

FULL COURT

BEFORE:

The Chief Justice (Sir Walter Campbell)

Mr. Justice Sheahan

Mr. Justice Shepherdson

BRISBANE, 23 SEPTEMBER 1982

BETWEEN:

MICHAEL TERENCE ELEISON

Plaintiff (Respondent)

- and -

GRALLMARK PTY. LTD.

Defendant (Appellant)

JUDGMENT

MR. JUSTICE SHEPHERDSON: On 22 March 1982, a master assessed damages in favour of the respondent as follows: general damages: \$27,000; loss of clothing: \$20; travelling expenses: \$35; medical expenses: \$1,002; wages lost up to trial: \$4,722.82, making a total of \$32,779.82.

These damages were assessed in an action brought against the appellant as a result of an industrial accident on 29 September 1978, while the respondent was working for the appellant. The respondent was then aged 16 years. He was born on 25 March 1962. In the accident he suffered

burns to the left hand and arm, the right hand, the neck and face - about 12 per cent of his body. He was admitted as an inpatient to the Royal Brisbane Hospital on the date of the accident, and remained an inpatient there for about 5½ weeks. During this spell in hospital, the respondent was, as the master found, treated with saline bathing. On 20 October 1978 he underwent surgery, in which tangential incision of his left hand and arm was performed, and also his neck, and split skin grafts were performed, the donor site being the respondent's left thigh.

The master had before him two reports from Dr. Stuart Pegg, the Director of Surgery and Director of the Burns Unit at the Royal Brisbane Hospital. Dr. Pegg said that at the time of the respondent's discharge on 6 November 1978, the respondent's grafted surfaces were good, and he was treated with pressure garments to his face and pressure garments for his arms, including his body. The master had photographic evidence of these pressure garments, which were intended to reduce the possibility of thickened scarring occurring.

The respondent wore these garments till November 1979. The garments were, as the master described them, "all enveloping ... except for space for the face." One photo shows that the garments covered the upper body, neck, shoulders, and the whole of the respondent's left arm to the wrist, as well as the top part of one leg. As the master found, the respondent was acutely conscious and embarrassed by the reaction of others to them.

After his initial 5½ weeks in hospital the respondent had two other short periods in hospital. The first was in July 1979, when release of scar bands in the left wrist with excision of hypertrophic scars in two areas of the hand were performed, with releasing of minor contractions. The excised areas were skin grafted, and the respondent continued to wear a pressure garment over these areas.

In November 1981 excision of some hypertrophic scars on the left arm was performed. A scar to the left elbow and

one on the left upper arm were excised and sutured. For both these operations the respondent underwent a general anaesthetic. In his report of 3 March 1982 Dr. Pegg described the respondent's condition as good, with minimal scarring present.

A plastic surgeon, Dr. Swiss Davies, gave evidence for the respondent. Reports of another plastic surgeon, Dr. Anthony J. Emmett, were admitted into evidence. The master referred to the plastic surgeons' reports that the operation and treatment which the respondent had received had been extremely well performed and resulted in a good recovery. The master inspected the scarring, and his summary was, "I inspected the scars which now appear on his arm, neck and around his left ear and, to some extent, encroaching on to the lower left side of the face. The scarring around the ear is largely obscured by the hairline, but the scarring around the neck, which would not be covered by any ordinary clothes and would be largely observable in the wearing of an open necked shirt, is very noticeable. The scarring of almost the whole length of the left arm, including the hand, is noticeable, including two red scars from more recent operations. There is a very slight patch of scarring to the right upper leg which is barely noticeable, and extensive scarring covering the front part of the left leg. Because of those recent operations to which I have referred Mr. Eleison still wears a pressure sleeve on his left arm."

The master recognised that although dramatic improvement in the scarring had occurred, there would still be further progress. The high colour of some of the scarring will fade and the texture of the scarred skin will show further improvement. Despite this, he found that the scars would largely still be observable, and that on the probabilities were likely to have some effect on the respondent.

There is no residual functional disability in movement or use of the respondent's left arm and hand, but the

medical evidence showed, as the master found, that the whole of the scarred area is more susceptible to injury if knocked or hit, as well as to sunburn. To some extent it disables the respondent from working in the sun for any extended period. In the witness box the respondent complained of pain only if the scarred areas were knocked or bumped.

I have already mentioned one aspect of the matter of embarrassment. The master found, as he was entitled to, that for the future there will be some embarrassment to the respondent. He found no evidence of present personality change. There was no overlay. There was, he found, no call for further treatment whether in relation to the burns or scars or by way of a psychiatric or psychological kind.

There were before the master reports from Mrs Elaine Dignan, a psychologist, and a Dr. B. Klug, a psychiatrist. Dr. Klug's report was referred to in the master's judgment. The respondent denied to Dr. Klug as early as March 1980 that the burns worried him or caused him to be selfconscious. In the witness box the respondent said they were not now sore Mrs Dignan's report was also referred to. She opined that the respondent's sense of his own physical image had been limited by his accident with increased loss of potential for self-esteem, producing some depressed responses. The master thought her report of significance in evaluating the respondent's work history experience both prior and subsequent to the accident. I shall shortly refer to what the master had to say about impairment of the respondent's earning capacity.

Before doing so, I should add that the master found that since the accident the respondent had suffered some impairment of his social life. He is a single man now aged 20 who has found no new female friends. He attends a church group, usually with his brother and sister, but finds it difficult to make friends there.

The master's assessment of general damages at \$27,000 was in respect of past and future pain, suffering and loss

of the amenities of life and included an unspecified sum for future impairment of earning capacity, although he found that there was no provable economic loss for the future.

The master said, "As to general damages, I have taken into account that the plaintiff's pain and suffering has largely passed, but must have been severe while he was enduring it, that he was compelled to wear the pressure suit, to which I have referred, and not in the sequestered circumstances of a hospital but in daily life throughout the period which I have mentioned, and that he has since the more recent operations as of necessity worn a similar garment on his left arm. I also take into account that he is left with his scars, although the unsightliness of those will lessen with the passage of time. He has them for the balance of his life. There is no provable economic loss for the future." He included in the general damages the matters which he mentioned and "any disability of a general kind in the labour market".

Earlier the master had said, "There is some evidence of reluctance on the part of employers to employ the plaintiff. To what extent that is because of his scars or disabilities by way of working in the open, and to what extent attributable to the degree of his education and absence of skills, it is very hard to say.

In the estimation of general damages, however, I think some allowance, although very limited, must be given to this factor. It is submitted by his counsel that there is and will always be some disability experienced by the plaintiff in the labour market, and I think that this is so. Some restrained allowance should also be made on this account."

I must say that for my part I have formed the view that on the evidence the master should only have included a very modest amount as the "restrained allowance." This means, therefore, the major part of the \$27,000 should have been in respect of past and future pain and suffering and

loss of amenities. The master expressly found that the pain and suffering had largely passed. Despite this express finding, when the master came to award interest he apportioned the general damages as to one-quarter up to the trial. This is, in my view, a very strange approach, and of itself suggests that despite the above express findings, the master regarded 75 per cent of that part of the general damages as attributable to pain, suffering and loss of amenities as being for the future or, alternatively, the fixing of one-quarter could well suggest a component for future economic loss, which, in my view, is other than a "restrained allowance."

Any such approach was, in my view, plainly wrong on the whole of the evidence. The master appears to have correctly taken the view that the respondent's pain and suffering had largely passed in the four years since the accident.

Despite this apparent confusion in the master's judgment - which of itself entitles this Court to interfere in the award - I have formed the clear view that in the case of this 20-year-old man, the assessment of general damages of \$27,000 where there is no provable future economic loss but merely some "restrained allowance" to be made for some unspecified disability experienced in the open labour market, is quite unreasonable and cannot be allowed to stand.

In my opinion, the appeal should be allowed, and for my part I would consider general damages should be assessed at \$20,000; however, having regard to the master's views I consider \$21,000 is fair compensation for the respondent. This sum, in my view, should be apportioned as follows: past pain and suffering and loss of amenities of life, \$8,000; future pain and suffering and loss of amenities of life - and I stress that this component is primarily for embarrassment and cosmetic impairment - \$8,000; future impairment of earning capacity, \$5,000, making a total of \$21,000.

Finally, in deference to an argument by counsel I would say that I do not subscribe to the view that damages for scarring and disfigurement bulk larger in the case of a female than in the case of a male. Scarring cases are always difficult. The effect of scarring is subjective - both for the sufferer and for the assessing tribunal and each case must be assessed on its own facts and in the light of the particular plaintiff and his or her injuries I would set aside the judgment of the master, and in lieu of the total damages of \$32,779.82 assessed by him, substitute a figure of \$26,779.82.

As there was an apportionment of 10 per cent against the respondent, this sum will be reduced to \$24,101.84.

As for interest, I would allow interest on the sum of \$8,149.50 at the rate of 10 per cent per annum from the date of the writ to the date of the judgment appealed from.

In summary, therefore, I would set aside the judgment ordered by the master and in lieu substitute the following: "Judgment for the plaintiff in the sum of \$24,101.84 with costs of the action to be taxed. Order that the defendant pay to the plaintiff interest at the rate of 10 per cent per annum, from 10 June 1980 to the date of judgment on the sum of \$8,149.50. Order that the sum of \$4,724.82 be refunded to the Workers' Compensation Board, Queensland, and the balance of the judgment paid to the plaintiff."

As to the costs of the appeal, I would order that the respondent pay the appellant's costs to be taxed.

THE CHIEF JUSTICE: Although this is a case of scarring, and one in which the Appellate Court should give, as I have done, proper weight to the advantages of the judicial officer sitting in the trial Court, I consider that the award of damages was manifestly excessive and should be reduced. I agree with the reasons of my brother Shepherdson and with the order proposed by him.

MR. JUSTICE SHEAHAN: I also agree.

THE CHIEF JUSTICE: So the order of the Court is appeal allowed with costs, the order of the master set aside, and there should be substituted therefor the order as indicated by my brother Shepherdson.

-----