting for the letters and figured eight thousand dollars (\$8,000.00) wherever they appear the letters and figures six thousand and sixty-two dollars, eighty cents (\$6062.80); that the respondent pay the appellant's costs of the appeal to be taxed; that the cross appeal be dismissed without any order as to costs.