Appeal No. 50 of 1975

MARIN JURA FAVRO (Plaintiff) Appellant

v.

NORTH QUEENSLAND ENGINEERS (Defendant) Respondent

THE CHIEF JUSTICE

MR. JUSTICE WANSTALL S.P.J.

MR. JUSTICE STABLE

REASONS FOR JUDGMENT DELIVERED BY STABLE J. THE CHIEF JUSTICE AND WANSTALL S.P.J. CONCURRING

"APPEAL ALLOWED. JUDGMENT OF WILLIAMS J. VARIED BY SUBSTITUTING $50,000.00 FOR THE SUM OF $35,000.00, ORDER THAT THE RESPONDENT PAY THE APPELLANT'S COSTS OF THE APPEAL."

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 50 of 1975.

MARIN JURA FAVRO (Plaintiff) Appellant

v.

NORTH QUEENSLAND ENGINEERS AND AGENTS PTY. LTD. (Defendant) Respondent

JUDGMENT - STABLE J.

The appellant plaintiff seeks the review of an award of $35,000 damage's made in his action brought in respect of injuries suffered in an industrial accident which

happened at the Mourilyan Mill, North Queensland, on 11th June, 1967. He was at that time an employee of the defendant respondent, and was engaged in the assembly of a boiler which was immediately below a bagasse feeder in the mill. In the course of his employment he sustained serious injury to his right hand when it was caught in the bagasse feeder which had been put in operation, as the learned trial judge found, without the appellant knowing that this was so. The issues of negligence and contributory negligence were determined wholly in favour of the appellant.

The appellant was born in Yugoslavia in 1938. He came to Australia in 1961, and at the trial in September, 1975, he still had what the judge called "obvious language difficulty". Before he came to this country he had undertaken an apprenticeship in general mechanics - something of the nature of the course undertaken to qualify one for the trade of fitter and turner. After working in this country at various jobs, including labouring, tobacco picking, cane cutting and as a motor mechanic, he was employed by the respondent as a fitter and turner. In this, it seems, he was successful. To quote the learned judge "Mr. Fry" (managing director of the respondent) "indicates that he was a better than average worker, and despite his language difficulties I have little doubt that had he stayed in this employment he would have advanced in his particular trade had hone of the other imponderables, as they are termed, changed his circumstances."

There was not dispute about the trial judge's description of the appellant's injuries. He said, "At all events the injuries took away the greater part of four of his fingers, gave him immense pain, suffering and distress, and involved him in an operation which has resulted in his having, eventually, an arthrodesed wrist. In addition he had a large laceration across the dorsum of the right forearm with damage to the underlying tendons, especially the extensors of the thumb. The thumb is not as functional as it would appear on first sight to be, having lost some

of its important tendons, and having to make do with others from another part of his hand transposed thereto. In addition he had a displaced comminuted fracture of the lower end of the right radius involving the wrist joint and damage to the distal sensory branches of the radial nerve of the hand." Exhibits 13 A to D illustrate better than words can do the end result of the many surgical procedures upon his right hand and wrist which the appellant endured between the date of the accident and August, 1970. He was medically cleared for work in June, 1971, with a residual disability assessed at 85% of the right forearm as a whole, and 70% to 75% loss of function of the right arm. The medical opinion is that no further surgery is justified, though it appears that the arthrodesis operation to relieve the pain in the radio-carpal joint of the wrist was not entirely successful as some movement has been left in the wrist.

The appellant tried several jobs, commencing with hisold employer, the respondent. He said, in effect, that he was unable to cope with the tasks given him. Again I quote the learned judge:—"The plaintiff, as I say, not unexpectedly left the shelter of this job, and went off to endeavour to find something else that suited him and caused him less distress." In November, 1972, the appellant was referred to the Rehabilitation Centre at Taringa where he remained for 4½ months. He said that he underwent a continuous programme of physiotherapy and exercises and that he was given instruction in the operation of a front end loader and back hoe. He did not, he said, become proficient with either machine. Upon his return to Cairns the appellant again sought work, and found it as a truck driver on 20th March, 1973. He is still in this employment. The trial judge said:— "It seems that only after he eventually got to the Rehabilitation Department and had proper professional assistance that he was able to find his particular avocation. He now works and works well as a truck driver, quite remarkably, it seems to me, for one with a thumb that does not function with 100% efficiency, who cannot make a pincer's grip except with a particular

apparatus which he wears over the end of his hand." This apparatus is a prosthesis device for the appellant's right hand and wrist region. It is basically a special glove with a steel hook. With its aid he can do most of the duties of a truck driver upon a truck such as the one he drives, with automatic transmission and power steering.

The appeal is on the ground of inadequacy of damages. It is said that the judge ought to have included in the award the sum of about $27,000.00 for loss of earning capacity to the date of trial, this figure, expressed roundly, being that shown in Exhibit 10 as the difference between the appellant's actual not earnings to trial and what he would have earned had he remained, uninjured, in his employment with the respondent. Further, that if he did include such a sum for loss of earning capacity to trial then the award was too low. The judgment was also attacked on the ground that the judge appears to have cut down the $27,000.00 because eight years elapsed between accident and trial, by reason of some fault of the appellant. It is not clear that the judge did this, but it does appear that he looked at the matter in the light of what he said in part of his reasons:—"The trouble, as I see it with, this unfortunate plaintiff is whether through neglect on his part or on that of his former solicitor, his return to functional work was greatly delayed, a delay long past the time when a man of his type with proper persuasion and assistance would have been back in the type of work he is in now. To that extent I do not think that the defendant should pay for all of the loss that could have be minimised by the plaintiff and/or his representatives." He also said that he was not satisfied that the appellant "throughout the intervening years for one reason or another took every opportunity to obtain other suitable employment." Of course His Honour was entitled to use his impression of the appellant as he saw him, but he had already said when he mentioned this man leaving his post-accident work with the respondent that he did so to endeavour to find something else that suited him and caused him less distress. There was evidence that before the doctor referred him to the

Rehabilitation Centre the appellant had tried several jobs and had applied for others. And almost as soon as he left the said Centre he took the job which he held at the time of trial. Nevertheless, on any view of the matter, where a long period has elapsed between injury and trial what would otherwise be regarded as and found as special damage for loss of earning capacity must be discounted by reason of the ordinary vicissitudes. Of course, we do not know to what extend the $27,000.00 was discounted. The judge was aware of the imponderables which had to be considered in addition to the view he chose to take of the appellant.

There can be no doubt at all that the injury was grave, grossly disabling to a right-handed man such as the appellant, and that in association with the injury itself and the numerous operations which followed over a period of years there was prolonged pain and suffering beyond the extent ordinarily encountered in accident cases. His capacity to enjoy life must necessarily have been greatly impaired. Since March, 1973, he has been in employment as I have related, but it is apparent that his earning capacity has been imparied for the rest of his working life. This is so because, should he lose his present job he would be a greatly handicapped man competing against hale men for available work. Additionally, the evidence shows that in the two whole years 1974 and 1975 his earnings have been substantially less than they would have been had he been uninjured and in the employ of the respondent. I have already quoted what the learned judge had to say about his future had he remained in such employ - a matter which in itself is to be viewed in the light of the usual vicissitudes of life. But the appellant has been deprived of the opportunity to continue in the trade in which he was qualified, so that his earning capacity has been adversely affected for the rest of his working life. It would be unreal to accept that this diminution of earning capacity would be of the order of a constant $1,000.00 per annum - a sum which was suggested to us. It might be greater or less. And there is the fact, which I have mentioned, that should

the appellant become unemployed he is gravely handicapped in the search for work.

In Neall v. Watson (1960) 34 A.L.J.R. 364 at p. 367 the court held, inter alia:

> "If an appellate court once concludes that there is a marked disproportion between the amount awarded by a judge and the injury suffered, that in point of law, justifies the court in interfering although it is not possible to point to any specific departure by the primary judge from the principles of assessing damages prescribed by law."

Viewing the award globally, and noting that the appellant is 38 years of age with many years of working life ahead of him, I consider that there is a marked disproportion between the award and the injury within the meaning of the test enunciated by the High Court, which I have just quoted.

I would allow the appeal with costs and vary the judgment below by substituting the sum of $50,000.00 for the sum of $35,000.00 and order the respondent to pay the appellant's costs of the appeal.