

IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA.)

CORAM : OLLERENSHAW, J.

PORT MORESBY

Thursday, 7th July, 1966.

BETWEEN ROBERT JOHN GORDON

Plaintiff

AND VICTOR LYNE

Defendant

J U D G M E N T

Port Moresby.
29th June,
1st, 4th and
7th July, 1966.

The plaintiff seeks damages for personal injuries sustained by him on the 6th April, 1965, when he was a passenger on the back seat of a motor car being driven by the defendant. This vehicle failed to make a right-angled turn at an excessive speed and after some quite erratic movements it rolled over a number of times.

Liability has been admitted in Court.

The defendant assisted the plaintiff to leave the car through the gap where the windscreen had been and observed him to walk about with his right shoulder hunched, his head bent towards it while he supported his right elbow with his left hand.

The plaintiff had been thrown about in the back of the car and had suffered some damage to his cervical spine and damage to his right brachial plexus, the complex of nerves travelling from the spine to supply his right arm. There was also some damage to the muscles and ligaments around the base of his neck. He was obviously in pain from these injuries.

Some play was made in cross-examination and in the evidence of the doctor, called for the defendant, upon a fracture of his right collar-bone that the plaintiff had experienced about sixteen years ago and a plate that was then screwed to the bone to aid union and has been left there. I say here, to exclude it from consideration in this claim, that I am quite satisfied that the injuries and disabilities of which the plaintiff complains are in no sense attributable to that fracture or plate. There could be no other finding upon the evidence.

He spent a painful and uncomfortable week in hospital. He was given sedation, his early pain was relieved by drugs and some comfort was afforded by pillows propped under his right shoulder and arm. He was helped to sit up and lie down because these movements, so he described it, tightened the muscle around his shoulder and brought on this great pain again. It was mainly well down at the base of his neck from the middle around the back of his neck, across to his right shoulder and over his right collar-bone to the middle of his breast-bone. He had difficulty and pain in moving his right arm and hand, a numb feeling down this arm and in this hand and he didn't seem to have any feeling in its fingers.

He was x-rayed at the time and again during the next month. No evidence has been called as to anything shewn by the photographs, nor is there any evidence from the doctor who attended the plaintiff, now believed by him to have gone away from the Territory, nor evidence from the specialist surgeon who was consulted at the hospital.

The plaintiff was discharged with his right arm in a sling which he wore for some three or four weeks. During this period he required assistance in doing those personal things which a right-handed person usually does with his right hand.

His more severe pain lasted for about six weeks 343
and during this time he says he had a great deal of pain
in his neck.

He returned to his position as a Refrigeration Mechanic with the Commonwealth Department of Works on the 18th May and missed a further two days some few weeks later when he went back to his doctor because one morning he found his arm completely numb and was unable to lift it or bend it at the elbow or use his fingers at all. The only medical attention that he has sought since then was in August when he went to a doctor for relief from pain, a need that, from the evidence, could be attributed to some extra work that his job at the time required him to perform without proper assistance.

Although he was back at work he could not do it properly, he couldn't lift anything with his right arm, nor handle his tools in his right hand, there was loss of power in this arm so that his grip was weak and he had a pins-and-needles feeling down his right arm and in his fingers. He was allowed to supervise to help him out and it was more or less that way, he says, until he left this position about the end of July.

Since then he has been employed constantly as a Refrigeration Mechanic in a succession of commercial enterprises, engaged in various types of refrigeration in Port Moresby and Brisbane. In spite of some suggestion to the contrary in the evidence I am not satisfied, upon the evidence and probabilities, that any of these changes of employer was attributable to the disabilities with which his injuries left him and, to some extent, still leave him, except possibly his resignation from his position with Fridgrite Ltd. in Brisbane, a company largely engaged in the "heavy air-conditioning" field. Here he says that he found the work, particularly in handling heavy parts of heavy compressors too much for him and he left just before coming back for this case, having obtained, apparently about the same time, a position as a Refrigeration Mechanic with Cottees Ltd., a company engaged in Brisbane in a greater variety of refrigeration activities. This position is being kept open for him and although he says he doesn't know if he will be able to do the work required by his new employer he feels hopeful that he will succeed. 344

I notice here that his work for some years before coming to the Territory was in the "heavy air-conditioning field", that he came here to do general refrigeration work, domestic, commercial and air-conditioning, with the Department and, too, that notwithstanding a loss of power in his right arm, affecting his grip on his tools and his capacity to lift, pain on movement of his neck and some loss of sensation in his right arm and hand, he appears to have managed well enough when he was working towards the end of last year for a company engaged in the domestic refrigeration business in Port Moresby. Upon retrenchment he left this company to go to the Fridgrite company in Brisbane.

I would also notice here difficulties the plaintiff has experienced in holding things; a cup of tea and a glass of beer and, at work, tools and gauges have dropped from his hand. He now takes his glass in his left hand but continues to use his right hand for his tools. He says that he found that trying to teach himself to use his left hand a very slow process and it was very awkward. From the evidence and my observation I think that he now uses his right hand for his work about as much as he used it before his accident and this I think is because the difficulty he experiences is not so great as to induce him to train himself to make the change to his left hand. I am inclined to think that he would use his left hand to assist his right more frequently now, particularly when he requires to exert pressure and in like situations.

His present complaints are: he still has pain at the base of the back of his neck, he gets a sharp pain when he moves his head from side to side or backwards and he demonstrates a kind of stiff neck-attitude, which requires him to rotate his body rather than his neck; his grip is weak; he still has a pins-and-needles feeling in his right hand and he has a burning feeling in this hand when he puts pressure upon his tools; most times he can pick up tools but occasionally they just drop out of his hand; if his hand is good enough to get a grip on heavy parts such as are involved in air-conditioning work his shoulder is not strong enough to take the weight; he has a particular

difficulty in work in confined spaces when it requires the use of his hands above his head.

He was examined for the purpose of these proceedings on the 17th June by a doctor, who gave evidence on his behalf, and in October and again in June by a doctor called for the defendant.

There is little conflict in the effect of their evidence except as to the extent of the impairment in the plaintiff's ability to perform his manual work and, as Counsel for the defendant has submitted, extent is the difficult question in this case.

There is no doubt that the plaintiff suffered an injury at the base of his neck, an injury that damaged the nerves which arise from his cervical spine and supply his right arm and shoulder. There is no doubt that, broadly speaking, he has been left with a stiff neck - stiff because movement is limited by pain - and a weak hand that is not as good as it used to be because of the damage to the nerves that serve it and, what is also a significant handicap in the case of such a manual worker, a residual loss of some sensitivity in his thumb and index finger.

There is no doubt that there has been considerable improvement in the plaintiff's condition brought about by the regeneration of his nerves and I would think that this has been assisted by the exercise involved in his work with pain, particularly from incautious but natural movements of his neck, and with considerable but decreasing discomfort and inconvenience. This improvement includes increased pain-free mobility of his neck and a decrease in the areas of diminished sensitivity in his arm and hand. There could be some further improvement but, at this stage, I do not think that that could be more than comparatively minor.

I now return to such conflict as there is between the doctors. For the plaintiff it is said that in performing manual work the plaintiff will be greatly impaired : There is such impairment in using his tools,

in lifting weights and in using his hands above his head, that in this respect he is limited by the weakness of his muscles that prevents him from raising his arm above shoulder height, by pain around the shoulder joint and by the gross restriction of the extension of his neck, accompanied by pain unless he can bend his whole body backwards instead of just his neck. The plaintiff's doctor also referred to the possibility of osteoarthritis in later years. For the defendant there is medical evidence that, while there will be permanent impairment in the plaintiff's ability to perform his work - some permanent loss of power in the arm and certainly impairment in his capacity to work with his hands above his head, as to the extent of which the defendant's doctor did not like to hazard a guess, and some diminished sensitivity in his fingers - such impairment in his opinion will not be great. He had found between his two examinations of the plaintiff, particularly, that the limitation of extension of his neck was reduced from two-thirds to one third, that while there still was residual tenderness over the right collar-bone it was not so marked, there was some improvement in the deltoid and supraspinatus muscles, his shoulder movements were freer and he could now carry abduction of his arm beyond the horizontal to 60° above the horizontal.

In my judgment the plaintiff will continue to have impairment that while not great is by no means insignificant.

I find assistance in coming to this conclusion and in awarding a proper compensation to the plaintiff in his history since he returned to work and from my assessment of the sort of person he is. There is the evidence of his employment as a Refrigeration Mechanic and there is no claim for any loss of remuneration since his return. I think that the plaintiff has achieved this result because of the type of person he happens to be. I take him to be a conscientious worker, who would consider it a duty to give a fair day's work for a day's pay, who would take pride in his ability to perform his work with satisfaction to himself and his employer. I do not think that these attitudes have been affected by his injuries and that, to his credit,

he has brought them to his aid in accommodating himself to, and working with his disabilities. I think that his natural disposition has enabled him to apply the extra effort, care and concentration that his condition requires. He is forty years of age and I think that his present situation will be maintained for many years. I think that he has had difficulty and that he will continue to have some difficulty. I think that his difficulties are not as great as they were and that some inclination on his part to lay stress, if not enlarge upon his present difficulties reflects more his earlier experience of his disability and shows, in a not uncommon way, an anxiety lest his past difficulties be overlooked because he has managed to carry-on with them.

Nevertheless, he is not the man, physically, that he used to be and I do not overlook that, as his Counsel has put it, not only has he had to live with his disabilities but he must go on living with them and that it might be more difficult for him to do so in later years.

The plaintiff's special damages, claimed for medical and hospital fees, and loss of wages while away from work, are agreed to be \$375.15 and, in his submissions for the plaintiff, Counsel made no other claim for "economic loss" up to the date of trial. In these submissions, Counsel for the plaintiff put pain and suffering as one item and looped together functional impairment and possible loss of earning capacity as another item. Any loss of earning capacity would arise, of course, from the impairment of the function of the plaintiff's body but such an impairment has other consequences and I find it better, as is more usual, to consider loss of earning capacity separately from the other items: See Paff v. Speed (1960-1961) 105 C.L.R. 549, per Fullagar, J., at p. 558 and see also Teubner v. Humble (1962-1963) 108 C.L.R. 491, per Windeyer, J., at pp. 505 and 506 and Bresatz v. Prizibilla (1962-1963) 108 C.L.R. 541 at pp. 542 et seq.

I consider together, as items that inevitably overlap, the plaintiff's pain, discomfort and inconvenience in the 348

past and in the future, the physical damage to, and diminution in the function of his body, the loss of enjoyment of life, in his case the impairment of the natural freedom and capacity he had in his working and other life and I assess his compensation under these heads of damages at \$2,300.

What further sum should be allowed, if any, for loss of earning capacity, as it is called more appropriately than "economic loss", or, as Windeyer, J., preferred to consider it in Teubner v. Humble (supra) at p. 506, the economic value of the diminution of a faculty? I say "further" because the claim for loss of earning capacity in so far as it depends upon the past is already provided for in the special damages.

The plaintiff has suffered a diminution of a faculty that has an economic value but at present there is no economic loss, as sometimes there is, by which it could be measured.

Nevertheless, I would agree with Counsel for the plaintiff that it should be taken into consideration, that while at present he incurs no loss of remuneration this may not always be so. I have already mentioned the plaintiff's personal qualities that I think have contributed to his present situation. Another contribution, I think, is the strong demand for Refrigeration Mechanics, stronger in the air-conditioning field, which at one time the plaintiff seems to have preferred, but still strong in all fields of refrigeration work. It could be that with increasing age the plaintiff later in the next twenty-five years will not be able to exert himself as much and as for as long as he now can and, although for the foreseeable future the demand for his work as a Refrigeration Mechanic should continue, this situation may not obtain for the rest of his working days. In a depressed labour market he would be handicapped.

I think that something must be allowed for these possibilities notwithstanding that they are only possibilities and the difficulty in fixing a figure that can be no more than arbitrary : See the judgment of this

Court in Hendron v. Cockburn (16th December, 1964).

I find particular guidance in allowing for the contingencies in the remarks of Windeyer, J., in

Brosatz v. Prizibilla (supra) at pp. 543 et seq.

and I assess compensation under this head of damages at \$700.

I find a verdict and pronounce judgment for the plaintiff for the sum of \$3,375.15, with costs.