IN THE SUPREME COURT OF QUEENSLAND Appeal No. 25 of 1978

FULL COURT

BEFORE:

The Acting Chief Justice

Mr. Justice D.M. Campbell

Mr. Justice Kneipp

BRISBANE, 22 SEPTEMBER 1980

BETWEEN:

DAVID ALBERT SCOTT (Plaintiff) Respondent

- and -

NORMAN RALPH De WHITTE (Defendant)

- and -

FIRE AND ALL RISKS INSURANCE COMPANY LIMITED (Defendant by election) Appellant

JUDGMENT

THE ACTING CHIEF JUSTICE: This is an appeal against a decision of my brother Demack given on 16 April 1980 in a case which arose out of a motor vehicle accident which happened on 6 November 1977. What happened was that the plaintiff and the defendant had been together at a gun club during the course of the afternoon and had left the gun

club, which was about 10 to 15 miles from Dysart, where they had intended to go, at about 6 o'clock in the evening. The defendant was driving the car and the plaintiff was a passenger sitting in the front seat. During the course of the journey the plaintiff fell asleep and he woke up when he felt the car bump. He saw that the car had gone off the road, on which side of the road the evidence did not establish, and the car continued to travel through the bush and strike a tree which, according to the plaintiff's evidence, was about 100 yards from the roadway, and having struck the tree, the car overturned and the plaintiff was injured.

The plaintiff pleaded res ipsa loquitur, but in the alternative he pleaded that the defendant had driven at an excessive speed and had failed to keep a proper look-out, and that is the basis upon which the learned judge dealt with it. It is quite true that there is no evidence to establish the manner in which the car left the road, but there is, in my opinion, ample evidence which justified the finding of negligence which the learned judge made on the basis upon which he found it, and in my opinion, the appeal on the question of liability should be dismissed.

The appellant also included in his grounds of appeal the assertion that the damages awarded were manifestly excessive, but that ground of appeal has been abandoned.

Judgment in the action was given on 16 April 1980. The notice of appeal was dated 6 May 1980. On 25 August 1980 a notice of cross-appeal was given, and that was, of course, out of time. What had happened was that in the meantime the decision of the High Court in Cullen v. Trappell, 54 ALJR, page 295, had been reported. That decision had been given on 1 May 1980, but the report to which I have referred appeared in the issue of the Australian Law Journal Reports for July 1980. That decision was thought to have effected a change in the basis upon which damages for future economic loss should be assessed in cases like this with respect to the notional income tax which would be attributable to the

notional interest which those damages would have earned. In my opinion, no extension of time should be granted for the purpose of allowing the respondent to raise this matter by way of cross-appeal in the circumstances of this case. No evidence was given which would have enabled the learned trial judge to have estimated the amount of any such factor for income tax, and the matter does not appear to have been raised at all in argument before the learned trial judge. What has happened before us is that a calculation has been put before us, which cannot be said to be a particularly simple calculation, and it leads to the conclusion that had the trial judge correctly apprehended and applied the principles which it is said, according to the High Court's decision, he is bound to apply, he would have awarded an extra $11,649 to the sum that he did award for damages for future economic loss, a very precise piece of calculation.

Now, there may be some process by which the learned judge could have done what it is now said he ought to have done. For myself, I would find it impossible to perform any such exercise without some evidence given at the trial. In my opinion, therefore, the appeal should be dismissed and the application for extension of time within which to file a notice of cross-appeal should be refused.

MR. JUSTICE D.M. CAMPBELL: I agree.

MR. JUSTICE KNEIPP: I agree.

THE ACTING CHIEF JUSTICE: The appeal will be dismissed with costs, and the Court will not make any order in respect of costs on the application on the cross-appeal.
