IN THE SUPREME COURT OF QUEENSLAND No. 1015 of 1977

FULL COURT

BEFORE:

Mr. Justice Douglas

Mr. Justice Sheahan

Mr. Justice Connolly

BRISBANE, 16 JUNE 1983

BETWEEN:

IDS HAAKSMA (Plaintiff) Respondent

- and -

SANDRA KAY HEINEMANN (Defendant) Appellant

JUDGMENT

MR. JUSTICE DOUGLAS: In this matter in my opinion the appeal should he allowed with costs, the judgment of the Master set aside and in lieu thereof judgment entered for the plaintiff for $32,136,03 damages and $2,356 interest and for costs. I publish my reasons. I am authorised by my brother Sheahan to say that he agrees with the reasons I have published and with the order I propose.

MR. JUSTICE CONNOLLY: I agree in the order which is proposed and in the reasons published by His Honour the presiding judge. I have nothing to add.

MR. JUSTICE DOUGLAS: The order is as I have indicated.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 1015 of 1977

FULL COURT

BOFORE:

Mr. Justice Douglas

Mr. Justice Sheahan

Mr. Justice Connolly

BRISBANE, 10 MAY 1983

BETWEEN:

(Plaintiff) Respondent

-and-

SANDRA KAY HEINEMANN (Defendant) Appellant

JUDGMENT

MR. JUSTICE DOUGLAS: The Court will consider the matter.

IN THE SUPREME COURT OF QUEENSLAND Writ No. 1015 of 1977

BETWEEN:

IDS HAAKSMA (Plaintiff) Respondent

AND:

SANDRA KAY HEINEMANN (Defendant) Appellant

DOUGLAS J.

SHEAHAN J.

CONNOLLY J.

Reasons for Judgment delivered by Douglas J. 16th June 1983, Sheahan and Connolly JJ. concurring.

"APPEAL ALLOWED WITH COSTS, JUDGMENT OF THE MASTER SET ASIDE AND IN LIEU THEREOF JUDGMENT ENTERED FOR THE PLAINTIFF FOR $32,136.03 DAMAGES AND $2,356 INTEREST AND FOR COSTS."

IN THE SUPREME COURT OF QUEENSLAND No. 1015 of 1977

BETWEEN:

IDS HAAKSMA (Plaintiff) Respondent

AND:

SANDRA KAY HEINEMANN (Defendant) Appellant

JUDGMENT - DOUGLAS J.

Delivered the 16th day of June, 1983.

This is an appeal by a defendant in respect of an assessment of damages by a Master.

The respondent who was born on 22nd September 1947 was injured in a motor vehicle accident on 13th June 1974. He suffered a compound fracture of the right femur above the knee, and a fracture of the upper end of the tibia, lacerations to the left lower leg and right forearm and bruising over the left chest. He was treated in hospital and discharged on 27th June 1974. He had sustained an injury to the same leg in 1964 but the evidence was that the effects of it were inconsequential. The Master found

> "As a result of the accident in 1974 he has a far greater shortening of the leg which requires built-up shoes and, notwithstanding his use of them, he is still disadvantaged and has difficulty and is found to be slower in various areas of his work. There is moderate muscular wasting throughout the limb, significant backward angulation of the lower part of the femur, moderate but significant laxity in the anterior cruciate and external lateral ligaments of the knee joint, some 30 degrees restriction of knee flexion on bending, some moderate crepitus of the knee cap during movement. In his most recent report, Dr. Maguire gives some measurements of certain degrees. For example, he finds a one and a half inch wasting of the right thigh above the knee and a rotation of the "leg is diminished by 30 degrees, both external and internal rotation being about equally restricted. I also find that there is present now arthritic change in the leg and that that is going to progress to the point which I have mentioned in about 10 years' time."

In this regard the relevant finding by the Master, after referring to the reports and evidence of Dr. Maguire and Dr. Lahz, was this

> "Importantly, both in their oral evidence, I find that their opinion is and the fact is that Mr. Haaksma, on the probabilities, will at some time, approximately 10 years from the date of the trial, be Incapable of performing an eight hour day's work without extreme pain and that for him to carry out a full day's work five days a week will be beyond his capacity."

Prior to the accident the respondent was a sharefarmer. He did a small amount of casual work from November 1974. He returned to full time work on 2 March 1975.

Apart from interest, damages were assessed at $120,213. Counsel for the appellant has tabulated them thus:—

$26,000.00	Pain and suffering
2,640.00	Lost wages to return to work
16,000.00	Past loss sharefarming
16,520.00	Future loss sharefarming
58,000.00	Future loss of earning capacity
652.00	Special damages agreed
101.00	Shoes
300.00	Rotary Hoe

The appellant makes no attack on the first two items or the last three. What is under attack is the assessment as it relates to the loss of the capacity and the opportunity to sharefarm, and the future loss of earning capacity generally.

It should be stated that according to Dr. Lahz's evidence the respondent at the time of trial had a permanent partial disability of the order of thirty five per cent of his right lower limb which will increase to something of the order of fifty percent by the time ten years has elapsed.

On reading the Master's judgment and the evidence one gains the immediate impression of an excessively high award. However the attack by the appellant is made in detail, and I propose to traverse the detailed attack, rather than look at the award in globo.

I turn first to the two separate amounts allocated to loss in sharefarming, and it is to be noted that I deal with them in isolation, having regard to the concessions

made by the appellant's counsel in respect of other heads of damage.

According to the evidence the respondent commenced sharefarming in 1970. He never showed an overall profit. Whilst he was disabled from working the parcels of land he was sharefarming were taken over and farmed, by the owners, and were not available to him when he was capable of again working. In any event he married in May 1975, and stated in evidence to the effect that he could not support his wife by a resumption of the sharefarming. Again on the evidence the area the respondent was sharefarming was not large enough to be so farmed effectively.

The Master allowed the respondent an amount of $2,000 per year after tax as loss suffered up to trial because he was precluded from sharefarming during that period. This is reflected in the first amount disputed $16,000. There can be no quarrel with the fact that the respondent could be allowed damages because he was precluded by his injuries from sharefarming, probably even if he had not been earning a profit previously. However that is not the case. The respondent went to work and earned full wages as a farm hand. There is no evidence that he had the time or the inclination to work also at sharefarming. The assessment of $16,000 is in respect of a loss which did not occur. If he suffered any such loss it was overtaken by the fact that he was otherwise earning beyond the potential loss.

As to the second amount under attack, that is the amount of $16,520, the Master assessed the respondent's loss from potential sharefarming at the rate of $40 per week for ten years from the date of trial. The fact is that, on the Master's findings, it would be expected that during this time the respondent would be capable of full employment, and fully employed as a farm labourer. Again in evidence he gave no hint of having the time or the inclination to do any sharefarming In addition to his work as a farm labourer. Again this is an assessment of damages which have not flowed.

The result is that neither the amount of $16,000 nor the amount of $16,520 can stand.

I next consider the amount of $58,000 assessed as future loss of earning capacity. I quote the relevant findings of the Master

> “ As I have indicated, he is now in full-time employment and will be able to continue in that for about a decade. At the expiration of that period he will be incapable of doing a full day's work and certainly of doing a full week's work. Taking the plaintiff's present taxable income as per his last return in evidence, taxable income was $11,226; allowing for tax on that amount, the plaintiff's net income after tax is approximately $171 per week.
>
> There is evidence of the position of the labour market in the sugar industry and I think, taking into account plaintiff's years of service to the one employer since the accident and the difficulty of obtaining labour that it is appropriate to regard him as likely, in his circumstances, to have continued in that employment for the balance of his working life. I have looked, therefore, at the tables to ascertain the plaintiff's loss of earnings from a period of ten years subsequent to the date of trial. Plaintiff would then be 43 years of age. One should therefore look at a period of 15 to 20 years, deferred ten years in applying the tables.
>
> “In doing that and applying the 5 per cent tables to $171 per week, the loss of earnings on a 20 year period deferred 10 years, would be $69,769. On a fifteen year period deferred 10 years, it would be $58,141. I think I should take into account the nature of the plaintiff's particular occupation and making some allowance for vicissitudes from which there appear to be few favourable, I propose to take a period of 15 years rather than 20.
>
> Accordingly, I award the plaintiff as part of the total damages, the sum of $58,000 for loss of capacity as a tractor driver and employed agricultural worker.”

It follows that, in the Master's view the respondent would be incapable of working, or getting work, because of

his injury, from the age of 43. I think that this view is inconsistent with the evidence. It would seem to be based in the main on this evidence by Dr. Lahz

> “ Just concerned with the tractor work, when the deterioration or if the deterioration occurs at 50 per cent loss of use of the limb, which your opinion is, how do you think he will get on then?-- If you say 50 per cent loss of the limb he is unfit for labouring work, for farm work. No doubt some people with that degree of disability have been able to cope with that work, but only as a result of unusual fortitude and determination by very special individuals. It is not reasonable to expect a man with that degree of disability to do labouring work having regard to the general standards of society today. Maybe it would have been expected perhaps 200 years ago when social progress wasn't as marked as it is today. A man with that marked degree of disability should not be expected to do labouring work.”

The answer clearly was not responsive to the question. Moreover just a little earlier in his evidence Dr. Lahz had said

> “I think he could do that because driving a tractor would come within the heading of semi sedentary work.”
>
> and
>
> “I can imagine circumstances where driving a tractor could be beyond this man's reasonable expectations or the reasonable expectations of anyone who employs him. I could imagine driving a tractor, if that involves heavy pressure, prolonged pressure in the use of this limb could cause a lot of pain. I can imagine that happening.”

The doctor in his report had stated to the effect that when permanent disability became 50% loss of use of the limb the respondent would be confined permanently to semi-sedentary work. On an analysis of what I have mentioned here, and what appears otherwise in the appeal record the respondent is far from being in the situation where his earning capacity can be considered as extinguished after the elapse of ten years from the date of trial. Taking into consideration the fact that the Master, who heard the

evidence, and observed the witnesses obviously took a very serious view of the respondent's injuries, I still think that this heading of damages has been greatly over-assessed. I think the ends of justice would be served if the assessment was reduced by fifty percent.

From what has been said above it follows that the total assessment should be reduced by an amount of $61,520 making it $58,693.

The parties had agreed that only 50% of the damages assessed should be recovered, so that means that the assessment should on that basis be $29,346.50. However the appellant was out of time with her appeal, and as a condition of allowing her to appeal, this Court, otherwise constituted, stipulated that the minimum amount of damages recoverable by the respondent should be $32,136.03, and that amount, of course, must stand.

It is necessary to look also at the interest awarded by the Master, and the situation is that the interest awarded on the amount of $16,000 representing loss on sharefarming prior to trial should be subtracted from the total of interest awarded. That leaves a total of $2,356 representing interest.

In my opinion the appeal should be allowed with costs. The judgment of the Master should be set aside, and in lieu thereof judgment should be entered for the respondent for $32,136.03 damages and $2,356 interest and costs.