IN THE SUPREME COURT OF QUEENSLAND Appeal No. 24 of 1976

BETWEEN:

GEORGE SEYMOUR (an infant by his next friend JAMES THOMAS SEYMOUR) (Plaintiff) Respondent

AND:

ERIC LACKEY (Defendant) Appellant

Wanstall S.P.J.

Douglas J.

Matthews J.

Judgment delivered by Wanstall S.P.J. on the 7th December, 1976, Douglas J and Matthews J. concurring with these reasons.

"THE APPEAL IS DISMISSED WITH COSTS."

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 24 of 1976

BETWEEN:

GEORGE SEYMOUR (an infant by his next friend JAMES THOMAS SEYMOUR) (Plaintiff) Respondent

-and-

ERIC LACKEY (Defendant) Appellant

JUDGMENT - WANSTALL, S.P.J.

The only point in this appeal is whether the learned judge of District Courts who tried the case had jurisdiction to assess the plaintiff's damages at $13,500 and give judgment for £9,450, in accordance with his apportionment of liability, or should have assessed them at no more than $10,000 (the statutory limit) and have given judgment for 70% thereof, $7,000.

The plaintiff's claim was for $10,000 damages in a personal action for negligence arising out of a vehicle accident.

Section 66 of the District Courts Act of 1967 confers jurisdiction on a District Court -

> "to hoar and determine all personal actions where the amount, value or damages sought to be recovered is not more than -
>
> (a) In the case of an action arising out of any accident in which any vehicle is involved ten thousand dollars;
>
> (b) and in any other case six thousand dollars whether on balance of account or after an admitted set-off or otherwise."

Section 7A is also relevant -

> "(1) Splitting demands; Abandonment of excess. A plaintiff shall not divide cause of action for the purpose of bringing two or more actions in a District Court; but a plaintiff having a cause of action for more than the amount for which plaint might be entered under this Act may abandon the excess (which abandonment shall be stated in the plaint), and thereupon the plaintiff may, on proving his case, recover to an amount not exceeding the limit specified by this Act and the judgment of the Court shall be in full discharge of all demands in respect of the cause of action, and entry of the judgment of the Court shall be made accordingly.

(2) Splitting debt by giving bills.. If a defendant has given two or more bills of exchange, promissory notes, bonds or other securities, for a debt or sum originally exceeding the amount specified in paragraph (b) of subsection (1) of section sixty-six of this Act the plaintiff may sue separately upon each of the securities not exceeding such amount an forming a distinct cause of action."

Counsel relied on the decision of the Court of Appeal in Kelly -v- Stockport Corporation (1949) 1 All E.R. 893 (not elsewhere reported), contending that it is directly in point. That plaintiff sued in the County Court to recover £200 damages for personal injuries, that being the maximum amount recoverable in the court. The section limiting jurisdiction read -

"(1) A county court shall have jurisdiction to hear and determine any action founded on contract or on tort whore the debt, demand or damages claimed is not more than £200, whether on balance of account or otherwise."

The learned judge, applying the apportionment Act, found the plaintiff one-third to blame, and having assessed at £300 the damages that would have been recoverable if the plaintiff had not been at fault awarded him two-thirds of that sum, i.e. the full amount claimed.

Tucker L.J. (with whom Asquith L.J. and Singleton L.J. agreed) said at p. 895 -

> "The case is very plain. It turns entirely on the language of the Law Reform (Contributory Negligence) Act, 1945. Section 1(1) reads as follows:
>
> 'Where any person suffers damage as the result partly of his own fault and partly of the fault of any other persons ..... the damages recoverable in respect thereof shall be reduced to such extent etc.....'"

The comparable Queensland legislation is identical. The Lord Justice continued -

> "In the present action the damages recoverable are limited, by reason of the provisions dealing with the jurisdiction of the County Court to £200. It in therefore the £200 which has to be reduced. In other words, it is not the damage sustained, in fact, by the plaintiff, but the damages recoverable in respect thereof which must be taken into consideration in this connection."

This case was closely examined by the Full Court of Victoria in Marks -v- Victorian Railway Commissioner (1955) V.L.R. 1 but that court was able to distinguish it without determining whether it was correctly decided. In Artts -v- V.C. and T. Greer (1954) N.I.L.R. 112 the Lord Chief Justice of Northern Ireland declined to follow it. Williams J., in Hussey -v- Page (1973) Qd.R. 509, expressed preference for the reasoning of the Lord Chief Justice in Artts's cone over that of the Court of Appeal.

However interesting may be the argument of counsel in which he discussed these cases, his contention is not open in this Court, in the face of the decision of the High Court in Unsworth -v- The Commissioner for Railways (1958) 101 C.L.R. 73. I interpret it as laying down the proposition that the Queensland apportionment legislation operates so as to enable "the initial assessment of the 'damages recoverable' ... to be made without regard to the existence of any statutory limit as to amount of which the defendant may ultimately take advantage ...". (per Taylor J., at p. 94). The relevant statutory limit in the Railways Acts prohibited the court or jury from finding or a ssessing or giving judgment for the plaintiff for any amount exceeding £2000, in the circumstances. In a Lord Campbell's Act action the jury apportioned the blame as to 85% to the defendant and found the deceased to blame to the extent of 15%, with the result that the trial judge entered judgment for the plaintiff for 85% of £2000, i.e. £1700. The High Court increased the amount to the full limit of £2000.

I am unable to find any basis for distinguishing Unsworth's case from the instant one. Counsel sought a distinction in the fact that the limit in this case is set as the upper level of the trial court's jurisdiction, rather than as the upper level of the liability of the defendant. That difference was regarded by Dean J. in Mark's case as irrelevant (p. 10), and at pp. 12 - 13 he actually used the illustration of the County Court's limited jurisdiction to support his reasoning as to the interpretation of the words "damages recoverable" (c.f. also Smith J. at p. 17). In Unsworth's case both Fullagar J. and Taylor J. specifically approved the decision in Mark's case.

Counsel also based an argument on the similarities of phraseology in the Queensland s. 10 and the English s. 1 (of the apportionment legislation), and the differences between both and s. 3 of the Victorian legislation, by which he sought to persuade us to prefer the decision in Kelly -v- Stockpart Corporation (supra) to that in Mark's case (supra). But this argument cannot prevail over the fact that the words which were construed by the High Court in Unsworth were those of the Queensland s. 10. It would be presumptuous of this Court to adopt an argument which would plainly treat that construction as having been made per incuriam.

I would dismiss the appeal with costs.