Assist Pec Law

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IN THE SUPREME COURT)
OF PAPUA NEW GUINEA)

CORAM: RAINE, J.

Friday,
20th July, 1973.

CARROLL

v.

THE ADMINISTRATION OF PAPUA NEW GUINEA

1973
June 12,
13, 14
July 20
PORT
MORESBY

RAINE, J.

(Only so much of the judgment thought to be of possible interest is reproduced).

Pain and suffering, loss of amenities, and the nature of the injuries themselves

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Senior Counsel for the defendant, on instructions, submitted that there should be no distinction made as to damages awarded for pain and suffering and loss of amenities, between natives of the country and expatriates. He submits that the same yardstick should be applied to both.

Putting it as politely as I can, and no doubt should, I cannot accept this as a general proposition. I have done a great deal of reading on this aspect, but have decided that it is only necessary to refer to the joint judgment of the High Court in Planet Fisheries Pty. Ltd. v. La Rosa (1). Their Honours said:-

> "There is, however, one submission made by Planet's counsel to which reference should be made. It was submitted that in deciding whether or not the award of general damages was excessive, we should seek out a norm or standard in the decisions of this Court for the assessment

(1) (1968) 119 C.L.R. 118 at 124, 125

of general damages, by comparison with which it was claimed that it would be seen that the award of $40,000 for general damages was disproportionate. In support of this submission we were referred to what our brother Windeyer said in Chulcough v. Holley (1968) 41 A.L.J.R. 336, at p. 338, and to the following cases as establishing such a norm or standard of the amount to be awarded for general damages in the case of injuries and disabilities of the kind experienced by the plaintiff: Bresatz v. Przibilla (1962) 108 C.L.R. 541; Teubner v. Humble (1963) 108 C.L.R. 491; Watts v. Rake (1960) 108 C.L.R. 158; Australian Iron and Steel Ltd. v. Greenwood (1962) 107 C.L.R. 308; Purkess v. Crittenden (1965) 114 C.L.R. 164; O'Leary v. Woods (1966) 40 A.L.J.R. 325; Parente v. Bell (1967) 116 C.L.R. 528.

We would emphatically reject this submission. It is the relationship of the award to the injury and its consequences as established in the evidence in the case in question which is to be proportionate. It is only if, there being no other error, the award is grossly disproportionate to those injuries and consequences that it can be set aside. Whether it is so or not is a matter of judgment in the sound exercise of a sense of proportion. It is not a matter to be resolved by reference to some norm or standard supposedly to be derived from a consideration of amounts awarded in a number of other specific cases. We cannot think that the passage cited from Chulcough v. Holley (1968) 41 A.L.J.R. at p. 338 should be understood as expressing a contrary view. The principle to be followed in assessing damages is, in our opinion, not in doubt. It is that the amount of damages must be fair and reasonable compensation for the injuries received and the disabilities caused. It is to be proportionate to the situation of the claimant party and not to the situation of other parties in other actions, even if some similarity between their situations may be supposed to be seen. What was sought to be done in this case by the appellant's counsel, namely, to derive a norm or standard from a group of judgments of this Court reviewing awards of damages on

> appeal is erroneous. The same would be true if the same course were sought to be pursued in relation to awards of a Supreme Court or of a County or District Court. The judgment of a Court awarding damages is not to be overborne by what other minds have judged right and proper for other situations. It may be granted that a judge who is making such an assessment will be aware of and give weight to current general ideas of fairness and moderation. But this general awareness is quite a different thing from what we were invited by Planet's counsel to act upon in this case. <u>The awareness must be a product of general experience and not formed ad hoc by a process of considering particular cases and endeavouring, necessarily unsuccessfully, to allow for differences between the circumstances of those cases and the circumstances of the case in hand.</u>"
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> (The underlining is mine).

I appreciate that much of the above is directed to an attempt by Mr. Burt, Q.C., as he then was, to urge upon the High Court that it should derive assistance from other awards and temper its approach to them, thus establishing or being guided by a norm. But the parts of the above judgment underlined by me are of the greatest assistance, if I might say so.

The fact is, disappointing though it may be to the "idéologue", that it is not possible to talk about equality, similar yardsticks, and so on, when one comes to assess damages. It might be possible to collect a group of a hundred men, with exactly similar injuries, and all of the same age, but each man in the group will differ from each of the remaining ninety-nine in some way or another. It is true that some might be very similar, in environment, background, character, employment, and so on. But it is on the cards that there will be vast differences among many of the men in the group selected.

It is to the point to remind myself that economic and social conditions in this country vary even more than they

do in Australia, and this is true as between native born and native born, European and European, and native born and European.

As between native and native, one has the backward sort of people I have seen from Nomad and the May River areas on the one hand, and the highly sophisticated and talented natives I have seen elsewhere, on the other hand. One example will suffice to show how the argument that is advanced by the defendant is not only impossible to apply in this case but would make it very difficult to give fair damages in any case. Let us take the case of a man blinded in an accident who comes from the May River, and a native born University Lecturer blinded in another accident. The man from May River will continue to live in his village, where he will be looked after, and helped by his people. Never having been able to read or write he will suffer nothing in these respects. It is true that he will probably suffer a loss, and have a sense of loss, because of his inability to fish and to hunt. Were he to be given $500.00 for pain and suffering and loss of amenities this would probably make him, to use the title of one of Mr. Nicholas Monsarrat's books, "Richer than all his Tribe". Ten times that amount, on the other hand, might not be adequate compensation for the blinded, native born academic.

As between European and European the same sort of thing happens. In a similar case to the one quoted above, an Australian academic might receive much greater damages for loss of amenities than the driver of a sanitary cart, although the latter might well have a much greater economic loss, as the academic might be able to continue his work notwithstanding his blindness. One thinks of Professor Cross.

As between the native born and Europeans, it is also impossible to apply yardsticks or to talk about equality. There are very many natives in high positions, or natives who will eventually be in high positions, men of sensitivity, fond of reading or music, or their profession, whose loss and sense of loss in many cases would far exceed the loss and sense of loss of Australian clerks employed here whose only interest, outside their often rather dull employment, is found in the immediate vicinity of the bar in their local clubs during

the week and at weekends.

None of the above is to say that I ignore the fact that in cases such as this the plaintiff is generally living here, in the country where the accident occurs, where he received his injuries. In many cases this will have an effect on the damages he receives, and I do not overlook this, nor the fact that I am sitting as a Judge in this country. One only has to give a trivial example to understand how necessary it is that what I have just said should not be forgotten. Thus, in the case of a man here who is blinded, or whose sight is gravely affected, and who intended to remain in this country, one would not be very impressed if he said that he was a balletomane, there is no ballet here. The same sort of thing goes for television and live theatre. Thus I reject the submission that senior counsel advanced on his instructions. I imagine that he will not be greatly surprised.

Solicitors for the Plaintiff: Messrs. McCubbery, Train, Love & Thomas

Solicitors for the Respondent: P.J. Clay, Crown Solicitor