

AUSTRALIA / JUDGMENT

Australia Postal Commission v Griffiths, W. [1987] FCA 723

COURT
IN THE FEDERAL COURT OF AUSTRALIA

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JUDGMENT No. Ta] WA

CATCHWORDS

Damages for personal injury - challenge to assessment of damages for whiplash injury resulting in fusion of cervical spine at two levels - plaintiff found to be totally incapacitated for work - award of \$541,132.59 said to be excessive - analysis of amounts included in the award for loss of past and future earning capacity and for general damages - amount, although high, not found to be excessive - no question of principle.

Bresatz and Another v. Przibilla and Another (1962) 108

C.L.R. 541 at p.544

AUSTRALIAN POSTAL COMMISSION v. WARREN WILLIAM GORDON
GRIFFITHS

No. ACT G29 of 1987

Coram: Sheppard, Neaves and Miles JJ.

Place: Canberra

Date: 15 December 1987

IN THE FEDERAL COURT OF AUSTRALIA

AUSTRALIAN CAPITAL TERRITORY

DISTRICT REGISTRY

No. ACT G29 of 1987

GENERAL DIVISION

On Appeal from the Supreme Court
of the Australian Capital Territory

BETWEEN: AUSTRALIAN POSTAL COMMISSION

Appellant

AND: WARREN WILLIAM GORDON

GRIFFITHS

Respondent

JUDGES MAKING ORDER: : SHEPPARD, NEAVES AND MILES JJ.

DATE OF ORDER: 15 DECEMBER 1987

WHERE MADE: CANBERRA

MINUTES OF ORDER

THE COURT ORDERS

THAT:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs of the appeal.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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CORAM: SHEPPARD, NEAVES and MILES JJ.

DATE: 15 DECEMBER 1987

REASONS FOR JUDGMENT THE COURT: This is an appeal by the defendant, Australian Postal Commission, against an award of damages in the Supreme Court of the Australian Capital Territory in favour of the plaintiff, Warren William Gordon Griffiths.

A number of grounds of appeal attacking nearly every component of the award of the learned trial Judge (Kelly J.) appear in the notice of appeal. However, only three of these were pressed at the hearing of the appeal. They relate to past loss of earning capacity, future loss of earning capacity and general damages. A fourth ground of

appeal was raised, relating to the award for loss of

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superannuation benefits but that part of the assessment was not the subject of any dispute at the trial and has not been shown to be incorrect.

There was no dispute at the hearing of the appeal as to any of the significant findings of fact on the part of the trial Judge. The facts may therefore be simply stated.

The respondent plaintiff was born on 15 October 1951 and was thus aged 28 at the time of his injury on 8 January

1979. He left school at the age of fifteen years and worked in a furniture store in Brisbane as a sales assistant. He continued to work in the furniture sales industry over the ensuing years, generally spending about two years at a time in any one position. He worked his way up towards Managerial level and acquired a Diploma in Work Study and a Diploma in Media Studies at technical colleges in Brisbane. He came to Canberra in 1976 and changed direction, temporarily working for a firm of liquor merchants. He was successful in that regard and boosted the sales of the firm during the six months or so when he worked for it. He then joined one of the principals of the firm and went into a business venture with him concerned with retailing bedding. However, on two occasions fires destroyed the warehouses where the stock was held and on another occasion the premises were flooded out. The company that controlled the enterprise went into liquidation and the plaintiff finished working for it by the end of 1978. By that time he was engaged to be married and it was whilst he was taking a break from work pending the marriage that he received his injury.

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The injury was sustained at about 11.15 a.m. on 8 January 1979 when the vehicle driven by the plaintiff was struck in the rear by a vehicle owned and driven on behalf of the defendant. The plaintiff felt a jolt, heard a "sort of crack" in his neck, and felt pain in the neck area. Although he was able to drive to a nearby police station and then drive himself home, pain in the neck persisted and a headache developed. He took himself to the Woden Valley Hospital later in the day where some medication was prescribed and he went home to bed. Next day he noticed pain in the lumbar region in addition to the neck pain and headache, but all pain had resolved within a couple of days at that stage.

Between January and July 1979 the plaintiff had intermittent severe pain in the neck and shoulder blades and "up under the scalp" sufficient for him to consult an unidentified doctor. The incidence and frequency of the pain is unclear. During that period he married and took up a managerial job with a firm of furniture removalists but he resigned after a few months after differences with the general manager. He did not obtain another position in employment until 24 September 1979.

It was during this period after July and when he was out of work that the lumbar pain appears to have increased, but it was not sufficient to prevent him commencing work as a trainee real estate salesman with Jennings Industries Limited (Jennings) in late September 1979. It was sufficient for him to consult his general practitioner,

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Dr Ingram, on 4 October 1979. He continued with Jennings for the rest of 1979 and into 1980. During that time his condition deteriorated and he lost periods from work. He was referred to Dr Robson, a Canberra neurosurgeon, who suggested an operation which the plaintiff declined. The Plaintiff was referred to a Melbourne orthopaedic surgeon, Dr Crock, whom he first saw on 16

July 1980. Physiotherapy was commenced at Dr Crock's suggestion. Medication increased. Still the condition deteriorated and the plaintiff's capacity to carry out his work declined. A number of admissions to hospital in Melbourne under the care of Dr Crock followed - discography in November 1980, traction and further discography in February 1981 and fusion at two levels of the cervical spine on 30 March 1981. The result of all that treatment appeared to be a further increase in symptoms. After being flown back to Canberra by ambulance on 16 April 1981, he was housebound for another month. The variety and intensity of medication increased and his condition continued to deteriorate. Between June 1981 and February or March 1982 Dr Crock performed four manipulations under general anaesthetic in Melbourne.

From the time of his commencement with Jennings until March 1981, the plaintiff worked only intermittently. From the time of the operation in March 1981 until February 1982 he was off work altogether. Although he returned to work at that stage, his condition was worse than it had been. His medical problems grew more complex. He began to have

urinary incontinence and to suffer from constipation and

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haemorrhoids. In 1983 he started having physiotherapy "between six and seven days a week". Depression set in and he started seeing a psychiatrist. Despite his problems, he completed a course in real estate salesmanship at the Canberra College of Advanced Education in 1983, although his Honour appears to have concluded that the work of a real estate salesman has been too demanding for his physical and mental condition.

His Honour expressed his findings on the curtailment of the plaintiff's general loss of enjoyment of life as follows:

"Gardening activities cause him pain. He has a

Man come to mow the lawn once or twice a week for

which he pays \$8-\$15. He also employs somebody

to clean and polish his car. Walking (and

running) and sitting for long periods cause him

difficulty as does driving for any distance.

Driving can cause so much pain that he cannot be

really alert. He has run once since the

accident, a distance of 50 yards, and as a

consequence spent days in bed. He swims in a

heated pool at Mrs. Daniell's home in Aranda but

is unable to swim in an unheated pool. He did not swim before his condition deteriorated. He used to engage in ten-pin bowling. It is now beyond him because of consequent pain. Carrying a brief case of books causes him difficulty."

These findings have not been challenged and it was clearly open to his Honour to make them.

The defendant does not challenge the finding of his Honour that there is a causal link between the accident and the plaintiff's present physical and emotional condition. For that reason it is not necessary to canvass the medical

evidence in detail. His Honour accepted all the medical evidence called on behalf of the plaintiff and rejected

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that of Dr Cassar called on behalf of the defendant. His Honour was clearly impressed with the evidence of Dr Crock, who was of the view that the plaintiff's physical problems arose from a combination of a degenerative condition in the spine with an adverse immunological reaction to surgical trauma. Dr Crock thought that the plaintiff would continue much as he was at the time of hearing for a period of a few years into the future, probably settling down to a point when he might be able to undertake the sort of work he had been doing in real estate for about two hours a day. His Honour accepted all the rest of the evidence that was favourable to the plaintiff relating to his' urinary problems, constipation and depression to the effect that he still suffered from them at the time of the hearing and would continue to suffer from them for an unspecified time into the future.

From all this and on a consideration of all the evidence his Honour concluded:

"Jee. Subject to one limitation, if that be the correct word, to which I will advert later, the Plaintiff is permanently disabled or, to put it in another way, unemployable."

The limitation to which his Honour referred was that the plaintiff, with his qualifications, was unlikely to remain idle for the rest of his life, and that on the contrary he was likely after "an appropriate period" to

recover some capacity to earn. This contingency, the recovery of earning capacity, was reflected in his Honour's

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discounting the assessment of the value of future loss of earning capacity by one third. The damages awarded by his Honour were as follows:

Loss of earning capacity to date

of trial \$109,238.00 Future loss of earning capacity \$264,000.00 Loss of superannuation benefits \$19,816.00

Physiotherapy expenses ~- 19 April

1985 to August 1987 \$ 11,666.00 Domestic assistance expenses \$ 18,624.00 Future pharmaceutical expenses \$ 6,000.00

Future medical expenses (general practitioner) \$ 4,300.00

Future medical expenses (psychiatric) \$ 2,500.00

Past out-of-pocket expenses {including physiotherapy expenses to 19 April 1985) \$ 39,988.59

Pain and suffering and loss of enjoyment of life \$ 65,000.00

\$541,132.59

The award for past loss of earning capacity was attacked only on the ground that his Honour should have reduced the sum awarded by a proportion which would take into account the contingencies that might have prevented the plaintiff earning the sort of money that he had been earning with Jennings in the nine months prior to 30 June 1981 even if the plaintiff had not been injured. Those earnings accorded with the average earnings of real estate salesmen

working for Jennings. His Honour acknowledged that

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unfavourable contingencies might be taken into account to reduce the award for past loss of earning capacity but he deliberately chose not to reduce the figure for that reason. On the contrary, he considered the case to be one where contingencies might equally be assessed as favourable bearing in mind what his Honour saw as the vigour and energy which the plaintiff had displayed as a salesman in the past. That it was open to his Honour to take favourable contingencies into account as a matter of law, is clear from the following passage in the judgment of Windeyer J. in

Bresatz and Another v. Przibilla and Another (1962) 108

C.L.R. 541 at p.544:

"I know of no reason for assuming that everyone who is injured and rendered for a period unable to work would probably in any event have been for a quarter of that period out of work, or away from work and unpaid. No statistics were presented to justify this assumption. Moreover, the generalization, that there must be a "scaling down" for contingencies, seems mistaken. All "contingencies" are not adverse: all "vicissitudes" are not harmful. A particular plaintiff might have had prospects of chances of advancement and increasingly remunerative employment."

It was argued on behalf of the defendant that his Honour had given undue weight to favourable contingencies and had not given proper weight to those which suggested that the plaintiff might not have been an unqualified success as a real estate salesman - in particular his prior failures in business, his history of going from job to job and a conviction for setting fire to a vehicle with intent to defraud in April 1978. However, those are all matters

referred to in his Honour's judgment and it is evident that

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far from ignoring them, his Honour took them into consideration. He had the advantage of seeing the plaintiff and of forming his own impression of the plaintiff's personality, which was a relevant factor. It is true that in his reasons for judgment his Honour did not advert to some evidence that the plaintiff had suffered a prior nervous condition in 1978 and also from past neck problems, but that evidence is inconclusive. Whilst we would not necessarily have come to the same conclusion as his Honour on the question of discount for contingencies, we are not convinced that he fell into error in declining to reduce the award for past economic loss by reason of contingencies.

The amount awarded for past economic loss' was \$109,238. It is not clear how this figure was arrived at as a matter of arithmetic. The base figure of \$15,750 per annum before tax was used (and not challenged) and his Honour said that he allowed for national wage increases and for deduction of tax at appropriate rates. The sum awarded has not been shown to be incorrect and we would not interfere with this component of the damages awarded.

We turn now to the award for future loss of earning capacity. Again it is not clear how the sum is arrived at as a matter of arithmetic. His Honour said that he assumed that the plaintiff would have retired at age 60 but the possibility that he might have worked beyond his 60th birthday was a favourable contingency to be taken into

account. His Honour also said that after making the same

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allowances for future economic loss as for past economic loss and with guidance of a report by an actuary he calculated future economic loss to the plaintiff's 60th birthday at \$396,500. We have considered the report from the actuary. It makes reference to an after tax weekly loss of \$418.24 and puts the value at 22 April 1985 of a loss at that rate to the plaintiff's 60th birthday at \$383,944. If national wage increases are taken into account to the date of judgment, then his Honour's calculation does not appear to be incorrect.

In any event, his Honour did not allow the calculation to age 60 in full. As we have already indicated, he thought that the possibility of the plaintiff recovering some earning capacity required the figure to be discounted by one

third, that is to say, to \$264,000. It was submitted that this method of approach was incorrect and that what his Honour should have done was to have allowed full loss of earning capacity for a limited period, then substantially discounted the figure for the remainder of the plaintiff's expected working life. We would agree that such an alternative approach was open, but we are not convinced that it would have brought about a result so different to warrant interference. For instance, if the plaintiff were awarded the total loss for two or three years from the date of judgment and then half the loss for the remaining years to age 60, taking into account his Honour's view that the plaintiff might have worked beyond 60, the end figure would not be so different that we should substitute our own

calculation.

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Thirdly, It was submitted that the award for pain and suffering and loss of enjoyment of life of \$65,000 was manifestly excessive. It was said for the defendant that the award was obviously too high for a "simple whiplash injury". However it is clear that each case depends upon its own circumstances and that every plaintiff is entitled to have his or her case decided accordingly. Indeed, counsel for the plaintiff suggested that the sum was so low as to be unacceptable in the courts of New South Wales. In this regard we would emphasise that we are hearing an appeal from the Supreme Court of the Australian Capital Territory and if a comparison is to be made with awards elsewhere in Australia, it is inappropriate to confine the exercise to New South Wales. In our view the award for general damages is high, but we are not persuaded that it is manifestly excessive.

The total sum of damages was \$541,132.59. As we have said, the notice of appeal challenged nearly every item making up the total. Although only three of them were the subject of argument at the hearing of the appeal, the general point was taken on behalf of the appellant that, looked at as a whole, the award of over half a million dollars to a man who could probably do at least some part-time work at some stage in the future and who had had a chequered work history as well as some prior neck problems, was manifestly excessive. The argument is not without

substance. We have looked at the award as a whole and we

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agree that it is a high one. Nevertheless, error on the part of the trial Judge has not been shown. Apart from the "limitation" expressed as a discount for future loss of earning capacity (and, we might add, a reduction of the amount claimed for physiotherapy) it seems that all the findings made by his Honour were favourable to_ the plaintiff. Those findings were open to him and we are unable to say that the total is so high that it calls for interference by this Court. The appeal will be dismissed

with costs.

I certify that this and the eleven (11) preceding pages are a true copy of the Reasons for Judgment herein of the Full Court consisting of their Honours Mr. Justice Sheppard, Mr. Justice Neaves and Mr. Justice Miles. . R wWalo~

Associate to Miles J.

Dated: 15 December 1987

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