

AUSTRALIA / JUDGMENT

Bain, J.A. v Stafrace, J.E. [1987] FCA 700

COURT

IN THE FEDERAL COURT OF AUSTRALIA

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CATCHWORDS

Negligence - actions by wife for damages for personal injury and
bv husband for loss of wife's consortium - defendant in breach of
duty of care to plaintiffs - finding by trial Judge that wife
suffered no iniury nor anv aggravation or exacerbation of an
existing injury in the accident - challenge to trial Judge's
findings - analvsis of medical evidence - no question of
principle.

JANET ANNE BAIN v. JOSEPH EMMANUEL STAFRACE

No. A.C.T. G34 of 1987

JOHN ROBERT BAIN v. JOSEPH EMMANUEL STAFRACE

No. A.C.T. G35 of 1987

Coram: Sheppard, Neaves and Miles JJ.

Place: Canberra

Date : 27 November 1987

IN THE FEDERAL COURT OF AUSTRALIA

AUSTRALIAN CAPITAL TERRITORY

DISTRICT REGISTRY No. A.C.T. G34 of 1987

~~~ re

GENERAL DIVISION

On Appeal from the Supreme Court  
of the Australian Capital  
Territorv

BETWEEN :

JANET ANNE BAIN  
Appellant

AND: JOSEPH EMMANUEL STAFRACE  
Respondent  
JUDGES MAKING ORDER: SHEPPARD, NEAVES and MILES JJ.  
DATE OF ORDER : 27 NOVEMBER 1987  
WHERE MADE 3 CANBERRA  
MINUTES OF ORD  
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 1s dealt with in Order 36  
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## REASONS FOR JUDGMENT

THE COURT: These are appeals from two judgments of the Supreme

2. Court of the Australian Capital Territory (Gallop J.) in which the Supreme Court dismissed actions brought by the appellants. Mrs. Bain was the plaintiff in an action brought against the respondent for damages for personal injury. Mr. Bain, who is Mrs. Bain's husband, sued the respondent for damages for loss of the consortium of his wife as a result of the injuries which she

suffered in the accident.

The accident occurred on 30 October 1980 in a car park adjacent to Northbourne Avenue and London Circuit, Canberra. There is no question but that the respondent was guilty of a breach of the duty of care which he owed each of the appellants.

The reason why his Honour found against the appellants was that he was not satisfied that the respondent's negligence was the cause of any injury to Mrs. Bain or of any exacerbation or aggravation of any pre-existing condition which she had. Her action failed on this ground alone. It was a necessary consequence of that conclusion that Mr. Bain's action should fail as well.

Gallop J. did not accept the evidence of the Bains as to the way in which the accident happened; he preferred the evidence of the respondent. It is common ground that the accident happened when the respondent, who was reversing out of a car parking space, collided with the Bains' vehicle which was being driven by Mr. Bain along one of the internal roadways in the car park. The rear of the Celica hatchback motor car being driven by the respondent struck the side of the Valiant motor car being driven

by Mr. Bain. The respondent said that his car had only moved

3.

three feet when he felt a jolt. The two vehicles stopped. The respondent said that he got out of his vehicle and saw that there was a slight white scratch mark on the rear bumper bar of the

Celica on the passenger's side which measured about 2 1/2 inches long by 1/4 inch wide. On the Valiant he observed a black equivalent sized mark on the rear mudguard about 3 inches by 1/4 inch. He also observed a large dent on the wheel just above the

scratch mark.

Mrs. Bain's case is that, by reason of the toltng and jarring which she sustained in the accident, she suffered a severe aggravation of back and neck conditions from which she had been sufferina for some vears. The respondent's case ls that the accident was such a minor one that lt could not have had anv aggravating or exacerbating effect on either of the conditions

from which Mrs. Bain undoubtedly suffered.

The evidence establishes that she had suffered an iniury to her back on her way to work at Parliament House Canberra on 20 September 1974. She was treated over a period of vears by her general practitioner, Dr. &R. Ouach, and an orthopaedic surgeon, Dr. Cairns. She had two periods in hospital, one at the end of 1976 and the other early in 1977. On 16 January 1977 Dr. Cairns carried out a fusion of her spine at the L5/S1 level. By the end of 1977 she had recovered sufficiently to pursue most normal activities except those necessitating increased strain on her spine or vepetitive bending or lifting. In a report dated 19 December 1977 Dr. Cairns said that Mrs. Bain would be likelv to

suffer intermittent pain and discomfort in the region of her low

back in the future.

Early in 1978 Mrs. Rain had what was described ina report made by Dr. Cairns to Dr. Quach on 2 March 1978, as a "sudden onset of a painful neck". Dre. Cairns saw Mrs. Bain about this matter on 16 February 1978. Dr. Cairns said that Mrs. Bain appeared to be settling and he had arranged for her to be assisted by further physiotherapy. He said that there were "little clinical findings" at the time of his examination. He thought she ought to see a neurosurageon, Dr. Alastair Robson, for a second opinion. He added that there were not "very startling

changes in her cervical spine and I could not determine any

obvious neurological abnormalities apart from a subiective decrease in sensation to pinprick over the C7 dermatome". Dr. Cairns said that Mrs. Bain's neck troubles had succeeded in

pushing her low back complaint into the backaround for the

present "but recent x-rays indicate that her fusion is solid".

Dr. Robson saw Mrs. Bain in 1978. He referred to this ina report dated 7 May 1982 in which he said that he first saw her in 1978 when she had pain in the neck which spread to her shoulders and hands and trouble also with her low back. He noted that she had had these troubles on and off since a fall in September 1974 when she twisted and hurt her back and neck. This latter statement does not seem to be consistent with Dr. Cairns' examinations and treatment of Mrs. Bain. These seem to have concerned her back condition only 'mtil the sudden onset of pain in her neck early in 1978. Tn his report of 7 Mav 1982 Dr.

Robson said that in March 1978 "further investigation would

5. disclose disc trouble then, and she (Mrs. Bain) had to decide whether she wanted to go ahead with those investigations then". He concluded by saying that he had no information upon which he could make a comparison about her pre and post-accident state. This was a reference to a request which had apparently been made to him to endeavour to state to what extent the accident which had occurred on 30 October 1980. had further adversely affected

Mrs. Bain.

In a report dated 21 June 1982. Dr. Ouach said that after the accident in "November 1980" (sic) Mrs. Bain complained of headache, a stiff neck and a burning sensation in her shoulder and the upper part of her back. She was treated with rest and physiotherapy. Her condition did not improve and she began to complain of aches in the neck with pins and needles affecting the fingers. She was referred to Dr. Robson. X-rays of her cervical spine showed a narrow disc at the C4/C5 level. On 3 April 1981 a myelogram was performed. It outlined nerve root involvement at the C5/C6 and C6/C7 levels. On 9 September 1981, Dr. Robson carried out what was described in evidence as a Cloward's Procedure at these levels. The object of it was to fuse the vertebrae. Dr. Quach said that Mrs. Bain had recovered well from her neck problems but her lower back was still causing pain. He said that Dr. Robson was contemplating fusing her lower back at the L4/L5 level.

Dr. Robson carried out that procedure on 21 October 1982. A detailed report of the operation is in evidence. At operation he found that the earlier fusion operation had not been a success.

6. There was no fusion at the L5/S1 level. Dr. Robson exposed the L4/L5 level which he said enabled him to have the L5 nerve root completely "unroofed right around the pedicle to the outside". In the upshot he fused the spine at the two levels. He concluded that the previous fusion operation had failed, saying that it "had done absolutely nothing in the way of freeing nerve roots or

of fusing the bones".

Before Mrs. Bain was seen by Dr. Robson, she was referred to Dr. Cairns. In a report dated 28 November 1980 Dr. Cairns referred to Mrs. Bain's admission to the Woden Valley Hospital. He described her as an old patient of his who recently suffered the aggravation of low back pain and cervical pain following a motor vehicle accident. He said that she was treated conservatively with rest in bed and anti-inflammatory and analgesic agents. She had gradually settled down and was fit for discharge on 26 November 1980. Arrangements were made for her continued treatment as an out-patient. Dr. Cairns said that he would review Mrs. Bain again in six weeks. In a report dated 22 January 1981, he said that she was reviewed "recently" and reported that she was coping reasonably well, although the accident had served to aggravate the pre-existing problems which she had in her spine. Dr. Cairns said that he had not made any arrangement to review her but would do so "if she gets into trouble again". So far as the evidence discloses. Dr. Cairns did not see

Mrs. Bain again, but in a report dated 17 May 1982, he referred to his treatment of her after the accident on 30 October

1980. He said that she was discharged from hospital after a short admission and subsequently reviewed on one occasion in his 7.

rooms. He also said. "In view of the relatively 'nebulous' symptomatology involved in this case I think that you will find it extremely difficult to determine the difference in her pre-accident and post-accident condition ...

In her evidence Mrs. Bain said that she did not see Dr. Ouach until 17 days after the accident. He spoke to Dr. Cairns. She said that he arranged for her immediate admission to hospital. She was in hospital for about 9 days. She said she had tried to see Dr. Quach earlier, but he was not on duty. She would not see another doctor. From her evidence it does not appear that she sought to see him earlier than a day or two before 17 November 1980 when he was able to see her. Mrs. Bain gave evidence of the pain and other consequences which she claimed the accident had caused. It was this evidence which his Honour rejected. The purport of her evidence was that she was quite severely disabled from the time of the accident. It was not a case of symptoms manifesting themselves, as sometimes happens, a week or two after the accident or of minor symptoms becoming gradually worse.

Dr. Robson saw Mrs. Bain on 27 November 1985. He concluded that Mrs. Bain's neck was not fused at levels C6/C7, nor did he think that she was fused at the L4/L5 levels. He thought that the L5/S1 level was solidly fused.

Mrs. Bain was seen for medico-legal purposes by Dr. J.R.

Corry who is a consultant in rehabilitation medicine. He saw her on behalf of the respondent on 26 July 1983 and 2 October 1984.

Dr. Corry made reports dated 19 September 1983 and 24 October

8.

1984. He took lengthy histories and made an examination on each occasion. He had available x-rays of Mrs. Bain's cervical and lumbar spine. Before he saw her in 1984, the respondent's solicitors had written to Dr. Corry apparently giving him an account of the respondent's version of the accident. In his

report of 24 October 1984 Dr. Corry said:-

"I discussed with her the detail of the

motor vehicle accident which occurred on the 30th October, 1980. Her description of this accident

is in variance to that of your client, as outlined in your letter to me of the 27th June, 1984. She states that your client's vehicle backed out from the parking lot at considerable speed striking the right-hand side of her car in which she was a front seat passenger. That is, she was sitting on the left-hand side. Her car was severely jolted about, and she was aware almost immediately of some damage to her neck and she states that there was \$300 to \$400 worth of damage to her vehicle.

Whatever the rights of the matter in relationship to the severity of the accident. I believe that one would have to accept that Mrs. Bain did have an exacerbation, at least to some extent, of her degenerative spondylitis affecting her cervical and low lumbar spine. According to her statement to me at the first consultation she was still having significant symptoms related to these disabilities at the time of the motor vehicle accident and was still regularly visiting her general practitioner, Dr. Quach, for prescription of analgesic tablets. She does state, however, that she feels that she was gradually overcoming the effects of the accident, and particularly the associated depression. It is my impression that her present physical disabilities may be not that much greater than they were at the time of the motor vehicle accident. The degree of her depression, however, is much more significant. It is possible that the second accident, with or without physical damage, could have exacerbated her depression to this degree, and stretched her coping mechanisms to the limit. I also wonder whether other factors such as conflict within the family may be at least partly causal, and a psychiatric opinion would be significant".

9.

That completes the account of the medical evidence which need be referred to. It should be mentioned that the evidence was contained in reports of the various doctors, No doctor was called to give oral evidence and there was no elaboration of or additional evidence on medical matters.

His Honour's conclusion was as follows:-

"Having considered all the medical evidence, in particular the medical reports and diagnosis of Dr. Robson and Dr. Cairns, made both before and after the accident, and taking into account the minor nature of the collision. I am not persuaded on the balance of probabilities that the plaintiff wife's disability was in any way exacerbated by the accident. Dr. Corry's view to the contrary does not convince me. The case history given to him by the plaintiff wife was exaggerated. To my mind, the almost trivial nature of the collision was inherently unlikely to have aggravated the plaintiff's pre-existing condition".

In the submission of senior counsel for the Bains his Honour's conclusion revealed error because the medical evidence was such that it established that there were some consequences arising from the accident on 30 October 1980 which had the effect of aggravating Mrs. Bain's previously existing conditions. The submission was based principally upon the statement appearing in Dr. Corry's report of 24 October 1984, which has been earlier quoted, that, whatever the rights of the

matter in relationship to the severity of the accident, he believed that one would have to accept that Mrs. Bain did have an exacerbation, at least to some extent, of her degenerative spondylitis affecting her

cervical and low lumbar spine. This view of the matter was said

to be supported by statements made by Dr. Cairns in his reports

10. of 28 November and 22 January 1981 to which reference has been earlier made. There was no evidence to the contrary. The other doctors, particularly Dr. Robson, were unable to express an opinion on the question. Counsel acknowledged that Dr. Cairns himself was guarded about the matter particularly in his later

report of 17 May 1982 to which reference has also been made.

We do not think that it would be right to take the view that Dr. Corry meant to indicate in what he said that it was of no consequence that the accident may have been so slight in its effect as not to cause Mrs. Bain to be moved about in her seat at the time of the impact. Counsel for the Bains foresaw the strength of this consideration and was forced to refer to some of the detail of what the Bains themselves had said in evidence, and also what they had said to doctors, about the accident. Mr. Bain said that the force of the impact was substantial enough to cause him to hit his head against the pillar of the motor car between the driver's and rear doors. This would seem to have been a matter rejected by his Honour, particularly because he took the view that the impact was towards the rear of the Bains' vehicle rather than at the site of the pillar which is what the Bains said. Counsel relied on the fact that Mr. Bain had not been cross-examined about this matter, but, so it seems to us, counsel in his cross-examination indicated quite clearly to Mr. Bain that his evidence was being challenged and that it was being suggested that he was overstating the extent of the force of the impact. Similarly, counsel relied on the fact that the respondent himself said that he felt a Jolt. There is also the fact that the

respondent could not know what the impact felt like inside the

11. Bains' car. But his Honour took an adverse view of the Bains' evidence and was not satisfied with what they told him concerning the accident. Into the bargain they made a serious error concerning the point of impact on their vehicle and damage to its underskirt which they alleged was caused in the accident but which his Honour found was not. As he found, the photographs demonstrate that the bumper bar of the Celica could not have been

the cause of this damage which, if it existed, must have been

caused in some other incident.

His Honour was entitled to treat the Bains' evidence as he did. He was also entitled to discount doctors' opinions which to a greater or lesser extent were based on histories which they had received from the Bains. That still leaves Dr. Corry's statement and, to a degree, Dr. Cairns' views in the reports relied upon by counsel. But unless Dr. Corry had been called to give evidence to explain precisely what he meant by the critical statement in his report, it does not seem to us that

a trial judge in the position of the trial Judge here was bound to give effect to it as if it were the deciding factor in the case. On the contrary, it was no more than one of many factors which he was entitled to take into account in reaching his conclusion. He did give the matter consideration and nothing in what he said concerning it

suggests to us that he made any error in his approach.

Before concluding, we emphasize that the determining factor for his Honour was the exaggerated account given by the Bains of

the severity of the accident. The Bains' case depended on their

evidence in this respect being accepted. When it was not, their

12. counsel was forced to make what he could of statements in the medical evidence which, in his submission, should have led the learned primary Judge to conclude that, notwithstanding their exaggerations, the evidence established that the accident had had some effect on Mrs. Bain's pre-existing conditions. The difficulty with this proposition is that their whole case was predicated on a moderately severe impact. That case was made, not only in their evidence, but also in histories given by them to doctors. The history given him by the Bains explains why Dr. Cairns reacted by arranging for Mrs. Bain's admission to hospital. It is clear that, when he reflected on the matter, as he did in his report of 17 May 1982, he had considerable reservations about whether the accident had had any adverse effect on Mrs. Bain. Dr. Robson had a similar reservation as is made clear in what he said in his report of 7 May 1982 earlier referred to. Really, as counsel for the Bains conceded, his case rested on what Dr. Corry said in his report of 24 October 1984.

That is a matter with which we have already dealt.

It remains to say that here and there in the medical reports are to be found suggestions that Mrs. Bain's depression may have been aggravated or worsened by the accident. As we understand the argument which was put to us, her counsel did not seek to make a case based on that matter alone. It would have been a very different case from the one which was made, that being a case in which the Bains sought to lay responsibility for the fusion operations performed by Dr. Robson at the respondent's

door.

13.

We have, therefore, reached the conclusion that the findings which his Honour made and the conclusion at which he arrived were well open to him on the evidence before him and that he did not misdirect himself in any way in going about the task of deciding

the matter. In those circumstances the appeal is dismissed with

Sosts. | certify that this and the /2 preceding pages are a true copy of the reasons for judgment: herein of the Court ; /, Al hvor Associate Dert 27 WovENBER (787 Counsel for the Appellants: Mr. P. Shiels, O.C. with Mr. H. Marshall Solicitors for the Appellants: Messrs. Crowley & Chamberlain Counsel for the Respondent: Mr. J. Hartigan Solicitors for the Respondent: Messrs. Crossin Power Haslem

Date of hearing: 5 November 1987

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