SUPREME COURT OF QUEENSLAND No. 4484 of 1987

FULL COURT

THOMAS J

RYAN J

MACKENZIE J

WAYNE WELLSLEY JACKSON (Plaintiff) Respondent

and

KIM MAREE BAGWELL (First Defendant)

and

JOHANNES MARIA GERRITSEN (Also known as HANS GERRITSEN) (Second Defendant)

and

SUNCORP INSURANCE AND FINANCE (Defendant by Election) Appellant

BRISBANE

..DATE 4/10/91 9.30 A.M.

JUDGMENT

MR JUSTICE THOMAS: I publish my reasons in this matter.

I will ask my brother Ryan to propose the orders.

MR JUSTICE RYAN: I would allow the appeal, set aside the judgment for the plaintiff and in lieu thereof order that there be judgment for the plaintiff in the sum of $129,338.66.

I would order that the respondent pay the appellant's costs of the appeal to be taxed and I publish my reasons.

MR JUSTICE MACKENZIE: I agree with the orders proposed by my brother Ryan and with his reasons.

MR JUSTICE THOMAS: The order will be that which is stated by my brother Ryan with this adjustment in relation to the action: with respect to those costs, it is ordered that the defendant by election pay the plaintiff's costs up to and including 29 April 1991 and that the plaintiff pay the defendant by election's costs of the action thereafter.

IN THE SUPREME COURT OF QUEENSLAND No. 4484 of 1987

FULL COURT

Before the Full Court

Mr. Justice Thomas

Mr. Justice Ryan

Mr. Justice Mackenzie

BETWEEN:

WAYNE WELLSLEY JACKSON (Plaintiff) Respondent

AND:

KIM MAREE BAGWELL (First Defendant)

AND:

JOHANNES MARIA GERRITSEN (also known as HANS GERRITSEN) (Second Defendant)

AND:

SUNCORP INSURANCE AND FINANCE (Defendant by Election) Appellant

REASONS FOR JUDGMENT - THOMAS J.

Delivered the 4th day of October, 1991.

CATCHWORDS:

Interest - Damages for pretrial pain, suffering and loss of amenities - Gogic (1991) 65 A.L.J.R. 203 applied - Need to abate for progressive suffering of detriments.

Counsel: J.J. Clifford Q.C. with L.T. Barnes for appellant
S.C. Williams Q.C. with A.J. Williams for respondent

Solicitors: Watkins Stokes and Templeton for appellant
Connolly Suthers for respondent

Hearing date: 12th September, 1991.

IN THE SUPREME COURT OF QUEENSLAND No. 4484 of 1987

FULL COURT

BETWEEN:

WAYNE WELLSLEY JACKSON (Plaintiff) Respondent

AND:

KIM MAREE BAGWELL (First Defendant)

AND:

JOHANNES MARIA GERRITSEN (also known as HANS GERRITSEN) (Second Defendant)

AND:

SUNCORP INSURANCE AND FINANCE (Defendant by Election) Appellant

REASONS FOR JUDGMENT - THOMAS J.

Delivered the 4th day of October, 1991.

I agree with the reasons of Ryan J. which I have had the benefit of reading.

I would add a word of explanation concerning the reduction of the interest on past pain, suffering and loss of amenities from $4,200.00 to $2,000.00.

For reasons more fully stated in Camm v. Salter and F.A.I. (published today) it is desirable that the practice in Queensland courts in assessing interest for pain, suffering and loss of amenities should fall into line with that suggested in Gogic's case (1991) 65 A.L.J.R. 203. That case speaks of a rate of four per cent as appropriate, but in applying that rate one must still give recognition to the fact that the detriments are progressively suffered over the relevant period (Fire & All Risks Insurance Co. v. Callinan (1978) 140 C.L.R. 427, 432-433; Callinan v. Borovina (1977) Qd.R. 366, 376-377). On some occasions this may be achieved by reducing the period during which interest is allowed (e.g. as suggested by King C.J. in Wheeler v. Page (1982) 31 S.A.S.R. 1, 5), but more commonly it is by allowing the whole period between accident and trial and by halving the rate applied to it.

These remarks apply only to interest on damages for pre-trial pain, suffering and loss of amenities.

As the interest should be recalculated in the present case, the usual halving exercise should be performed. The ultimate exercise is $20,000.00 multiplied by five years

multiplied by four per cent multiplied by one-half. This comes to $2,000.00.

I agree with the order proposed by Ryan J.

IN THE SUPREME COURT OF QUEENSLAND No. 4484 of 1987

FULL COURT

Before the Full Court

Mr Justice Thomas

Mr Justice Ryan

Mr Justice MacKenzie

BETWEEN:

WAYNE WELLSLEY JACKSON (Plaintiff) Respondent

- and -

KIM MAREE BAGWELL (First Defendant)

- and -

JOHANNES MARIA GERRITSEN (also known as HANS GERRITSEN) (Second Defendant)

- and -

SUNCORP INSURANCE AND FINANCE (Defendant by Election) Appellant

JUDGMENT - RYAN J.

Delivered the Fourth day of October, 1991

Counsel: J.J. Clifford Q.C. with L. Barnes for the Appellant
S.C. Williams Q.C. with A. Williams for the Respondent

Solicitors: Watkins Stokes for the Appellant
Connolly Suthers for the Respondent
Hearing Date: 12 September 1991

IN THE SUPREME COURT OF QUEENSLAND No. 4484 of 1987

FULL COURT

BETWEEN:

WAYNE WELLSLEY JACKSON (Plaintiff) Respondent

- and -

KIM MAREE BAGWELL (First Defendant)

- and -

JOHANNES MARIA GERRITSEN (also known as HANS GERRITSEN) (Second Defendant)

- and -

SUNCORP INSURANCE AND FINANCE (Defendant by Election) Appellant

JUDGMENT - RYAN J.

Delivered the Fourth day of October, 1991

This is an appeal by the defendant by election against a judgment for the plaintiff for the sum of $220,538.66.

The plaintiff who was born in September 1945 was injured in a motor cycle accident on 29 April 1986. Liability was admitted in the course of the trial. The learned trial Judge assessed damages as follows:

Pain, suffering and loss of amenities, including future medication, psychiatric counselling and Griffiths v. Kerkemeyer factor	$ 43,000.00
Interest on past loss ($20,000) at 6 per cent per annum for 3.5 years	$ 4,200.00

Agreed special damages and interest	$ 5,338.66
Past economic loss	$ 40,000.00
Future economic loss	$128,000.00

His Honour's assessment for pain, suffering and loss of amenities included the cost of future medication, future psychiatric treatment and a Griffith v. Kerkemeyer component. The plaintiff gave evidence that he spent no more than $2.50 a week on analgesics. A psychiatrist gave the cost of psychiatric treatment as $3,000. His Honour allowed $2,000 for the Griffith v. Kerkemeyer factor. Accordingly, the question is whether an award for pain, suffering and loss of amenities of approximately $36,000 was manifestly excessive.

Evidence was given that the plaintiff sustained an injury to his back when he fell off the motor cycle on which he had been a pillion passenger. He had a compressed fracture of the eighth dorsal vertebra, and injuries to his lumbosacral spine and cervical spine. He also had injuries to the right side of his face, to the left shoulder joint and to the left hand. His Honour indicated that he preferred the evidence of Dr. Farquhar over that of some other medical witnesses. Dr. Farquhar gave evidence that the plaintiff had sustained a very significant fracture of the thoracic eighth vertebra. He assessed that he had a 10 per cent impairment of body function. He considered that the plaintiff was exaggerating when he complained of incessant pain.

Evidence was also given that the plaintiff is suffering from a severe depressive disorder. A psychiatrist expressed the opinion that this disorder was a direct result of the accident. However, His Honour was not satisfied that the depressive condition was caused by the accident, although he was satisfied that it had, to some extend, been aggravated by it.

The findings by the learned trial Judge were not challenged. I am unable to say on these findings that the award for pain and suffering was manifestly excessive.

His Honour apportioned $20,000 of the award for pain and suffering to past loss, and allowed interest thereon at 6 per cent per annum from the time of issue of the writ to the date of the trial. It was submitted that this was justifiable, as being equivalent to 4 per cent from the date of the accident. But nothing that was said in M.B.P. (S.A.) Pty. Ltd. v. Gogic (1991) 65 A.L.J.R. 203 would lead to the conclusion that this was the proper method to be used in calculating interest on past non-economic loss. Even accepting that the figure of 4 per cent per annum should be adopted, its application in the present case would lead to a computation of interest in the amount of $2,000.

The learned trial Judge found that as a result of his injuries the plaintiff had been incapacitated for heavy work, but that he retained a capacity to work in the car sales industry. He thought it difficult to work out to what extent he would have reduced capacity for heavy work, but he made an assessment based upon an allowance of $150 per week for five years.

The plaintiff worked for five years after leaving school on construction jobs. He then worked for two chemical companies for about five years. In 1972 he obtained a position as a car salesman in Newcastle. He left that position to work for 12 months as part lessee of an hotel. He returned to the position in Newcastle for two years.

In late 1978 he went into partnership with a Mr Greene. Two years later that partnership was dissolved, and the plaintiff took over the business in his own name. He continued with this until November, 1983, when he closed the business. He gave as his reason that he wanted to leave the area after his divorce from his first wife. In 1984 he set up business at Port Macquarie. In November, 1984, he closed this business and moved to Brisbane. From 26 November 1984 until 20 November 1985 he received unemployment benefit. In May 1985 he opened a car sales

business with a Mr Shannon in Brisbane. It closed at the end of October 1985, because, so he stated, they were not granted a Queensland motor dealer's licence. He received unemployment benefits from 30 October, 1985 until the date of the accident.

The plaintiff's income for the 10 years prior to the accident was as follows:—

Year ended 30 June 1976	$12,906.00
1977	$20,655.00
1978	$12,602.00
1979	$ 6,659.00
1980	nil
1981	$ 6,658.00
1982	$ 8,007.00
1983	$ 6,644.00
1984	nil
1985	nil
1 July, 1985 to 29 April 1986-	no taxable income other than unemployment benefits.

His Honour's assessment was based upon the net weekly income for a car salesman. This varied over the period 1987 to 1990 between $400 and $600 per week. By allowing the plaintiff $150 per week over five years as past loss, the learned trial Judge made a heavy discount to take account of his residual income earning capacity. It was however submitted that the assessment should have been based upon the plaintiff's actual earnings in the past rather than what he might have earned as a salesman. These earnings indicated that over many years prior to the accident he had received a low income from his activities as a car salesman operating in partnership or on his own account. He gave evidence that his plans immediately before the accident were to get into work again as a manager/salesman. This would indicate that he intended to continue his past method of working.

In my opinion, it is inappropriate, in making an assessment of economic loss, to do so on the basis that the plaintiff would be engaged in activities which he had shown no inclination to pursue. He had not earned his living for many years as an employed car salesman. His venture as a manager/salesman had been financially unsuccessful, and there was little reason to think that the situation would change in the future though this might have occurred as a result of financial commitments he had made in the purchase of a house subject to a mortgage. It was appropriate to compensate him for the inability to perform work of a heavy nature, but the level of compensation awarded him for pre-trial economic loss was in fact higher than his average net income for the period in which he had been engaged in running a car sales business, and was higher than his net income of all years except one in that period. In my opinion, the amount awarded him for past economic loss was excessive. I consider that it would be impossible to justify a figure for past economic loss in excess of $15,000.

For the future, His Honour allowed the plaintiff $200 per week for 19 years. He recognised that what the plaintiff had lost as a result of the accident was the capacity to do heavy work and an additional impairment as a result of his depressive illness to the extent that it was aggravated by the injury. In my opinion, it is not possible to justify a figure in excess of $100 per week in calculating future economic loss. On that basis, the amount awarded should have been $64,000.

I would allow the appeal, set aside the judgment for the plaintiff, and in lieu thereof order that there be judgment for the plaintiff in the sum of $129,338.66. I would order the respondent to pay the appellant's costs of the appeal, to be taxed.