B. Woods

SC 810

No. W.S. 92 of 1971 (P)

IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM: LALOR, J.
Tuesday,
23 September, 197 4.

BETWEEN:

CONSTANTINO ALFREDO DIAZ
- Plaintiff

and

DILLINGHAM CORPORATION OF NEW GUINEA PTY. LTD.
_ Defendant

In this action the plaintiff claims damages for personal injuries sustained by him and caused by the negligence of the defendant.

On the 13th October, 1968 at approximately 7.00 p.m. the plaintiff was a passenger in a motor vehicle, owned by the defendant and driven by its employee, travelling from Kieta to Panguna. The road was a windy dirt road with sharp curves and steep rises and inclines. It was a narrow road on which two vehicles could pass very carefully. In the direction of travel, the left-hand side of the road was bounded by a cliff face and the right-hand side by a deep precipice falling away at an angle of some sixty degrees. About a mile from Kieta, the driver came upon a group of New Guineans walking along the road some twenty yards in front of the vehicle. Without alteration of speed, he swung the vehicle to the right-hand side of the road partially leaving the dirt surface and with his off-side wheels on the grass verge of the precipice. He travelled along this verge some twenty or thirty feet when the vehicle struck a water course, rolled over the edge of the precipice and fell some one hundred and fifty feet before coming to rest. The plaintiff was thrown from the vehicle and was found a further thirty feet below it. He suffered a fracture of the L I vertebra which severed the lowest part of the spinal cord and nerves. As a result of this injury, he is, and will remain, paraplegic.

LIABILITY

The defendant does not dispute his vicarious liability if his employee, the driver of the vehicle, is found to have caused the plaintiff's injuries by his negligence.

There can be no doubt as to the duty of care owed by the driver to the plaintiff as a passenger in the vehicle which he was driving. Equally, there can be no doubt that any reasonable person would forsee physical injury to a passenger from an accident involving a motor car falling down a precipice. The question then remains whether the accident was caused by the negligence of the defendant's driver.

I have set out above a brief outline of the facts. But in considering the question of whether the defendant's driver acted with due care towards the plaintiff the circumstances existing at the time must be considered in more detail.

On the evidence, the road on which the vehicle was travelling was, in any sense of the word, dangerous. It was narrow with only limited room to manoeuvre. It climbed steeply and curved; in a high rainfall area, there was an obvious probability of erosion by water courses at the edges. Its surface was not good, being dirt and metal and, at the time in question, it was slippery from rainfall. On the steep parts the vehicle, under pressure, tended to lose its grip on the road and slip. The outer edge was covered with grass for a distance of a foot, perhaps slightly more, before falling away to a gully some hundreds of feet deep. The grass could only have obscured any danger, particularly at night. In all, a road upon which the ordinarily prudent driver would drive with the utmost caution.

Immediately prior to the accident, the headlights of the car picked up a group of New Guineans some twenty yards in front. They were walking on the left-hand side of the road being spread out towards the centre. Their presence added a further hazard to an already dangerous road. It reduced the area of road available for the vehicle.

The driver maintained his speed of some 10-15 miles per hour and, as described above, attempted to pass the pedestrians by driving with his off-side wheels on the grass verge of the precipice when the vehicle struck a water course and rolled over the edge.

Counsel for the defendant relied upon a statement taken from the plaintiff whilst in hospital some three weeks after the accident. In it, he stated that the driver was driving "quite carefully". It was also submitted that there was no absence of care on the part of the driver, who, faced, with the unexpected emergence of pedestrians on the road adopted the course he did as an alternative to the possibility of striking one of them.

I do not find the plaintiff's assessment of the mode of driving of any assistance, since it is clear from the evidence that he was sitting in the back of the land cruiser talking to a fellow Spaniard. He saw nothing and was unaware of how the accident happened.

Nor do I accept that the presence of New Guineans on the road can properly be described as an "unexpected emergence". It can always be expected that New Guineans will be found walking along country roads.

Nor again, can I accept that the driver adopted the course he did as an alternative to the possibility of striking the pedestrians. He had ample opportunity to slow the vehicle, and if necessary, stop until the pedestrians moved over to allow him to pass on the road proper.

I find that the driver acted without reasonable care in choosing to embark on a foreseeably dangerous course which any reasonably prudent driver would have rejected.

SPECIAL DAMAGES

The parties have agreed the amount of out of pocket expenses to the date of trial is $12,926.

The disagreement of the parties as to the amount of loss of earnings from date of injury to the

trial centres around two questions. Firstly, whether on the evidence the plaintiff's earnings over this period, should be assessed with reference to employment in the mining construction industry; and secondly the extent to which the plaintiff would in fact have worked during this period.

For the plaintiff, it was submitted that the evidence shows that, by the date of the injury, the plaintiff was committed to the construction industry and, further, that an analysis of the five year period prior to the injury shows he was a regular worker in the pattern of the construction industry; taking holidays at more irregular intervals and, in total, slightly longer than other workers, but not disproportionate to the time worked.

For the defendant, it was submitted, that the evidence is of a single man travelling the world, with no commitment to the mining construction industry. Further, that his history from the date of arrival in Australia until commencing work in Bougainville in July 1968 shows that he worked only some 80-84% of that time. Accordingly, it was submitted, the calculation of lost earnings should be on this percentage rather than as a full-time wage earner.

It is necessary, then, to consider the evidence in relation to these matters.

The plaintiff, the son of a miner from the Asturias province of Spain, was born in 1936 and migrated To Australia in January 1963. Prior to coming to Australia he had, on the completion of his primary education, studied at a religious college with a view to becoming a priest. The curriculum appears to have been comprised of religious subjects, rather than secular, with the exception of some languages. He left the seminary in late 1957 and spent the following two years doing military service in the army. The next two years were spent studying agrarian reform at a technical school, either as or with the intention of becoming an employee of the Lands Department. He migrated to Australia arriving in January, 1963.

His first nine months in Australia were spent in a series of casual jobs - fruit picking, operating a machine in a shoe factory and labouring in a steel-works.

In October, 1963 he commenced work as a second class miner with the SnowyMountains Authority at Cooma. He remained there until August, 1965 being classified as a first class miner in February, 1964.

After a few weeks' holiday, he took a job as a machine tool operator in Sydney and remained there from August, 1965 to 22nd December, 1965.

Again, after a few weeks' holiday, he was engaged by Utah Constructions as a first class miner for work in New Zealand where he remained until 13th December, 1966 when he returned to Sydney.

From 5th January, 1967 to 10th July, 1967 he was in South America on holidays.

On 28th July, 1967 he resumed work with Utah Constructions in New Zealand as a first class miner and remained there until 3rd July, 1968.

On 14th July, 1968 he commenced work with the Dillingham Corporation as a first class miner on the Bougainville Copper project at Panguna in New Guinea. He remained there until 13th October, 1968 when he was injured in the accident out of which the present proceeding arose.

I should now say something concerning the evidence about what is described as the mining construction industry. It appears that the term is used to include all work in connection with the exploration, opening up and building of mining projects and in particular civil engineering type work. The industry is represented on the employers' side by the Australian Mines and Metals Association and comprises all the major exploration and mining companies operating at numerous projects throughout Australia. The pool of workers engaged in the industry are represented by the Australian Council of Trade Unions. Wages rates are negotiated between these bodies with similar rates for projects throughout the industry, but with variations to allow for local conditions.

It seems clear to me that the plaintiff had been a member of that industry since October, 1963, and that his loss of earnings up to the date of trial should be assessed on that basis. His short period of employment in a factory in Sydney in 1965 appears to have been merely filling in between mining jobs. The pay was not as good as in the construction industry and he did not return, nor intend to return, to that type of work.

With regard to the extent to which the plaintiff would have worked during the accident-trial period it is clear that allowance should be made for periods of non-paid holidays, and also, waiting periods between jobs if it were concluded that he would have sought work elsewhere than in Bougainville during this period. From the evidence it appears that he intended to complete a two year term at Bougainville and then visit his family in Spain. He was uncertain as to the intended length of the visit but put it as one or two months. He would, of course, have been entitled to two months' paid holiday at this time.

The submission of Counsel for defendant that the evidence showed that the plaintiff worked only some 80% or 84% of the time in the period October, 1963 to October, 1968 appears to take no account of the paid holidays to which the plaintiff was entitled during that period. There were obvious language difficulties in the examination of the plaintiff and it is difficult to reconcile the dates of starting and finishing jobs with his estimates of holidays taken. At the conclusion of the Snowy Mountains job, for example, he would have been entitled to some seven weeks' paid leave but, in fact, commenced the factory job in the same month that he finished at Cooma. In all, with the exception of the six months' holiday in South America and even there, there is some evidence that he may have worked, it does not appear that the plaintiff took holidays much in excess of the time for which he was paid.

Counsel for the plaintiff suggested the sum of $30,000 as an appropriate figure for loss of earnings for the period October, 1968 to the present. Taking the net figure, after taxation, of wages paid in Bougainville during this period, varying from between $90 in 1968 to

$150 per week in 1974 the total net wages payable for that period amount to in excess of $37,000. In computing this figure an estimated four months' unpaid holiday time was taken into account. No amount is included for free board and lodging, which the plaintiff would have received since 1969. If an amount of $2400, being wages received by the plaintiff during this period, is deducted, the net wages figure for the period would be approximately $35,000. I accept the figure of $30,000 on account of loss of earnings as being a moderate estimate after allowing for the contingencies apart from the accident which may have affected the plaintiff's employment during this period.

GENERAL DAMAGES

After the accident on the 13th October, 1968 the plaintiff was flown to Sydney and ammitted to the Royal North Shore hospital on the 15th October.

On admission he was found to be suffering from a fractured dislocation of the spine, with a resulting total paraplegia, paralysis and loss of sensation below the first lumbar segment.

He was operated on on 16th October to re-align and stabilize the spine. Following this, he remained in the hospital until his back had stabilized, and he had achieved some ability to cope with his condition.

At the conclusion of his hospitalisation, he remained with a paralysed bladder and bowel, which, for the rest of his life must be operated mechanically.

The lack of normal control of the bladder and bowel has resulted in a urinary infection which spread through the whole of the renal pathway to the kidneys. The lower urinary tract infection is common in paraplegics but it is the infection of the upper renal tract, essentially the kidneys, which is significant in the present case. The probability is that it will lead to recurrent periods of hospitalisation, further surgery and a reduced life expectancy.

The plaintiff was re-admitted to hospital on the 30 March, 1971 because of the development of this upper renal tract infection. At this stage, there was significant deterioration in his kidneys and renal tracts; but in the last two yeqrs, the infection, although present, does not appear to have caused further deterioration in the kidneys.

In addition to the two periods of hospitalisation directly attributable to the injury itself, the plaintiff was hospitalised on two further occasions for injuries flowing from his condition. On the first occasion on 16 March 1970, he was admitted following severe burns to his left leg from boiling water in a bath, which was due to lack of sensation, he could not feel.

On the 20 February 1973 he was again admitted for pressure ulceration which was treated by surgery. The likelihood of both accidents of the type of the earlier injury and also of future ulceration, must remain a continual hazard for the plaintiff.

On the 7 August 1969 the plaintiff entered Mount Wilga Rehabilitation Centre where he joined the paraplegic class and received physiotherapy. In addition, he went through a general assessment programme in occupational therapy whereby the potential of patients is assessed.

Because of the nature of his injury, the Rehabilitation Centre considered that, if he could be trained for clerical work, this would be the most suitable occupation for him. He was given special training in English and generally the programme was directed towards bringing him to a standard which would enable him to obtain clerical work. This was not successful, mainly apparently through his lack of facility in English. Although he was kept at the Rehabilitation Centre much longer than the normal paraplegic, he was regarded as "a sort of failure" with the only real possibilities open to him being that of light bench work or process work of that nature.

After leaving Mount Wilga Rehabilitation Centre, the plaintiff went to a hostel run by the Civilian Maimed and Limbless Association. He has remained there ever since and is employed in a sheltered workshop, working in the book-binding department for which he is paid fifteen dollars a week.

The object of the sheltered workshop is not so much a training operation as was Mount Wilga, but a conditioning for future work. The plaintiff works four days one week and five days another. His English is adequate for this type of work. He is a meticulous worker, although slow, and is regarded as having great potential. It would appear that the possibility of him improving his English is not great, as he is, by nature, a retiring person who keeps to himself a great deal.

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On the whole of the evidence, the plaintiff's future earning capacity is not high. The occupations open to him are restricted; and the probability of further deterioration in his general health must restrict both the hours he will work and his effective working life.

The medical assessment of his expectation of life was in the vicinity of 75 per cent of average expectancy, due largely to the prognosis of the upper renal tract infection. This compared with a 90 per cent expectancy for the paraplegic without such infection. It was common ground, that the plaintiff might expect to live till his early sixties.

Having accepted this, it is inevitable that the progressive deterioration in general health will increasingly prevent regular and full-time attendance at work, and will cause an earlier retirement than would otherwise be the case. The extent to which this applies cannot be demonstrated but must be borne in mind in an assessment of future earning capacity.

It was submitted for the defendant that the future earnings of the plaintiff should be assessed in a clerical occupation. In my view, the probability of the plaintiff obtaining the necessary skills to obtain clerical employment is remote. He was not able to do so after prolonged and expert assistance whilst at Mount Wilga. His present occupation will not assist. And, whilst it appears that further Commonwealth retraining may be available, it is, in my view, wholly speculative as to whether the plaintiff would qualify and, assuming that he did, whether the result would be any different than the Mount Wilga experience.

I find, then, the probability is that the plaintiff's future employment will be in the lower paid areas of manual work and that his earnings in this employment will be affected by loss of time through illness and a considerably shortened working life.

I have found that, prior to the accident, the plaintiff was committed to the mining construction industry. The evidence was that, at present, it is difficult to obtain first class miners and that the plaintiff, but for his disability, could be employed at Bougainville in that capacity at a gross cash wage of $11,000 per annum. As noted earlier, there is a basic similarity in wages throughout the whole of the industry. In addition, he would receive free board and lodging, five weeks' paid holidays each year and other fringe benefits.

Leaving aside, for the moment, the question of contingencies beyond the control of the plaintiff, the important question is whether he would have continued to work in the industry for the remainder of his working life. Counsel for the defendant submitted that he would leave the mining industry no later than age forty and seek other employment.

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Various reasons were advanced for this view, none of which were compelling and some of which were, to my mind, of little weight. The question involved appears to me one which the plaintiff himself could not answer, depending as it does on so many unknown factors. I can do no better than say that, in the assessment of the value of the plaintiff's lost earning capacity, a substantial allowance must be made for the possibility that he may have left the mining industry of his own accord and taken a less remunerative job for reasons personal to himself. On the other hand, I would consider it unrealistic to conclude that a man earning wages of these proportions would voluntarily leave that job unless he was able to find employment which, though lower paid, was still reasonably remunerative.

I do not think a great deal need be said concerning the non-economic loss of the plaintiff as the relevant facts have largely been set out above. He is now aged 38 years. Prior to the accident his interests were largely outdoor occupations. In addition to the physical distress of the injury he suffered, in 1971, an understandable and severe mental distress. Since that time he has learnt to live with his condition and the knowledge that his life will inevitably be shortened. He faces the prospect of future deterioration in health, further hospitalisation and surgery as well as a premature deterioration of his already chronic condition. I have no doubt that a substantial award is warranted for his loss of amenities of life and for his present and future pain and suffering.

In arriving at a figure for these general damages I have had in mind the contingencies beyond his control such as further accidents in a hazardous occupation, economic depression etc. as well as the possibility of him voluntarily leaving the mining industry.

Additionally, I am bound by the decision of the Full Court in The Administration v. Carroll (1) to make a further reduction in an otherwise appropriate award of non-economic general damages by reason of the circumstances of this country, and I have done so.

Counsel for the defendant, in reply, made the formal submission that the principle established by the Full Court in that case in relation to non-economic loss, should also be applied to economic loss with a consequent further reduction in quantum. No argument was addressed to the Court on this point and I will deal with it briefly.

With respect, I find myself unable to agree with the majority of the Full Court in Carroll's case (2) (supra). Insofar then, as the submission is said to be based upon an extension of the reasoning in that case I would reject it.

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(1) Unreported Judgment F.C. 56

(2) Unreported Judgment F.C. 56

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In the circumstances of the case I assess an amount of $75,000 for general damages.

FUTURE EXPENSES

I am satisfied on the evidence that the minimum medical future expenses as set out in the evidence of Doctor Yeo amount to some $430 per year. Similarly, medical appliances for a paraplegic will cost about $260 annually. Using the 6% tables, which Counsel agreed were applicable, this would give a lump sum of $9000.

If the plaintiff is to engage in employment he will require household assistance. Both the medical evidence as to the desirability of his own accommodation and the plaintiff's wishes in this regard render it most probable that he will buy his own house. The Senior Rehabilitation Officer of the Paraplegic and Quadruplegic Association of New South Wales gave evidence that, in her opinion, the plaintiff would require domestic assistance for half a day for every day worked to do housework and shopping and prepare meals in advance. Apart from this, it may well be though that, in later years, the plaintiff would require further assistance as he becomes more debilitated. The fact that he is without family in Australia reinforces this view.

Counsel for the defendant conceded that it was likely the plaintiff would buy a house if he got married and relied on certain parts of the evidence pointing to the likelihood of his marriage. But, he argued that if the plaintiff does marry then it destroys the case for domestic assistance. Looked at in its best light the argument ignores the question of when the plaintiff will marry. At its worst, it assumes that the wife should wholly subsidise the damage caused in this respect by the defendant.

I think a moderate estimate of the domestic help required would be in the area of three hours a day, three days a week. At current rates this would cost about $20 a week, which converted to a lump sum amounts to some $13,000.

Counsel for the plaintiff submitted that a further necessary future expense was the purchase and operation of a motor car. He submitted that the defendant should pay the cost of the car initially, and the cost of depreciation, maintenance, registration and operation of the vehicle. In all a cost of something in the order of $1200 a year.

Counsel for the defendant conceded that, if the plaintiff is to be gainfully employed he must have a vehicle. But he queried the extent of the liability as a separate item of damage and submitted that an annual figure of $200 would be appropriate.

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In my view, the imposition of a total liability for the cost and running of a vehicle as a separate item of damage would result in some duplication with the amount awarded as general damages. Insofar as the vehicle is necessary for work and household purposes I consider that percentage of the cost is properly regarded as a future expense. Insofar as it will provide an amenity for the plaintiff I consider that it has already been allowed for in general damages.

I think the fairest manner of assessing this item is to allow a sum to cover the necessary mileages at a rate which includes a component for depreciation.

Taking into account the evidence of the desirability of the plaintiff's work being in reasonable proximity to his home and allowing for necessary household running I would consider an annual mileage of three thousand miles as reasonable. A lump sum of $6000 would provide for this expense.

It was also submitted on behalf of the plaintiff, the costs of altering an existing house to the specific requirements of a paraplegic was a further future expense, to be taken into account. The alterations involved would include the remodelling of bathroom and kitchen for the use of a person in a wheel chair, widening of doors and the construction of ramps into the house. Some evidence was called to the effect that the cost of such alterations would be in the vicinity of $8000.

I think somee allowance should be made for this item but the evidence is such that it must be a somewhat arbitrary figure. I would assess the figure of $4000 for this item.

Accordingly, I assess damages for the plaintiff at $149,926 comprising $42,926 special damages, $75,000 general damages and $32,000 for future expenses. There will be a verdict for the plaintiff for $149,926.