IN THE SUPREME COURT OF QUEENSLAND Appeal No. 20 of 1982

FULL COURT

BEFORE:

The Chief Justice (Sir Walter Campbell)

Mr. Justice Dunn

Mr. Justice Sheahan

BRISBANE, 2 NOVEMBER 1982

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BETWEEN:

TREVOR DAVID KELLO (Plaintiff) Respondent

-and-

WOWAN SAW MILLS (a firm) (Defendant) Appellant

JUDGMENT

THE CHIEF JUSTICE: In my opinion the appeal should be allowed with costs, and the judgment appealed from varied by substituting for the sum of $42,477.51 the sum of $28,527.51. I publish my reasons.

I am authorised by my brother Dunn to say that in his opinion the appeal should be allowed with costs, and that the order of the Court should be as proposed by me, and that he agrees with my reasons and with those about to be published by my brother Sheahan.

MR. JUSTICE SHEAHAN: I also agree that the appeal should be allowed with costs, and that the amount of the judgment should be the sum of $28,527.51. I publish my reasons.

THE CHIEF JUSTICE: The order of the Court will be as I have indicated.

The Court orders that moneys paid into Court by way of security for costs be paid out to the solicitors for the appellant.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 20 of 1982

WOWAN SAWMILLS (A FIRM) Appellant

-v-

TREVOR DAVID KELLO Respondent

THE CHIEF JUSTICE

DUNN J.

SHEAHAN J.

Judgment delivered by the Chief Justice and Sheahan J. on the 2nd November, 1932. Dunn J. concurring.

"Appeal allowed with costs. Judgment varied by substituting $28,527.51 for the sum of $42,477.51. Security for costs be paid out to solicitors for Appellant."

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 20 of 1982

BETWEEN:

TREVOR DAVID KELLO (Plaintiff) Respondent

-and-

WOWAN SAWMILLS (a firm) (Defendant) Appellant

JUDGMENT - THE CHIEF JUSTICE

Delivered the Second day of November 1982.

I have had the advantage of reading the reasons for judgment prepared by Sheahan J., and I agree with those reasons and the order proposed by him. In my opinion, the learned trial Judge was not justified, on the evidence, in adopting an amount of $25 loss per week for the purpose of assessing damages for impairment of the respondent's future earning capacity. This may be illustrated by the following analysis of the evidence.

The wages for a bench operator under the Saw Milling Award, as at 21st January, 1982, were $226.80 gross per week. As at 29th March, 1982 (the date of the trial was 15th April, 1982), the gross award wage for a tractor driver was $216.10 per week, showing a (gross) loss of $10.70 per week. Assuming that, at the date of the injury, the respondent was earning $22.37 per week overtime (see Ex. 7 - Schedule 1), that figure represents slightly less than 3½ hours per week overtime work. If it is to be assumed further that he would have continued to work 3½ hours per week overtime as a bench operator, this would have earned him $31.17 per week gross. The addition of $31.17 and $226.80 produces a figure of $257.97 per week. The respondent said in evidence that he was working about 3¾ hours per week overtime (three quarter hours per day) as a tractor driver. He also stated that he had been working an extra two hours per week overtime, but that he did not see this continuing. A letter from the Shire Clerk of the

Banana Shire Council (Ex. 6) stated that he was working in a permanent capacity and "would expect to work a minimum of five hours overtime per week at a rate of time and a half". However, if one merely adds a figure for 3¾ hours overtime per week, namely $30.38 per week, to the basic rate of $216.10, the gross weekly earnings amount to $246.48. The difference (gross) between $257.97 and $246.48 is $11.49. Having regard to the incidence of income taxation, the net weekly difference or loss would be in the vicinity of $8.

The learned trial Judge took a loss of $25 per week for a period of 30 years which, on the 5% tables, would produce a figure of $20,550. But I consider that the assessment of damages for impairment of earning capacity in this case should have resulted from a broad and common sense approach rather than one based on a narrow mathematical way of looking strictly at the actual difference between pre-accident and post-accident earnings. The respondent must be compensated for the difficulties he may encounter in the open labour market with his injured hand, and I think that an award of $12,000 is a fair and reasonable one under this heading.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 20 of 1982

BETWEEN:

TREVOR DAVID KELLO (Plaintiff) Respondent

- and -

WOWAN SAWMILLS (a firm) (Defendant) Appellant

JUDGMENT - SHEAHAN J.

Delivered the second day of November 1982.

This is an appeal by the defendant firm against an award of damages to the plaintiff in an action in the

Supreme Court in which the latter sued the former as his employer for damages for negligence and breach of statutory duty. The action arose out of an accident in the appellant's sawmill at Wowan on 17th October 1979 in which the respondent suffered severe lacerations of his right hand resulting, inter alia, in the amputation of his right index finger. The only issue before the learned trial judge was the quantum of damage thereby suffered by the respondent.

The grounds of appeal are ten in number, but essentially what is attacked is that component of the award which relates to future economic loss as being manifestly excessive. The total damages assessed below is in the sum of $54,750.39 of which $29,950.00 was for loss of capacity to earn wages in the future.

For the purposes of this judgment it is sufficient to say, at the outset, that the respondent, as a result of his injury, is no longer capable of performing the work involved in his employment as a bench man in a sawmill, as His Honour found. However the respondent, after securing a position as an “order man” with a firm in Brisbane, obtained employment with the Banana Shire Council as a tractor driver on 20th January 1982. This position he still holds and it is a permanent one, at least in the sense that there was no evidence placed before His Honour that it was likely to be terminated in times of economic recession affecting the revenue of the Banana Shire Council. The respondent is physically capable of performing the work involved in his present employment, which as His Honour found, was less hazardous than working in a sawmill.

The critical question on the aspect of future economic loss was the amount (if any) by which the respondent is likely to be disadvantaged financially for the future by his injury and permanent disability.

Figures placed before the learned trial judge and accepted by him revealed that at about the time when the respondent commenced work with the Shire Council the weekly

award rate for a bench operator was $226.80, a sum which must be taken as gross (Exhibit 5). However, schedules of the respondent's loss of wages to trial (Exhibits 8 and 9) include for each separate period a component called "Gross Average Overtime" in the sum of $22.37 throughout the period from 17th October 1979 to 6th January 1982. The schedule shows that his pre-trial loss of wages as a benchman are calculated by adding $22.37 to the relevant award rate for the various periods set forth in the schedule. Now one looks in vain for any mention of overtime payments at the sawmill in Exhibit 1 which is a statement of the respondent tendered on his behalf. However this statement does mention his average weekly overtime at Mouldings Pty. Ltd., where he worked after his accident before taking his present employment. Neither in exhibit 1 nor in the respondent's evidence is there any mention of what he earned before his accident at the sawmill. Furthermore counsel for the respondent at the trial said, with respect to Exhibits 8 and 9 as follows:—

> "It is now a matter of admission that the plaintiff's pre-trial earnings total $8,300.39 it is an admission as to the calculation of those two schedules, not an admission as to loss."

Clearly, at a glance at these schedules reveals, the words "loss of" should be inserted between the words "pre-trial" and "earnings" in the passage quoted. But more important, the figures were not admitted by the defendant as factual. Therefore it seems right to say that there was, in truth, no evidence before His Honour of overtime payments which would be made to the respondent in the period up to trial, or likely to have been made. If this be correct, then it seems, with respect, that His Honour had no warrant to award pre-trial loss of earnings in the sum of $8,300.39. Be this as it may, no specific ground of appeal touches this question, or this part of the award of damages; the explanation seems to be that His Honour, looking at other evidence, to which I will advert later, considered that because of the incidence of overtime in

other sawmills during the pre-trial period, that sum is very conservative and so allowed it in full.

I turn now to the critical question in this appeal, namely, future economic loss. After observing that the respondent was "very fortunate in finding a job that returns him an income not greatly different from what he would have earned in a sawmill" His Honour went on to say:—

> "For the future, I am not satisfied there is any realistic basis for thinking that Mr Kello would have become a manager of a sawmill. It does seem that a great number of small mills in the Rockhampton area are owned by families or partnerships which provide their own managership. Consequently, he was chasing a very rare prize for which there were, no doubt, many competitors. He was also engaging in what is essentially a hazardous industry and he has not shown the capacity for keeping himself intact, "which is part of the equipment for survival in the sawmilling industry. Nonetheless, I am satisfied that he did have a capacity to earn more money as a sawmiller than he has as a disabled tractor driver. It seems to me that this must be self-evident because his injury is a grave one and it must be reflected in some way in economic terms.
>
> Doing the best I can with the evidence, I am satisfied that the net amount per week which is proper to treat as his loss of capacity is $25. This is based on his present earnings and what could be earned as a benchman according to Mr Hinz. I am satisfied that this amount ought to be projected over a period of thirty years. It seems to me this is a proper figure for what is a hazardous industry.
>
> The factor, according to the three percent tables which I use for the reasons I have previously given in the case of Abel and Katsanaves, is 1038. Over the period of 25 years, this represents a sum of $25,950. It does not seem to me that this amount ought to be reduced any further because I have taken conservative figures in arriving at that sum. I therefore assess the loss of economic capacity for the future in that amount."

Now it is clear enough that His Honour, in arriving at the figure of $25,950.00, has based this sum on the loss of

$25.00 per week for 30 years, not 25 years, using the three percent tables. But on the five percent tables this sum would involve a "factor" of 822, which over a period of 30 years would amount to $20,550.00, a difference of $5,400.00. This difference is by no means insignificant. If such were the only error appearing, this appeal would have to be allowed to that extent. Powell v. Black & Anor. (unreported No. 952/1980). But the appellant's attack on the award for future economic loss is basically founded on a different ground, and that is the reliance by His Honour on the evidence of available overtime in the sawmilling industry for a benchman such as the respondent but for his accident, and I now turn to the evidence of Mr Hinz, on whom His Honour relied. It is sufficient for my purposes to quote from portions of the evidence of this witness, a partner-owner of a sawmill at a place called "the Caves". First, after stating the basic award rate for a benchman, the following appears:—

> "There are some other bonuses?-- We pay our benchman $15 per week, which is $10 per week and a dollar per day. That is an incentive.
>
> Is that a normal type of bonus in Central Queensland?-- I don't know how many other mills pay that amount. I think they all probably pay above award. I couldn't be certain about that. I don't know just what they pay.
>
> Is there a demand for benchman?-- Yes. There is no benchman out of a job, I don't think - that I know of, anyway.
>
> Is overtime worked at your mill?-- Yes, we work a considerable amount of overtime - I would say, a minimum of four, possibly six hours up to ten hours per week for the benchman.
>
> Does overtime attract penalty rates under the award?-- Yes.
>
> What are they?-- Time and a half, $8.55, and double time is $11.40.

When does double time start?-- I think it is after four hours in any one day or three hours on Saturday, it might be. It could be changed. I wouldn't like to argue that, but it is something like that, without reading the award."

Later, in cross-examination, this passage appears:—

"Do you have any knowledge of the Wowan Sawmill at all?-- Very little.

Are you able to say whether it is of comparable size to yours, or bigger or smaller?-- Yeah, it would be comparable to ours, I think.

Do you know how many benchmen are employed there?-- Wowan, as far as I know - only one benchman. I couldn't say - that for certain. They have only got one bench, anyway.

I understood the effect of your evidence was there is a need to work overtime in your mill in order to make supply; is that right?-- That's right, yes.

I understood your evidence was also to the effect that you thought other mills around the area also worked overtime?-- I know some other mills but not all are opened Saturday mornings.

"You are referring to mills around the Rockhampton area?-- That's right, the Rockhampton and Yeppoon area."

Now it would seem prima facie reasonable to suppose that the last question by counsel in the passage just quoted carried an implication that Mr Hinz's evidence was confined to sawmills in an area which did not include Wowan. But even if this was the case, I feel, in fairness to the learned trial judge, that he was having regard to the possibility that the respondent would, as his experience increased, be able to secure employment in the "Rockhampton and Yeppoon area" where overtime was available. However, as against that possibility there is the fact that at the date of trial the respondent's gross weekly wage as a tractor driver was $216.10, but as he works at least three quarters of an hour overtime for five

days a week at time and a half, this would increase his gross wages per week to about $237.00 per week. If still employed at the sawmill he would have then been earning about $226.80 gross, and, as I have said, there is no evidence that he did, or ever would earn overtime at the Wowan sawmill.

What then is a reasonable sum to compensate the respondent for the possibility that he might have chosen to seek employment in another sawmill, obtain it and earn the award rate plus some indeterminable amount of overtime for such period in the future as he might elect to accept the hazards of working in a sawmill as a benchman?

In my opinion a sum of about $12,000.00 to provide for such possibilities would be reasonable. If invested now this sum will, with accretions, amount to a sizeable sum by the time the respondent would have been likely to get a better paid job than the one at Wowan, assuming he could achieve that end, which of course is a matter of speculation. The paucity of evidence from Mr Hinz as to what amounts of overtime, or bonus payments (if any) are available in mills other than his own calls, I think, for a cautious but not a pessimistic approach to the respondent's future economic loss. Accordingly, I would reduce the award in this respect to the sum of $12,000.00. Despite the unsatisfactory nature of the evidence placed before the learned trial judge, I think it must be kept in mind that the respondent will be severely disadvantaged if compelled at some stage in the future to compete on the open labour market, however slight that risk may be.

I would allow the appeal with costs and substitute a sum of $41,505.40 for the sum of $55,455.40. From this must be deducted the sum of $12,977.89 being Workers' Compensation payments, resulting in a judgment for the respondent in the sum of $28,527.51.