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

CORAM: CLARKSON, J.

BETWEEN JEFFREY THOMAS BURNHAM

Plaintiff

AND THE COMMONWEALTH OF AUSTRALIA

Defendant

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The plaintiff sues the Commonwealth for damages for personal injuries suffered on the 27th July, 1967 in Port Moresby. On that day on Champion Parade near the Papua Yacht Club the plaintiff was struck by an Army 3-ton truck driven in the course of his army duties by Rite-Tolamare.

It is clear that the plaintiff's right elbow was struck by a hinge on the truck tray approximately 10 feet from the front of the vehicle on the near side. As a result the plaintiff suffered a nasty injury to his right elbow which required treatment over quite a long period, and which has left him with a permanent disability. The plaintiff claims that the injuries result solely from the negligence of the truck driver and sets up a number of particulars of negligence, some of which were not pursued at the trial. The defendant denies its servant was negligent and alternatively claims that the plaintiff was guilty of contributory negligence.

Many of the facts were not disputed. It appears that at about mid-day when traffic on Champion Parade was fairly heavy, the plaintiff and his wife drove from Port Moresby with the intention of having lunch at the Yacht Club. The car park of the Yacht Club, which was on the plaintiff's right hand side as he drove out from town, was full. He therefore parked on the left hand side of the road off the bitumen surface some little distance past the Yacht Club. The plaintiff and his wife alighted and moved back to a position approximately opposite the entrance to the Yacht Club with the intention of crossing the road to the Club. Whilst they stood together facing the Club, the plaintiff's wife was on

his right, that is on the side nearest to the town. As they stood there, the Army truck driven by Rite approached from their right. The side of the truck passed very close to the plaintiff's wife and the plaintiff's right elbow was then struck by the hinge on the side of the truck to which I have referred. The plaintiff was thrown to the ground. The truck driver heard a noise such as of a stone hitting the vehicle, and looking back saw the plaintiff on the ground and stopped his truck. I do not think much turns on the events which then occurred. The plaintiff, assisted by his wife and others, was taken temporarily to the Yacht Club and then to the Port Moresby hospital.

Although, as I have said, traffic was fairly heavy and there must have been a number of people in the vicinity of the Yacht Club, it appears that neither the plaintiff nor the defendant was able to find any independent eye-witnesses of the accident.

At the point where the accident occurred the bitumen surface of the road is 20 feet wide with a strip of compacted dirt and gravel some 4 feet or more wide on the seaward side of the bitumen, which is the side where the plaintiff and his wife were standing. Traffic was passing in both directions and immediately prior to the accident the plaintiff was idly watching an inward bound car which he said had stopped to let down a passenger. There was no suggestion that this car formed any obstruction to the free flow of traffic. The exact position at which the plaintiff was standing has been hotly contested at the trial. The plaintiff claims that he and his wife were standing 4 feet from the edge of the bitumen road. If this were accepted, then the near wheels of the truck must have left the bitumen for the hinge on the side of it to strike the plaintiff's elbow because the hinge overhung the centre of the tyre by less than one foot. The defendant maintains that the absence of any tyre marks made by the heavy tread of the defendant's vehicle shows that the truck wheels did not leave the bitumen and that therefore the plaintiff must have been standing closer to the

bitumen than he claims and in a position which was dangerous.

I do not propose to summarise all the evidence. I am satisfied that the speed of the truck was not unusual. It was travelling in a line of vehicles, all of which were necessarily travelling at about the same speed. I think the impression gained by the plaintiff's wife that the vehicle was travelling fast was understandable but mistaken. She saw the vehicle when it was quite near to her approaching on a course which would take it extremely close to her. This, together with the noise of the engine, gave an impression of speed. She also said that the vehicle veered to its left, but could not say that she saw the near side wheels of the vehicle leave the bitumen. Again, I think the fact that the vehicle was travelling almost at her led her to think it was veering off the road.

Evidence, which I think is reliable, was given by the defendant's witnesses of searches made on the dirt and gravel surface immediately adjoining the bitumen. These searches failed to reveal any sign that the truck wheels had left the bitumen and I am satisfied that if they had left the road they would have left marks which would have been visible at least when the first of the searches to which I have referred was made.

The position was then that the driver of the truck was driving a vehicle 8 feet wide on a 20 feet wide road. He had then 10 feet of bitumen to the centre of the road on which to pass the plaintiff standing just off the bitumen. There is nothing to show that any threat arose from the other side of the road. The driver saw in plenty of time the plaintiff and his wife standing on the side of the road. He drove his vehicle so close to them that the plaintiff's wife, who saw it approach, was immobilised by fear. The plaintiff, who did not see it approach, became conscious of the front of the vehicle passing very close to him and threw up his arm in an involuntary movement to protect himself from danger. I am satisfied that the driver of the truck drove his vehicle too close to the two pedestrians. The driver saw the vehicles

ahead of him pass the pedestrians safely. Whether he momentarily forgot the width of the vehicle he was driving or not I do not know, but I am satisfied that the plaintiff and his wife did not move, and that the near side of the truck was certainly further to the left than the near side of any of the vehicles which immediately preceded it. Assuming that his near side wheels were on the extreme edge of the bitumen, but not off it, he was 2 feet from the centre line with nothing unusual appearing on the other side of the centre line.

Once it is established, and I think it is, that the plaintiff and his wife remained stationary whilst the truck approached and that the driver saw them, which he did, I am forced to the conclusion that the driver drove his vehicle dangerously close to the plaintiff. In these circumstances the defendant cannot escape all liability by saying that if the plaintiff had only stood still the vehicle would have passed within inches of him but would have caused no damage.

At the same time I cannot find the plaintiff blameless because I am satisfied that his conduct needlessly increased the risk of injury to him. On the evidence I have accepted the near wheels of the truck did not bear on the gravel surface adjoining the bitumen which places the plaintiff much closer to the edge of the bitumen than he claims. I have no confidence in the apparent agreement by the driver, given in answer to leading questions in cross-examination, that the plaintiff and his wife were standing well back from the bitumen - 4 feet back.

The plaintiff recognised that the road where he was, especially when carrying fairly heavy traffic, presents obvious dangers to pedestrians. It is only 20 feet wide and there is no footpath or kerbing, and at the time of this accident there was no cross walk. It was common ground that for whatever purpose, vehicles encroach from time to time on to the surface adjoining the bitumen. The plaintiff, who was a regular user of the Yacht Club, agreed that on former occasions when waiting to cross the road he had had to step backwards to be safely clear of passing vehicles.

I think he placed himself in a position so close to the bitumen that it was incumbent on him having a proper regard for his own safety to watch approaching outbound traffic. If he had watched, as his wife did, he would have seen the line of approach of the Army truck and would have been able to retreat or at the least being forewarned, he would not have thrown his elbow up so that it was struck by the vehicle and it seems clear that if the plaintiff had not made this sudden movement there would have been no accident. I am satisfied that the plaintiff reacted involuntarily in a dangerous situation, but that situation was created by both the negligence of the driver and the contributory negligence of the plaintiff. There was no good reason why the truck should be driven so close to the plaintiff and his wife, but at the same time the plaintiff by standing where he did and not keeping a proper lookout, increased the risk of injury to himself. I think in all the circumstances that it can be said of the conduct of both the driver and the plaintiff that it was not reasonable, when there was no necessity for it, to cut things so fine as to allow no margin of safety for the miscalculations or thoughtlessness of others.

It then becomes necessary for me to make the apportionment required by statute in accordance with the parties' respective degrees of responsibility. Culpability is to be measured by the degree of departure from the standard of care of the reasonable man, Pennington v. Norris (1). Having regard to all the circumstances, particularly the fact that the plaintiff was a stationary pedestrian in full view of the truck driver, I have reached the conclusion that a just and equitable reduction of the plaintiff's damages would be 30%.

I turn now to consider the damages to which the plaintiff would have been entitled if he were wholly successful and no apportionment were made.

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(1) 96 C.L.R.10

At the time of the accident the plaintiff was 27 years of age. Although not qualified he had over a number of years completed part of the examinations necessary for qualification, and was employed as an Accountant in Port Moresby earning $4,750. His wife was also working and their intention was to save a substantial sum over about five years which would enable the plaintiff to turn to cattle raising as a full time occupation.

I am quite satisfied that the plaintiff has a genuine interest in going on to the land, but I am also satisfied that he has adopted a highly optimistic view of the probable rewards.

There was considerable speculation during the trial as to the likely income the plaintiff might have as a farmer. It is unnecessary to set out a detailed consideration of what was said because the plaintiff agreed that in spite of his injuries he did not intend to abandon his hope of raising cattle as a full time occupation. Whether if he had not been injured his income in that occupation would have been greater or less than as an Accountant it is unnecessary to determine. I am satisfied that his earning capacity as an Accountant has not been affected by this injury and for what it is worth I am inclined to think that with or without his injury the plaintiff's prospects as an Accountant might well be brighter than they would be as a farmer.

The real complaint is that if and when he decides to make the change, the return from his new occupation may not be as great as it would have been because he will have to hire labour to do the heavy work which he would be unable to do. This may well be true, but the evidence does not establish an immediate financial loss. What is established is a restriction on his capacity to engage in cattle raising if he chooses to leave what is probably more secure and more remunerative employment as an Accountant to become a farmer. This is certainly a factor to be taken into account in fixing general damages because it relates to his future earning capacity in another occupation, but it must be discounted to

a fraction of the claim as made that the plaintiff has shown a financial loss of $50-60 per week for 32-35 years.

As to the other factors relevant to damages there was little dispute. The special damages were agreed and the plaintiff's medical history and prognosis as detailed in the evidence and medical certificates were not seriously challenged.

The plaintiff suffered considerable pain and inconvenience due to the injury and subsequent surgical and other treatment, and he has a substantial permanent injury to his right elbow which results in a loss of function amounting to at least 15%. This has undoubtedly affected his capacity to do heavy manual labour and has restricted his normal sporting, social and domestic activities in a number of irritating and frustrating ways. At the same time, it seems to me that the plaintiff is still greatly preoccupied with his injury and appears unwilling, as yet, to use his right arm to the full extent of its present capacity.

Taking into account the factors I have mentioned I think a reasonable sum by way of general damages is $8000. Special damages are $540 giving a total of $8540. After the apportionment I have already determined is made the plaintiff is entitled to judgment for $5978.

Solicitor for the Defendant: Acting Crown Solicitor.

Solicitor for the Plaintiff: E. J. Andrews, Esq.