IN THE SUPREME COURT OF QUEENSLAND Appeal No. 103 of 1990

FULL COURT

BEFORE:

The Chief Justice (Mr. Justice Macrossan)

Mr. Justice McPherson S.P.J.

Mr. Justice Derrington

BRISBANE, 12 APRIL 1991

BETWEEN:

KENNETH AUGUST DITTMAN (Plaintiff) Respondent

-and-

THE WIDE-BAY BURNETT ELECTRICITY BOARD (First Defendant) First Appellant

-and-

THE QUEENSLAND ELECTRICITY GENERATING BOARD (Second Defendant) Second Appellant

-and-

MODERN PRODUCTS PTY. LTD. (Third Defendant) Third Appellant

JUDGMENT

THE CHIEF JUSTICE: This is an appeal by the defendants in a damages claim brought by an employee. The appeal involves one point only, as we see from the notice. It is said that the sum assessed for general damages for pain and suffering and loss of amenities was manifesly excessive. The amount which the learned District Court Judge awarded for pain and suffering and loss of amenities was $102,000. The result was that the total amount awarded on the plaintiff's claim was $168,886.56.

The accident in which the injury occurred happened a long time ago; it is as long ago as June of 1979. The plaintiff was one of two persons working on a transformer. In the course of his employment, an explosion occurred and he was engulfed in flames and very badly burnt. This description, which appears to be appropriate, is taken from the reasons of the trial judge:

> "The plaintiff was thrown to the ground and engulfed in flames. His clothes and hair were on fire. He received very severe burns and the experience was so horrifying that he can scarcely to this day discuss the matter without emotional distress. Eventually, after local attention and treatment, the plaintiff arrived in agony at the Royal Brisbane Hospital. Thereafter followed quite prolonged and no doubt excruciatingly painful treatment."

The description which I will now give was also set out by the trial judge and taken from a report of the Royal Brisbane Hospital. The trial judge described it as an accurate description. This is contained within it:

> "The burn was extensive. The main areas burnt were the face, scalp, ears and dorsum of both hands. Those areas sustained full and deep partial thickness burns. As well, the plaintiff sustained respiratory burns. Treatment then had to be applied to deal with this condition."

We note the following further factors. Dr. Hinkley, a plastic and reconstructive surgeon, carried out operative procedures upon the plaintiff and there was a report containing these matters:

> "There was a major area of hair loss and marked thinning in a further area apart from that which suffered the major loss. Operative procedures were carried out which involved, really, moving around sectors of the scalp to make the most of the hair bearing skin which was left to the plaintiff. The result of these procedures was to decrease the major area of hair loss to about one third of its original state. The cosmetic improvement and the protective covering of the plaintiff's head has been achieved at the expense of discomfort because of the tightness of the scalp which followed the operative procedures. There are also, of course, certain residual areas of scarring throughout the scalp."

The learned trial judge then went on to say:

> "The final scarring which has been left is obvious when the plaintiff is viewed from a distance of some 10 or so paces and a portion of the plaintiff's right ear also is lost, and the loss is obvious from a similar distance. Naturally enough, the plaintiff is conscious of his disfigurement and this disfigurement will be permanent. His hands are also disfigured. He must contend not only with the embarrassment which he suffers but the need to protect against sunburn and the application of force to the areas where his skin is weakened. He was originally a social golfer and a keep fisherman. He now plays little golf and is obliged to confine his fishing to night-time. He is left with a morbid fear of obligations to work in sub-stations, that being where the accident occurred."

The trial judge concluded, and there is no reason to depart from his thoughts on this matter, "The plaintiff's nervous condition will continue and accordingly then is very much part of his loss of amenities."

We see that the medical opinion is that there would be no reason to advise further surgery to the scalp. We take into account the burning and scarring left on the face as well as the ears. There is some webbing left in the hands because of the way in which the skin has healed. There is scarring as well in the area of the right elbow, and similar sized scarring on the buttocks. The plaintiff's right thigh was used as the donor site for the extensive skin-grafting procedures which had to be carried out. Minor

surgery may be appropriate for the webbing condition between the plaintiff's fingers if it ever became a significant problem.

As well as the matters which I have already outlined, the plaintiff has a very significant hearing loss. The specialist evidence, which was accepted and acted upon, is that in his right ear, he has no useful hearing at all and he has a lowered threshold in the left ear. The result from an overall point of view is that he has hearing loss of about one-third.

There is no doubt that the plaintiff was very badly burned and suffered excruiatingly painful and prolonged treatment and is left with significant disabilities and restrictions to his lifestyle. However, he was lucky enough to make some recovery from his adversity in a number of respects. He was 35 years of age when he was injured. He managed to get back to work, in the first instance, after about four months from his initial injury, but treatment subsequently dislocated his work and he got back finally, as one might say, about two years or so after the injury and since then has worked continuously. He has stayed with his former employer, so we are not dealing with a case, as we note, where the plaintiff's capacity for employment has been substantially affected.

It is always difficult to deal with appropriate levels of damages in scarring cases and cases involving disfigurement 30 due to burning because even more than usual, judgments of impression are called for. Of course, a trial judge in these circumstances has a significant advantage. We would accept the principle which has been enunciated in Pannucio reported in Vol. 56 A.L.J. 429 and the application of the principle in this case that there is necessarily a wider range than ordinarily in a case where facial scarring is involved and there is accompanying neurosis. We are not dealing simply with facial scarring alone, but the principle has a valid application in present circumstances.

We were assisted in our judgment of the extent of the disability affecting the plaintiff by coloured photographs which are part of the record. This enabled a better impression to be gained and we had our attention drawn to a number of cases where awards of general damages have been made in cases where burns and scarring have occurred. The cases which were handed up to us and where the references were included in the extracts given to us included the following. There was the case of Czislowski and Shorgan which involved a 24 year old. The assessment was made in 1985 by Mr. Justice Ryan. The burns were over 40 per cent of the body. The amount of the general award was $45,000. The case of Yuskan and Sala, a 1982 case before Mr. Justice Kneipp, involved a 19 year old and $60,000 was the amount of the general damages awarded. The plaintiff in that case was permanently unemployable and had to wear a pressure suit. He was left in a condition where he was most hesitant to go out from his house at all. Rumball was a 1984 case. The assessment was made by Mr. Justice Williams. $50,000 was the amount of the award. In the case there, the plaintiff was aged 47 and was badly burned to 55 per cent of his body. He had a depressive reaction and he had diabetes. There was the case of Travers which was a $40,000 award. The judgment was given in March of 1988 by Mr. Justice Dowsett. Sixty per cent of the body was burnt. There was the case of Weir where Mr. Justice Demack in June of 1989 awarded $90,000 as a global sum for what he described as a very serious injury. When the case is examined, it can be seen that the figure must have been very largely comprised of a general damages award for pain and suffering and loss of amenities. Thirty per cent of the body was burnt. The plaintiff in that case was 51 years old at the date of the accident. His life was very restricted subsequently and all attractive activity was virtually closed off to him. There is the more recent case of Forbes and Olympic General Products (Queensland) Pty. Ltd. Mr. Justice Byrne assessed the damages in the case of a 30 year old who had been badly burnt to 80 per cent of his body and had been obliged to endure very painful treatment. He was not able to work at all. After the accident, he turned to

drink as a consolation. He was left with a number of other disturbing features in his lifestyle such as disturbed sleep, depression and what can be described as quite severe psychological problems. We are assisted by a survey of these cases and we are left in judging the appellant's submission that the damages awarded in the present case were manifestly excessive with a matter of impression.

One does not lightly interfere in cases where a general award is made and personal injury has been suffered where the judge has all the usual advantages, and perhaps more than the usual advantages, in judging the extent of the injury and the appropriateness of any particular award of damages. Nevertheless, speaking for myself in the present case, I am left with the distinct impression that the award made by the trial judge is really out of line with other awards made by this Court, and in the circumstances should be judged as manifestly excessive.

We are not called upon to enter a judgment as though the case were being considered for the first time, even though we may decide that the award is manifestly excessive. It does not mean that the learned trial judge's assessment should be substantially ignored, and for myself, I would be prepared to give considerable weight to his assessment, excessive though it was, and involving an over-generous approach, as I believe it did. Allowing for this additional factor, I would for myself alter the award of general damages and reduce it to the sum of $75,000. I should also say at this point what I believe should be done in respect of the further application made, should we alter the award, for a certificate under the Appeal Costs Fund Act. There is a discretion to make such an award where an appeal succeeds on a point of law. Counsel for the respondent argued strongly that a point of law was involved in this case. For myself, that would not be my reaction, although I note that the Supreme Court of Tasmania came to a conclusion which counsel for the respondent claimed to rely upon. A somewhat similar case was considered by this Court in Vella and Larsen. I emphasise the word “somewhat”

because the case I have referred to involved a matter of sufficiency of evidence which in some categories and from some points of view can be described as involving a judgment on a point of law.

However, I do not need for myself to continue this investigation further because even if I were persuaded a point of law is involved - and I must say I am not - there is undoubtedly still remaining a discretion in the appeal court to decide whether a certificate should be awarded and I can see nothing in this particular case which would call for the granting of a certificate unless, indeed, we were disposed to move to grant certificates in the case of all damages appeals and I do not think that is an appropriate course. However, restricting my consideration to the present case, for myself I would not grant a certificate.

The result in my view would then be that the amount of the damages awarded by the learned trial judge should be set aside. That would involve a necessary simple mathematical calculation.

MR. JUSTICE McPHERSON: I agree. It is evident from the many cases of comparable injuries that were cited to us in the course of the appeal that the amounts awarded by way of general damages have, as one would expect, been influenced by the sequelae of the injury. In many of them, the injury and the unsightly personal appearance that is inflicted produces a disturbance, in some instances severe, of the mental and social balance of the plaintiff. Relatively speaking, the complainant in this case seems to have overcome with considerable success any disadvantages of that particular kind. Even so, the sum of $75,000 proposed to be substituted continues to compare favourably with awards in other cases of this general kind. I agree with what the learned Chief Justice has said and with the ruling that he has given with respect to the application for an indemnity certificate under the Appeal Costs Fund Act.

MR. JUSTICE DERRINGTON: I would agree with everything that has been stated, but I would add a few comments of my

own. An award of damages must show fairness to the plaintiff and the defendant. That fairness must still provide full compensation for the loss suffered. However, in respect of pain, suffering and loss of amenity of life, its purpose is to provide consolation. It cannot relieve pain, nor delete the pain that has been suffered. The severity of pain suffered in the immediate post-traumatic period and during the earlier convalescing period is certainly taken into account in the assessment of damages, but it is not to be unduly emphasised as a component. Unremitting pain or the knowledge of the certainty of life-long pain is usually regarded very seriously in the assessment. It is true that the learned trial judge had an obvious advantage in circumstances such as the present. It is also true that the amount of the award is a matter of impression based upon the background knowledge of the nature of the amount of awards in other cases. This is not to say that identity of awards should be the target of a court in award damages, for it is almost impossible to find identity of injury and loss. Nevertheless, knowledge of the awards in other cases has some value as part of the background.

In the present case, and even before the presentation of comparable awards and taking into account the factors referred to above, I still had a strong impression that the award was manifestly excessive. Nothing that has been said since has provided any departure from that impression. No doubt the injuries suffered were extremely severe and painful at the time and have been fully recounted by the learned presiding judge. That is not the point. The point is to try to provide an assessment of damages that properly and fairly reflects the true award for damages suffered in this case. I agree with the proposed award stated by the Chief Justice and with his reasons and those of my brother, the Senior Puisne Judge. I also agree with the proposed order in respect of the application for relief in the Appeal Costs Fund.

THE CHIEF JUSTICE: The result then is as follows: the appeal will be allowed. The total sum awarded for damages by His Honour shall be set aside and adjusted by reducing the amount of the component for pain, suffering and loss of amenities by the sum of $27,000; interest to be calculated on the basis that it apply to two-thirds of the sum of $75,000 to which we referred in the reasons until the date of trial, i.e. for the period and at the rate prescribed. In all other respects the judgment and order of His Honour will stand. The effect of what we are ordering is that the interest calculated on this item will be re-calculated in accordance with the approach adopted above. The total amount then awarded will be correspondingly modified.

The appellant should have the costs of the appeal against the respondent to be taxed.