IN THE SUPREME COURT OF QUEENSLAND Appeal No. 120 of 1984

FULL COURT

BEFORE:

The Chief Justice (Mr. Justice Andrews)

Mr. Justice Kneipp

Mr. Justice Shepherdson

BRISBANE, 9 OCTOBER 1985

BETWEEN:

MALCOLM CORNELIUS McIVER (Plaintiff) Appellant

-and-

GORDON MAGEE (Defendant) Respondent

JUDGMENT

THE CHIEF JUSTICE: In this matter I agree with the orders proposed by my brother Kneipp. I agree with the reasons about to be published by both my brothers.

MR. JUSTICE KNEIPP: In my opinion the appeal should be allowed with costs, so much of the judgment appealed from as relates to compensatory damages should be set aside, and there should be a new trial limited to the assessment of compensation damages. I publish my reasons.

MR. JUSTICE SHEPHERDSON: I agree with my brother Kneipp that this appeal should be allowed, and with the orders he proposes. I publish my reasons.

THE CHIEF JUSTICE: The Court orders that a certificate issue in favour of the respondent from the Appeal Costs Fund Act.

Mr. Magee, you will have to get someone to draw that up for you. I suggest that you see someone in Registry, or alternatively see a solicitor. I expect it will be part of the costs that you will be able to recover under the certificate.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 120 of 1984

FULL COURT

BETWEEN:

MALCOLM CORNELIUS McIVER (Plaintiff) Appellant

AND:

GORDON MAGEE (Defendant) Respondent

_____

CHIEF JUSTICE

KNEIPP J.

SHEPHERDSON J.

_____

Reasons for judgment delivered by Kneipp J. and Shepherdson J. on 9th October, 1985. The Chief Justice concurring with those reasons.

"Appeal allowed with costs, set aside so much of the judgment appealed from as relates to compensatory damages and order that there be a new trial limited to the assessment of compensatory damages.

Order that the respondent have a certificate under the Appeal Costs Fund Act.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 120 of 1984

FULL COURT

BETWEEN:

MALCOLM CORNELIUS McIVER (Plaintiff) Appellant

AND:

GORDON MAGEE (Defendant) Respondent

JUDGMENT - KNEIPP J.

Delivered the 9th day of October 1985.

The plaintiff sued the defendant in a District Court for damages (both compensatory and exemplary) for unlawful assault. The defendant admitted an assault, but set up defences of self-defence and provocation. There was a trial before a Judge and jury, the jury finding for the plaintiff on liability, assessing compensatory damages at the sum of $3,500.00, but declining to award any amount by way of exemplary damages. The plaintiff appeals, on the grounds that the award of $3,500.00 for compensatory damages was inadequate, and that exemplary damages should have been awarded. The second ground was not argued before us; hence I confine myself to the first.

There was a good deal of medical evidence, none of which was contradicted. This shows that some hours after the alleged assault, when he presented at a hospital, the plaintiff was suffering from gross distortion of the facial features with swelling, particularly due to subcutaneous emphysema; bilateral severe sub-conjunctival haemorrhages; and multiple fractures of the middle third of the face. The plaintiff's case is that these injuries were all caused by repeated blows from the defendant's fists.

In the view I take it is not necessary to canvass in any detail the facts relating to the treatment of the plaintiff's injuries. It is stated in a medical report that the injuries were very severe and that they have been "extremely demanding in treatment". The evidence is that further facial surgery is required which will cost $1,500.00 to $1,700.00. This should be followed by dental surgery which will cost about $1,000.00. There were special damages in the sum of $816.80. Thus there was evidence, which a jury could not reasonably reject, of outlays which will come to a total of some $3,300.00 to $3,500.00. The amount of $3,500.00 allowed by the jury, therefore, allows not more than $200.00 for other heads of damages. These appear to be-

(a) Pain, suffering and discomfort, past and future;

(b) The plaintiff has double vision in some fields;

(c) He was unable to work for some weeks after the alleged assault;

(d) There is at least a possibility of some permanent dental problems.

Without attempting to quantify these detriments, I think that, if one assumes that all the plaintiff's problems flow from the alleged unlawful assault, the jury's award was plainly so low as to be unreasonable.

The only problem about the matter is whether it should be assumed that the jury acted on the basis that all the plaintiff's injuries were caused by the unlawful assault by the defendant. The defendant appeared on his own behalf, and it is obvious from the transcript that his presentation of his case was a long way from being adequate. But he certainly suggested during the course of the evidence that he was not responsible for all the plaintiff's injuries. In the course of his cross-examination of the plaintiff he suggested that the plaintiff had got into a second altercation and had fallen down some steps. The suggestion was denied by the plaintiff, and it was not supported by evidence. There was thus direct evidence of only one possible cause of the plaintiff's injuries, namely the assault by the defendant. But the defendant said that there were only three blows struck, and as to their weight he said that they were "not that large". He agreed that the plaintiff was knocked down, and that he did not know whether or not the plaintiff's head might have struck some object as a result of his falling. It was common ground that after the assault the plaintiff was driven to his home in the defendant's vehicle, and that they called at a hotel on the way. The defendant said that some stubbies were procured, and that the plaintiff was drinking from stubbies during the remainder of the journey. He said that the plaintiff appeared to be alright, and that his only sign of injury was that he was a bit swollen around the eyes.

Another passenger in the defendant's vehicle was a man named Fritz. He said that the plaintiff drank one stubby during the journey and one at his home. He said that the plaintiff was "a little bit swollen around the eyes", but that "otherwise he looked quite all right".

If the jury accepted that evidence, or were not prepared to reject it, then they might have acted on the view that the defendant was not responsible for all the plaintiff's injuries. But the question is whether we should assume that they acted on that basis. In my view, notwithstanding that the burden of proof was on the

plaintiff throughout, one should not act on that assumption. There is direct evidence of only one possible cause of all the plaintiff's injuries. There is no reason to suppose that those injuries could not be caused by three blows. It is well known that reaction to some types of injuries can be considerably delayed. There was medical evidence that consumption of beer from a stubby was not necessarily inconsistent with the plaintiff's injuries. An award of $3,500.00 would be altogether excessive as compensation for an assault and its observed consequences as described by the defendant. In the summing-up it was not suggested that an assessment of compensatory damages should be on any basis other than that the defendant was responsible for all of the plaintiff's injuries. In all the circumstances, I think that it is altogether unlikely that the jury adopted any other basis. I think that it should be assumed that they did adopt it.

On that basis, I think that the appeal should be allowed with costs, that so much of the judgment as relates to compensatory damages should be set aside, and that there should be a new trial limited to an assessment of compensatory damages. The respondent should have a certificate as to costs.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 120 of 1984

BETWEEN:

MALCOLM CORNELIUS McIVER (Plaintiff) Appellant

AND:

GORDON MAGEE (Defendant) Respondent

JUDGMENT - SHEPHERDSON J. - FULL COURT

Delivered the 9th day of October 1985.

I have had the benefit of reading the reasons prepared by Kneipp J. I am grateful to accept his analysis of the evidence on the aspect of compensatory damage.

It is well established that when the verdict on damages from which an appeal is brought is that of a jury this Court will only set it aside if satisfied that the verdict is such that it is out of all proportion to the circumstances of the case. (Mechanical & General Inventions Co Ltd (1935) A.C. 346; Miller v. Jennings (1954) 92 C.L.R. 190 at 196)).

In his summing up to the jury the learned trial judge said-

> "Obviously compensatory damages in a case like this - if you come to award them - must be a substantial figure. It is not a slight case for damages if you come to it, and they are going to be quite substantial, and it is for you to say how much."

His Honour then went on to discuss the components in an award of compensatory damages. He specifically mentioned the special damages of $816.80. He did not mention other amounts. No criticism has been levelled at any part of the summing up. When one takes into account the specific items of cost to which my brother Kneipp has referred it is patently clear that the jury must have gone very wrong when they came to consider the other heads of damage to which my brother has referred. It seems they quite failed to heed the learned trial judge's advice that the compensatory damages must be a substantial figure.

During the hearing I had been concerned with the onus of proof which lay on the plaintiff of proving the damages suffered in the assault. (Edwards v. Hourigan (1968) Q.R. 202).

However on further consideration and on reading the reasons given by my brother Kneipp I agree with his views on this aspect of the appeal. I would only add that the learned trial judge, a very experienced judge, who had the

advantage over us of presence at the trial, obviously had no doubt that the injuries suffered were caused by the three blows.

I agree with my brother Kneipp that this appeal should be allowed and with the orders he proposes.