IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM: PRENTICE, J.

Friday,

13th October, 1972.

TALI KAIPENG RAQUEL

v.

SMERDON

1972

Sep 21 & 22

LAE

Oct 4 & 13

PORT MORESBY

Prentice, J.

At the conclusion of evidence taken after an adjournment of some eleven days, and indeed at the conclusion of his final address, Mr. White for the defendant herein, asked leave to add and rely on an additional particular of contributory negligence namely, "that the plaintiff had been negligent in driving in Lae when not sufficiently skilled". If this were a matter which the defendant sought seriously to rely upon, I consider he could have advised himself by appropriate searches prior to the hearing as to whether or not the plaintiff was a licensed driver and what was his degree of skill, and should have advised the plaintiff of an intention to apply to amend at an early stage. I do not consider he should be allowed to amend at the heel of the hunt, when all evidence has been called, further evidence having been called in Port Moresby after the plaintiff was released from further attendance in Lae, presumably to return to Kavieng. I refuse the application; but I may say that I do not consider the action is affected by my decision, as there is in my opinion no evidence which would support such a particular of negligence.

On 27th May 1970, the plaintiff then being the holder of a permit to ride a motor cycle, was driving such a cycle equipped with "L" plates front and rear, in Markham Road, Lae towards its T intersection with Huon Road. He was travelling at about 25 miles per hour intending to proceed straight along Markham Road. At a point when it was some 50 feet away he first took note of a car driven by the defendant. He thought the car was "going straight ... that it would continue along Markham Road and pass (him) on (his) right. His evidence continued - "I was crossing on the hill .... I was surprised that the car came on my right side and just turned. He was

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trying to turn up here on Huon Road. He turned into my side ...." He indicated that the car began to turn when he was about twelve feet away from it, that the car was going very fast. He thought the car would come and stop. He did not realise it would just come and turn. The car did not give a signal. The front of the car hit the side of the motor cycle's back wheel. A witness, John Loe, said he saw the accident from a point some twenty to twenty-five feet away - he had been playing football alongside the road; seeing the plaintiff approaching he called out to him but failed to gain his attention. He stated the car turned right without stopping. The front of the car hit the motor bike on the front mudguard of the bike. The signal light of the car was not flashing. The motor bike did not change course or speed. He was amazed when he saw the car actually hit the bike. An attack was mounted on this witness, to suggest that he was not present, and did not see the accident - that he came along as an after-thought to bolster the plaintiff's case. This attack was based on the fact that the investigating policeman Kinsim (at the time of the accident, a cadet officer), had no record of Loe's being a witness, and did not speak to him. Loe said he gave his name to a sub-inspector immediately after the accident and that he was at that time holding the plaintiff (presumably on the ground). Kinsim came to the scene some time later, according to his evidence, on instructions of Sub-Inspector Rogers. I would not be surprised that a sub-inspector would fail to note a witness's name on to a file or into a notebook being kept by a cadet officer. I accept the witness as a witness of truth. It was alternatively suggested from his answer "Yes" to the question "When you heard the collision you turned and looked the other way and saw the cars (sic) together", followed by the answer "No" to the question, interpreted through Pidgin as, "You did not see the car before that" - that he had not actually seen the impact. To a like question, "I suggest you did not actually see the bike hit the car" he replied, "No, I saw it". I am satisfied from the whole of the witness's evidence that he <u>did</u> see the impact occur. However, I do not think all his recollections of the accident are correct.

Sub-Inspector (as he now is) Kinsim attended the scene and reported, in his recollection (he had no notebook presently available), that the car was damaged only on its side - both doors on the passenger's side. The defendant admitted to him he was turning right at the intersection, but said he was travelling at five miles per hour.

The defendant stated the time of the day as about 5.45 p.m. - that he was driving with parking lights on, that he had changed from second gear coming out of Hermes Street (some hundred yards from the point of impact) to third gear, that he turned his right-turn indicator on and reduced speed, that he was looking ahead. That he changed down again to second gear and proceeded to turn. That he first saw the plaintiff's motor cycle approaching him when it was fifteen to twenty feet away from him. That he tried to increase speed to avoid the accident. That the motor cycle struck the passenger side of the car. That there were no marks in front of his car from this accident. That the motor cycle was close to its left side of the road and looked as though the driver was intending to go straight ahead - passing in front of his car. The defendant in crossexamination admitted to being able to see approaching cars (from about the point of impact) some forty to fifty yards away. A view had of the scene does not support this piece of the defendant's evidence. If I were entitled, as I assume I am not, to substitute my own observations I would estimate that the view at the point of impact was some 100 to 150 yards at least. He said he did look but "(the plaintiff) was not there prior to my turning into Huon Road". He thought then a collision was unavoidable. I make the following findings of fact -

(1) the plaintiff was proceeding at 25 miles per hour in a position on the roadway towards his left hand side of the bitumen in Markham Road going towards Voco Point;

(2) the defendant at that point of time was approaching in the opposite direction and was decreasing speed, that he was travelling slowly in second gear immediately before the point of impact at some four to five miles per hour;

(3) that the plaintiff's motor cycle would have been visible to the defendant at least fifty yards before it reached the intersection;

(4) the defendant turned across the motor cycle's path when it was in his close proximity, that he was actually making his turn when he first saw it at a distance of some 15 to 20 feet away;

(5) that the plaintiff's motor cycle did not alter course or speed before the impact;

(6) that the impact occurred near the extreme left edge of the bitumen of Markham Road and close to the traffic dome which is in the centre of the jaws of Huon Road.

I am satisfied that the impact occurred on the passenger's side of the motor car. It appears to me probable that but for the acceleration of the motor car it may well have hit the side of the motor cycle. I am unable to be satisfied that the defendant was giving a right hand turn signal. Insofar as he did not actually see the plaintiff's motor bike until a fraction of a second before impact, I rather feel he was not. But even assuming that he was so signalling his intention to turn, the plaintiff was entitled to assume, given the relative position of the vehicles, their speeds and courses, that the defendant would slow further and if necessary stand, until he could turn safely. I note from the defendant's evidence that he says he had travelled in his estimate some fifteen feet across Markham Road before seeing the motor cycle.

That the plaintiff did not see or notice the defendant's motor car at an earlier point of time, is not in my opinion a contributory cause of the accident - because he was entitled to assume until that vehicle actually began to turn that it would not turn in front of his car so as to endanger or possibly collide with him. I find negligence clearly established in the defendant in his failing to keep a proper look out, in his trying to execute a right hand turn when neither the time nor opportunity was available for him to do so, in his failing to slow sufficiently or stop or alter course so as to avoid a collision. I find there was no contributory negligence on the part of the plaintiff. The plaintiff is therefore entitled to a verdict.

The plaintiff is an ungraded teacher of some 39 to 40 years of age. In the opinion of his headmaster he is "an intelligent person". He began as a cinematograph operator at Sogeri School, and was encouraged to go in for

primary teaching, despite his minimal education. His headmaster for two years at Bowali Primary T School, Lae, describes him as "one of the best teachers (he has) ever had anything to do with. He wasn't very well trained but had excellent teaching reports". He taught Preparatory and Standard 1 after having achieved only Standard 7 himself. As a teacher (as distinguished from an Education officer) in the Papua New Guinea Education Service one cannot get higher than being an ungraded teacher without Form II qualifications, normally. But if one passes two Form II subjects one can go automatically to teacher Grade 1, thence one can be promoted as far as teacher Grade 3 without further qualifications. At that level a further barrier exists. His headmaster, Mr. Kenna, had been helping him and had no doubt as to his prospects of successfully attaining his second Form II subject (he had already gained one). In addition, apparently as a special dispensation, as an older teacher, he could have become teacher Grade 1 up until 1973 when this concession ends, even without obtaining Form II subjects. Mr. Neitz who was called by the defendant and who is Superintendent of Operations in the Primary Division of the Department of Education clarified that promotion in the department depends ultimately on inspection reports. From the headmaster's evidence which was read to him he stated that he would infer that the plaintiff had obtained a rating of 9 or 10 (seemingly this is equivalent to being in the top 10 per cent of teachers at his level - see the judgment of Muirhead, A.J. in Largo Gerebi v. Joseph Tomonoi and Anor. (1)). Mr. Neitz agreed that the plaintiff would have got automatic reclassification this year (1972). I am satisfied from the evidence of Mr. Kenna and Mr. Neitz and from my observation of the plaintiff that he was an enthusiastic teacher devoted to, and enjoying the practice of his profession, who was among the best teachers of his level, who would have looked forward to and whom I would have expected to have gained, promotion up as far as Grade 3, and who might well have in his dedication, gone beyond the retiring age of 55 years. The plaintiff resumed teaching after the accident for a period of some 14 to 15 weeks but apparently he found it impossible. His headmaster said that he was put on light duties but found it impossible to teach a class. He could not handle blackboard, rulers, books; he could not participate with the children in games and other activities

(1) Unreported judgment No. 695 of 4/9/1972 at p. 16

necessary with younger children. He was also suffering pain from his injuries. He complained that he could not sleep at night because of the pain so he was not fit for work each morning. The headmaster was asked whether he was able to express opinion as to the likelihood of the plaintiff being re-employed and said that it was very doubtful, in his first-hand experience. The plaintiff's injuries did not seem to have improved and overall he would say it would be impossible for him to do a full day's teaching.

The plaintiff was examined by a Mr. Lumsden, the regional psychologist stationed at Rabaul, on 25th October, 1971 and again in September of this year. In October, 1971 Mr. Lumsden found the plaintiff's memory to be poor and that he appeared to be fairly confused. He had a relatively poor memory for short or recent events, for sequences in numbers and in tapping tasks. He was a little less confused on the second examination of him this year. In Mr. Lumsden's opinion, the injury that he still has, leaves him unable to work. He was firmly of the opinion that he will not be able to teach. This opinion was apparently based on his findings that the plaintiff is now unable to think properly or make use of all facets of his intellect, and on emotional factors inherent in him as a result of this loss. He felt that the plaintiff had very definite problems in adjusting to the injury. He was very dependent on other people which was putting heavy strain on his family, and in turn this made him very worried about his not being able to work, and he is also confused about things that he could remember and do before, but now cannot remember or do. He has a very poor image of himself. In Mr. Lumsden's opinion if there were any chance of improvement in the future it could be over a period of ten years and he would then be too old to teach. The overall findings of his testings indicated a loss of abstract reasoning performance as well as non-verbal performance which was consistent with an adult suffering brain damage.

It is clear that the plaintiff suffered very grave injuries indeed in the accident. He was four months in hospital undergoing operations and treatment and for the first ten days of this period he was unconscious. He had four major operations. On admission he was unconscious and in a critical condition as a result of multiple injuries including bleeding from the mouth which threatened asphyxia,

His main injuries were -

(1) a closed head injury resulting in unconsciousness;

(2) a fracture of the mandible, a compound fracture of the premolar region, and a closed fracture of the right condyle;

(3) complete paralysis of the left arm with a closed fracture of the shaft of the humerus, dislocation of the left elbow, compound comminuted fracture of the radius and ulna and fractures of some small bones of the hand;

(4) left leg, a fracture of the shaft of the left femur, minimally compound.

Apparently he had made a good recovery, in medical terms, from the head injury and fracture of the jaw, though he himself has some complaints in this respect. The left leg also united satisfactorily and does not leave him with a deformity. His major and gross injury remaining, is that of the left arm. Apart from some minor bony deformity thereof resulting from the multiple injuries, there is a persisting total paralysis of the left arm. This results from brachial plexus injury - avulsion of the main nerve trunk in the left side of the neck. Dr. Shepherd in 1970 was of the opinion that it was unlikely, although not impossible, that there would be any recovery. Dr. Robson, a specialist surgeon, who examined him in December, 1971 then observed that the left arm had almost negligible function present and he agreed in the patient's opinion of himself that the patient would probably not work again. Dr. Berg examined the plaintiff recently and reported that the jaw injury has resulted in a satisfactory union although there is some restriction on chewing activity and there is an uneven bite. He also reports the left arm as being completely paralysed and that there is permanent damage to the nerve supply in that arm. The whole arm is wasted and is quite useless. He estimates that the plaintiff would have had considerable pain lessened however by his state of unconsciousness in the first ten days when the pain would normally have been at its severest. He did not think that the plaintiff would be suffering from significant pain now and, presumably inferentially, into the future. In his opinion so high is the injury, that it was most unlikely that any nerve

repair would benefit him at all, and he in fact regards the arm as a useless appendage, and has apparently strongly advised amputation of it. He describes the plaintiff as having "a splint and claw hand". It is being carried at the present time and apparently indefinitely for the future in a sling. The doctor's opinion is that the wasting may get worse but he would not expect the circulation to be affected. The result is that "he's carrying around something of absolutely no use at all in the shape of his paralysed left arm". He would expect no further complications. In crossexamination he said he formed the opinion on questioning the plaintiff, that he had had very little retrograde amnesia, and though he could not detect any obvious abnormality or defect in regard to brain damage, the fact of unconsciousness for ten days after the accident must suggest that the plaintiff therein sustained some reasonably serious cerebral damage. He admitted that he was more concerned with the orthopaedic nature of the plaintiff's injuries.

I am satisfied that in the accident the plaintiff suffered some cerebral injury which has left him with permanent impairment of intellect, a disturbance of thinking processes and an emotional overlay which in combination with his physical injury has had the result that he will never be able to carry out his teaching work again.

I am satisfied that apart from the first ten days, while in hospital the plaintiff must have suffered considerable pain. He himself described it as "heavy pain, very painful, everyday all day of each day". While unable to accept his evidence that he is "still paining in (his arm)," I am satisfied that he may have some pain in his knee on certain movements, that his jaw is still sore and uncomfortable and that as a result of the head and facial injuries he has had to give up smoking and chewing betel nut. It seems likely, in my opinion, that this deprivation would be permanent after this length of time.

I am satisfied that he will not suffer significant pain from these residual injuries in the future.

Before the accident his headmaster describes the plaintiff as a very happy, smiling, lively person who is now rather withdrawn and very quiet. He was very interested in extra curricular activities, particularly the boys' sport, and was training junior boys' football teams. He was a very active spectator when the boys were playing.

He himself gave the court to understand that he also took a hand in, or "foot in," soccer, basketball, baseball and cricket games, being picked to play on some weekends. He cannot now of course move his left arm at all and he is quite unable to dress himself. Apparently his wife assists him not only to have a bath but to put on his lap-lap and when necessary his shirt. Even the putting on of a belt has to be done by somebody else. He is able to write with his right hand but apparently does not read at all now because of what he describes as a feeling of pain. Previously he used to read the newspapers, confining his attention mainly to sport and the happenings at the House of Assembly. Living as he does now in the village his wife carries the responsibility of doing all the gardening and going to market, where she makes a little bit, but not much, money. His activities seem to be negligible; the only matters of which he spoke in the rather lengthy crossexamination of him were his taking an interest in the schooling of his younger children. Apparently he asks them questions about things, reads their sentences and corrects them for them. The overall picture is one of a man who has not only lost a previously keen enjoyment in his professional and extra curricular activities as a teacher, but one who has been permanently deprived of most of the enjoyable things in the livelihood of a domestic setting in a village.

At the time of the accident Mr. Raquel's gross annual salary was $1,070. From a gross fortnightly figure of $41.02 there were deductions of 80 cents for tax and 25 cents for P.S.A. subscription. Other deductions for rent and retirement benefits fund made weekly, should not I consider be deducted in trying to arrive at a net figure for purposes of computing his out of pocket losses to date. It is now two years four months since the accident. During that period he was employed back by the Education Department for some eight months, and the amounts received for sick leave both at a full-pay rate and half-pay rate, are the equivalent of another seven months' pay. Taking this as indicating that he has been paid for fifteen of these months, the result is that he has remained unpaid for thirteen months of this two years four months period. I have adopted $40 per fortnight as an appropriate figure of real loss which for thirteen months I compute at $1,040.

In attempting to compute his future economic loss, I have had regard to the salary ranges relating to the grades immediately above that in which he was employed

at the time of the accident. At present the rates are as follows -

in Grade 1 - $1,070 to $1,785;
in Grade 2 - $1,785 to $2,155; and
in Grade 3 - $2,155 to $2,555.

I consider that he would by now have been reclassified as a teacher Grade 1 and be receiving yearly increments that would take him up to the figure of $1,785 per annum. From the evidence as to his abilities and professional dedication, I consider it more probable than not that he would have remained in the service at least sixteen years and that in that time he would have progressed to the present range of Grade 2 salary which goes up to $2,155; and thence again by yearly increments to the top range of Grade 3 as at his retirement period. Given his disposition and abilities I think it quite reasonable to expect that he would have continued working for some years after reaching the 55-year mark and one would expect of course the ranges of salaries to increase over that period.

It is difficult to arrive at a proper figure in all the circumstances obtaining here of a man's economic future. Doing the best I can on the material before me I have considered it reasonable to assume that he would have been employed at Grade 1 level for some five years and at each of Grades 2 and 3 for some five years. I consider the figure of $1,900 to fairly represent the average annual earnings which I would expect him to achieve. In arriving at what has now come to be called the "multiplicand" in the English courts' jargon, I take this figure represented weekly as $38; and I allow a deduction of $3 for taxation purposes to arrive at a net figure of $35 per week. As I have accepted that he would work for at least sixteen years I think it is fair to accept this as the "multiplier". In arriving at these I have allowed for the vicissitudes of life and the possibility of other incapacitating factors, and such other contingencies as I can envisage; and making discount for the enhanced value of having the present sum of future earnings; I have then had some regard to the tables of economic loss appearing in Leslie and Britts, Motor Vehicle Law (N.S.W.), 3rd edition at p. 704-5 - those computed on an interest rate of 6 per cent per annum. I consider that the figure of $19,000 would fairly represent compensation for future economic loss.

The questions of compensation for pain and suffering and for the loss of enjoyment of life are of course notoriously difficult. One must do one's best to try to give a proper measure of monetary compensation in the setting of Papua New Guinea. I consider $500 to be a fair figure to cover pain and suffering to date and for the future. There do not appear to have been a great number of cases in which Papuan New Guineans have suffered grave injury which has called for compensation. I have been assisted by a consideration of the judgments of my brothers Frost in Gaudi Kidu v. The Port Moresby Freezing Co. Ltd. & Anor. (2), Cameron-Smith A.J. in McCarthy v. The Public Curator of Papua and New Guinea (3), and Ollerenshaw in Iapidik v. Green and Anor (4), and Kelly in Leemba Yosuwe v. Kumren Behekona and Anor. (5). In the last mentioned case, in the circumstances there prevailing, $15,000 was awarded under the heading of loss of amenities and enjoyment of life to a paraplegic. In Gaudi Kidu's case (supra) (6) an amount of $8,000 was awarded under the same heading, for the loss of a leg. I have regard to the fact that a sum of money in Papua New Guinea would be of more value to a villager in his village setting than it would be to an Australian in an urban setting. However there is another aspect, and perhaps I may be pardoned for referring to what I said in the case of Tepra Tibuka v. Sheedy, a case decided in Mount Hagen in April 1970, not reported, but appearing in page 32 of my Civil Notebook No. 2. Therein I indicated that a man who had been accustomed to a full range of village activities - hunting, gardening, sports, sing-sing, fishing, the carrying of timber, tree climbing and house-building and garden work - would find that the loss of a leg (in that case) would cause a more severe invasion of his life than a similar loss would to an urban dweller; that he would be unable to face and cope with hazards of nature, fire and flood and danger from attack by animals or men in the varying degrees of primitive environment that he might still have to cope with; that he would be unable to forage for and house his dependants and carry on the essential manly duties of the village. Here the plaintiff has suffered a similar invasion to his life. He can neither enjoy the activities of his

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(2) (1967-68) P. & N.G.L.R. 466 at pp. 476, 477.
(3) (1964) P. & N.G.L.R. 134 at p. 140.
(4) (1964) P. & N.G.L.R. 178 at p. 184
(5) Unreported judgment No. 662 of 21/1/1972.
(6) (1967-68) P. & N.G.L.R. 466

professional life, nor those which he would have had in the village in his periods of leave. Nor can he take an active part in the village activities of the kind outlined in Tepra's case (supra), which would be going on around him no doubt in his present village living. Doing the best I can to estimate a figure of compensation for this head of damage I allow the figure of $7,000. The total sum therefore which I have allowed under the various headings would be $27,540. Taking a round view of this sum in the light of the plaintiff's circumstances, I consider that it is the proper sum which should be awarded. I therefore assess damages in the sum of $27,540.

Solicitor for the Plaintiff: W.A. Lalor, Public Solicitor

Solicitor for the Defendant: Norman White & Reitano